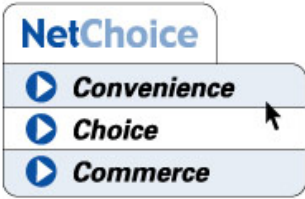


NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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U.S. House of Representatives Subcommittees on
Communications & Technology, Consumer Protection & Commerce

October 15, 2019

RE: NetChoice letter for the record for hearing: *Fostering a Healthier Internet to Protect Consumers*.

Dear Chairman Doyle and Chairwoman Schakowsky, Ranking Members Latta and McMorris Rodgers, and distinguished members of the Committee:

We thank the U.S. House of Representatives subcommittees on Communications & Technology, Consumer Protection & Commerce for holding this important hearing on *Fostering a Healthier Internet to Protect Consumers*.

NetChoice is a trade association of businesses who share the goal of promoting free speech and free enterprise on the net. We are significantly engaged in the states, in Washington, and in international internet governance organizations.

Today's hearing will demonstrate the fundamental need to retain Section 230 of the Communications Decency Act ("Section 230")¹ as it is written. Moreover, we hope that today's hearing will identify the failures of the prior edits to Section 230 (FOSTA)² and the harms that have resulted. Finally, today's hearing will hopefully identify the increasing need to promote America's values of free speech in other countries and how including such principles of Section 230 in our trade agreements will help bring free speech to other parts of the world.

It is important to remember the value of Section 230, not only to our free speech but to our economy. Section 230 enables a world-leading, innovative and competitive tech industry.

¹ 47 USC § 230.

² Pub. L. No. 115-164, 132 Stat. 1253 (2018).

Studies show³ that over the next decade, Section 230 will contribute a further 4.25 million jobs and \$440 billion in growth to the economy.

Section 230 has enabled the U.S. tech industry to far outperform the EU. In the U.S., online platform businesses are 5 times more likely to raise over \$10 million in venture capital funds than EU platform businesses.

In our letter for the record, we describe the origins and motivations for Section 230, clarify legal limitations of Section 230 in providing platform immunity for content created and posted by others, discuss the scope of what Section 230 does and does not allow, combat misinformation about Section 230 and outline the likely harms of amending Section 230.

History and purpose of Section 230

Section 230 was signed into law more than 20 years ago.⁴ When the law was conceptualized by Reps. Chris Cox (R-CA) and Ron Wyden (D-OR) in 1995, roughly 20 million American adults had access to the internet.

Those who took advantage of this opportunity, including many in Congress, quickly confronted this essential aspect of online activity: many users converge through one portal. The difference between newspapers and magazines, on the one hand, and the World Wide Web (as it was then called), on the other hand, was striking. In the print world, human beings reviewed and cataloged editorial content. On the Web, users created content which became accessible to others immediately. While the volume of users was only in the millions, not the billions as today, it was evident to almost every user of the Web that no group of human beings would ever be able to keep pace with the growth of content on the Web.

At the time, however, not all in Congress were users of the Web. The Communications Decency Act (“CDA”) was premised on the notion that the FBI could filter the web, screening out offensive content. This was a faulty premise based on a fundamental misunderstanding of the scale and the functioning of

³ Mike Masnick, *Don't Shoot the Message Board* (Aug. 2019).

⁴ 104 P.L. 104, 110 Stat. 56.

the internet. Nonetheless, in large part because the stated target of the CDA was pornography, the Senate voted overwhelmingly (the vote was 84-16) in favor of it.⁵

Section 230 was not part of the original Senate bill. Instead, it was introduced as the Internet Freedom and Family Empowerment Act in the House, which was intended *as an alternative to the CDA*. As is so often the case in legislative battles between House and Senate, the conferees on the Telecommunications Act of 1996, which became the vehicle for this subject matter, agreed to include both diametrically opposed bills. Subsequently, the U.S. Supreme Court gutted the CDA's indecency provisions, which it found violate of the First Amendment, giving Reps. Cox and Wyden an ultimate victory they did not at first win in conference.⁶

From the point of view of Section 230's authors, the fundamental flaw of the CDA was its misunderstanding of the internet as a medium. It was simply impracticable, they realized, for the bulletin boards, chat rooms, forums, and email that were then budding on the Web to be screened in any meaningful way by the operators of the websites and fledgling ISPs such as CompuServe and Prodigy that existed then. Worse, if the law were to demand such screening, the fundamental strength of the new medium – facilitating the free exchange of information among millions of users – would be lost.

The Prodigy and CompuServe cases

Then-Rep. Cox was on a flight from California to Washington, DC during a regular session of Congress in 1995 when he read a Wall Street Journal story about a New York Superior Court case⁷ that troubled him deeply. The case involved a bulletin board post on the Prodigy web service by an unknown user. The post said disparaging things about an investment bank. The bank filed suit for libel, but couldn't locate the individual who wrote the post. So instead, the bank sought damages from Prodigy, the site that hosted the bulletin board.⁸

Up until then, the courts had not permitted such claims for third-party liability. In 1991, a federal district court in New York held that CompuServe was not liable in circumstances like the Prodigy case. The court reasoned that CompuServe "had no opportunity to review the contents of the publication at

⁵ *Id.*

⁶ *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

⁷ Milo Geyelin, *New York judge rules Prodigy responsible for on-line content*, Wall St. Jo., May 26, 1995.

⁸ *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

issue before it was uploaded into CompuServe’s computer banks” and therefore was not subject to publisher liability for the third party content.⁹

But in the 1995 New York Superior Court case, the court distinguished the CompuServe precedent. The reason the court offered was that unlike CompuServe, Prodigy sought to impose general rules of civility on its message boards and in its forums. While Prodigy had even more users than CompuServe and thus even less ability to screen material on its system, the fact it announced such rules and occasionally enforced them was the judge’s basis for subjecting it to liability that CompuServe didn’t face.

The perverse incentive this case established was clear: any provider of interactive computer services should avoid even modest efforts to police its site. If the holding of the case didn’t make this clear, the damage award did: Prodigy was held liable for \$200 million.¹⁰

By the time he landed in Washington, Rep. Cox had roughed out an outline for a bill to overturn the holding in the Prodigy case.

Creating Section 230 and its goals

The first person Rep. Cox turned to as a legislative partner on his proposed bill was Rep. Ron Wyden (D-OR). The two had previously agreed to seek out opportunities for bipartisan legislation. As this was a novel question of policy that had not hardened into partisan disagreement (as was too often the case with so many other issues), the two knew they could count on a fair consideration of the issues from their colleagues on both sides of the aisle.

For the better part of a year, the Congressmen conducted outreach and education on the challenging issues involved. In the process, they built not only overwhelming support, but a much deeper understanding of the unique aspects of the internet that require clear legal rules for it to function.

The rule established in their bill, which they called the Internet Freedom and Family Empowerment Act,¹¹ was pellucid: the government would impose liability on criminals and tortfeasors for wrongful conduct. It would not shift that liability to third parties, because to do so would directly interfere with the essential functioning of the internet.

⁹ *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (emphasis added).

¹⁰ *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

¹¹ Internet Freedom and Family Empowerment Act, H.R. 1978, 104 Cong. (1995).

The Congressmen were well aware that whether a person is involved in criminal or tortious conduct is in every case a question of fact. Simply because one operates a website, for example, does not mean that he or she cannot be involved in lawbreaking. To the contrary, as the last two decades of experience have amply illustrated, the internet – like all other means of telecommunication and transportation – can be and often is used to facilitate illegal activity.

Section 230 was written, therefore, with a clear fact-based test.

- If one is a content creator, then one is liable for any illegality associated with that content.
- If one is not the content creator, then one is not so liable.

And what of the case where someone (or some company) is just partly involved in creating the content? What if, moreover, they were only indirectly involved? In that case, Section 230 comes down hard on the side of law enforcement. In such cases, a website operator who is involved only in part, and only indirectly, is nonetheless deemed just as guilty as the content creator.

Here is the precise language of Section 230 in this respect:

The term “information content provider” means any person or entity that is responsible, in whole or *in part*, for the creation or *development of* information provided through the Internet¹²

At a recent forum in Washington, D.C., Rep. Cox, the lead drafter of Section 230, stated that these words in Section 230 – “in part” and “development of” – are the most important part of the statute.¹³

The clear intent of this plain language, and of Congress in enacting Section 230, was not to create immunity for criminal and tortious activity on the internet, but to ensure that innocent third parties will not be made liable for unlawful acts committed wholly by others. If an interactive computer service becomes complicit, in whole or in part, in the creation of illicit content – even if only by “developing” the content – then the service has no Section 230 protection.

This language in the statute proceeds directly from the legislators’ recognition that given the volume of content that passes through most internet portals, it is unreasonable for the law to presume that the

¹² 47 USC § 230(f) (emphasis added).

¹³ Armchair discussion with Former Congressman Cox, Back to the Future of Tech Policy, YouTube (August 10, 2017), https://www.youtube.com/watch?time_continue=248&v=iBEWXIn0JUY.

portal will screen all material. If in a specific case there is evidence that a portal did review material and edit it, then the plain language of Section 230 would deprive that portal of immunity.

Today, as federal and state law enforcement and civil litigants pursue Backpage.com, we have a clear example of how the law is designed to function. For purposes of analysis, let us assume the facts as they are presented in the Staff Report of the Senate Permanent Subcommittee on Investigations, “Backpage.com’s Knowing Facilitation of Online Sex Trafficking” (the “Senate Report”).¹⁴

Backpage, according to the Senate Report, systematically edits advertising for activity that is expressly made criminal under both federal and state law. Furthermore, Backpage proactively deletes incriminating words from sex ads prior to publication, to facilitate this illegal business while shielding it from the purview of investigators. Beyond this, Backpage moderators have manually deleted incriminating language that the company’s automatic filters missed. Moreover, Backpage coaches its users on how to post apparently “clean” ads for illegal transactions.

Furthermore, according to the Senate Report, Backpage knows that it facilitates prostitution and child sex-trafficking.¹⁵ It knows that its website is used for these purposes, and it assists users who are involved in sex-trafficking to post customized content for that purpose. Its actions are calculated to continue pursuing this business for profit, while evading law enforcement.

In sum, assuming these facts in the Senate Report are true, it is abundantly clear that Backpage is not a “mere conduit” of content created by others. The company is actively involved in concealing the illegal activity on its site by directly involving itself in modifying the content. This goes far beyond the minimum level of activity that eliminates immunity by Section 230’s standard of “indirect” involvement or mere “development” of content created by others.

Protecting the innocent and punishing the guilty

Throughout the history of the internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 is such a balance – holding content creators liable for illegal activity while protecting internet platforms from liability for such content created entirely by others. At

¹⁴ Recognizing that the claims against Backpage.com are pending resolution in the courts, NetChoice does not by its assumption *arguendo* make any representation, express or implied, concerning the truth of the specific allegations in the Senate Report. NetChoice has no independent information concerning these specific allegations.

¹⁵ Staff Report at 37.

the same time, Section 230 holds platforms liable when they are complicit, even if only indirectly and even if only in part, in the development of illegal content.

The plain language of Section 230 makes clear its deference to criminal law. The entirety of federal criminal law enforcement is unaffected by Section 230. So is all of state law that is consistent with the policy of Section 230.¹⁶

Why did Congress not create a wholesale exemption of state criminal law, or state civil law, from the operation of Section 230?

First, and most fundamentally, it is because the essential purpose of Section 230 is to preempt state law like the court decision in *Prodigy*.¹⁷ Congress meant to establish a uniform federal policy, applicable across the internet, that would not punish an internet platform for the criminal or tortious conduct of another. Obviously, were state laws to be exempted from the coverage of Section 230, then Section 230 itself would become a nullity.

Even if such a wholesale exemption were limited to state criminal law, this would risk negating the federal policy. All a state would have to do to defeat the federal policy would be to place intermediary liability laws in its criminal code.

But in all other respects, Congress intended Section 230 to be entirely consistent with robust enforcement of state criminal law and state civil law. Today, every state and every federal prosecutor can successfully target online criminal activity by properly pleading that the defendant was at least partially involved in content creation, or at least the later development of it.

The importance of Section 230 for user-generated content

In simplest terms, Section 230 protects website operators that are not involved in content creation from liability for content or conduct by third party users. There is one exception to the rule that a website operator will become liable for “in part” developing content. If the website operator is involving itself in order to delete content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or

¹⁶ 47 USC § 230(e)(3).

¹⁷ *Stratton Oakmont v. Prodigy Servs Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995).

otherwise objectionable, whether or not such material is constitutionally protected,” then it is protected as a “Good Samaritan.”¹⁸

That liability protection has not only become the foundation supporting sites like eBay, Facebook, Amazon, Yelp, Twitter, and other well-known web brands that provide user-generated content (UGC), but also the entire Web 2.0 revolution through which thousands of smaller, innovative platforms have offered a range of socially useful services.

Without Section 230, small social media platforms would be exposed to liability for everything from users’ product reviews to book reviews. Airbnb would be exposed to liability for its users’ negative comments about a rented a home. Without Section 230, any service that connects buyers and sellers, workers and employers, content creators and a platform, victims and victims’ rights groups, or provides any other interactive engagement opportunity we can imagine, could not continue to function on the internet displaying user-generated content.

Coverage of Section 230

Some mistakenly claim that Section 230 prevents action against websites that knowingly engage in, solicit, or support criminal activity. As extensively discussed above, this is wrong. First, Section 230 expressly exempts violations of federal criminal law. Second, it bears repeating that Section 230 provides no protection for any website, user, or other person or business involved even indirectly in the creation or development of content that is tortious or criminal.

Why online sites and services cannot use Section 230 as a shield from federal prosecution

Section 230 provides online platforms no protection whatsoever from prosecution for violations of federal criminal law. Specifically, bad actors cannot rely on Section 230 as a shield from federal criminal prosecution because, by its express terms, Section 230 has no effect on federal criminal law. As noted above, Section 230(e)(1) clearly states:

No effect on criminal law - Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to

¹⁸ 47 U.S.C. § 230 (c)(2)(A).

obscenity) or 110 (relating to sexual exploitation of children) of title 18, *or any other Federal criminal statute*.¹⁹

As this is a matter of black-letter law, nothing more need be said on the point. The question, then, is whether existing federal criminal law suffices to prosecute offenses like terrorism and drug trafficking. The answer is yes because there is a federal criminal proscription of terrorism²⁰ and drug trafficking.²¹ In all its actions to combat terrorism and drug trafficking on the internet under federal criminal law, Department of Justice will face no restrictions from Section 230.

Americans rely on Section 230 and oppose efforts to hold platforms liable

Americans, whether aware or not, rely on Section 230 every day.

Section 230 enables:

- Donations to charities via services like Donors Choose and GoFundMe.
- Finding babysitters via Care.com
- Helping to plan better vacations through review sites like Yelp and TripAdvisor.
- Learning new information from user-created content sites like Wikipedia.
- Discovering social issues via Change.org.

Tech platforms powered by Section 230 continuously protect consumers from harmful and illegal activity while empowering free speech online. The results from this polling showcase that maintaining Section 230 is a priority for the American people.

Polling by RealClear Opinion Research revealed that 62 percent of Americans say users who act illegally or post illegal content online are the ones who should be held responsible.

¹⁹ 47 U.S.C. § 230 (e)(1) (emphasis added).

²⁰ 18 U.S.C. § 113B.

²¹ 21 U.S.C. § 841.

Just 26 percent think the online platform should be held liable.

Section 230 enables online platforms to connect workers with potential employees, consumers to read reviews and comments to help them make decisions, and families to stay connected. It is understandable that the American public would continue to support Section 230 and not want to hold platforms liable for the content other people are posting.

Additional finds by RealClear Opinion Research found:

- Americans overwhelmingly (70%) say their ability to post or view user-created content online is valuable to their personal and professional lives.
- 62% of Americans say users who act illegally or post illegal content online are the ones who should be held liable.
- Of those polled, 73% say users, not platforms, should be held responsible for posts made in the comments section of a webpage.
- Only 1 in 5 polled say they trust the government keep online business practices ethical and fair, whereas a majority most trust consumers or businesses.

It's clear from this polling and activity that American consumers and voters have different priorities than the editors of legacy newspapers and broadcast media. Of course, legacy newspapers and broadcast media are actively stoking anti-tech sentiments with headlines that often blame social media for awful things that people do. It seems as if traditional media is consciously trying to defame social media in order to convince advertisers and audiences to come back to their websites and stations – not do what is best for Americans or do what Americans want.

Section 230 is the law that stops the spread of extremist speech

Throughout our discussions on Section 230, it's clear that some don't understand how fundamental Section 230 is in keeping our online interactions civil. That's not to say there aren't problems on the internet, but they are not as bad as they would be without Section 230. In fact, sites like 8-Chan, that engage in no content moderation, are least affected by removal of Section 230.

From our oped in Morning Consult:²²

There are those who wrongly say Section 230 is the reason for problems on the internet. They claim we would be better off without that law's incentives to moderate content created by users. These critics appear confused or disingenuous about what Section 230 actually does, and have apparently forgotten that our First Amendment says government cannot block hateful or disturbing speech — whether online or off.

Section 230 doesn't enable hate speech on the internet. It doesn't make the internet a worse place. It is actually the law that stands between an internet where much offensive content is removed and an internet where anything goes.

Despite the misinformation about the law, Section 230 actually has two components. The oft-cited "immunity provision" — Section 230(c)(1) — says that a platform is not liable for the content created by others, unless that content violates federal criminal or copyright law.

Despite what anti-tech advocates want you to believe, this is not a novel idea. This was Congress in 1996 enshrining what is called "conduit immunity," a legal concept that has been applied to all kinds of intermediaries since the 1950s — well before the creation of the internet.

Take for example Barnes & Noble. If it sells a book with libelous content, it would be absurd to hold Barnes & Noble liable. And if a criminal uses a phone to commit a crime, it would be absurd to hold AT&T liable. If you bought a lemon of a car listed in the NY Times classifieds, you could not hold the Times liable for misrepresentation in that ad.

Along comes the internet, and in 1991 a court applied this "conduit immunity" to an online message board that did no content moderation whatsoever. In essence, Section 230(c)(1) simply enshrined "conduit immunity" in law, but gave no platform immunity for violations of federal criminal or copyright law.

It is in the lesser-known Section 230(c)(2) that we see the real brilliance and benefit of this law at protecting us from hateful and extremist speech. Section 230(c)(2) empowers platforms "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

²² Carl Szabo, *Section 230 Is the Internet Law That Stops the Spread of Extremist and Hate Speech*, Morning Consult (Aug. 27, 2019).

Section 230(c)(2) enables Gmail to block spam without being sued by the spammers. It lets Facebook remove hate speech without being sued by the haters. And it allows Twitter to terminate extremist accounts without fear of being hauled into court. Section 230(c)(2) is what separates our mainstream social media platforms from the cesspools at the edge of the web.

Now let's suppose anti-tech advocates get their wish and upend Section 230. What would be the effect?

A diminished Section 230 makes it easier for hateful and extremist speech to spread to every corner of the internet. A diminished Section 230 makes it easier to send spam messages and viruses across the internet.

While some vile user content is posted on mainstream websites, what is often unreported is how much of this content is removed. In just six months, Facebook, Twitter, and YouTube took action on 11 million accounts for terrorist or hate speech. They moderated against 55 million accounts for pornographic content. And took action against 15 million accounts to protect children.

All of these actions to moderate harmful content were empowered by Section 230(c)(2).

Did Section 230 make the internet perfect? No. Nor did seat belts stop automobile fatalities. Is there room to improve the internet? Of course. But diminishing Section 230 will only make the internet worse, not better.

In essence, removing Section 230 will lead to the spread of more extremist speech.

Platforms actively engage in removing offensive and objectionable content

A report by NetChoice aggregated and clarified some of the findings and data from transparency reports by major social media platforms.

In just the six-months from July to December 2018, Facebook, Google, and Twitter took action on over 5 billion accounts and posts (5,051,079,936).

These takedowns over just six-months broke down in the following ways:

- Nearly 17 million accounts and posts removed related to Child Safety (17,243,426)
- Over 57 million accounts and posts removed related to Pornography and Nudity (57,300,867)
- Nearly 2 billion accounts and posts removed related to Fake Accounts, Impersonations, and Doxxing (1,954,046,453)
- Over 3 billion accounts and posts removed related Spam (3,010,481,904)
- 12 million accounts and posts removed due to Extremist, Terrorist, and Hateful Conduct (12,007,286).

“Despite what you may hear, platforms are actively removing offensive and objectionable content all the time”

- Carl Szabo, Vice President
NetChoice



12 MILLION
extremism,
hate speech,
terrorism
REMOVED



2 BILLION
fake accounts,
impersonations,
doxing
REMOVED



17 MILLION
child safety
REMOVED



57 MILLION
nudity and
pornography
REMOVED

Failures and harms of prior amendments to Section 230

While some herald the passage of FOSTA as a success, such statements are questionable at best. In fact, new reporting shows that FOSTA has caused significant harms to local communities and resulted in increased police activity.

Since FOSTA’s enactment over a year ago, and despite the alleged benefits for law enforcement of FOSTA, we’ve actually seen a 25% *decrease* in prosecutions of sex-trafficking.²³ Moreover, we have unfortunately seen no evidence of significant decrease in sex-trafficking in the United States.

²³ Human Trafficking Institute, *2018 Federal Human Trafficking Report (2018)*, available at <https://www.traffickingmatters.com/wp-content/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf>.

As a result of the passage of FOSTA, cities like San Francisco have reported a 170% spike in sex-trafficking.²⁴

If there was a significant decrease in sex-trafficking, it would most likely be attributed to the takedown of Backpage.com. And while some mistakenly claim that the passage of FOSTA was necessary for the takedown of Backpage, the infamous website was removed before FOSTA was even signed into law calling into the underlying justification for FOSTA.²⁵

At the same time, even those groups who might have thought FOSTA was a good idea have realized that it is actually harming the efforts to help victims of sex-trafficking.²⁶

“[Passage of FOSTA] was unlike anything we’d ever seen,” says Meg Munoz, a sex-trafficking survivor and founder of the OC Umbrella Collective, an organization that serves sex workers and those being domestically trafficked in Southern California. “The immediate impact was swift and, honestly, terrifying. We watched people literally walk back to their pimps knowing they had lost any bit of autonomy they had. We watched people wind up homeless overnight. We watched members of our community disappear.”²⁷

...

“The legislators, law enforcement officials and advocates who championed SESTA and fought to take down Backpage, while perhaps well intentioned, have effectively forced an entire industry further underground, making the work of victim advocates and law enforcement that much more difficult.”

As predicted, the passage of FOSTA also unleashed frivolous civil lawsuits aimed at attacking deep-pocketed third-party businesses. *Doe v Salesforce* is part of a string of unintended consequences we’ve seen since the passage of FOSTA last year.²⁸

The plaintiffs assert that because Backpage.com used Salesforce’s tools (thousands of other sites use Salesforce’s tools as well), that Salesforce is directly liable for the harm caused by Backpage.com.

²⁴ CBS SF Bayarea, *New Laws Forced Sex Workers Back On SF Streets, Caused 170% Spike In Human Trafficking* (Feb. 3, 2019).

²⁵ *DOJ Seizes And Shuts Down Backpage.com (Before SESTA Has Even Been Signed)*, TechDirt (Apr. 6, 2018).

²⁶ *Anti-Sex-Trafficking Advocates Say New Law Cripples Efforts to Save Victims*, Rolling Stone Magazine (May 25, 2018).

²⁷ *Id.*

²⁸ More information at *DOE V SALESFORCE*, available at <https://netchoice.org/doe-v-salesforce-the-unintended-consequences-of-sesta-fosta/>.

Backpage.com, a notorious site where sex-trafficking occurred, was shut down by law enforcement in 2018 prior to the enactment of FOSTA.

While *Doe v Salesforce* does not specifically mention FOSTA or Section 230, it is clear that FOSTA potentially mollified Salesforce's ability to have the suit dismissed under Section 230.

Before the passage of FOSTA, Salesforce would likely have seen this suit immediately dismissed as a violation of Section 230 – which holds the bad actors, not the platforms responsible for violations of state law. But FOSTA opened holes in Section 230 allowing lawsuits like this one make the intermediary liable for abuses of their tools.

Moreover, FOSTA has afforded a cottage-industry for plaintiff's attorneys to grow and take action, not against bad actors, but instead deep-pocketed intermediaries like Salesforce. Note that the lead attorney in *Doe v Salesforce* is also the lead attorney in *Doe v Facebook* — both suits brought post-FOSTA enactment. It's very likely that these lawsuits are just the beginning of what is going to be a gold-rush for private attorneys.

So before we begin amending Section 230, we must look to see the effects of the prior actions – and clearly FOSTA has, unfortunately, failed to stymie sex-trafficking and has actually led to real harms for victims.

Importance of including Section 230 in trade agreements

Because of Section 230, U.S. companies, creators, and consumers have generated more free speech than at any time in the history of the world. For over 20 years, U.S. policy has encouraged user-created content on the internet.

Spreading free trade and free speech via inclusions of Section 230 in trade agreements

Section 230 enables greater free trade. A fundamental reason that platforms have been able to play a trade-enabling role is their open nature. Online services enable transactions and communications among millions of businesses and consumers, enabling US sellers to connect directly with global buyers. If there were a duty to inspect or filter each piece of content, then these services simply wouldn't exist, meaning that small businesses wouldn't be able to leverage new online tools to reach new customers abroad.

Over the next decade, Section 230 will contribute a further 4.25 million jobs and \$440 billion in growth to the economy.²⁹ And Section 230 has enabled the U.S. tech industry to far outperform the EU. In the U.S., online platform businesses are 5 times more likely to raise over \$10 million in venture capital funds than EU platform businesses. Section 230 enables a world-leading, innovative and competitive tech industry.

Research makes clear that Section 230 continues to enable strong American economic growth. There is a direct correlation between countries with intermediary liability protections like Section 230 and economic growth.

The fact that America, the birthplace of the internet, decided early on to “maximize user control over what information is received by individuals who use the Internet” established norms that should be emulated in countries around the world. The provisions in USMCA continue America’s goal of being a beacon to the world by encouraging adoption of Section 230 as a tool of democracy and free speech.

Section 230 has enabled speech from diverse political perspectives to flourish online in a way that never could have happened if just three networks or a handful of media companies were in a position to decide who can participate.

Addressing false claims by opponents of Section 230

While some special interests falsely claim that American does not add provisions to trade agreements that are currently being debated in Congress and agencies, this statement cannot be further from the truth.

Our trade agreements have often included provisions related to the protection of US copyrights and trademarks abroad. For example, the USMCA requires “a minimum copyright term of life of the author plus 70 years, and for those works with a copyright term that is not based on the life of a person, a minimum of 75 years after first authorized publication.” This provision is currently being debated in the halls of Congress as various interests are approaching life-end of their copyrights.

²⁹ Mike Masnick, *Don’t Shoot the Message Board* (Aug. 2019).

Likewise, USMCA includes provisions for protecting trademarks as legislatures and courts across the country are considering whether to amend our current trademark process like Trade Protection Not Troll Protection Act and cases being decided before US courts.

Also false are claims that including Section 230 in trade agreements will “tie the hands of congress.” Of course, we all know that unlike a treaty, the USMCA is only an agreement. This means that neither the US nor Mexico nor Canada are strictly bound to the text. In essence, if the US decides to exceed the text of the USMCA, it can.

Moreover, the power of Congress to exceed the text of the trade agreements is enshrined in the Trade Promotion Authority (reenacted in 2015). The TPA expressly included a section on “Sovereignty” to confirm that U.S. law has primacy over trade agreements.

Section 108(a) of TPA ensures that U.S. law will prevail in the event there is a conflict between the law and a trade agreement entered into under TPA. Section 108(b) ensures that no provision of a trade agreement entered into under TPA will prevent Congress from amending or modifying a U.S. law. Section 108(c) provides that dispute settlement reports issued under a trade agreement entered into under TPA shall have no binding effect on U.S. law.

Finally, USMCA is subject to longstanding exceptions that allow countries to enact measures “necessary for the protection of public morals.” USMCA negotiators made clear that this exception applies to Article 19.17, and highlighted the recent FOSTA-SESTA law as a recognized example under this exception.

In essence, arguments are **false** that say section 19.7 of the USMCA prevents Congress from amending Section 230 or that such inclusions are novel. Now is more important than ever to spread America’s values of free speech across the world and as such, now is the time to include platform immunities in our trade agreements.

Dangers of a “reasonableness” requirement for Section 230

Individuals like Danielle Citron mistakenly suggest that Section 230 require a reasonableness standard to hold platforms immune. This approach is flawed for many reasons.

A “reasonableness” standard will snowball legal costs for small platforms from \$80,00 to \$750,000 per suit.

As described above, the only sites and services that really need Section 230 are those that engage in content moderation. As shown through decades of case law, the immunity provision of Section 230 is not novel, and already exists in the form of “conduit immunity.” The need for Section 230 is for those platforms that engage in content moderation – like removal of extremist speech.

This means that only the platforms that seek to remove objectionable content need Section 230 – not sites like 8-Chan. Today, Section 230 provides these platforms an opportunity for a Fed. Civ. Law 12(b)(6) motion to dismiss (of course Section 230 has no effect on federal criminal actions as such law is exempted). Each time a site or service is sued, a motion to dismiss under Section 230 costs the site up to \$80,000.³⁰

Without this ability for a quick dismissal, these lawsuits can snowball to nearly \$750,000. For large platforms this may not be significant but imagine a smaller platform that faces just ten lawsuits – without Section 230, the small platform is looking at \$7.5million in legal fees. This is easily enough to put platforms out of business.

By a desire of small platforms to settle, even frivolous lawsuits, rather than suffer legal fees of \$750,000, this amendment of Section 230 will supercharge the plaintiff’s bar and ravage small entrepreneurs.

Conclusion

We thank the Committee for considering our views and we welcome the opportunity to provide more information about the importance of Section 230.

Sincerely,

Carl Szabo

Vice President and General Counsel, NetChoice

NetChoice is a trade association of online businesses. www.netchoice.org

³⁰ Engine, *Section 230: Cost Report*.

A World



WITH
or
WITHOUT

Section 230

Section 230's Good Samaritan provision was enacted to empower platforms to moderate content without assuming liability for content posted by others.

Consumers want content moderation. Platforms without it can become venues for abuse, inappropriate content, and spam. Without content moderation, the world wide web would become the wild wild west.

There's a reason the most successful platforms all moderate user content.



With Section 230

Platforms could pursue good faith efforts to remove rule-breaking content, like pornography or drug use.

This is the heart of the Good Samaritan provision - don't punish good actors.

By empowering platforms to moderate content, platforms can protect their users from inappropriate content.

Section 230 encourages platforms to monitor content.

This empowers platforms to notify law enforcement when they observe criminal activity.

Moderation

Inappropriate Content

Illegal Content

Without Section 230

Without Section 230, platforms couldn't moderate without risking legal liability.

To avoid liability, platforms might not moderate at all.

Without Section 230, most online platforms would not risk engaging in removal of pornography and other inappropriate content.

Because platforms probably wouldn't moderate content, law enforcement would lose a valuable tool in stopping crimes and saving lives.

Section 230 enables content moderation.

**PROTECT SECTION 230. PROTECT OUR
ONLINE VOICES.**



Learn more at ProtectOnlineVoices.org

SECTION 230 MAKES ME A BETTER...

Neighbor



NextDoor.com makes it easier to keep in touch with my neighbors

Entrepreneur



Etsy and eBay help me grow my customer base

Citizen



Change.org enables me to get involved in local and national issues

Student



Wikipedia helps me research - even for controversial subjects

Traveler



TripAdvisor and Yelp help me plan better vacations and dining experiences

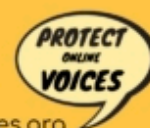
Donor



GoFundMe empowers me to help those I care about

Section 230 is federal law that lets these online platforms host and moderate user content - without risk of private lawsuits or liability for local laws.

If Yelp could be sued by restaurants over harsh reviews posted by users, Yelp would not be in business today.



Learn more at ProtectOnlineVoices.org

A day in the life of Section 230 on the hill



All platforms and services highlighted below would be impacted by changes to Section 230. Some would not be able to function, others would have to change their business model.

Section 230 enables user-generated content all over the web. Without it, the internet would not be what it is today.

AM



- Research for today's meetings using **Wikipedia**, **Google**, and **YouTube**
- Record public reaction to Rep's new op-ed on **Twitter**, **Facebook**, and **legacy newspaper comment sections**
- Reply to messages in my **email inbox**

- Find an event providing a free lunch for staffers on the hill using **Eventbrite**
- Look up **Yelp** reviews for tonight's happy hour location

LUNCH



PM



- Send out press statement on yesterday's big news **Facebook** and **Twitter**
- Research new contact on **LinkedIn** before you meet with them for coffee
- Post today's Rep remarks to our **YouTube channel**

Section 230 enables user-generated content and provides us with the internet we use and rely on every day.

PROTECT SECTION 230. PROTECT OUR ONLINE VOICES.



Learn more at ProtectOnlineVoices.org