

Attachment—Additional Questions for the Record

**Subcommittee on Communications and Technology and
Subcommittee on Consumer Protection and Commerce
Joint Hearing on
“Fostering a Healthier Internet to Protect Consumers”
October 16, 2019**

Dr. Corynne McSherry, Ph.D., Legal Director, Electronic Frontier Foundation

The Honorable Anna G. Eshoo (D-CA)

- 1. Even if we leave Section 230 as it is, how do you think we should deal with the illegal sales of opioids, the rise in child sex abuse imagery, or any other major content issue we see today?**

Response: For content that is illegal under federal criminal law (as the examples provided are), Congress should look to increased enforcement of existing federal criminal law as a first measure. Congress could also provide additional resources for increased law enforcement against direct perpetrators.

For example, a recent study laid out how drug companies wooed physicians and prescribers “with speaking fees, free dinners, paid trips, and more . . . to convince [them], contrary to the evidence, that the narcotics were safe and effective, persuading them to prescribe far more of the drugs.”¹ Studies like this suggest that it would be more effective to target those companies (as is already underway) than looking to social media companies to police content on the Internet.

Congress should be very careful to avoid collateral damage, such as regulations that might encourage platforms to takedown posts and groups aimed at harm reduction.²

a. Should Congress do anything else to incentivize content moderation?

Response: Most, if not all, of the major platforms already do a significant amount of content moderation. And much of it is highly problematic from a human rights perspective, with the speech of those holding minority views frequently being most vulnerable. We respectfully suggest that a better question is how to encourage them to do a better job of it.

Congress should first understand there are significant First Amendment issues that will arise with any content-based restriction on speech or compulsion to speak. Congress should also understand

¹ German Lopez, *We now have more proof that drug companies helped cause the opioid epidemic*, Vox (Jan. 25, 2019) <https://www.vox.com/future-perfect/2019/1/25/18188542/opioid-epidemic-marketing-overdose-death-purdue>.

² Maia Szalavitz, *Facebook Is Censoring Posts That Could Save Opioid Users’ Lives*, Vice (Jul. 2, 2019) https://www.vice.com/en_us/article/qv75ap/facebook-is-censoring-harm-reduction-posts-that-could-save-opioid-users-lives.

that it is practically impossible for anyone operating at scale to moderate content perfectly, or even well. Content moderation is a fundamentally thorny activity, prone to subjective choices, cultural clashes, robot flaws, and disparities in reporting patterns that can disproportionately affect specific people and vulnerable communities.³ Platforms should align their policies with human rights norms and apply those policies consistently. At the same time, different platforms should be able to take different moderation choices, indeed, we should value and foster a panoply of platforms with difference features and methods of organizing and displaying content. However, platforms should make their moderation choices and policies explicit.

Accordingly, our own strategy has been to urge platforms to adopt robust transparency and due process measures. That is why we joined other organizations in devising and spurring a set of principles on platforms' transparency, due process, and accountability in content moderation.⁴ Having precise information on how they carry out their moderation activities (both the policies themselves and how they are enforced) and ensuring due process through meaningful notice and appeal mechanisms are essential to making platforms' policies and practices more consistent with human rights law. Greater algorithmic transparency through independent audits would also be valuable.

b. Should Congress update our federal criminal statutes?

Response: If Congress believes that there is an unprotected category of speech under the First Amendment that is not currently covered by federal criminal law, it could pursue that strategy. But any law criminalizing protected expression because of its content will need to satisfy First Amendment strict scrutiny independent of Section 230.

2. Platforms have been criticized for doing too much moderation (particularly with respect to political biases) as well as doing too little moderation (particularly with respect to streaming of mass shootings). Which criticism, if any, is more accurate?

Response: Both and neither. While we certainly agree that online platforms have created content moderation systems that remove speech, we don't see evidence of systemic partisan bias. What we do see are content removal practices that seem to be inconsistent, arbitrary, and non-transparent. We are also concerned that content moderation is too often under pressure from powerful actors, be those non-democratic governments or those with significant economic leverage.

That said, the question points to a concern we share: the need for more empirical data, particularly from the platforms themselves. We know that platforms erroneously remove considerable amounts of content that does not violate their rules, but we have little data on

³ Jillian C. York and Corynne McSherry, *Content Moderation is Broken. Let Us Count the Ways!*, Electronic Frontier Foundation (29 April 2019). Available at <https://www.eff.org/pt-br/deeplinks/2019/04/content-moderation-broken-let-us-count-ways>

⁴ Santa Clara Principles, <https://santaclaraprinciples.org>

precisely how much. Of the major social media platforms, only one company, Reddit, provides data on the number of appeals received and their aggregate outcomes.^{5, 6}

The Honorable Kathy Castor (D-FL)

- 1. On June 19, 2019, The Verge published an investigation into one of Facebook’s content moderation sites in Tampa, FL, which is operated by the firm Cognizant. The article details allegations of appalling working conditions including sexual harassment, verbal and physical fights, theft, and general filthiness in addition to adverse mental health effects associated with the nature of their work.**
 - a. Operationally, how should tech platforms moderate their content? What role should human content moderators play? What role should technology play?**

Response: The labor conditions of content moderation are a serious problem. Prof. Sarah T. Roberts at UCLA has done extensive research and writing on this topic and we highly recommend her work.⁷

But content moderation that relies entirely on technology is not the solution either. Filtering mechanisms can be useful in *flagging* material that might violate a platform’s policies, but they cannot substitute for human judgment. Content decisions are almost always deeply contextual in ways that technology cannot discern, and technological screening without human review inevitably leads to over-moderation. This is one of the impossible problems with content moderation, and policy decisions must be made knowing that it is unsolvable.

One useful approach, however, is to put more power in the hands of users themselves to determine what they do and do not want to see. Rather than calling on the platforms to police online speech via an army of underpaid workers, we could call on them to help users control their own social media experience.

- b. What standard should a private company use to evaluate content? “Quasi constitutional”, a “community standard” established by the company along the lines of other private media, other?**

Response: Each platform has a First Amendment right to decide what content it wants to host, and users are best served by having a variety of options available to them. Some users may prefer a site with minimal moderation. Some might prefer a site limited to specific subject matters or

⁵ Gennie Gebhart, *Who Has Your Back? Censorship Edition 2019*, Electronic Frontier Foundation (June 12, 2019) <https://www.eff.org/wp/who-has-your-back-2019#reddit>

⁶ Reddit Transparency Report 2018, <https://www.redditinc.com/policies/transparency-report-2018>

⁷ Sarah T. Roberts, *Behind the Screen, Content Moderation in the Shadows of Social Media*, Yale University Press (<https://yalebooks.yale.edu/book/9780300235883/behind-screen>)

communities. Some may want a site that comports with their own standards; some may seek to learn about others' values and perspectives. Quasi-legal standards are difficult given that legal protections vary internationally and almost all platforms serve users around the world.

Rather than dictate specific content policies, we urge platforms to clearly indicate to their users what their standards are, to apply those standards as consistently as possible, to notify users when content (their own and others') has been removed, to provide avenues of appeal of moderation decisions, and to allow outside access to their decision-making so that it can be independently assessed.

- c. Given that private companies are not governed by standards that government would be when it decides not to post content, why do content moderators have to spend so much time reviewing and in such great detail evaluating explicit, violent, or hateful content? What value is there to society and the site owner to work to ensure that such explicit, violent, or hateful content is given every opportunity to be posted?**

Response: As noted, moderators, and the platforms that hire them, face an intractable problem: huge swathes of online content simply doesn't fit into a pre-specified, universally understood category. What one user considers hateful another may consider valuable social commentary. What one user considers sexually explicit, another may consider artistic. Of course, some decisions may be easier than others, but many are not.

With female nudity, for example, moderators seem to struggle to differentiate between with artistic, breast-feeding, and sexualized images. And while much violent content may serve little purpose, other violent imagery, such as that emerging from Syria, may be used to build an important historical record.

- d. This explicit, violent, or hateful content often is known to be inconsistent with the tech platform's content bylaws. Why do tech platforms, like Facebook, force content moderators to not only look at but also evaluate in great detail explicit, violent, or hateful content that is often inconsistent with the tech platform's bylaws?**

Response: We can't speak for all platforms. But from a human rights perspective, content should not be removed from a platform unless an informed decision has been made that removal is appropriate. Because those decisions are frequently not obvious and highly contextual, there must be a human in the loop.

- e. Should content moderators have more leeway to ban harmful content so they don't have to look at it over such lengthy time periods and evaluate the content in such detail?**

Response: We're concerned that such shortcuts will lead to the over-removal of content. As previously noted, moderators already make a significant number of errors.

- f. What should industry best practices be for treating content moderators? Should Congress play a role in ensuring worker rights in this unique industry? If so, how?**

Response: We are not worker rights experts, but it is clear from recent reports that this is a very challenging issue. We urge Congress to commission further factfinding in this area.

- g. Is it common practice among tech platforms to use contractors to conduct content moderation for their sites? Why do some tech platforms use contractors to conduct content moderation for their sites? Should tech platforms do this?**

Response: These are excellent questions, but workforce policy questions are outside of EFF's expertise.

The Honorable Lisa Blunt Rochester (D-DE)

- 1. What can the federal government do to improve the capacity and ability to effectively moderate online content, including technological research?**

Response: At a minimum, the government could fund research into tools that give users more power over their Internet experience. In addition, Congress should review and reform legal impediments to add-on innovation so that the private sector can offer the same kinds of tools. This includes reforming laws that are doing little to accomplish their intended purpose, and instead being misused to hinder innovation, such as the Computer Fraud and Abuse Act,⁸ and Section 1201 of the Digital Millennium Copyright Act.⁹

The Honorable Tom O'Halleran (D-AZ)

- 1. Dr. McSherry, in your testimony you state how changes to Section 230 could increase liability risks for platforms and force some to over-censor due to a lack of resources to review content as a result. Craigslist's decision to remove its personal ads section is the example you used.**
 - a. With the increasing amount of user-generated content being published on platforms daily, what do you believe to be the correct balance between using algorithms and human reviewers for platforms moderating content?**

⁸ *Computer Fraud And Abuse Act Reform*, Electronic Frontier Foundation <https://www.eff.org/issues/cfaa>

⁹ House Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet, Hearing: "Chapter 12 of Title 17", Testimony of Corynne McSherry, September 17, 2014, <https://www.eff.org/files/2014/09/17/09.17.14-testimony-eff.pdf>

Response: There is no one-size-fits-all approach. The correct balance will likely depend on the particular platform and may vary according to particular categories of content. Algorithmic technology may work for preliminary identifying, sorting, and flagging of some types of visual content, but content flagged by algorithms must still be reviewed by humans to ensure that content is not wrongfully removed. Furthermore, given the nuance required for adjudicating text-based content, that task is best left to human moderators.

The Honorable Greg Walden (R-OR)

- 1. At the hearing, Rep. Bilirakis asked you whether EFF has argued for including language mirroring legislation in trade deals explicitly for the purpose of “baking” language into an agreement to protect the statute domestically.**

For the record, Yes or No: Is including 230-like language in trade agreements an attempt to preclude us – the committee of jurisdiction – from revisiting the statute?

Response: No. Including Section 230-like language in a trade agreement may reflect international support for its core principles and could facilitate Internet commerce and expression. But the existence of such language would not prevent this committee from revisiting the statute.

In general, however, trade agreements are not the best vehicle for addressing questions involving fundamental rights such as free expression and access to information. The article to which Mr. Bilarakis referred expressed this very concern.

If Congress wants to ensure that the rights of Internet users are heard in trade agreements, it should seek to fundamentally reform the process by which trade agreements are developed, to ensure much greater transparency and accountability.

The Honorable Adam Kinzinger (R-IL)

- 1. Dr. McSherry, you state in your testimony that “victims can use defamation, intentional infliction of emotional distress...fraud, and other civil causes of action to seek redress,” (emphasis added). In cases where one user utilizes a fake profile to defraud another user—which I’d imagine is the situation in most of these fraud cases—it seems that those legal tools are extremely difficult to use.**
 - a. So how would a user even go about identifying a perpetrator to bring a lawsuit? Can you tell the Committee how many civil cases have even been filed in these situations?**

Response: Parties bringing meritorious lawsuits to identify anonymous Internet users can and frequently do identify the perpetrators of illegal acts. Courts for decades have confronted the

competing and weighty interests implicated in these cases: the right to obtain evidence and identify perpetrators and First Amendment right to speak anonymously.

The First Amendment protects anonymous speakers, though not absolutely. Our founders believed that anonymous speech was an essential tool to provide critical commentary and to foster public debate. The Supreme Court has recognized that anonymous speech is not some “pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). Anonymity is often a “shield from the tyranny of the majority.” *Id.* at 357. “The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.” *Id.* at 341–42. Indeed, our founders relied on anonymity in advocating for independence before the Revolutionary War and later when publishing the Federalist Papers as they debated our founding charter. *See Talley v. California*, 362 U.S. 60, 64–65 (1960).

“Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The ability to speak one’s mind on the Internet without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.” *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

As the court in *Dendrite Int’l v. Doe No. 3*, recognized, procedural protections for anonymous speakers are needed to ensure that litigants do not misuse “discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet.” 775 A.2d 756, 771 (N.J. App. Div. 2001). Similarly, the court in *Doe v. Cahill* stated, “there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics.” 884 A.2d 451, 457 (Del. Sup. Ct. 2005).

Courts have also recognized that, in meritorious cases, parties have a compelling interest to identify anonymous Internet speakers and vindicate legal claims. To balance the competing interests in parties obtaining justice and speakers’ First Amendment rights, courts have developed legal tests that determine when a party is justified in identifying anonymous Internet users. Although the specifics of these tests vary, they generally require the party seeking to identify an anonymous speaker to show early on that their case has merit and that they have endeavored to identify the individual without a court’s help. Upon meeting those tests, parties are generally able to use legal process, such as subpoenas, to obtain identifying information about Internet users and then pursue legal claims against them.

The law as it stands thus already provides a path for individuals to vindicate legitimate legal claims against individuals while also protecting anonymous online speakers from vexatious and harassing lawsuits designed to violate or chill their First Amendment rights. We have not tracked specific numbers, but we see many instances in which the disclosure of pseudonymous and anonymous user data is compelled upon a proper showing by a plaintiff. Of course, there will be examples where it may be very difficult to identify an offender, but that challenge is not unique to the Internet.

2. Many of us are aware of federal indictments against foreign nationals and U.S. residents for running these scams, which is wire fraud.

a. But how many of the foreign nationals do you believe will see a courtroom, let alone a prison cell?

Response: The answer to that question lies beyond EFF's expertise, but we suspect it involves fundamental issues involving law enforcement resources, complexities of extradition, and cross-border prosecutorial agreements.

b. At what point should an online platform have responsibility to a victim harmed by a user the platform failed to verify?

Response: This will vary greatly according to the situation. But we do not support placing an affirmative duty on platforms to verify every one of their users.

First, given the problem of scale, this will be very difficult to do and very burdensome. We fear that only the most entrenched and best-resources platforms will be able to make even a meaningful effort, much less succeed.

Second, the First Amendment and international human rights laws protect the right to anonymous and pseudonymous speech, with good reason. As noted, our founders relied on anonymity in advocating for independence before the Revolutionary War and later when publishing the Federalist Papers as they debated our founding charter. *See Talley v. California*, 362 U.S. 60, 64–65 (1960). They understood that anonymous speech was an essential tool to provide critical commentary and to foster public debate. Accordingly, the Supreme Court has consistently recognized that anonymous speech is not some “pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995). That is still true today, when there are many people, such as those living in oppressive regimes abroad or as minorities in their communities in this country, who face dangerous retaliation if they attach their real identities to their speech.

c. Is there a point where a platform's unwillingness or inability to protect consumers make them liable?

Response: Courts, such as the Ninth Circuit in the *Internet Brands* case, have appropriately identified situations in which a platform may owe a duty to its users. This is when the duty arises from something other than a third party's contribution of content to the platform. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016).

Platforms could take action if put on notice by user complaints. However, this is problematic due to the “heckler's veto” problem, where some users deploy illegitimate complaints to try to silence other users. At EFF, we have seen many examples of this kind of abuse, such as efforts to flood a platform's takedown systems with takedown complaints/demands, and seen how it can lead to the silencing of legitimate speech, particularly minority voices.

As for Prof. Citron's duty of care proposal, we fear it does not adequately protect online speech.

First, it is effectively a negligence/reasonableness rule that will inevitably lead to ruinous litigation for smaller platforms as they try to prove that the actions they have taken are adequate. Moreover, if the analysis is largely fact-based, then a defendant will not be able to resolve the litigation quickly and the effectiveness of Section 230's limits on litigation burdens and financial costs is lost. This adds up to a strong incentive to simply over-censor to try to stave off litigation.

Second, duty of care proponents have acknowledged that it would not apply to the largest platforms, because it would not be reasonable for them to take action at scale. Thus, this proposal wouldn't even apply to a vast amount of online content.

Finally, we note that while market pressures already encourage platforms to verify and screen users, any legislation in this area is likely to pose a constitutional problem under the First Amendment.