

December 1, 2021

The Honorable Michael F. Doyle,
Chairman
Communications And Technology Subcommittee
U.S. House Of Representatives
270 Cannon House Office Building
Washington, DC 20515

The Honorable Robert E. Latta,
Ranking Member
Communications And Technology Subcommittee
U.S. House Of Representatives
2467 Rayburn House Office Building
Washington, DC 20515

RE: Hearing on “Holding Big Tech Accountable: Targeted Reforms to Tech’s Legal Immunity”

Dear Chairman Doyle, Ranking Member Latta, and Members of the Committee:

Thank you for holding this hearing on the potential for reform of Section 230 of the Communications Decency Act. In an increasingly connected world, social media plays a significant role in society as a way of bringing users together and providing an easily accessible platform for users to express themselves.

The American Action Forum is an independent, nonprofit organization. Our focus is to educate the public about the complex policy choices the country faces, such as the rules that currently govern the internet and social media platforms. We have engaged in a significant amount of research on the topic of content moderation and internet governance, mainly analyzing the impacts of Section 230 in online innovation and free speech. We have also focused on different content moderation legislation, such as the Digital Millennium Copyright Act, as an alternative to Section 230’s standards for content moderation policy.

Our research on the matter has found a common thread: The framework behind Section 230 has allowed platforms to host content with little legal or financial risk, providing a platform for small businesses and marginalized groups and fostering innovation online. Alternative content moderation standards that place bigger liability on platforms, often known as “notice and takedown,” have often resulted in increased censoring of online speech and further implementation of algorithms and automated systems, which can sometimes be inaccurate. Increasing a platform’s liability would make it more costly and risky to host content online, which would disproportionately harm small businesses, content creators, and marginalized communities, as platforms are incentivized to remove content as soon as they receive a takedown notice and before they have even studied the veracity of the claim.

The attached appendices contain some of our recent work on the topic that may be useful to the Subcommittee as it seeks to build a comprehensive approach to content moderation.

Appendix A discusses the pro-competition benefits of Section 230, as it keeps barriers to entry low for new online platforms, keeping the online economy a dynamic market. The piece concludes that moving

away from Section 230 would greatly increase the costs and risks of hosting user-generated content, hindering competition, harming smaller platforms, and placing the largest platforms, such as Facebook and Twitter, in a privileged position.

Appendix B compares the principles behind Section 230 and other content moderation legislation, namely those which establish a “notice and takedown” system. This insight highlights that notice and takedown systems, which place higher legal liability on platforms, have resulted in over-moderation of content, as platforms are incentivized to remove content as soon as possible, regardless of the validity of the infringement notice. This has resulted in increased censorship, less innovation, and the potential of weaponization of infringement notices, disproportionately hurting small businesses, content creators, and marginalized groups.

These documents provide a broad background regarding the different kinds of legislation on content moderation, highlighting the importance of a content moderation standard that puts users first and fosters free speech and innovation online. We thank the Subcommittee for its attention to these issues. If we can be of any assistance to Members of the Subcommittee, please feel free to contact us or our colleagues at the American Action Forum.

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Insight

Section 230 as a Pro-Competition Policy

JENNIFER HUDDLESTON | OCTOBER 27, 2020

Executive Summary

- Critics of large social media platforms such as Twitter and Facebook claim they have grown too large and too powerful in part due to the “special privileges” platforms are given through Section 230 protection.
- Section 230 liability protection should instead be viewed as pro-competition policy that keeps barriers to entry low and encourages a dynamic market for platforms that host user-generated content.
- Policymakers should be careful about attempting to address content moderation concerns with ill-equipped tools, such as antitrust enforcement, as such policies threaten to hinder market competition.

Introduction

Section 230, a shield that protects online platforms from being held liable (in most cases) for content created by their users and enables them to engage in content moderation, has faced recent criticism from policymakers on both sides of the aisle. On the right, some argue that Section 230 is enabling anti-conservative bias by removing or limiting the reach of conservative voices or unfairly targeting the sharing of information critical of the left. On the left, some contend that platforms are not doing enough to stop the sharing of misinformation and hate speech, and that Section 230 allows online platforms to unfairly dominate the conversation at the expense of local media. With these concerns in mind, the CEOs of Twitter, Google, and Facebook are scheduled to testify before the Senate Commerce Committee on October 28, 2020, in a [hearing](#) entitled “Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?” The Senate Judiciary Committee also recently voted to issue subpoenas to the CEOs of Facebook and Twitter regarding allegations of anti-conservative bias.

As policymakers express concerns about Section 230’s liability protections, however, it is important to remember Section 230 plays a key role in keeping the barriers to entry low for new competitors and enables new entrepreneurial opportunities through third-party content. Changes to Section 230 may risk making it more difficult to challenge the existing giants and their policies as well as diminish many opportunities that the internet has yielded.

Section 230 Lowers Barriers to Entry

Concerns around Section 230 often are expressed with the view that it helps large social media platforms maintain their dominance. Section 230, however, is critically important to keeping barriers to entry low for new platforms that allow user-generated content.

Section 230 keeps barriers to entry low by protecting platforms from liability for user-generated content and their decisions around what content to moderate. This liability shield allows platforms that wish to compete with existing giants, such as the new Twitter competitor Parler, and platforms that may come up with completely new ways for third-party users to share content to emerge without fearing a potentially business-ending liability for hosting user-generated content. As [Engine](#) points out, without Section 230, litigation would likely be common

and place significant burdens on individuals and small companies. Even a platform whose content moderation decisions were vindicated in court or was not found liable for a user's content after the fact would still have to bear many expenses to defend such a case.

Section 230 enables small platforms to focus on their product and the choices that best serve their users rather than investing in large legal teams. The result is that innovators can start new ventures on limited budgets in garages and college dorm rooms based on a good idea. It allows innovators and platforms to pursue different options for what content they allow and to develop and compete in the market they feel they can best serve. In other cases, a platform may gain popularity but still have limited staff. For example, Reddit only has [approximately 350 employees](#) but hosts a wide range of content with different standards set by each community.

In some cases, platforms may seek to serve specific audiences and moderate their content accordingly. Section 230 allows platforms to reach these audiences and tailor their choices to the specific needs. Section 230 was [never intended](#) to require all platforms to serve all content and audiences, but rather to allow platforms to find the solutions that best served their consumers' needs. This differentiation has allowed, for example, differing political voices to be heard on a variety of websites, and has allowed social movements, such as #metoo, to leverage the power of platforms to gain attention for previously under-reported issues. The result is a diverse array of platforms that allow for more speech than ever before and a reduction in the barriers for individuals to express their opinions.

Changes to Section 230 that increase liability, and particularly those that would allow individuals to sue platforms for their users' actions, would increase the risk companies face when allowing user-generated content. This liability could discourage new platforms from providing opportunities for users to share content and cause larger platforms to engage in even more intense content moderation. The result would not be to improve opportunities for speech, but rather to limit opportunities for user-generated content. Existing giants might be able to afford the cost of compliance, but new platforms would face an uphill battle to survive such litigation and compete with the incumbents.

Third-Party Content Increases Small Business Opportunities

Section 230 not only promotes increased competition among platforms, but the explosion of user-generated content also provides new entrepreneurial opportunities that benefit both sellers and consumers. While we often think of Section 230 in terms of social media platforms, user-generated content takes many forms including review sites and online marketplaces. This type of user-generated content has created increased opportunities for small businesses to expand their reach.

Without Section 230, platforms might be less willing to allow third-party content on their website if they might be sued for this content. Online marketplaces such as Etsy and [sharing economy websites such as Airbnb](#) allow providers of goods and services to write their own descriptions and create their own content. These platforms provide opportunities for entrepreneurship at a lower cost than traditional options and connects sellers to consumers that they would have otherwise not reached. As Santa Clara University law professor Eric Goldman [notes](#), applying strict liability to online marketplace transactions and limiting the applicability of Section 230 in online markets would make such opportunities far more limited. He writes, "Online marketplaces are one of the exceptionalist [sic] achievements of the Internet—there literally is no offline equivalent where complete strangers are comfortable enough with each other to blindly transact without doing any research on each other. That basic premise has unlocked hundreds of billions of dollars of wealth in our society (both producer surplus and consumer surplus)."

The result of diminished online marketplaces would be to further increase concentration and increase the cost of doing business and the price to consumers. At a time when more businesses are having to go online, changes to Section 230 could discourage platforms from carrying third-party content.

Distinguishing Section 230's Pro-Competition Effects from Antitrust

While policymakers are looking at amending Section 230 to address concerns about online speech or content moderation, they are also considering antitrust enforcement action. This consideration appears to rest on an assumed equivalency: Any policy with competition effects is *ipso facto* a competition or antitrust matter. While Section 230 has pro-competitive effects, it is important to note that the reverse is not true—antitrust policy is the wrong policy tool to address non-competition related concerns such as cocontent moderation. In fact, a break up of Big Tech platforms such as Facebook or Google would fail to improve and could even exacerbate many concerns about content moderation. First, there is no guarantee that smaller platforms would develop different content moderation policies than the current large platforms. Second, these smaller platforms would have fewer resources to devote to content moderation, which would make it unlikely they would be able to better address concerns through new tools or devote additional resources to improving content moderation. While Section 230 increases competition by decreasing barriers for platforms, issues of online content moderation should be considered separately from the conversation surrounding antitrust. Policymakers must be careful not to presume that, just because Section 230 has pro-competitive effects, utilizing antitrust against tech companies provides an alternative policy mechanism to resolve concerns about online content.

Conclusion

Many critics of Section 230 argue that it unfairly protects Big Tech from liability. While many large platforms encounter the difficulty of content moderation at scale, Section 230 is a pro-competition law that keeps the barriers to entry low for platforms that carry user-generated content. As a result, it enables new platforms to provide alternative content moderation options for users if they feel current giants fail to serve their needs. It also has enabled platforms to provide opportunities for third-party business content that would be riskier if subject to liability. Policymakers should be cautious when considering changes to Section 230; beyond burdening today's tech giants, such changes may inadvertently make it more difficult for new players to arise.

Insight



Content Moderation Using Notice and Takedown Systems: A Paradigm Shift in Internet Governance

JUAN LONDOÑO | NOVEMBER 8, 2021

Executive Summary

- “Content moderation” – the removal of undesirable, offensive or illegal user content from online platforms – has emerged as a potent political issue and important policy challenge.
- The current approach (Section 230) shields platforms from legal liability for user content; a variety of proposed bills would place higher legal liabilities on platforms, typically through “notice and takedown” systems.
- Notice and takedown systems require platforms to remove content in a timely manner after receiving a notification that the content is potentially unacceptable, and have been implemented in the context of copyright infringement and sex-trafficking content.
- While the Section 230 regime has fostered free speech and innovation online, experience with notice and takedown systems suggests that they are a threat to these objectives.

Introduction

Content moderation of online platforms – particularly those known as “Big Tech” – is a potent political issue and an important policy challenge. Republican members of the House Energy & Commerce Committee have introduced a [broad package of draft bills](#) seeking to reform Section 230 of the Communications Decency Act, a linchpin of internet content moderation, while Democratic Chairman of the House Judiciary Committee Jerrold Nadler introduced the [SHOP SAFE Act](#), which aims to increase platforms’ liability regarding the sale of counterfeit goods on their websites.

Section 230 provides platforms with a shield from liability so they can freely moderate content, placing the liability of the content on the users who create and post it. This has contributed to [innovation in online content](#). An alternative approach to content moderation, used in the Digital Millennium Copyright Act (DMCA), the Fight Online Sex Trafficking Act (FOSTA), and the Stop Enabling Sex Traffickers Act (SESTA) is a “notice and takedown” system. Such a system places a higher responsibility on platforms, as they must remove offending content after a notification has been placed.

This insight examines these regimes and concludes that notice and takedown systems have resulted in over-moderation of content, thus suppressing innovation and speech online.

Content Moderation Under Section 230

Section 230 of the Communications Decency Act establishes that online platforms should not be treated as the publisher or speaker of any information provided by other content providers. In other words, online platforms will only be legally liable for the content they publish themselves, exempting them from legal liability for content posted by their users. This prevents platforms from receiving a potentially jeopardizing lawsuit from hosting users' content, therefore making online interaction less risky and more cost-effective.

This system benefits both platforms and users alike. The benefit for platforms, especially startups, is clear. This approach allows platforms to allocate more resources in the development of the core product, instead of needing to spend significant resources on a robust content-moderation strategy and a legal team to fight the consequences of any shortcomings that said strategy could present. Essentially, Section 230 provides a low barrier of entry for internet startups, as it eliminates the liability risk associated with hosting user-generated content.

For users, the main benefit of content moderation under Section 230 is that the content they wish to post online is more easily hosted. As platforms have less fear of legal liability, they will have more lenient review processes, and are less likely to subject content to a screening before it is posted. This approach allows users to be able to experiment and innovate with the content they generate, pushing platforms toward unintended content. This greatly benefits users trying to post more content considered counter-cultural or controversial, as platforms face lower legal ramifications for hosting it. As Democratic Senator Ron Wyden – one of the co-authors of the Communications Decency Act – has expressed, the bill [took the principles of the First Amendment](#) and applied them to internet governance.

Notice and Takedown Systems

Bills such as the DMCA, FOSTA, and SESTA have established what is known as a notice –and takedown system. As its name describes, it establishes that platforms must remove offending content in a timely matter after it has received a notice of infraction. The reasoning behind the system is that by notifying platforms, they will be aware of the existence of potentially problematic content, and they can quickly review and remove it if they find it violates either copyright law – in the case of the DMCA– or promotes sex trafficking – in the case of FOSTA and SESTA. Therefore, these bills create a completely different paradigm from Section 230: As platforms have been notified of potentially problematic content but have not removed it, they are now responsible for it, regardless of whether they or a third party published it.

Practical Challenges of Notice and Takedown Systems

On paper, notice and takedown systems seem to establish a clear path of action and a seemingly easy approach to combat offending content. In practice, however, its application has shown various unintended consequences. First, it pushes platforms to take an overly precautionary approach, preemptively removing content that may not be offending but has been flagged as so. This has been [especially prominent in the case of copyright](#), in which the sheer number of complaints platforms receive makes it almost impossible to appropriately review content in a timely manner. As regulations establish that content must be removed in a timely matter or platforms will face onerous fines, platforms are incentivized to remove content first, and review it later.

This “remove first, review later” approach leads to the emergence of a second problem: the “guilty until proven innocent” regime. As platforms remove the content preemptively in order to ensure they are complying with the timeliness requirement, users are now the ones to bear the burden of proving their content is non-infringing. Thus, platforms will receive a sizeable number of appeals at a time, leading to an often-lengthy process of review before content may be allowed to be reposted. The burden of timely content review is shifted from the initial notice to the appeal process, harming users and benefiting notifiers. This shift in the burden of proof has become ripe for the use of notifications of copyright infringement as a method to [extort or silence content creators](#), which see platforms de-monetize or outright shut down their profiles as a response to infringement notices.

The third issue is that notice and takedown has generated a need for further implementation of algorithms to speed up the content removal process. As platforms receive notifications for the millions of pieces of user-generated content that are posted every day, they have had to ramp up the automation process in order to remove potentially infringing content in a prompt and cost-effective manner. But the implementation of algorithms raises concerns. The main concern is the question of accuracy, as the artificial intelligence (AI) that powers these algorithms often lacks the ability to discern the context of the post. These algorithms also have to go through a lengthy trial and error process, which would theoretically allow the AI to develop accurate judgement criteria, a process [industry insiders](#) are skeptical about. Algorithms have also proven vulnerable to exploitation, as in the cases where law enforcement officers [played copyrighted music](#) in order to prevent civilians’ recordings from being uploaded to online platforms.

Looking at other countries that lack or have repealed analogous regulations, the impact of moving away from Section 230 becomes clearer. Australia’s [high court ruled](#) that media outlets are to be considered “publishers” of allegedly defamatory comments in their comments section on social media. Many media outlets and public figures reacted by [disabling their comments section](#), alleging that due to the 24/7 nature of social media and the sheer volume of comments, maintaining constant, flawless moderation of comments would be impossible. Therefore, it was easiest to remove the comment section to shield themselves from legal liability.

Conclusion

Legislative efforts to improve online content moderation have focused on altering Section 230 of the Communications Decency Act, a key piece of legislation establishing that online platforms are only legally liable for the content they publish themselves. A review of the performance of the primary alternative to Section 230 –notice and takedown systems– indicates that the result is content over-moderation and further implementation of algorithms and automated systems. Policymakers should keep in mind that the principles behind Section 230 foster a dynamic online environment, as it allows platforms to host user-generated content at a lower cost and reduces the barriers to entry to new competitors.