

June 21, 2024

Robert E. Latta, Chairman
Congress of the United States
House of Representatives
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515
Attn: Noah Jackson, Legislative Clerk

Sent via USPS and noah.jackson@mail.house.gov

Re: Legislative Proposal to Sunset Section 230 of the Communications Decency Act –
Responses to Additional Questions for the Record

Dear Chairman Latta,

I write in response to your June 7, 2024, correspondence following the May 22, 2024 hearing entitled “Legislative Proposal to Sunset Section 230 of the Communications Decency Act,” at which I appeared and testified before the Committee on Energy and Commerce Subcommittee on Communications and Technology.

I herein respond to the Hon. Russ Fulcher’s Additional Questions for the Record.

1. What are some of the various legal outcomes you see possible as courts begin to wrestle with Section 230 as it applies to AI-content generated by a third party?

Section 230 immunizes only information content published by a third party information content provider. It is my strong opinion that generative AI produces content that is the platform’s own content. And thus, the third prong to qualify for Section 230 immunity is not met. (Under *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009) 1) no “interactive computer service” shall be (2) treated as a “publisher or speaker” of 3) content provided by another “information content provider.”)

While most courts determine Prong 2 by considering if the duty breached is a publishing function, one outlier decisions (i.e. *Herrick v. Grindr* in the Second Circuit) adopted a broader reading declaring that Section 230 immunity applies so long as content flowed from content. Thus in the Second Circuit, simply by a user inputting the prompt into the AI tool, the platform may automatically obtain immunity.



C.A. GOLDBERG

PLLC, NEW YORK

a. Do you believe the AI developer will assume more liability than the platform provider?

Nobody is going to voluntarily assume liability. To the extent the question is about the AI manufacturer, there could be viable product liability claims if the AI product was not reasonably safe or failed to warn. For instance, the products that are obviously about creating sexual deepfakes, like Nudify, there is no reasonably safe use for that product. And there should be liability both for the manufacturer as well as the distributors of those products. Product manufacturers commonly defend themselves by saying somebody misused the product. So if an AI product is marketed as having many uses, it will be more difficult to hold them liable.

If I'm misunderstanding the question and the "AI developer" is the individual who generated the content and published it somewhere, that person could have liability without Section 230 even being called into question. The issue, though, would be with anonymous and judgment-proof defendants.

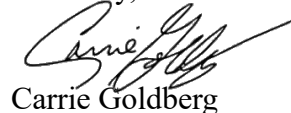
2. If Section 230 is sunset and reformed to allow for some liability, do you envision better self-policing by social media companies, or do you see them preferring to fight it out in court?

I envision that with the sunset of Section 230 would come the dawning of a new internet age where companies care about safety. Like with all industries, they will be liable for injuries they cause, and thus will be incentivized to avoid injuring people. If they don't harm people, they won't need to fight things out in court. Some companies will want to make a display of aggressive litigation to show they won't settle cases without a fight. A certain amount of litigation is good to establish case law and precedents which then guide and deter the filing of other cases.

3. In allowing the Section 230 immunity protection to end for social media companies, do you believe that companies will be engaging in protected "commercial speech" by arranging users feed via an algorithm?

The organizing of content warrants no First Amendment protection. Commercial speech is the least protected category of protected expression which includes commercial advertising, promises, and solicitations. The organizing of content – whether matches on a dating app or results from a search engine query – is not itself speech. Instead, the act of organizing (even if via algorithm) is conduct; and thus distinct from the content being organized. In cases where a platform organizes content to amplify certain content that they are getting paid for, there is an argument that that content should be attributed to the platform -- and if the content is illegal or malicious, the platform should be liable (see *FTC v. Leadclick*, US Ct. of Appeals, 2nd Cir 2016).

Sincerely,



Carrie Goldberg



C.A. GOLDBERG

PLLC, NEW YORK