# Time for the Section 230 Pendulum to Swing

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The internet is a wonderous tool, but few would say there isn't room for improvement. Although it is increasingly being used for communication, commerce, and creativity, it is also increasingly being misused to denigrate, deceive, and destroy.

Many people have argued that the internet is just a mirror of society—showing us both the best and worst of human nature. Others contend, I believe correctly, that it has turned from mirror to amplifier. And lately, it appears to be amplifying more of the worst and less of the best.

All tools are amenable to abuse, of course. What's different here is that no one is adequately minding the toolshed. In part, that is because the policy pendulum has swung too far in favor of shielding internet platforms from liability—at the expense of accountability and consumer welfare.

In the brick-and-mortar world, legal accountability helps check the flaws of human nature. Section 230, at least as construed by the courts, has removed much of that legal accountability from the online world. It shields platforms from liability for almost any unlawful conduct by their users—regardless of the harm caused; regardless whether the platforms knew or should have known about the unlawful conduct; regardless whether they collected advertising fees, subscription revenue, or valuable data around the unlawful conduct; and regardless whether they engaged in reasonable (or any) content moderation.

This has the effect of eliminating for platforms the duty of care that ordinarily requires businesses to take reasonable steps to curb use of their services to harm others. And so, despite conventional wisdom and Congress' best intentions, section 230 as applied today makes content moderation by platforms less likely—not more—and increases the risk the public will be harmed online.

As more of our social and economic lives move from the accountable brick-and-mortar world to the unaccountable online world, a failure to reform section 230 would be an abdication of responsibility—ironically, much like the abdication we are accusing platforms of. An online environment that is both permissionless and unaccountable is not anywhere anyone should want to be.

Modest section 230 reform can help once again center the pendulum—without "breaking the internet." It can promote more of the good and curb some of the bad, both in this law and in the online experience.

The best way forward remains for Congress to amend section 230 to require that platforms take reasonable steps to curb unlawful conduct as a condition of receiving section 230's liability protections. And when it comes to issues involving lawful expression—such as concerns over hate speech, bias, and fake news—transparency requirements and enforcement of platforms' terms of service may provide a constitutional way forward.

Short of congressional action, the FCC can help address the harm from the overbroad court interpretations by clarifying that section 230 does not bar holding platforms liable when they: 1) negligently, recklessly, or knowingly fail to curb unlawful conduct; or 2) act in violation of their own policies, under pretext, or inconsistently when deciding whether to take down or leave up lawful content.

Which is why in the initial round of FCC comments I expressed support for a rulemaking. Most participants in that round expressed views about what the FCC *can't do*, rather than what it *can*. In light of that, I chose to also submit reply comments yesterday, emphasizing the following points:

- Section 230(c)(2), *by itself*, accomplishes Congress' goal of overturning *Stratton Oakmont* and preventing the act of content moderation from subjecting platforms to liability.

- Despite ambiguity in the language of section 230(c)(1), courts have construed it as limiting platform liability even when platforms don't moderate but instead negligently, recklessly, or knowingly fail to curb use of their services to harm others.

- The FCC can construe section 230 under the authority of section 201(b) of the Communications Act, in accordance with Supreme Court precedent.

- Because section 230(c)(1) is ambiguous, the FCC is not constrained by prior court interpretations when construing it, but courts would be required under Supreme Court precedent to give deference to the FCC's construction going forward, so long as that construction is reasonable.

- The FCC can reasonably conclude that—although subsection (c)(1) *does* prohibit treating platforms as the speakers or publishers of their users' content in defamation cases—it *does not* prohibit treating them as distributors of that content in defamation cases. Nor does it prohibit holding them liable for negligently, recklessly, or knowingly failing to curb other unlawful conduct.

- Such a construction would better accomplish Congress' goal of promoting content moderation and protecting the public.

- Such a construction does not amount to regulation.

- Holding platforms accountable for negligently, recklessly, or knowingly failing to curb unlawful conduct by their users would not hinder innovation, hurt smaller platforms and startups, or harm the ability of platforms to serve as avenues of free expression.

Section 230 reform, ideally from Congress, would make the internet an even stronger engine for economic growth, innovation, and healthy discourse. It would help restore trust that platforms are minding the toolshed appropriately: Mitigating predictable harm. Taking content down or leaving it up consistent with clear policies and processes. Ensuring people understand what rules a platform is playing by and have a fair opportunity to be heard.

There is a lot to love about the internet, but it is by no means perfect. To say that the status quo online is acceptable, and that neither the internet nor a 25-year-old law can be improved upon, is dishearteningly cynical for an industry that built itself on notions of limitless innovation and making the world better.

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