The App Coalition

Understanding Section 230 of the Communications Decency Act

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I. Introduction

As consumer engagement with digital content has evolved over the last three decades, Section 230 of the Communications Decency Act remains foundational not only to past evolution but future innovation. Section 230's protections emerged during a time when the judicial system that was grappling with how to assign liability in an age where the roles of publisher and distributor were blurring. This paper provides a historical overview of liability for content on the Internet prior to the passage of Section 230, the reason for its adoption by Congress, and the post-230 judicial decisions that are continuing to shape liability for entities that offer user-generated content. It concludes with a look at two bills in Congress that are receiving particular attention, the *Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020* (EARN IT Act of 2020) and the *Platform Accountability and Consumer Transparency Act* (PACT Act).

II. Liability for Content Prior to Section 230

In the early years of online activities, bulletin boards were the primary form of user-generated content and it was the free-wheeling speech available on bulletin boards that attracted users. Two of the most prominent companies of their time- CompuServe and Prodigy- hosted bulletin boards allowing users to interact with communities of shared interests. The two companies, however, took somewhat different approaches to the editorial management of the flow of content across their platforms, and that difference was the basis for inconsistent assignment of liability by the courts in separate cases that were brought against the companies.

CompuServe's Hands-Off Approach

CompuServe was an interactive computer service that offered its millions of subscribers access to over 150 special interest "forums," which were comprised of electronic bulletin boards, interactive online conferences, and topical databases.[1] These forums offered users the ability to engage with content that was posted by others with little to no editorial review by CompuServe before the posting was made. CompuServe often contracted out space for the forum and left the management and editorial control over that space to the forum space's owner. That fact was key to a decision in a case that was brought by Cubby, Inc. and Robert Blanchard, which alleged libel, business disparagement, and unfair competition over a posting that was made in the Journalism Forum hosted by CompuServe.[2]

As the U.S. district court in the *CompuServe decision* found, by not exercising editorial control over the forum at issue in the case, CompuServe was a distributor more akin to a "for-profit library that carries a vast number of publications and collects usage and membership fees from

[1] Before the Web: Online Services of Yesteryear.
[2] *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139. (1991) (*CompuServe decision*).

its subscribers in return for access to the publications."[3] Noting that the First Amendment has long protect[ed] distributors of publications and that to do otherwise "would be an impermissible burden on the First Amendment," the court did not impose liability on CompuServe.

The distinction between whether an online provider of content would be found to be a distributor, and thus not liable, or a publisher was revisited four years later in a case involving Prodigy, another online content provider.

Prodigy's Editorial Approach

Like CompuServe, Prodigy ran bulletin boards in which millions of users could subscribe to find content of interest to them. Unlike CompuServe, these communities operated under guidelines adopted by Prodigy and monitored for compliance. Prodigy was seeking to differentiate itself in the market by providing a family-friendly environment by ensuring that "objectionable" content that was available on its competitors' boards was prevented from being served to members of its service.[4] Those guidelines stated that "users are requested to refrain from posting notes that are insulting and are advised that notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards, or are deemed harmful to maintaining a harmonious online community, will be removed when brought to PRODIGY's attention." Prodigy further noted that while it is "committed to open debate and discussion on the bulletin boards...this doesn't mean that anything goes."[5] Moreover, Prodigy had in place additional controls, including software screening tools and the use of Board Leaders, to enforce its guidelines.[6]

Consistent with the distinction drawn in the *CompuServe decision*, which determined liability based on whether the actor was a distributor or publisher, the Nassau County Supreme Court found that unlike CompuServe, which exercised no control over the content posted on its forums and thus was a distributor, Prodigy had in place mechanisms that made it more like a newspaper and thus a publisher.[7] As a publisher, therefore, Prodigy could be held liable for

[3] *Id*. at 140.
[4] Prodigy (Online Service).
[5] *Stratton Oakmont, Inc. v Prodigy Svcs. Co*. 23 Media L Rep 1794 (1995).
[6] *Id*.
[7] *Id*. ("Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, Prodigy implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and "bad taste", for example, PRODIGY is clearly making decisions as to content (see, *Miami Herald Publishing Co. v. Tornillo, supra*), and such decisions constitute editorial control. (*Id.*) That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.").

content under prior decisions that held "one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it."[8]

These two decisions, considered together, created a perverse set of incentives for emerging online companies. On the one hand, they could allow their services to offer users unmoderated content from any and every one who is willing to subscribe and so long as they in no way edit or manage these posts, they would have no liability, regardless of how offensive or libelous the post. If, however, a company develops guidelines or codes of conduct regarding what is deemed appropriate and uses such guidelines to moderate content of offensive posts, they would be held liable for defamatory content in a post. As the court in the *Prodigy* decision was aware, its ruling would be preempted if Congress were to pass the Communications Decency Act, which was pending before Congress at the time of its decision.[9]

III. Section 230's Passage

As the courts were grappling with how to treat the emerging online platforms, so to was Congress, which had for years been looking at ways to modify the Communications Act of 1934 to better accommodate the evolving telecommunications landscape to address not only emerging competition in telecommunications offerings, but how to accommodate emerging technologies. To address the question, Representatives Ron Wyden (D-OR) and Chris Cox (R-CA) offered the amendatory language that would become Section 230 of the Communications Decency Act. Its provisions were intended to address the perverse incentive created by the courts concerning content moderation.

Liability Protection to Distributors of Content

Section 230(c)(1) provides that interactive service providers (essentially the distributors of content) may not be treated as the publisher or speaker of any information provided by another information content provider and is not liable for restricting access to material posted by another information content provider (the publisher of information).[10] Section 230(c)(2)

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[8] *Id*. (*citing Cianci v. New Times Pub. Co.,*639 F.2d 54, 61; Restatement, Second Torts § 578 (1977)).

[9] *Id*. ("the issues addressed herein may ultimately be preempted by federal law if the Communications Decency Act of 1995, several versions of which are pending in Congress, is enacted.").

[10] 47 U.S.C. § 230(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker –

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability –

No provider or user of an interactive computer service shall be held liable on account of-

(A) any action voluntarily taken in good faith 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; or

provides immunity to interactive service providers and information content providers that undertake efforts to proactively filter content that the provider or user of the service may find objectionable, whether or not the content is "constitutionally protected."[11] The effect of these two provisions are to provide websites, apps and other interactive service providers protection from liability for the views of others expressed on their platforms as well as protection against editing and managing the information that is presented on their platforms.

The structure of Section 230 achieved the goal of the sponsors by ensuring that content moderation could be performed without the risk of liability. It also ensured that the platform owners managed content moderation on their platforms without governmental involvement. In fact, a review of the legislative history of Section 230's passage clearly demonstrates that a concern animating the decision was to allow online service providers a free hand at moderating content presented on their platforms so no government agency would be placed in the role of content moderator. As Representative Cox (R-CA) stated during the debate on passage of the provision, Section 230 was intended to: [12]

> "Protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet, let us say, who takes steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York that they should not face for helping us and for helping us solve this problem. Second, it will establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government. In this fashion we can encourage what is right now the most energetic technological revolution that any of us has ever witnessed. We can make it better. We can make sure that it operates more quickly to solve our problem of keeping pornography away from our kids, keeping offensive material away from our kids, and I am very excited about it."

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

[11] *Id*.

[12] Cong. Rec. 4869-70 (1995).

Representative Wyden (D-OR) further explained the difference between the House version, which placed control in the hands of online service providers, and the Senate version, which sought to empower the Federal Communications Commission to monitor online activities to protect against objectionable material. Representative Wyden stated that: [13]

> Now what the gentleman from California [Mr. Cox] and I have proposed does stand in sharp contrast to the work of the other body. They seek there to try to put in place the Government rather than the private sector about this task of trying to define indecent communications and protecting our kids. In my view that approach, the approach of the other body, will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. The fact of the matter is that the Internet operates worldwide, and not even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children who use the new interactive media, and I would say to my colleagues that, if there is this kind of Federal Internet censorship army that somehow the other body seems to favor, it is going to make the Keystone Cops look like crackerjack crime-fighter.

It was, therefore, the intent of Congress to ensure that Section 230's liability immunity was to be free from government interpretation or second-guessing to avoid putting government agencies in the position of regulating speech.

The immunity was not blanket.[14] The law included important exceptions.

Exceptions to the Immunity Provisions

Section 230 originally noted four exceptions to its immunity provisions: (1) federal criminal laws; (2) intellectual property laws; (3) any state law that is "consistent with" Section 230; and (4) the Electronic Communications Privacy Act of 1986. These exceptions were intended to ensure that the free flow of content over platforms was encouraged but not to the extent that such content was illegal (or access to it would be illegal without a warrant). Moreover, state

[13] *Id*. at 4870.

[14] In addition to the exceptions in Sec. 230, Congress had sought to criminalize the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. 47 U.S.C. § 223(d). In 1997, following a protracted court challenge, the United States Supreme Court found that the "indecent transmission" and "patently offensive display" provisions abridge "the freedom of speech" protected by the First Amendment and were thus unconstitutional. *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997).

laws that were consistent with this federal framework could still be enforced, including state criminal laws.

In 2018, Congress clarified that the federal criminal law exception in Section 230 to explicitly includes sex trafficking, as defined in 18 U.S.C. § 1591, as an exception to the protections. Through the enactment of the House of Representative's Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA), which included provisions from the Senate's Stop Enabling Sex Traffickers Act (SESTA), Congress made clear Section 230 does not protect entities that engage in activities that enable sex trafficking of minors or prostitution.[15] Additionally, Congress provided that civil actions related to sex trafficking were an exception to Section 230's protection.[16]

IV. Judicial Analysis of Liability Under Section 230

As Section 230 has made its way through hundreds of cases, courts have helped define the law's applicability. While defamation, trafficking and free speech cases garner much public attention, Section 230's protections have been invoked in cases alleging discrimination,[17] false advertising,[18] breach of contract,[19] copyright infringement,[20] fraud[21] and invasion of privacy.[22] Regardless of the context in which the underlying claim arises and consistent with the liability protection construct created in the statute, courts have focused on whether the defendant is an information content provider (publisher) or an interactive computer service (distributor) and whether the editorial control exercised converted the defendant from a service provider to a content provider.

To understand when liability will be extended to an interactive computer service, it is helpful to understand how courts analyze the fact pattern of the entities' activities in hosting content created by users. In these cases, the interactive computer service is the defendant and the person alleging harm is the plaintiff. In undertaking an analysis of whether a defendant is an interactive computer service, courts look to the materiality of the contribution made by the

[15] Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230). The law denies liability protection to any entity that "knowingly recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or benefits, financially or by receiving anything of value, from participation in a venture which has engaged in such acts. In addition it precludes from liability protection any entity that is advertising, in reckless disregard of the fact, to cause the person to engage in a commercial sex act."). *Id*.

[16] *Id*.

[17] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008); *Fair Housing Council of San Fernando Valley v. Roommates.com*, LLC, 521 F.3d 1157 (9th Cir. 2008).

[18] *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009).

[19] *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007).

[20] *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

[21] *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008), cert denied, 129 S. Ct. 600 (2008).

[22] *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, decision summary aff'd, 242 Fed. Appx. 833 (3d Cir. 2007), cert denied 522 U.S. 1156 (2008).

defendant. The 9th Circuit, for example, uses a three-prong analysis to determine whether the contribution is material and sufficient to attach liability, known as the *Barnes* test.[23] The 9th Circuit (as well as other circuits) essentially hold that "immunity from liability exists for (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider."[24]

With regard to the first prong, the court interprets the term interactive computer service "expansively."[25] The analysis juxtaposes the interactive computer service definition against the information content provider definition focusing on the terms "creates" and "develops." Courts generally find that to lose immunity the defendant must do "something more substantial" than editing or selecting material to post.[26] In 2019, the 9th Circuit confirmed that algorithmic features and function that perform these editorial tasks do not alter the analysis. [27]

Courts have relied on a materiality test to determine whether liability attaches, finding that a distributor must be shown to have materially contributed to the content that gives rise to the misconduct to be considered as the content creator and thus lose Section 230 immunity.[28] Thus, for example, where a defendant elicited information that contributed to a violation of law as a condition for using its service, or helped gather information illegally, courts have found liability attaches because the defendant is "developing" content by directing users to engage in the unlawful activity.[29] Therefore, interactive computer services will shift from being

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[23] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009).

[24] *Id*.

[25] *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone or alter content -- are barred"); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) ("Under the statutory scheme, an "interactive computer service" qualifies for immunity so long as it does not also function as an "information content provider" for the portion of the statement or publication at issue.").

[26] *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1123 (9th Cir. 2003).

[27] In 2019, the 9th Circuit confirmed that algorithmic features and function that perform these editorial tasks do not alter the analysis. *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) ("It is true that Ultimate Software used features and functions, including algorithms, to analyze user posts on Experience Project and recommended other user groups. This includes the heroin-related discussion group to which Greer posted and (through its emails and push notifications) to the drug dealer who sold him the fentanyl-laced heroin. Plaintiff, however, cannot plead around Section 230 immunity by framing these website features as content…These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves.").

[28] *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014) ("[W]e interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct").

[29] *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008) ("Here, the part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws--the information about sex, family status and sexual orientation--is provided by subscribers in response to Roommate's questions, which they cannot refuse to answer if they want to use defendant's services. By requiring subscribers to provide the information as a

distributors to online content creators when they engage in activities that courts find are integral to the content created or developed that is the basis of the claim.

The second prong looks to determine whether the plaintiff's allegation treats the defendant as a publisher or speaker. This analysis similarly turns on whether the activities conducted by the defendant convert it to an information content creator.[30] Here, courts note that they "need not perform any intellectual gymnastics to arrive at this result."[31] The key is whether the plaintiff's argument is dependent on treating the defendant as an information content provider for actions associated with editing.

The third prong flows from the analysis of the first two prongs. Where a defendant is found to be an interactive computer service, whose actions did not materially contribute to the content at issue, then the information is deemed to have been provided by another who is the information content provider. That person or entity is then the one liable to plaintiff for damage that flow from the posting of the content. Where the defendant is also found to be an information content provider, then it and the person that posted the content are both liable.

The *Barnes* test provides a straightforward application of the statutory construct in determining liability under Section 230. This has provided an understanding to platforms that host user-generated content as to when their actions will stray from being considered publishers under the law to being content creators. This clarity allows both plaintiffs and defendants an ability to gauge the activities in question to determine whether the cause of action should rest with the platform or whether it rests with the user that created the content. It also permits defendants to seek and judges to rule on dismissal at an early stage of litigation, typically through a motion to dismiss or motion for summary judgment, which provides potential relief from costs incurred as a consequence of protracted litigation. Moreover, the clarity of the definition likely helps discourage claims against interactive computer services, which also helps plaintiffs focus their efforts on the person that the law holds liable, the information content provider.

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condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information."); *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) ("That is, one is not "responsible" for the development of offensive content if one's conduct was neutral with respect to the offensiveness of the content (as would be the case with the typical Internet bulletin board). We would not ordinarily say that one who builds a highway is "responsible" for the use of that highway by a fleeing bank robber, even though the culprit's escape was facilitated by the availability of the highway.").

[30] Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1101-1102 (9th Cir. 2009) ("Thus, what matters is not the name of the cause of action--defamation versus negligence versus intentional infliction of emotional distress--what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability."

[31] *Id*.

V. Efforts to Amend or Repeal 230

Section 230 has been amended once in its history and that occurred in 2018. The enactment of the *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* ("FOSTA") rescinded legal immunity for websites that intentionally host user-generated advertisements for sex trafficking.[32] The change followed on the heels of a court decision involving an Internet website, Backpage.com ("Backpage), which was alleged to have facilitated underage sex trafficking, which is a federal crime under the *Trafficking Victims Protection Reauthorization Act* (TVPRA). Backpage, as part of the classified advertising the site offered users, included a category entitled "Adult Entertainment," which includes a subcategory labeled "Escorts."[33] In its decision, the 1st Circuit's rejected the efforts by the plaintiffs to hold Backpage liable for civil damages associated with criminal behavior as the TVPRA permitted. The court interpreted the Section 230 (e)(1) exception, which states that there is no liability protection for violations of Federal criminal statutes, to exclude civil liability despite it being part of the Federal criminal statute, reasoning that had Congress intended to allow for civil remedies even when part of a criminal statute, it would have said so.[34] As such, the Court analyzed the case under its established precedent finding that the "cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another."[35] The uproar following this decision ultimately led to the passage of FOSTA, which effectively overturned the 1st Circuit decision.

Since the enactment of FOSTA, members of Congress have introduced additional legislation to restrict the liability protections afforded by Section 230. At current, the 116th Congress has seen the introduction of ten bills that either seek to modify the protections afforded by Section 230 or alter the immunity through other means. Two bills that have been introduced are of particular note as they are moving through the legislative process and are receiving particular

[32] Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§ 1591, 1595, 2421A and 47 U.S.C. § 230). FOSTA's Senate companion bill was the Stop Enabling Sex Trafficking Act (SESTA), which is an earlier unenacted Senate bill that sought much of the same reforms to Section 230. S. 1693, 115th Cong. (2017). The bills were not identical and Congress effectively combined SESTA and FOSTA prior to enactment. 164 CONG. REC. H1248 (daily ed. Feb. 26, 2018). Most articles about these reforms cite both SESTA and FOSTA. IN this paper we refer to the law as FOSTA.

[33] *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016). The lawsuit brought by three women who were underage at the time of the claimed sex trafficking on Backpage's website, alleged that Backpage's policies and profit motives led to the facilitation of the crime (relaxed verification schemes of users, allowing anonymized email and phone numbers, collecting advertising fees, and permitting sponsored advertising). This strategy, the appellants say, led to their victimization. In an effort to overcome Section 230 liability protection, the appellants asserted that the *Trafficking Victims Protection Reauthorization Act* (TVPRA), which is a criminal statute that allowed for civil remedies, fell within the scope of the exception contained in Section 230(e)(1) regarding federal criminal statutes.

[34] *Id*. at 23 ("[T]he appellants suggest that their TVPRA claims are saved by the operation of section 230(e)(1). That provision declares that section 230 should not "be construed to impair the enforcement of . . . any . . . Federal criminal statute. The appellants posit that the TVPRA's civil suit provision is part of the enforcement of a federal criminal statute under the plain meaning of that term and, thus, outside the protections afforded by section 230(c)(1). This argument, though creative, does not withstand scrutiny.").

[35] *Id*. at 20.

attention – the EARN IT Act of 2020,[36] which seeks revisions to Section 230 to address child sexual abuse material (CSAM) and the PACT Act,[37] which seeks revisions to Section 230 to increase transparency in the process online platforms use to moderate content and hold those companies accountable for content that violates their own policies or is deemed by a court to be illegal.

EARN IT Act

The EARN IT Act, introduced by Senate Judiciary Chairman Lindsey Graham (R-SC) and Sen. Richard Blumenthal (D-CT) would establish the National Commission on Online Child Sexual Exploitation Prevention, a 19-member commission comprised of government and non-government representatives that would develop best practices for interactive online services providers to assist in preventing, reducing and responding to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material (CSAM).[38] The bill would amend Section 230(e) to exclude liability protection for the advertisement, promotion, presentation, distribution or solicitation of (CSAM) and would subject interactive computer service providers to state criminal and civil liability.[39] On July 2, 2020, the Senate Judiciary Committee adopted the EARN IT Act by unanimous consent.

A number of public interest organizations have spoken out against the EARN IT Act, noting that it raises serious First Amendment issues,[40] does not address the root cause of the proliferation of CSAM (law enforcement funding)[41] and threatens intermediaries' ability to provide end-to-end encryption.[42] Significantly, the EARN IT Act is redundant to an exception that already exists in Section 230, which makes clear in Section 230(e) that the liability protections afforded by Section 230(c) do not extend to violations of federal criminal laws related to sexual exploitation of children).[43]

PACT Act

The PACT Act, introduced by Sens. Brian Schatz (D-HI) and John Thune (R-SD), would establish a new requirement for platforms to be transparent in their content moderation practices through a range of mandatory consumer disclosures. The bill would also require platforms to provide consumers and content creators tools for removal of content and for the reinstatement of

[36] *Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020*, S.3398, 116th Cong. (2020).
[37] *Platform Accountability and Consumer Transparency Act*, S.4066, 116th Cong. (2020).
[38] EARN IT Act, Sec. 4(a).
[39] *Id.* at Sec. 5.
[40] Electronic Frontier Foundation, The New EARN IT Bill Still Threatens Encryption and Free Speech (July 2, 2020).
[41] American Civil Liberties Union, The EARN IT Act is a Disaster for Online Speech and Privacy, Especially for the LGBTQ and Sex Worker Communities (June 30, 2020).
[42] Center for Democracy and Technology, Amendments to EARN IT Act Can't Fix the Bill's Fundamental Flaws (July 1, 2020).
[43] 47 U.S.C. §230(e).

content through an appeals process established by the platform consistent with the requirements in the bill. The bill also creates a new avenue for holding these companies responsible for hosting illegal content by making changes to Section 230 of the Communications Decency Act. As described by Sen. Schatz in advance of a July 28, 2020 hearing on the PACT Act, his view is the bill "is not designed to attract people who want to bully tech companies into political submission. It's designed to improve federal law."[44] Senator Thune noted that the bill "would update Section 230 to enable greater transparency and accountability for users without damaging its foundational economic, innovative, and entrepreneurial benefit that helped allow the internet to flourish in the first place."[45]

The PACT Act would seek greater transparency by requiring online platforms to explain their content moderation practices in an acceptable use policy and make those policies easily accessible to consumers; implement a quarterly reporting requirement for online platforms that includes disaggregated statistics on content that has been removed, demonetized, or deprioritized; and provide for development of industry best practices and guidelines through a National Institute of Standards and Technology-led voluntary framework.

The bill would hold companies accountable by establishing a complaint system that processes reports and notifies users of moderation decisions within 14 days, and allows consumers to appeal online platforms' content moderation decisions within the relevant company. The bill would also amend Section 230 to require large online platforms to remove court-determined illegal content and activity within 24 hours and would subject companies to civil liability.[46] Failure to do so, would remove liability protection available under section 230 for that content.

Professor Daphne Keller, while not endorsing the PACT Act, noted it is "an intellectually serious effort to grapple with the operational challenges of content moderation at the enormous scale of the Internet."[47] Professor Keller's blog outlines some of the shortcomings of the legislation, including vague language around enforcement, opening up liability claims to "any federal civil law, not just the ones the agencies enforce" and the unclear language concerning active monitoring, something she notes "could raise major issues under both the 1st and 4th Amendments." She concludes, however, that the PACT Act is "a list of serious ideas, imperfectly executed. If you like any of them, you should be rooting for lawmakers to do the work to figure out how to refine them into something more operationally feasible."[48]

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[44] PACT Act Takes on Internet Platform Content Rules with "a Scalpel Rather Than a Jackhammer" (June 24, 2020).
[45] Statement of Chairman John Thune before the Subcommittee on Communications, Technology, Innovation and the Internet. (July 28, 2020).
[46] The PACT Act includes a small business exception that would require businesses that meet the definition to remove content "within a reasonable period of time" of being notified that a particular piece of content has been found illegal by a court. Sec. 6(a)(3)(C).
[47] Keller, Daphne, Platform Regulation Director, Stanford Cyber Policy Center, CDA 230 Reform Grows Up: The PACT Act has Problems, but It's Talking About the Right Things (July 16, 2020).
[48] *Id.*

Professor Eric Goldman expressed deeper, more fundamental concerns with the PACT Act. In a recent blog he noted that the PACT Act would mandate editorial controls that would "run head-first into a huge First Amendment brick wall." He concludes that "while the PACT Act may lack the malevolence of more extreme Section 230 reform proposals, it's not narrow, modest, or good… and it imposes significant costs on [user-generated content] sites that will grow exponentially when the bill's features are weaponized."[49]

VI. Conclusion

Since its enactment, Section 230 has provided not just large platforms, but a wide range of websites, apps, community listservs, non-profits, other interactive computer services, and ordinary individuals the ability to engage in commerce, social discourse, and community building. It has also fueled the growth of the digital economy and remains vital to that growth today. While there are some large companies that may be able to afford the litigation costs that would result from repeal or modification of section 230, the risk calculus for smaller companies, non-profits, community-based listservs, and those that are just incubating their ideas from concept to service is quite different. The evidence lies in the pre-230 world where companies faced litigation, lacking any ability to calculate the likely outcome, and finding themselves facing liability when their actions were second-guessed by reviewing courts. In the post-230 world, the full range of entities that offer a forum for user-engagement are provided a framework for understanding what actions will bring about liability and which actions will be deemed appropriate given the ability of their services to produce millions of pieces of content daily. Section 230 also properly incentivizes content moderation. More can be done, but changing Section 230's protections should not be the knee-jerk, first stop for addressing these concern. As Congress and others analyze the continuing importance of this provision, they should be mindful of the consequences, intended and unintended, that may follow from their revisions.

[49] Comments on the "Platform Accountability and Consumer Transparency Act" (the "PACT Act") (July 27, 2020).