

**U.S. House of Representatives
Committee on Energy and Commerce**

**Joint Remote Subcommittee Hearing on:
“Disinformation Online and a Country in Crisis”
Subcommittee on Communications and Technology
Subcommittee on Consumer Protection and Commerce**

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Chairman Pallone, Ranking Member Walden, Chairman Doyle, Ranking Member Latta, Chair Schakowsky, Ranking Member McMorris Rodgers, and Members of the Committee:

Thank you for inviting me to testify. After 10 years as communications and technology counsel to this Committee, it’s an honor to be on this side of the witness table. I have been involved in the section 230 debate since 1999,¹ and welcome the opportunity to share my views. These views are my own, and I have no client on section 230 matters.

I come not to bury section 230, but to improve it. I recommend restoring a duty of care online by requiring internet platforms to take reasonable, good faith steps to prevent illicit use of their services as a condition of receiving section 230’s protection.² This would better protect users, as well as ameliorate concerns about the platforms’ market power. And it would do so without regulating the internet, without jeopardizing the content moderation safe harbor the platforms say they need to continue serving as conduits for free expression, without raising the risk of government censorship, and without requiring legislation for each and every problem that arises online.

Growing frustration with the online ecosystem stems not just from the increasing amount of illicit activity pervading the internet, although that’s an enormous part of it.

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¹See Neil Fried, *Dodging the Communications Decency Act when Analyzing Libel Liability of On-line Services: Lunney v. Prodigy Treats Service Provider like Common Carrier Rather than Address Retroactivity Issue*, [1 Colum. Sci. & Tech. L. Rev. 1](#) (1999).

²The United Kingdom is in the midst of its own proceeding to create an online duty of care, see U.K. DEPARTMENT FOR DIGITAL, CULTURE, MEDIA & SPORT, [ONLINE HARMS WHITE PAPER, INITIAL CONSULTATION RESPONSE](#) (Feb. 12, 2020), and Boston University Law Professor Danielle Keats Citron has previously testified before this Committee about requiring platforms to moderate content as a condition of receiving liability protection, see [Fostering a Healthier Internet to Protect Consumers: Hearing before H. Subcomm. on Commc’ns. & Tech, and H. Subcomm. on Consumer Prot. and Commerce, H. Comm. on Energy and Commerce, 116th Cong.](#) (2019) (statement of Prof. Citron).

Frustration also stems from the lack of accountability for internet platforms and online intermediaries such as domain name providers and reverse proxy services. Few other sectors, if any, enjoy as much freedom from both regulation and judicial review.

Increased transparency would help. As would legislative action restoring access to the WHOIS information needed to catch those engaged in illegal conduct, which some domain name providers are withholding in light of an over-application of the GDPR.³

Fully realizing the internet we all aspire to, however, will also require recalibrating section 230. So long as platforms and online intermediaries can facilitate illicit activity with impunity, we will continue to be fighting a losing battle.

The Rise of Section 230

“Primary publishers”—those responsible for approval of another’s content, such as publishers of books, newspapers, and magazines—can be held culpable for libel if the content contains falsehoods that harm someone’s reputation, subject to certain First Amendment safeguards.⁴ Because primary publishers’ editorial discretion over the content gives them an opportunity for review, they can be held culpable for defamatory falsehoods even if they are unaware of the specific statements or their falsity.⁵

“Distributors” (also called “secondary publishers”)—those that do not have editorial discretion over content but that are responsible for its delivery, such as libraries, bookstores, and newsvendors—can also be held culpable for libel.⁶ Because of their lack of editorial discretion, however, they can only be held culpable if they knew, or should have known, about the false, defamatory statements in the content they delivered.⁷

In 1995, the New York Supreme Court applied a traditional libel analysis in *Stratton Oakmont v. Prodigy* to conclude that platforms with editorial discretion over their users’ posts could be held culpable for the users’ defamatory statements, even if the platforms were unaware of the offending material, but that platforms without editorial discretion could not be held culpable absent actual knowledge of the statements.⁸ The case involved an anonymous accusation on Prodigy’s “Money Talk” bulletin board that Stratton Oakmont—the brokerage firm later depicted in *Wolf of Wall Street*—had committed criminal securities fraud. The court ruled that Prodigy could be held culpable for the statement, if libelous, because of its “live” and automated moderation of the board.

Congress—concerned platforms would stop moderating content to avoid potential liability under *Stratton*—enacted section 230 of the Communications Act⁹ to prevent use

³See Coalition for a Secure and Transparent Internet, <https://secureandtransparent.org>.

⁴See W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 113, at 803, 810 (5th ed. 1984).

⁵See *id.*

⁶See *id.*, § 113 at 810-11.

⁷1 ROBERT D. SACK, SACK ON DEFAMATION, § 7:3.1[A], at 7-11 (5th ed. rel. no. 3 April 2020).

⁸See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

⁹Congress added section 230 to the Communications Act with section 509 of the Telecommunications Act of 1996. See Pub. L. No. 104–104, sec. 509, [110 Stat. 56](#), 137-39. Section 509 and all the other provisions in 1996 Telecommunications Act title V—which sought to address indecent, obscene, and violent transmissions by phone, on television, and over the internet—are collectively referred to as the Communications Decency Act. *Id.*, secs. 501, 502-561, 110 Stat. at 133-43. Provisions created by section

of a platform’s content moderation efforts as the basis for civil liability.¹⁰ In particular, section 230(c)(2) provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . 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.”¹¹ Section 230(c)(2) is sometimes referred to as the content moderation safe harbor.

Section 230’s Misincentive

As often explained by Senator Wyden—one of section 230’s original authors—Congress enacted section 230 to bestow upon internet platforms a content liability shield so that they would wield a content moderation sword.¹² The goal was to encourage internet platforms to protect consumers from objectionable and illicit activity online, while at the same time promoting free expression, by giving the platforms relief from potential liability for carrying and moderating user-generated content.¹³ Because of the analogy to liability protections for people who help others in distress, Congress called the main language of section 230 the “Good Samaritan” provision.¹⁴

Unfortunately, despite claims that section 230 encourages content moderation, it actually does the opposite. Although the subsection (c)(2) safe harbor does mitigate the disincentive to moderate content by removing the potential liability that would otherwise stem from *Stratton*, eliminating a disincentive is not the same as creating an incentive. Moreover, subsection (c)(1) prohibits treating a platform “as the publisher or speaker” of its users’ posts.¹⁵ Significantly, this preempts both the imputed knowledge standard that applies to publishers, and the actual knowledge standard that applies to distributors. As a result, platforms cannot be sued for what a user does over their services—regardless of the harm caused, regardless whether the platforms knew about the illicit activity, regardless whether they monetized the content and served an amplifying role, and regardless whether

502 of the CDA that sought to criminalize certain indecent online communications were held unconstitutional in [Reno v. ACLU](#), 521 U.S. 844 (1997), and [Shea v. Reno](#), 930 F. Supp. 916 (S.D.N.Y. 1996), *aff’d*, [521 U.S. 1113](#) (1997). In [United States v. Playboy Entertainment Group, Inc.](#), 529 U.S. 803 (2000), the Supreme Court also found unconstitutional certain provisions created by CDA section 505 that required scrambling of adult cable channels. Provisions in CDA section 551 governed creation of the television rating code and mandated that certain televisions include technology, commonly known as the “v-chip,” that would allow viewers to block programming based on rating. *See* 110 Stat. 140-42, sec. 551.

¹⁰Congress was clear that “[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy*.” TELECOMMUNICATIONS ACT OF 1996, [S. Rep. 104-230](#), at 194 (1996) (Conf Rep.).

¹¹[47 U.S.C. § 230\(c\)\(2\), \(c\)\(2\)\(A\)](#).

¹²*See, e.g.*, Ben Popken, [Senate intel committee grapples with social media's threat to democracy](#), NBC NEWS.COM, Aug. 1, 2018 (quoting Sen. Wyden as stating that “the whole point of 230 was to have a shield and a sword, and the sword hasn’t been used and these pipes are not neutral.”).

¹³*See* [141 CONG. REC. H8468, H8469-70](#) (daily ed. Aug. 4, 1995) (comments of then-House members Chris Cox and Ron Wyden about amendment language that would eventually become section 230, stating that the language was intended to promote content moderation while preserving discourse on the internet).

¹⁴*See* [47 U.S.C. § 230\(c\)](#).

¹⁵*See id.*, § 230(c)(1) (stating “[n]o 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.”).

they engaged in adequate (or any) content moderation.¹⁶ In other words, they reap the benefits of the shield even when they drop the sword.

Thus, section 230(c)(1) does not just protect platforms when they behave like good Samaritans. Because platforms need not take any action to receive the liability limitations of 230(c)(1), it protects them even when they behave like bad Samaritans—negligently, recklessly, or knowingly turning a blind eye while they facilitate (and collect advertising or other revenue around) the unlawful behavior of their users. So rather than create an incentive to moderate content, section 230 creates a *misincentive* that allows platforms to profitably sit on their hands without legal consequence.¹⁷

Facilitating Illicit Activity

This misincentive is aggravating the spread of illicit activity online.

Ordinarily, a business has a duty of care to take reasonable steps to prevent third parties from using its services to harm others.¹⁸ Courts have construed section 230 broadly, however, as precluding platforms' civil liability for enabling illegal conduct.¹⁹ This has the effect of eliminating the duty of care over third-party behavior, even when the platforms have facilitated unlawful conduct negligently, recklessly, or knowingly.²⁰ As a result, section 230 is exacerbating the spread of illicit activity online, such as fraud;²¹ animal and antiquities trafficking;²² sale of fake, unsafe products;²³ identity theft and theft of personal

¹⁶See [Zeran v. AOL](#), 129 F.3d 327 (4th Cir. 1997) (stating that section “230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”).

¹⁷See <https://en.wiktionary.org/wiki/misincentive> (defining “misincentive” as “[s]omething that is meant to be an incentive but has no (or the opposite) effect”).

¹⁸See DAN B. DOBBS ET AL., HORNBOOK ON TORTS § 9.2, at 191, § 20.1, at 459-60, § 20.6, at 465-66, § 25.1, at 615-16, § 25.4, at 620-21, §§ 26.1-26.5, at 633-44, §§ 26.9-26.10, at 651-55 (2d ed. 2015) (stating that a business has an affirmative duty to prevent one person from using its auspices to harm another if the business has a relationship with either party, such as by welcoming one or the other to engage with it, and that failure to meet that duty can lead to liability).

¹⁹See, e.g., *Zeran*, *supra* note 16.

²⁰Platforms do not receive the protection of section 230, however, if their own, affirmative actions facilitating the illicit, third-party conduct are themselves unlawful. See [Fair Housing Council of San Fernando Valley v. Roommates.com](#), 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

²¹See, e.g., U.S. Securities and Exchange Commission, [Internet and Social Media Fraud](#), INVESTOR.COM (last visited June 20, 2020); Sabri Ben-Achour, [The most common scams in the U.S. involve online purchases](#), MARKETPLACE, Oct. 28, 2019.

²²See, e.g., Kurt Wagner, [A black market in wildlife trafficking thrives on Facebook and Instagram](#), L.A. TIMES, July 12, 2019; Karen Zraick, [Now for Sale on Facebook: Looted Middle Eastern Antiquities](#), N.Y. TIMES, May 9, 2019.

²³See, e.g., Andrew Martins, [Online Searches Often Lead Customers to Counterfeit Goods](#), BUS. NEWS DAILY, Oct. 21, 2019.

information;²⁴ malware;²⁵ housing discrimination;²⁶ harassment;²⁷ unlawful drug sales;²⁸ cyber attacks;²⁹ terrorist activity;³⁰ espionage;³¹ revenge porn;³² and the proliferation of child sexual abuse materials.³³

Those directly engaged in illicit behavior should of course be held primarily accountable for their actions. But the decentralized, often anonymous, and global nature of the internet makes finding those culprits—let alone stopping them before harm has occurred—far more difficult without platform involvement. By limiting platform liability for negligent, reckless, and willful disregard of illegal activity on their services, section 230 puts internet users in harms way and often leaves victims without a remedy.

The platforms argue that they have market incentives to combat illicit activity, since they will lose users if they don't. But the reality is that a few, dominant platforms have become so critical to so much of today's social and economic fabric that many consumers and commercial users cannot realistically forgo patronage.

The platforms also argue they have reputational and ethical incentives to prevent illicit activity. Although that's true, those incentives do not appear to be sufficiently stemming the tide. Those incentives also tend to manifest themselves cyclically, so while they help when tragedies reach the public consciousness, they do not help the victims of the unnoticed tragedies that occur every day.

The platforms say they are taking reasonable steps to curb illicit activity. In some circumstances that may be true. But why must we take their word for it? Why should their judgment be beyond objective, judicial scrutiny? Where they are acting reasonably, they will be vindicated. But certainly some platforms, in some cases, are taking inadequate or even no steps to mitigate unlawful behavior. Few other sectors, if any, get a pass in such circumstances, especially when they have an outsized and growing influence in social and commercial discourse—and are increasingly used to perpetrate illicit acts.

²⁴See, e.g., Zoya Gervis, [More than 60% of Americans say they've been a victim of an online scam](#), N.Y. POST, Dec. 6, 2019.

²⁵See, e.g., Charlie Osborne, [The hacker's paradise: Social networks net criminals \\$3bn a year in illicit profits](#), ZDNET, Feb. 26, 2019.

²⁶See, e.g., John D. McKinnon and Jeff Horwitz, [HUD Action Against Facebook Signals Trouble for Other Platforms](#), WSJ, Mar. 28, 2019; Aaron Rieke and Corrine Yu, [Discrimination's Digital Frontier](#), THE ATLANTIC, Apr. 15, 2019.

²⁷See, e.g., Maeve Duggan, [Online Harassment](#), PEW RESEARCH CENTER, July 11, 2017; Angela Chen, [The legal crusader fighting cyberstalkers, trolls, and revenge porn](#), MIT TECH. REV., Aug. 26, 2019.

²⁸See, e.g., Nitasha Tikku, [Facebook has not warned investors about illegal activity, says whistleblower](#), INDEPENDENT ONLINE, May 28, 2020.

²⁹See, e.g., Danny Palmer, [CEOs are deleting their social media accounts to protect against hackers](#), ZDNET, Jan. 28, 2020.

³⁰See, e.g., Desmond Butler and Barbara Ortutay, [Facebook auto-generates videos celebrating extremist images](#), AP, May 9, 2019.

³¹See, e.g., Catalin Cimpanu, [FBI warning: Foreign spies using social media to target government contractors](#), ZDNet, June 18, 2019.

³²See, e.g., Cara Bayles, [With Online Revenge Porn, The Law Is Still Catching Up](#), LAW360, Mar. 1, 2020.

³³See, e.g., Michael H. Keller and Gabriel J.X. Dance, [Child Abusers Run Rampant as Tech Companies Look the Other Way](#), N.Y. TIMES, Nov. 9, 2019.

Harming Competition

Section 230 also harms competition.

First, by shielding platforms from potential liability that other companies appropriately face if they unreasonably fail to prevent illicit action by their customers, section 230 provides platforms an unearned ability to avoid the ordinary business costs of mitigating harm. In that sense, section 230 subsidizes platforms, enabling them to grow in scale and scope more recklessly and giving them an unfair advantage in the marketplace.

Second, that scale and scope provides platforms with extraordinary market power to negotiate aggressive terms and conditions in their favor.

Third, section 230 allows platforms to profit from advertising or other monetization opportunities around the illicit activity of users, creating an inappropriate and unmatched source of revenue to fuel their businesses.

Fourth, section 230 allows the platforms to ignore harms their users cause their competitors, further increasing their advantages and points of leverage over them.

Solution: Restoring a Duty of Care

Section 230 was created almost twenty-five years ago in a world of dial-up bulletin boards. In today's always-on, broadband and mobile environment, it is having harmful, unintended consequences. One way to preserve the benefits of subsection (c)(2)'s content moderation safe harbor, while fixing subsection (c)(1)'s harmful misincentive, would be to restore a duty of care. This could be achieved by requiring platforms to take reasonable, good faith steps to curb illicit activity over their services as a condition of receiving liability protection. Doing so would mean platforms do not enjoy protection from liability when they negligently, recklessly, or knowingly facilitate illicit activity by their users. I would be happy to discuss with the Committee a variety of possible language changes to section 230 to accomplishing that objective.

Altering section 230 in this way would better realize Congress' goal of encouraging platforms to moderate content, so that we get the best out of the internet and mitigate the worst. It would help combat illicit activity online. And it would ameliorate competition concerns arising from the fact that while many of the platforms' rivals appropriately have a duty of care regarding third-party conduct, the platforms themselves do not.

Such a solution also avoids harms that critics typically ascribe to section 230 reform:

- First, it preserves the content moderation safe harbor the platforms say they need to be willing to continue carrying user-generated content, so this approach does not jeopardize online expression.
- Second, it requires no new regulation of the internet. Regulation typically involves advance, industry-wide restrictions on permissible business models, usually promulgated by an agency. Under this proposal, however, platforms would still have discretion over their business models on the front end. They just would appropriately be held accountable on the back end if they use that discretion poorly. That potential back-end accountability would prompt more responsibly from the start. In essence, it would encourage more "responsibility by design."

- Third, it does not rely on the creation of proscriptive content requirements by Congress or an agency, avoiding First Amendment claims.
- Fourth, it reduces the need to develop issue-specific provisions or to pass separate bills for each and every current or future problem online, thereby minimizing the risk of creating a patchwork of inconsistent requirements.
- Fifth, the effort needed to meet the duty of care will inherently be proportional to platform size, ensuring smaller platforms are not unreasonably burdened as they try to grow. Indeed, any evaluation of the reasonableness of content moderation efforts will factor in the resources available to a platform. Moreover, smaller platforms and platforms that focus less on user-generated content will have fewer users and uses to moderate.

Congress created section 230 in 1996 to: 1) help the then nascent online industry develop into a forum for user-generated content; and 2) stem the growing spate of harmful behavior on the internet. The first goal has been accomplished, as the online industry is now far from nascent. The second goal remains elusive, with harmful behavior on the internet continuing to proliferate at an alarming and arguably accelerating pace.

The platforms say they are addressing the problems through voluntary initiatives, and that they will redouble their efforts. But that has been their pledge from the beginning, and time is running out.

Regulating the platforms is another possible solution, but would risk hindering innovation, slowing growth, and potentially violating the First Amendment.

Doing nothing, however, is not an option, as the status quo is untenable.

Perhaps it is time to embrace a third solution: recalibrating section 230 to restore a duty of care. Holding platforms accountable when they act with negligent, reckless, or willful disregard seems preferable to preemptively regulating the business models of an entire sector, which would restrict platforms even when they are acting responsibly.

In the meantime, the United States should refrain from including section 230-type language in trade deals.³⁴ Until we have resolved concerns here, it seems irresponsible to export the problem abroad. Doing so could wreak the same harms on citizens of foreign nations—as well as U.S. companies doing businesses overseas—that we are experiencing at home. Moreover, because the internet is inherently global, lax standards for platforms in other countries can also harm citizens and businesses in the United States.

I thank the Committee again for providing me the opportunity to appear today, and welcome any questions.

³⁴See [Letter from Chairman Frank Pallone and Ranking Member Greg Walden, U.S. House of Representatives, Committee on Energy and Commerce, to Ambassador Robert Lighthizer, U.S. Trade Representative, Aug. 6, 2019.](#)