



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

Subcommittee on Communications and Technology

Hearing on “Latest Developments in Combating Online Sex Trafficking”

November 30, 2017

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Summary of Major Points:

- * Section 230 ranks as one of Congress’ most important policy achievements in the past quarter-century.
- * Section 230 means that online services can deploy, and experiment with, a wide range of content moderation techniques without fearing liability for whatever they miss.
- * Congress can balance anti-sex trafficking initiatives with Section 230’s benefits by (1) exposing online services only a single federal standard of liability rather than state-by-state variations; and (2) encouraging online services to keep performing socially valuable content moderation efforts.

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Chairman Blackburn, Ranking Member Doyle, and Members of the Subcommittee:

I applaud the efforts of Congress and this subcommittee to combat the horrible crime of sex trafficking. These efforts include the “Allow States and Victims to Fight Online Sex Trafficking Act of 2017” (sometimes called “FOSTA”).¹ I defer to experts in the sex trafficking victim advocacy community about whether FOSTA would help victims.² Based on my expertise in Internet law, I’ll discuss FOSTA’s implications for 47 U.S.C. §230 (Section 230), the law Congress enacted in 1996 that says websites aren’t liable for third party content.

Section 230 Is One of Congress’ Greatest Policy Achievements

Section 230 ranks as one of Congress’ most important policy achievements in the past quarter-century.³ Section 230 deeply touches each of our lives by enabling the Internet services we rely upon every waking hour.⁴ It also advances free speech by helping ordinary people communicate with a global audience—for the first time in history. Furthermore, Section 230 improves marketplace efficiency across our entire economy⁵ and reduces entry barriers so that new and innovative online services keep emerging.

¹ Appendix 1 compares FOSTA with the most recent version of SESTA.

² The expert community is not unanimous that FOSTA would help victims. See, e.g., Alex F. Levy, *How Section 230 Helps Sex Trafficking Victims (and SESTA Would Hurt Them)*, Tech. & Mktg. L. Blog, Aug. 15, 2017, <http://blog.ericgoldman.org/archives/2017/08/how-section-230-helps-sex-trafficking-victims-and-sesta-would-hurt-them-guest-blog-post.htm>; Nyssa P. Chopra, *Another Human Trafficking Expert Raises Concerns About SESTA*, Tech. & Mktg. L. Blog, Nov. 2, 2017, <http://blog.ericgoldman.org/archives/2017/11/another-human-trafficking-expert-raises-concerns-about-sesta-guest-blog-post.htm>; *Freedom Network Urges Caution in Reforming the CDA*, <https://www.eff.org/files/2017/09/18/sestahearing-freedomnetwork.pdf>; Letter from Kristen DiAngelo, Executive Director, Sacramento Sex Workers Outreach Project, to Sens. John Thune & Bill Nelson, <https://www.eff.org/files/2017/09/18/sestahearing-sac-swop.pdf>; *SWOP-USA Stands In Opposition of Disguised Internet Censorship Bill SESTA*, S. 1963, Aug. 11, 2017, <http://www.new.swopusa.org/2017/08/11/call-to-actionpress-release-swop-usa-stands-in-direct-opposition-of-disguised-internet-censorship-bill-sesta-s-1963-call-your-state-representatives-and-tell-them-to-fight/>.

³ Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TULANE J. TECH. & I.P. __ (2017), <https://ssrn.com/abstract=3025943>.

⁴ The 10 most-trafficked U.S. websites (as ranked by Alexa in October 2017) all rely heavily on Section 230. The sites are Google, YouTube, Facebook, Reddit, Amazon, Yahoo, Wikipedia, Twitter, eBay and LinkedIn.

⁵ I explain how Section 230 improves marketplace efficiency in Appendix 2.

Section 230 is a globally unique policy.⁶ No other country provides such strong protections for online publishers of third party content. This differentiation gives United States a global competitive advantage for such services, which has helped create enormous social value in the U.S.⁷

Section 230 Avoids the Moderator's Dilemma

Congress enacted Section 230 in response to a 1995 ruling that an online service could be liable for user content because it had removed other objectionable content.⁸

The ruling created a dilemma for all online services that moderate user content. Online services had to choose between two strategies: (1) exercise full editorial control over user content and accept liability for whatever legally problematic content they miss, or (2) minimize potential liability by exercising no editorial control over user content.

Some services can't afford to exercise full editorial control, and other services (such as tools for real-time communication) can't function with full editorial control. Thus, if failing to moderate content perfectly leads to liability, some online services will abandon their efforts to moderate user content or even shut down.

⁶ ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 330 (July 14, 2017 ed.).

⁷ Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA Consulting, June 5, 2017, <https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf>; David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, Volokh Conspiracy, Aug. 27, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/?utm_term=.87428a710ed7.

⁸ *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995) (“PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards [and] implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce”).

Section 230 eliminated this “moderator’s dilemma.” Section 230 applies regardless of what online services do to moderate content or even what they “know” about user content. This means that online services can deploy, and experiment with, a wide range of content moderation techniques without fearing liability for whatever they miss. This helps online services, but it also helps people access publication tools that let them reach new audiences.

FOSTA would reinstate the moderator’s dilemma. For the first time in over two decades, it would cause online services to question whether they should moderate content. Some services will conclude that it’s too risky to do so. If online services reduce or eliminate their moderation efforts, FOSTA may counterproductively cause a net increase in sex trafficking promotions (and all other types of anti-social content).

Combating Sex Trafficking While Preserving Section 230

Section 230 does not give a “free pass” to online services facilitating sex trafficking. Section 230 does not limit federal criminal prosecutions,⁹ and the Department of Justice has prosecuted online services for publishing third party ads, including at least two prosecutions against services (MyRedbook and Rentboy) that facilitated online prostitution.¹⁰ Furthermore, in the 2015 SAVE Act, Congress criminalized online advertising of sex trafficking, and a Phoenix grand jury has been investigating Backpage.com.

Congress can balance additional anti-sex trafficking initiatives with Section 230’s benefits by:

⁹ 47 U.S.C. § 230(e)(1).

¹⁰ Cary Glynn, *The DOJ’s Busts of MyRedbook & Rentboy Show How Backpage Might Be Prosecuted*, Tech & Mktg. L. Blog, Sept. 28, 2017, <http://blog.ericgoldman.org/archives/2017/09/the-doj-busts-of-myredbook-rentboy-show-how-backpage-might-be-prosecuted-guest-blog-post.htm>.

1) Ensuring that online services face only a single federal standard of liability, rather than state-by-state variations that will make it difficult or impossible for online services to determine what law applies to them.

2) Encouraging online services to continue performing socially valuable content moderation efforts by: (A) basing liability on an online service's intent to facilitate illegal activities, not what it "knows," and (B) expressly saying that online services shall not be legally penalized for their moderation efforts.¹¹

I oppose FOSTA because it does not conform to either principle. Thank you for the opportunity to address the subcommittee on this important topic.

¹¹ I proposed this addition to SESTA: "The fact that a provider or user of an interactive computer service has undertaken any efforts (including monitoring and filtering) to identify, restrict access to, or remove, material it considers objectionable shall not be considered in determining its liability for any material that it has not removed or restricted access to." See Eric Goldman, *Answers to Questions for the Record Regarding S. 1693, the Stop Enabling Sex Traffickers Act of 2017*, Nov. 6, 2017, <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2593&context=historical>.

Appendix 1: Comparison of FOSTA and SESTA

This chart compares the major differences between the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), as introduced in the House of Representatives on April 3, 2017, and the Stop Enabling Sex Traffickers Act of 2017 (SESTA), as passed by the Senate Committee on Commerce, Science, and Transportation on November 8, 2017.

	FOSTA	SESTA
State crime enforcement	Section 230 excludes “section 1591 of such title (relating to sex trafficking)”; “any State criminal statute that prohibits—(i) sexual exploitation of children; (ii) sex trafficking of children; or (iii) sex trafficking by force, threats of force, fraud, or coercion”; and victim restitution.	Section 230 excludes “any charge in a criminal prosecution brought under State law if the conduct underlying the charge constitutes a violation of section 1591 of title 18, United States Code.”
Civil enforcement	Section 230 excludes “section 1595 of title 18, United States Code” and “any other Federal or State law that provides causes of action, restitution, or other civil remedies to victims of (i) sexual exploitation of children; (ii) sex trafficking of children; or (iii) sex trafficking by force, threats of force, fraud, or coercion.”	Section 230 excludes “any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title.” Also: “In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.”
What constitutes “participation in a [sex trafficking] venture”	“knowing or reckless conduct by any person or entity and by any means that furthers or in anyway aids or abets the violation of [18 U.S.C. §1591](a)(1).”	“knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).”
New crime	“Whoever, being a provider of an interactive computer service, publishes information provided by an information content provider, with reckless disregard that the information provided by the information content provider is in furtherance of an offense under subsection (a) or an attempt to commit such an offense, shall be fined in accordance with this title or imprisoned not more than 20 years, or both.”	N/A

Other provisions, such as legislative findings, statements about Section 230's policy, and retroactivity, are substantively identical in both bills. However, SESTA contains a more detailed savings clause to supplement the retroactivity provision.

Appendix 2: How Section 230 Facilitates Marketplace Efficiency*

Congress enacted 47 U.S.C. § 230 in 1996, at the height of “Internet exceptionalism”—the belief that the Internet was a unique medium compared to other media. Thus, the law represents an unusual example of legislative restraint. Fearing that Congress, state legislatures or the courts would develop rules that prevent the Internet from reaching its full potential, Congress immunized online intermediaries from liability for publishing third party content—even in situations where offline intermediaries would face liability for publishing the exact same content.

Treating the Internet as a unique medium has led to the advent of consumer reviews, a whole new class of content we never saw in the offline world. Consumer opinions about goods and services in the marketplace have been shared for millennia, principally as oral “word of mouth.” However, prior to the Internet, consumers could not easily share their opinions with larger audiences. In contrast, the Internet allows consumers to share their opinions with a mass audience at virtually no cost. Humankind has never seen a phenomenon like this before.

While consumers value other consumers’ reviews generally, they especially value comprehensive and curated databases of other consumers’ reviews. However, if websites faced liability for gathering and curating consumer reviews, they would be reluctant to undertake those efforts. 47 U.S.C. § 230 provides them a legal immunity for these generation, curation and publication efforts. The result has been a proliferation of consumer review websites.

Thus, 47 U.S.C. § 230 helps create an unprecedented class of published content—consumer reviews—by providing legal immunity to consumer review websites for generating, curating and publishing those reviews.

* Adapted from Eric Goldman, *Expert Report on the Value of Consumer Review Websites and 47 USC 230*, Tech. & Mktg. L. Blog, Nov. 12, 2012, http://blog.ericgoldman.org/archives/2012/11/expert_report_o.htm.

The marketplace’s “invisible hand”—the mechanism that rewards good producers and punishes bad producers—depends on well-informed consumers. Consumer reviews educate other consumers about which producers deserve their dollars. Plus, vendors become more responsive to consumers’ demands, knowing they will be publicly accountable for how well they meet consumers’ needs. Consumer reviews thus improve our marketplace’s operation.

By strengthening America’s marketplace, 47 U.S.C. § 230 improves our country’s competitive position compared to other countries. No other country provides as generous a legal immunity for consumer review websites as 47 U.S.C. § 230. Instead, in other countries, businesses typically can “veto” consumer reviews they don’t like; and naturally, they will only veto critical reviews. Compared to their foreign counterparts, American consumers have more access to consumer reviews—especially negative consumer reviews—to guide their marketplace choices. Over time, as consumer reviews improve the “invisible hand” of American consumers, the American marketplace will become more efficient than foreign marketplaces. Ultimately, 47 U.S.C. § 230 will help make the American economy stronger than foreign economies.