What is Section 230?: A Legislative Primer

Prepared by

Shreyanka Mirchandani Changaroth\(^1\) and Lateef Mtima\(^2\) of the Institute for Intellectual Property & Social Justice (IIPSJ), under a grant from The Wikimedia Foundation’s Knowledge Equity Fund.

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\(^1\) Wikimedia Race and Knowledge Equity Fellow 2022-23
\(^2\) Professor of Law at the Howard University School of Law, and Founder and Director of the Institute for Intellectual Property and Social Justice
Executive Summary: About Section 230

Section 230 of the Communications Decency Act of 1996\(^3\) protects interactive computer service providers (platforms such as Instagram, Shopify, and Google) and their users from being held legally responsible for content created by third parties.\(^4\) For example, under Section 230, Instagram is not liable for the content posted by Instagram users. See p. 5.

Purpose of this Activist/Legislative Primer

Section 230 is currently under review by the United States Supreme Court in the case of Gonzalez v Google. The Court is expected to interpret and clarify the provisions and applications of the statute. Some critics argue that Section 230 should be repealed or updated, while others argue in favor of maintaining its status quo. See pp. 7-9. This Primer is intended to provide an overview of the statute and the implications for Internet speech and activism, and particularly the impacts on historically marginalized communities.

Section 230’s Influence

Section 230 is credited with shaping the Internet of today. See pp. 5-6. The immunity granted by the statute protects platforms from the risk of legal liability for content developed by platform users who post content. This has resulted in many important social benefits including:

- Promotion of free speech and sharing of knowledge and information
- Enhanced opportunities for grassroots activism and organizing
- Self-regulation and content moderation by platforms
- Innovation and optimization of internet services

Section 230 has also impacted the interests of Historically Marginalized Communities See pp. 6-7 in both beneficial and adverse ways, including

- Democratization and wide accessibility of knowledge
- Promotion of civic engagement and activism
- Increase in economic empowerment opportunities
- Shielding discriminatory algorithms

Should Section 230 Be Revised? Current Conversations and Concerns See pp. 7-10

Some critics of Section 230 argue that some platforms misuse the statutory immunity to censor viewpoints they disagree with; other critics argue that platforms should do more to use Section 230 to restrict illegal and socially harmful content more effectively, such as hate speech. Amending Section 230 immunity could put a greater onus on platforms to determine what is lawful content. This can be concerning for several reasons, in particular:

- More liability could mean more censorship by platforms to avoid the risk of legal action, particularly in connection with non-traditional speech.
- Less liability could mean more reliance on automated moderation to identify and remove unlawful third-party content.
- More automated moderation could mean greater reliance on systemically problematic moderation and filtering tools (such as algorithms) that could censor legitimate and, particularly, marginalized voices.

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\(^3\) Enacted as part of the Communications Decency Act of 1996

\(^4\) There are some exceptions to the section 230 immunity. For instance, section 230 will not protect an ISP or platform user where their online behavior violates federal criminal and IP laws, and certain electronic privacy and sex trafficking laws.
A. Introduction

In the 1990s, as internet usage began to grow exponentially, it became clear that the question of platform liability for user content needed to be addressed – should platforms be held liable for the unlawful content posted by its users?

Two conflicting court decisions in the early 1990s⁵ resulted in the introduction of Section 230 of the Communications Decency Act 1996 (hereinafter “Section 230”), which aimed to ensure that the internet remains an open and unrestricted forum for free speech, while at the same time enabling platforms to undertake reasonable measures to protect the integrity of their forums. It did this by shielding online service providers from being sued for the content of third parties on their platforms, including platforms which implemented content moderation policies to keep their communities safe.

Since its introduction, the section has been interpreted as providing wide immunity to big tech platforms for all manner of content posted by third-party users on their platforms. In the last decade or so, some critics have argued that this expansive immunity has disincentivized platforms from taking action to curb rampant misinformation, disinformation, terrorism, and hate speech online.⁶ This has resulted in many attempts to reform the section, with only one attempt succeeding – in 2018, a carve-out was added requiring platforms to remove content that violated sex trafficking laws.⁷

In 2022, the Supreme Court determined that it would undertake a review of the limits and applications of Section 230 in the case of Gonzalez v Google. The Court will hear arguments in February 2023, and will undoubtedly take this opportunity to make a statement concerning the appropriate extent and limits of the section. In the months that follow, Congress is likely to receive increasing pressure to consider amending the statute.

With reform on the horizon, the conversations around Section 230 are now more relevant than ever. However, any envisaged review or reform of section 230 must take account of the interests of communities that have historically lacked equal access to media channels and knowledge and information resources. Section 230 has promoted the Internet as a venue for marginalized communities to disseminate non-traditional viewpoints, and to otherwise provide access to knowledge and information previously unavailable to them.⁸

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⁵ Cubby Inc. v. CompuServe Inc. held that platforms which took no action to moderate content should be immune from liability, while subsequently Stratton Oakmont Inc. v. Prodigy Services. Co. held that platforms could be held liable for taking even responsible action to protect the public from false information.⁷


⁷ FOSTA-SESTA (or Allow States and Victims to Fight Online Sex Trafficking Act and Stop Enabling Sex Traffickers Act)

⁸ See for e.g. Deen Freelon et al., How Black Twitter and other social media communities interact with mainstream news, Knight Foundation (2018); Minjie Li, Visual Social Media and Black Activism: Exploring How Using Instagram Influences Black Activism Orientation and Racial Identity Ideology Among Black Americans, 99 Journalism & Mass Commc’n Q. 718 (2022)
It is imperative that civil rights and social activist organizations ensure that their voices and concerns regarding Section 230 are heard. This Primer is intended to provide an overview of the statute and the implications for Internet speech and activism, and particularly the potential impacts on historically marginalized communities.

B. Background

The advent of the Internet meant that online platforms quickly became intermediaries for large amounts of content produced and disseminated by third-party users of these platforms. It soon became clear, however, that platforms were sometimes used to disseminate illegal content by third-party users. This raised the question – should the platforms be held responsible for hosting illegal content posted by their users?

Section 230 was the legislative response to this problem: it immunized Internet platforms from legal claims arising in connection with the content created or distributed by users of their platforms:

“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.” 47 U.S.C. § 230(c)(1)

The rationale for this was that if businesses could be held liable for such content, they would feel compelled to protect their interests by engaging in heavy-handed censorship on their platforms, and this in turn could have a chilling effect on speech. Given that the internet was increasingly becoming a widely attended public square for the exchange of ideas, the protection of free speech online was especially important to allow ideas to grow and for society to flourish.

It was Congress’s intent that the internet remain “a forum for a true diversity of political discourse, [...] and myriad avenues for intellectual activity,” which “ha[s] flourished with a minimum of government regulation.”9 By immunizing platforms from third-party user liability, platform purveyors could freely offer and develop their platforms regardless of how third-party users might choose to use these services.

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9 § 230(a)(3)-(4) Communications Decency Act
C. How does Section 230 work?

**Publishers vs distributors.** Section 230 treats online service providers as distributors rather than publishers. A publisher can decide “whether to publish, withdraw, postpone or alter content”\(^\text{10}\) and so it takes on the role of shaping the content that is eventually published. In contrast, a distributor of third-party content, such as a book store, cannot be held liable for content produced by others as they play no role in shaping the content. Internet users who re-post existing content can also rely Section 230, as they will also be treated as “distributors” for the purposes of the section.

**Liability for third-party content.** Section 230 states that platforms cannot be liable for third-party content, and courts have interpreted this to mean a wide immunity regardless of the nature of content or its egregiousness.

**Content moderation.** While Section 230 shields platforms from liability for the content posted by their users, it also shields them from liability for taking action to remove content they deem inappropriate for their platforms:

> “No 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;” 47 U.S.C. § 230(c)(2)(A)

Accordingly, platforms are free to remove or leave up content on their platforms as they see fit. Section 230 shields platforms in both scenarios, and thus encourages platforms to proactively develop and implement their own content moderation policies.

D. How has Section 230 shaped the internet?

User-generated content, a cornerstone of the internet, can exist only because of the safe harbor provided by Section 230 to internet intermediaries, including online platforms and users who repost content previously posted by others. Intermediaries, who act as conduits of speech for others, can operate or use platforms and rest assured that any content posted by will not be legally attributed to them. Section 230 has thus been vital in shaping and developing the internet of today in many important ways.

**Increased interactivity and innovation of internet services.** Instead of merely delivering content to users, websites were able to develop their services to better serve their users by allowing users to generate their own content. These new innovations were possible because websites did not have to worry about liability for unlawful behaviour by users.

**Economic growth.** The internet has become the biggest economic driver globally, increasing wealth and job opportunities for all. It has been able to do this primarily because of

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\(^{10}\) Zeran v. America Online, Inc.,129 F.3d 327 (4th Cir. 1997)
intermediaries, including social media influencers, which have in turn been aided by legal protections for third-party content they host, including advertisements and listings for goods and services. Without these protections, the internet would not have become the economic force it now is.

**Knowledge for all.** With a click of the mouse, internet users can now access knowledge and information posted by third-party users. Sites such as Wikipedia are able to rely on millions and millions of users to maintain their online encyclopaedia. Section 230 immunity has allowed websites to base their businesses on the content and voices of third-party users, which has in turn allowed the internet to become a source of knowledge for anyone with an internet connection.

**A platform for all voices.** Unlike traditional media, information available on the internet is not subject to vetting by a select few who have power to control what information and narratives to push to the general public. Voices from all backgrounds can contribute stories, find like-minded communities online, and enjoy the millions of platforms available online.

**The rise of social media platforms.** Comments, forums, and user reviews exist because of Section 230; Section 230 immunity allows websites to do all of the above without being sued. Even the smallest risk of liability would be enough for websites to scale back services, and websites like Instagram, Yelp, and AirBnb are unlikely to exist or offer the services they provide today.

**Encouraging self-regulation.** Platforms understand that to attract and retain users, they need to provide a space that is safe and welcome to all. For this reason, many platforms actively self-regulate by moderating content they consider harmful to their communities. Section 230 encourages proactive content moderation by assuring platforms that doing so will not expose them to liability for “wrongful or inadequate” moderation.

### E. Section 230’s effect on marginalized communities

If Section 230 did not exist, many platforms might feel the pressure to engage in heavy-handed pre-emptive censorship to ensure that unlawful or potentially unlawful content is deleted. Pre-emptive censorship for fear of liability would cast a wide net, capturing all types of information, including lawful content and protected speech, and particularly from marginalized communities. More often than not, where censorship is permitted to flourish, groups that already face discrimination are the first to be silenced. Section 230 has been key in fostering a space for marginalized communities in mainstream discourse in various different ways.

**Amplification of voices of colour.** Unlike traditional mainstream media, social media is available to everyone with minimal barriers. Social media platforms have provided marginalized communities with vast opportunities to be heard. Communities that were historically left out of mainstream media no longer have to contend with the traditional gatekeepers of media or powerful commercial intermediaries to reach audiences. They are
free to forge their own narratives and amplify their voices on social media platforms, who in turn are able to provide this space due to the protections provided by Section 230.

**Promotion of civic engagement and activism.** New technologies have given historically silenced voices increased opportunities to speak and publish, and in turn influence politics and culture. Frictionless access to platforms allows communities to amplify their voices, and further their goals and civic participation without the threat of being silenced. Marginalized communities can now easily and publicly shine a light on issues that are relevant to their communities and cultures.\(^\text{11}\) Section 230 thus ensures that platforms can provide a forum for all voices, ideas, and stories, even those that could be perceived as a threat to the groups in power.

**Increase in creative and economic opportunities.** The internet is responsible for much of the uptake in entrepreneurship and increased economic empowerment of marginalized communities. Financial and non-financial barriers that have traditionally prevented marginalized individuals from pursuing economic or creative opportunities are minimized and even eliminated on the internet due to the low cost of business formation and expansion, and increased access to customers and audiences. Members from marginalized communities have participated in the creator economy and started lucrative businesses at unprecedented rates since the introduction of the internet and social media.\(^\text{12}\)

**Democratization of knowledge for underserved communities.** Traditional systems of knowledge have often only furthered systemic racial and class inequalities. Deserving individuals from less privileged backgrounds have been denied the same opportunities as the privileged. The internet, however, has allowed knowledge to move from centralized sources like universities and news publishers, to the internet – a decentralized and accessible source of knowledge for all. Knowledge is now widely available and no longer the domain of the privileged few in society who have historically held control over cultural and political discourse.

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F. Should Section 230 Be Revised? Current Conversations and Concerns

Given that section 230’s effect has been divergent and manifold, it has been the source of much controversy. Not only has it been credited with “creating the internet”\(^\text{13}\), it has become one of the most hotly debated internet law issues in the US and beyond.

On one side of the aisle, critics of Section 230 believe that it has caused the proliferation of hate speech, sex trafficking, terrorist recruitment, and harassment. They believe that reform is necessary to address systemic harms that have found their way onto the internet.

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\(^{13}\) Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (April 2019: Cornell University Press)
On the other side, there are concerns that any sort of reform will have far-reaching ramifications and unintended consequences that will threaten our democracy and safety.

In late February 2023, the Supreme Court will hear the case of Gonzalez v. Google, where claimants are attempting to argue that Google recommended terrorist-related content that ultimately resulted in the 2015 terrorist attacks in Paris. A central issue in the case is whether Section 230 protects recommendations and algorithms created by platforms that recommend certain types of content. The Court’s decision will impact the scope and breadth of Section 230 and what kinds of content are shared on the Internet.

**Concerns about the Section 230 “Status Quo”**

**Online harms.** One of the most pervasive criticisms of the section is that it allows the proliferation of sexist, racist, violent, and bigoted content that attacks and harms various minoritized groups. Many believe that platforms should take more action to remove the especially egregious content they host, such as hate speech, terrorist content, violence, child abuse material, and non-consensual distribution of intimate images.

**Incentivizing bad behaviour.** The broad and sweeping immunity provided by the section could mean that platform operators have no incentive to respond to most criminal behaviour by users on their platforms.

**Protection of discriminatory algorithms.** Algorithms with inherent bias that process individual data will damage opportunities for minorities and continue the cycle of systemic oppression. Algorithms designed or used by platforms and that inadvertently or deliberately facilitate discrimination are covered by Section 230 immunity.

**Increase in unfettered discrimination online.** Victims of online assault and harassment are overwhelmingly members of marginalized communities – women, people of color, and sexual minorities. Section 230 immunity means that platforms do not have to take down illicit material, and victims have no way of compelling them to do so. This can have the effect of silencing the voices of the marginalized and turning them away from online spaces.

**Concerns about reforming Section 230**

Reforming Section 230 would almost certainly mean reducing the immunity granted to intermediaries. However, reducing immunity without a careful and balanced consideration of all possible outcomes will have damaging and unintended consequences – platforms will be forced to take measures that could result in over-moderation and collateral censorship of marginalized voices, and thus shrink the internet as we know it.

**Over-moderation and collateral censorship.** Imposing liability will put pressure on intermediaries to implement heavy-handed, far-reaching, “perfect” content moderation strategies to avoid any possibility of unlawful – and perhaps merely “objectional” - content slipping through the cracks. If any unlawful content does slip through the cracks, the “perfect” moderation strategy will persuade courts that the intermediary did not know of the unlawful content. However, such strategies could see intermediaries – including users
who repost content - removing legitimate borderline or non-mainstream content to safely ensure that they are operating within the limits of the law.

**Reform of the section may not appropriately target harmful behaviour, and instead shrink the internet.** Using very specific harmful behaviour as a basis for law reform may not accurately target harmful behaviour and, worse, may further result in harmful unintended consequences. For instance, FOSTA-SESTA was a well-meaning legislation that aimed to target sex-trafficking conduct on online platforms. However, some members of the sex worker industry have argued FOSTA-SESTA has made it necessary that they return to dangerous, “underground” venues to pursue lawful activities through which they make an independent living. (see more on FOSTA-SESTA in Appendix p. 14)

**Platforms are ill-equipped to enforce the law.** Platforms as content intermediaries host massive amounts of speech. As private, profit-making companies, they are ill-equipped to determine the lawfulness of content. They will likely fall back on over-moderation.

**Over-reliance on discriminatory algorithms to moderate large swaths of content.** Platforms use a mixture of humans and algorithms to moderate content online. Algorithms are essential content moderation tools as they can analyze content at speeds and scales that humans alone cannot. However, they can be poor substitutes for human beings because of their inability to interpret nuance and context. There is also evidence that existing negative biases in society infiltrate algorithms when they are created, and in turn, perpetuate these biases in the online world. More automated content moderation could mean more automated discrimination on online platforms.

**G. Reform Possibilities**

Unlike the First Amendment protections, Section 230 immunity was created by Congress. This means that Congress is free to amend the section at any time. There have been various legislative efforts and proposals for reform (see Appendix for full history). This section will look at the various reform possibilities that might be considered by Congress (and some that have been considered).

- Placing limits on Section 230 immunity unless certain conditions are met;
  - No immunity unless Industry-standard / best practices followed i.e. deny immunity to ISPs and users who have knowledge of unlawful content
  - Provide immunity only on the condition that reasonable steps have been taken to prevent proliferation of unlawful content
  - Revoke s230 immunity “as a penalty for failing to implement effective mechanisms, such as permitting access to inappropriate content by minors. Similar such “regulatory” approaches would deny Section 230 immunity to ISPS who use algorithms to distribute content or to display behavioural advertising.”
- Require the removal of objectionable content;
- Creating carveouts for individual harms;
o However, there can be unintended consequences if done without careful consideration and when blinded by a fact-specific inquiry such as in the case of FOSTA-SESTA

- Imposing a “reasonable standard of care” on platforms;
  o However, having such a standard apply across the board would have many unintended consequences (possibly even more than carveouts). It could also cause more collateral censorship and increase confusion around the legal limits and standards for provision of internet services.

- Expand enforcement of Section 230 to states;
- Study the effects of any Section 230 amendment before introducing it;
- No reform. Instead, continued or increased reliance on self-regulation, including establishing industry-standards / best practices

H. Conclusion

Any inquiry into reforming Section 230 should include a careful balancing exercise to minimize the risk of unintended consequences. That said, reducing or revoking section 230 immunity will certainly affect the availability of free speech and knowledge and information dissemination through the Internet. Civil rights organizations, social activists, and the communities they serve, particularly communities that have been traditionally marginalized and underserved, should take action to ensure that their interests are considered in the judicial and legislative efforts to interpret, implement, and/or amend Section 230.