

United States Senate
Committee on Commerce, Science, and Transportation
Subcommittee on Communications, Technology, Innovation, and the Internet
Hearing on “The PACT Act and Section 230: The Impact of the Law that Helped Create the Internet and
How It Should Be Reformed for Today’s Online World”
July 28, 2020

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Committee Chairman Wicker, Ranking Member Cantwell, Subcommittee Chairman Thune, Ranking Subcommittee Member Schatz. Members of the Senate Subcommittee on Communications, Technology, Innovation, and the Internet,

Thank you for inviting me to today’s hearing about reforming 47 U.S.C. § 230. I have been thinking and writing about this provision and its attendant judge-made doctrine for the past few years. I have argued that the law is not adapted to the ways in which online intermediaries today effectively control practically all aspects of consumers’ online experiences. The so-called “immunity” under Section 230, developed in the late 1990s, continues to presume that online intermediaries (or “interactive computer services”) are no more than mere publishers or distributors of user-generated content. The courts have read the provision as a shield from liability unless a plaintiff in any given case successfully pleads that a defendant intermediary “materially contributes” to the content at issue.

Pursuant to this standard, courts today have been unwilling to see anything but glaring direct contributions of substantive content as counting as “material contribution.” In 2020, this presumption – this benefit of the doubt – makes no sense. The biggest of these companies today design their services to elicit, collect, harvest, sort, analyze, redistribute, and altogether repurpose their consumers’ data in service of their business objectives and the interests of the advertisers who have come to rely on them. And they use sophisticated but demonstrably imperfect automated decisionmaking systems to do this. (They actually purport that these systems, even as they structure the entirety of our online experiences, help them to moderate user content.)

None of this – especially the companies’ pecuniary designs on user data – resembles the considerations at work when Congress enacted 47 U.S.C. § 230. The relatively quaint and romantic motivations of the Usenet newsgroups or AOL bulletin boards were on the minds of legislators or judges in the 1990s. They could not foresee Big Tech’s industrial designs on controlling and consolidating information flows to achieve their own commercial objectives.

Nor does the statute’s titular claim that online intermediaries’ “Protection for ‘Good Samaritan’ blocking and screening of offensive material” do any real work. One could reasonably read Section 230(c)(2) as the operative “safe harbor” under the statute, in which case courts would only immunize “interactive computer services” that voluntarily take good faith steps to moderate illicit or illegal user-generated content. But, in practice, that is not what defendants, Big Tech companies, or their advocates have asserted. Rather, they have projected 230(c)(1)’s passive-voice and indirect mandate about how providers of “interactive computer services” should be “treated” onto Section 230(c)(2) in ways that effectively overshadow and essentially eliminate the mechanism for courts to consider whether an online intermediary is reasonably trying to moderate content. Because of this doctrine, defendants raise

the Section 230 defense at the motion to dismiss phase, well before plaintiffs and courts ever get to find out how implicated intermediaries are in their control and administration of user content or data.

It is time that the law and doctrine reflect our currently reality. This is why I am honored and eager to engage your consideration of the PACT Act and other reforms of the statute. For what it is worth, the following are, in reverse chronological order, the recent pieces I have written on the topic:

- [*Solve the Underlying Problem: Treat Social Medias as Ad-Driven Companies, Not Speech Platforms*, Knight Foundation \(June 16, 2020\)](#)
- [*Recovering Tech's Humanity*, 119 Columbia Law Review Forum 252 \(November 2019\)](#)
- [*A Watchful Eye on Facebook's Advertising Practices*, N.Y. Times \(March 28, 2019\)](#)
- [*Discriminatory Designs on User Data*, Knight First Amendment Institute "Emerging Threats Series" \(April 2018\)](#)
- [*Intermediary Design Duties*, 50 Connecticut Law Review 203 \(March 2018\)](#)
- [*AOL v. Zeran: The Cyberlibertarian Hack of §230 Has Run Its Course*, Law.com \(November 2017\)](#)

My views of the prevailing doctrine precede the emergent *du jour* argument that social media companies have a liberal coastal urban bias. I will answer inquiries from you on this question if you have them, of course, but, at the outset, please know that I do not believe that online intermediaries' editorial moderation decisions are unlawful or even imprudent. As I have written elsewhere, Facebook and Twitter, for example, have sensibly developed tools that enable their users to control the ways in which trolls and bigots slide into online "conversations" and user-groups. They have used their constitutionally protected editorial prerogative to flag user content that they find hateful or dangerously misleading. The principal question I have in this context is whether these efforts are enough, since illegal content and advertisements continue to proliferate on their services.

More pertinently, I believe that framing the question of Section 230 reform in terms of political viewpoint or even free speech obscures what is truly at work: the political economy of online advertising. The biggest and most popular online intermediaries today are not simple "platforms" for user-generated content as much as commercial services for targeted advertising to consumers. These companies design their applications and the automated decisionmaking systems that power them to maximize advertising revenues. Social media companies in particular are keenly committed to designing services and products that keep users viscerally engaged in service of their bottom-line. We are well past the discounts and coupons that retail chains include in their circulars.

The current debate about Section 230 should focus instead on Big Tech's unprecedented power to control consumer behavior. The beneficiaries of the protection under Section 230 are not in the business of promoting free speech as much as designing services that optimize user engagement which, in turn, maximizes the scope and depth of their advertising revenue. They do this more or less unmoored by settled legal conventions because of the broad protection under Section 230, a doctrinal protection that I do not think any other species of company in the United States has ever enjoyed.

To be sure, their pecuniary motivation, unfettered by the threat of liability under the courts' broad reading of the protection under Section 230, has allowed an array of innovative applications for user-generated content to proliferate. But the current legal protection under Section 230 has also cultivated in application developers a cool, above-it-all indifference to (1) public law norms and (2) the immediate lived harms that so much of the content and data that they distribute causes. Dangerously misleading public health related information, disinformation about elections, nonconsensual pornography, and

discriminatory advertising, all of which may be illegal in any given circumstance, proliferate still because online intermediaries do not have to bear the responsibility for designing systems that carefully distribute them. The question for you is whether there is something legislation can do to cultivate and engender a demonstrable sense of social responsibility.

If you were to ask me to make any recommendations today about Section 230 reform, it would first be that courts should read the protection for interactive computer services far more carefully than they have. We have seen slow but steady improvement on that front since the Ninth Circuit's decisions in *Fair Housing Council of San Fernando Valley v. Roommates.com* in 2008 and *Barnes v. Yahoo!* in 2009 and, more recently, perhaps, after the Second Circuit's decision last summer in *Oberdorf v. Amazon*. My humble recommendation to courts is that they should be far more searching than they have been in determining whether a defendant interactive computer services' designs materially contribute to the distribution of illegal content. At a minimum, opening the standard up in this way would allow plaintiffs to engage in discovery on colorable claims – a prerogative that litigants in other legislative fields generally have. Today, most Section 230 defenses are decided at the motion to dismiss, before any discovery can be had. I urge courts to be far more open to the pleaded claims that online intermediaries' designs materially contribute to illegality. But this is for the courts to sort out under current doctrine.

My humble recommendation to you, as legislators, must be different, as you bring a different, more generalizable and prospective institutional authority: the exceptional legal protection that online intermediaries now enjoy under the statute is ripe for narrowing because, today, it directly causes consumer harms and sometimes entrenches racism, misogyny, and discrimination against members of historically marginalized groups. Public laws and regulations exist to protect people from these kinds of injuries. But, because of the prevailing doctrine, the entities most responsible and capable of protecting people bear no legal responsibility to do so.

Thanks again for the generous invitation to testify. I look forward to engaging your questions as best I can.