

Statement of Neil Chilson
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“Section 230 – Nurturing Innovation or Fostering Unaccountability?”
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Thank you to Attorney General William Barr and to the Department of Justice for inviting me to participate in this discussion. I am the senior research fellow for technology and innovation at Stand Together, part of a community of social entrepreneurs, academics, think tanks, community organizers, and policy advocates working to break barriers so that every individual can reach their unique potential. Other organizations in this community include Americans For Prosperity, the Charles Koch Institute, and the Charles Koch Foundation.

At Stand Together, we believe that market-tested innovation has been the primary driver of widespread human prosperity. But innovation doesn’t just happen. It requires a culture that embraces innovation rather than fearing it and a regulatory environment that enables innovation.

Section 230 of the Communications Decency Act is a crucial part of the U.S.’s regulatory environment. The principles of individual responsibility embodied in Section 230 freed U.S. entrepreneurs to become the world’s best at developing innovative user-to-user platforms. Some people, including people in industries disrupted by this innovation, are now calling to change Section 230. But there is little evidence that changing Section 230 would improve competition or innovation to the benefit of consumers. And there are good reasons to believe that increasing liability would hinder future competition and innovation and could ultimately harm consumers on balance. Thus, any proposed changes to Section 230 must be evaluated against seven important principles to ensure that the U.S. maintains a regulatory environment best suited to generate widespread human prosperity.

I. Section 230 Emphasizes Individual Responsibility

Section 230 embodies a clear and conservative principle of individual responsibility. In the simplest terms, it says that individuals are responsible for their actions online, not the tools they use. This is the normal way that we do things in the U.S. We hold newspapers, not newsstands, liable for news articles. Authors, not bookstores, accountable for book contents. So too do we hold social media users, not services, responsible for users’ words online.

Section 230’s principle of individual responsibility aligns with our general moral intuitions that individuals ought to be responsible for acts they commit and not for those that others commit. Likewise, harmed parties are owed redress from the person that harmed them, not from others. From a law and economics perspective, this approach sets the proper incentives by imposing the legal penalty for a wrongful act on the party that committed the act.

Counter to that intuition, intermediary liability means holding responsible someone other than the bad actor. Intermediary liability in effect deputizes one party to police others’ behavior – and holds the deputy responsible for any violations the policed parties commit. Though counter to

¹ This statement has been revised and was resubmitted February 27, 2020 per Department of Justice staff request.

our moral intuitions, this approach may make economic sense in certain circumstances. But it always has side effects, including on markets and competitive dynamics. Below, I discuss these effects in the context of a new kind of intermediary: internet platforms that connect users to other users.

Section 230 is a limited protection from liability: it does not immunize platforms from liability for their own content or from violations of federal criminal law, violations of intellectual property, or crimes involving sexual exploitation of children, among other carve outs.

II. Section 230 Enables a New Kind of Intermediary

There have always been intermediaries that connected people so that they could talk, trade, or otherwise interact, but over the last twenty years the internet has facilitated an entirely new type of intermediary: the user-to-user platform.² On these platforms users generate content for other users to read and view. Users share their content with each other through a software-powered, largely automated process. Such platforms provide individuals with technical tools that make it inexpensive and productive to interact directly with thousands or even millions of other people.

User-generated content (UGC) platforms are extremely powerful. They eliminate middlemen, increasing direct user access to information and reducing transaction costs. By doing so, these platforms enable beneficial interactions that otherwise never would have occurred. In fact, the rise of such user-to-user platforms has transformed nearly every area where people interact: commerce, through services such as Etsy, Thumbtack, and third-party selling on Amazon and Walmart.com; housing through Airbnb and HomeAway; transportation through Uber, Lyft, and Turo; communications on Pinterest, Twitter, YouTube, and Facebook; and even philanthropy through GoFundMe, CaringBridge, and Indiegogo. These are just a few of the hundreds of internet platforms where people go to connect with other people and accomplish something together.

Some companies (like Facebook and YouTube) that operate user-to-user platforms are very large and generate significant advertising revenue. But the primary benefit to users even on these platforms is their connections to each other, usually in a non-commercial interaction that, absent these platforms, would not happen at all. It is important to consider these less tangible benefits when considering competitive impacts.

A personal story might serve as a good example. My wife and I have a 7-month-old daughter. While still in utero, she was diagnosed with a club foot, a birth defect that thanks to the miracles of modern science is entirely correctable. But correcting the problems requires a challenging process that spans many months. As new parents we had many questions, concerns, and worries. Our doctors were great but not always available. You know who was always available? The five thousand plus people in the Facebook Clubbed Foot support group. At any time, day or night, we could hear from people we had never met but who understood what we were going through. And

² User-to-user platforms are not the only types of intermediaries protected by Section 230 (see Section VI below), but they are the focus of much of the controversy and therefore the focus of my discussion.

now that we're through the hardest part of this process we can help other parents who need support. I cannot put a dollar value on this experience. It is not the kind of thing you could build a business plan around. But it exists because Section 230 means Facebook's lawyers don't have to review and verify every post to that group.

This is one example of the millions of ways user-to-user platforms benefit real people. No surprise, then, that I think the biggest total harm from changing Section 230 will not fall on platform companies or startups. It will fall on users. Platforms deputized to police their users will face little or no penalties for taking down a post or an entire discussion group but could face expensive lawsuits for leaving something up. The obvious incentive will be to over-remove content. People who use platforms in unanticipated, non-commercial, hard to measure, and easy to ignore ways – like the Clubbed Foot support group – will find platforms a little less welcoming to their uses. Given the huge volume of user interactions on these platforms, even tiny increases in costs to interactions would have enormous negative total cost to users.

Of course, this powerful new way of connecting people has disrupted many old ways of connecting. Companies that professionally generate entertainment or news content now compete with millions of amateur videographers, photographers, and essayists for the attention of the public. This has dramatically affected advertising-supported business models, in part because UGC platforms eroded the regional near-monopolies that newspapers had on distribution of certain kinds of information.³ Today, middlemen and matchmakers of all kinds are competing against massive online marketplaces that bring together orders of magnitudes more sellers and buyers. Old business models face significant challenges in this new environment. No surprise then that some disrupted competitors are interested in modifying a law that has been central to the rise of these new intermediaries.

III. Imposing Intermediary Liability on UGC Platforms Would Harm Competition and Innovation

So how might we expect changes to Section 230 to affect competition and innovation? All proposed changes to Section 230 seek or threaten to increase the number of actions for which an intermediary would be liable. Increasing intermediary liability would affect competition and innovation in the following ways:

Increasing intermediary liability will raise costs. These higher costs would take two forms. First, companies will have to increase their “policing” of users to reduce litigation risk. For example, even under Section 230 today, Facebook pays tens of thousands of content moderators worldwide.⁴ Increasing liability would require many other platforms to engage in expensive moderation. Second, imposing liability will necessarily raise companies' legal bills. Without

³ See Marc Andreessen, *The Future of the News Business* (Feb. 25, 2014), <https://a16z.com/2014/02/25/future-of-news-business/>.

⁴ NPR.org, *Propaganda, Hate Speech, Violence: The Working Lives Of Facebook's Content Moderators* (Mar. 2, 2019), <https://www.npr.org/2019/03/02/699663284/the-working-lives-of-facebooks-content-moderators>.

Section 230, even meritless lawsuits would become much more expensive to defend – potentially tens of thousands of dollars more expensive.⁵ Indeed, Section 230 currently protects small intermediaries “from having to defend against excessive, often-meritless suits—what one court called ‘death by ten thousand duck-bites.’”⁶

Increased costs will benefit old gatekeepers and suppress new competitors. Increased costs could affect market structure in two ways. First, if UGC platforms compete against other, non-intermediary companies, increased costs will favor those non-intermediaries. For example, consider the market for advertising. Platforms like Instagram attract users by offering them the ability to view content posted by other users, and then sell advertisements that users see while on the platform. Increasing liability would raise the cost to obtain user-generated content and affect the platform’s ability to gain and maintain users, weakening UGC platforms’ ability to compete for advertising dollars. Thus, lobbying for changes to Section 230 could serve as a way for business-to-user companies to raise their existing rivals’ costs.

Second, and related, increased costs raise barriers to entry into the UGC platform marketplace. New UGC platforms would bear litigation risk from the very first piece of shared user content they hosted. The costs of mitigating such risks would be priced into investment decisions and on the margin would discourage entry into the user-to-user space. As a result, even moderate increases in intermediary liability would tend to concentrate the intermediary market. Absent Section 230, we believe “compliance, implementation, and litigation costs could strangle smaller companies even before they emerge.”⁷ Higher costs would favor established, sophisticated and profitable UGC platforms over small or new UGC platforms. Established firms can afford to mitigate litigation risk through expensive content moderation and takedowns at scale and can bear the cost of litigation that emerges. Thus “[a]ny amendment to Section 230 that is calibrated to what might be possible for the Internet giants will necessarily *mis*-calibrate the law for smaller services.”⁸ In short, recalibrating liability to what the biggest platforms can manage could eliminate a wide swath of smaller competitors.⁹

Indeed, even with Section 230 currently limiting the litigation risks of content moderation, the costs of effective content moderation are high enough that many companies, including news

⁵ Engine, *Section 230 Cost Report*, <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c6c5649e2c483b67d518293/1550603849958/Section+230+cost+study.pdf>.

⁶ Liability for User-Generated Content Online: Principles for Lawmakers at 2 (July 11, 2019), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2992&context=historical> (hereafter “Liability Principles”).

⁷ Liability Principles at 2.

⁸ *Id.*

⁹ Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 is Your Best Hope* (June 19, 2020) (“In a counterfactual world without Section 230’s financial subsidy to online republishers and the competition enabled by that subsidy, the Internet giants would have even more secure marketplace dominance, increased leverage to charge supra-competitive rates, and less incentive to keep innovating.”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631&download=yes.

companies, avoid doing it. For example, NPR, Reuters, and many others reputable news organizations removed their reader comment sections years ago specifically because they cannot find ways to moderate cost-effectively.¹⁰ Many instead now outsource the public discussion of their content to social media platforms and rely on those platforms to moderate public discussions at scale.¹¹ Imposing intermediary liability would increase any businesses' in-house content moderation costs and could accelerate the rush of companies outsourcing their user-to-user interactions to the biggest social media companies.

Increasing liability would hinder or eliminate user-to-user interactions. As mentioned above, the primary consumer benefit from user-to-user platforms are the interactions between users. Increasing the scope of user behavior for which platforms could be held liable will decrease the quality and quantity of user interactions on platforms. Such changes would re-insert a middleman into the user interactions, increasing transactions costs such as improper takedowns or bans or delayed posting. Given the sheer number of participants on many platforms, even a small per-interaction increase in costs could swamp any proposed benefits of Section 230 reform.

Furthermore, platforms' incentives as a middleman would conflict with its users' desires. Platforms will seek to avoid penalties and will play it safe when it comes to taking down user content. This risk averseness threatens user speech, as I discuss further below.

IV. Imposing Intermediary Liability Would Likely Reduce Investment into New UGC Platforms

All else being equal, one would expect that increased liability for user content would reduce investment into new user-to-user platforms.¹² The Copia Institute and NetChoice offered empirical evidence from international comparisons to support this expectation. Their recent report examines the effect of Section 230 on investment as compared to other liability approaches around the world.¹³ The report concludes that “the broad immunity offered by Section 230 ... likely resulted in somewhere between two to three times greater total investment in internet platforms in the US as compared to the more limited protections offered in the EU,”

¹⁰ Elisabeth Jensen, *NPR Website To Get Rid Of Comments* (Aug. 17, 2016), <https://www.npr.org/sections/publiceditor/2016/08/17/489516952/npr-website-to-get-rid-of-comments>; Justin Ellis, *What happened after 7 news sites got rid of reader comments* (Sept. 16, 2015), <https://www.niemanlab.org/2015/09/what-happened-after-7-news-sites-got-rid-of-reader-comments/>.

¹¹ Ellis, *supra* n.9 (“We believe that social media is the new arena for commenting, replacing the old onsite approach that dates back many years.”) (quoting Kara Swisher and Walter Mossberg on their decision to drop comments from Recode content.).

¹² It is also possible that heightened barriers to entry could increase investment into the largest incumbent UGC platforms in anticipation of a secured market position they could use to raise prices.

¹³ Copia Institute, *Don't Shoot the Message Board*, 1,4 (June 2019), <http://netchoice.org/wp-content/uploads/Dont-Shoot-the-Message-Board-Clean-Copia.pdf>.

and “[e]ven in situations where there are some intermediary liability standards, the stronger those protections are for the intermediaries, the more investment and economic growth we see.”¹⁴

V. Imposing Intermediary Liability Would Limit Free Expression

Deputizing platforms by making them liable for what their users say would incentivize over-enforcement, reducing users’ effective speech. Platforms would face little or no penalty for removing content that does not violate any law, and significant penalties for leaving something up that should be removed. In that situation, platforms will have the incentive to “err on the side of caution and take it down, particularly for controversial or unpopular material.”¹⁵ Yet that is precisely the kind of speech that benefits from user-to-user platforms: content that isn’t broadly appealing enough to convince a newspaper editor or a radio jockey to pass it along. Indeed, liability changes for platforms will harm the voiceless far more than those who already have large voices in the marketplace of ideas. As free speech litigator and journalist David French has argued,

“Celebrities have their own websites. They’re sought after for speeches, interviews, and op-eds. Politicians have campaigns and ad budgets, and they also have abundant opportunities to speak online and in the real world. If they succeeded in making social media companies liable for users’ speech, they would pay no meaningful price. You would, however. Your ability to say what you believe, to directly participate in the debates and arguments that matter most to you would change, dramatically.”¹⁶

If we change Section 230, the famous and the powerful will continue to connect with others through traditional means and gatekeepers that have long favored them. The average, niche, unpopular, disadvantaged, and unusual will find it harder to connect with an audience that platforms today make easy to find.

VI. Any Steps Forward Should Follow Seven Principles

If Congress determines that it ought to adjust Section 230, there are seven key principles it should follow. We at Stand Together, along with an ideologically diverse group of fifty-three academics and twenty-seven other civil society organizations, recommend Congress use these principles for evaluating any changes to Section 230.¹⁷

¹⁴ *Id.*, 1, 4.

¹⁵ Daphne Keller, *Toward a Clearer Conversation About Platform Liability* (Apr. 6, 2018) (“Empirical evidence from notice-and-takedown regimes tells us that wrongful legal accusations are common, and that platforms often simply comply with them.”), <https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability>.

¹⁶ David French, *The Growing Threat to Free Speech Online* (Jan. 24, 2020), TIME, <https://time.com/5770755/threat-free-speech-online/>.

¹⁷ See Liability Principles, *supra* n.5.

Principle #1: Content creators bear primary responsibility for their speech and actions.

Principle #2: Any new intermediary liability law must not target constitutionally protected speech.

Principle #3: The law shouldn't discourage Internet services from moderating content.

Principle #4: Section 230 does not, and should not, require "neutrality."

Principle #5: We need a uniform national legal standard.

Principle #6: We must continue to promote innovation on the Internet.

Principle #7: Section 230 should apply equally across a broad spectrum of online services.

Stand Together fully supports all these principles, but I want to quickly highlight one. Principle #7 discusses the wide range of online intermediaries protected by Section 230. In these comments I've focused on user-to-user services like social media platforms. However, many other internet intermediaries – including internet service providers such as AT&T or Comcast, email marketing services such as MailChimp or Constant Contact, customer relationship management databases such as Salesforce, any of the tens of thousands of webhosts, or domain name registrars such as GoDaddy – do not directly interact with end users. They have only blunt instruments – such as site-wide takedowns – to deal with content problems. Imposing liability on such parties would “risk[] significant collateral damage to inoffensive or harmless content.” Thus, Principle #7 recommends that Section 230 protections remain broad enough to protect the actions of companies that do not have direct user interactions.

VII. Conclusion

Thank you again for the opportunity to comment on these important topics. Section 230's principle of individual responsibility has enabled everyday individuals to build powerful and meaningful connections. Section 230 is a vital part of American technology policy and we believe it remains essential to the continued dynamic development of user-to-user internet platforms and the many benefits they bring to Americans. Changing it risks shutting down the voice of the everyday person and solidifying the position of already powerful speakers and gatekeepers.