

Making Sense of Section 230

Section 230 of the Communications Decency Act (“Section 230”) is perceived by many as a critical safeguard for free expression that has fueled the growth of the internet and the world’s most competitive technology industry. Others see Section 230 as an outdated immunity that has fueled the proliferation of illicit online content. As with many polarized debates, the truth is much more complicated. This issue brief provides a high-level overview of what Section 230 does, why it is important to a much broader spectrum of stakeholders than those that have galvanized the current debate, and key considerations for evaluating potential reforms.

What Is Section 230?

Enacted in 1996, **Section 230 codifies the fairly commonsense proposition that an “interactive computer service providers” (i.e, online services) should not be treated as the “publisher or speaker” of—nor held liable for content (i.e, speech) they host or transmit on behalf of one of their customers.** For example, Section 230 ensures that an online email provider cannot be held liable for a threatening or defamatory email sent by one of its users.

Beyond providing legal certainty for the transmission of third-party content, **Section 230 also provides the legal foundation that enables online service providers to proactively block unlawful or objectionable content.** In this way, Section 230 provides an email provider with the legal certainty it needs to proactively block messages containing viruses from landing in its customers’ inboxes.

Why Is Section 230 Important?

The bipartisan sponsors of Section 230 intended it to accomplish two objectives. First and foremost, they sought to address an unintended quirk of the common law that would have punished online service

providers for proactively removing harmful content from their networks. Prior to Section 230, online platform providers were faced with perverse incentives that discouraged them from removing objectionable content because doing so heightened their exposure to liability for any unlawful content that they might have missed. By removing this disincentive and ensuring that online service providers are not liable for third party content, Section 230 frees consumer-facing online services to take a more hands-on approach to removing content that is illegal or that violates its terms of service or code of conduct.

In addition, Section 230 was intended to promote innovation and encourage investment by creating a stable and predictable legal environment for operators of online services. To that end, Section 230 ensures that liability for unlawful material is imposed on the entity who created it and clarifies that the mere act of hosting, processing, or transmitting a digital communication does not make a company liable for its contents.

These simple propositions made sense in 1996 when the internet was still nascent, and they remain important today due to the complicated array of online services that may be involved in the transmission of even a single message. Consumer-facing online services are now supported by dozens of backend services that operate invisibly but play an important role in routing network communications. For instance, a consumer-facing service may utilize an infrastructure-as-a-service provider that hosts its content, a content delivery network that ensures fast load times around the world, an identity access management provider that controls access to the site, a third-party cybersecurity firm that prevents fraudulent transactions, and many more. It would be extremely disruptive for these backend service providers to potentially be liable for unlawful content that a user posted on or sent across the consumer-facing service’s network.



Considerations for Reform

Given the centrality of Section 230 to today's internet—both the positive and the negative—it is reasonable to assess whether the statute provides the right balance of incentives to achieve its originally intended vision. As Congress examines the role of Section 230 and evaluates potential reforms, BSA encourages it to account for the following considerations:

✓ Accounting for the Broad Range of Technologies and Industries That Rely on Section 230

The universe of services, technologies, and industries that rely on Section 230 goes well beyond the handful of social media platforms that have galvanized the current debate. A newspaper that allows its readers to submit online comments, a retailer that invites customers to post online reviews, and a video game company that enables its users to create custom avatars all rely on Section 230. The immunity provided by Section 230 is likewise important to the backend enterprise and infrastructure cloud services that enable online newspapers, retailers, and video games to operate seamlessly. Proposed reforms must therefore be flexible enough to account for the complex landscape of stakeholders, including B2B companies, start-ups, and small and medium-sized enterprises, that rely on Section 230 and the unique relationship each type of service provider may have with their customers or consumers. In some situations, the service provider may not have the legal right to monitor content—either because of statute or contract; in other situations, the service provider may not have the technical or legal ability to monitor, moderate, or remove content.

✓ Maintaining Legal Certainty for Innovation and Responsibility

Any reforms should be evaluated in terms of their impact on Section 230's twin objectives—providing legal certainty to enable innovation and incentives to engage in good faith, voluntary efforts to prevent the distribution of unlawful and objectionable content. Online service providers should not be treated as the speakers of content that they had no role in creating or modifying, and companies should be encouraged to pursue good faith, voluntary efforts to remove and block illegal and harmful content.

✓ Preserving the Public Interest Benefits of Section 230

The public interest benefits of Section 230 cannot be overstated and are manifest each time we communicate with our relatives online, share a photo with friends, or connect with our colleagues through a video conferencing network. The benefits are also evident when the operators of content-sharing services take action to prevent them from being used to promote racism, incite violence, or flood our inboxes with spam. Without Section 230, the services that are integral to our ability to communicate and freely express ourselves online would look vastly different in ways that could leave us all worse off. As reforms to Section 230 are considered, it is important to evaluate their real-world impact on the diversity of online services and the users across society that have come to rely on them to share views and stay connected.

✓ Avoiding One-Size-Fits-All Mandates

Service providers should be encouraged to adopt moderation policies and practices that are tailored to address their position in the technology ecosystem, considering the scale, likelihood, and types of potential harms that may arise based on the nature of a specific online service and its proximity to unlawful content. For example, consumer-facing content-sharing services that promote and amplify terrorist and extremist violent content present heightened risk for service users and for society, and should bring heightened responsibilities. Similarly, some services, such as those aimed at children or livestreaming services, should be prepared to take on responsibilities that reflect heightened risk posed by these service offerings. In contrast, enterprise and infrastructure cloud service providers do not have a direct relationship with individual end-users and lack the technical and legal capability to prevent the distribution of individual pieces of content. For these reasons, an overly prescriptive, one-size-fits-all approach to reforming Section 230 should be avoided.