

Five Things to Know About Section 230

Eric Goldman*

Section 230 of the Communications Decency Act,¹ enacted by the U.S. Congress in 1996, says websites typically aren't liable for third-party content.² Many people agree with Section 230's general principle that liability should be imposed on the party that posts wrongful content, rather than on the speech facilitators in the middle.³

Yet Section 230's reputation took a hit from former U.S. president Donald Trump's relentless attacks in 2020,⁴ plus the overall "techlash" against the accumulation of power and resources in the hands of the Internet giants.⁵

US regulators are now increasingly open to reforming Section 230 in ways that will dramatically change the Internet's role in our society⁶ —but almost certainly for the worse. Here are five reasons why.

* Eric Goldman is Associate Dean for Research and Co-Director of the High Tech Law Institute at Santa Clara University School of Law. <http://www.ericgoldman.org>, egoldman@gmail.com. This is a footnoted version based on work published originally by the Centre for International Governance Innovation. Copyright 2021. Reproduced with permission.

¹ 47 U.S.C. § 230.

² Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 155 (Giancarlo Frosio, ed. 2020); JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET (2019).

³ Eric Goldman, *People Who Understand Section 230 Actually Love It*, S.J. MERCURY NEWS, Jan. 10, 2021, at A12, <https://blog.ericgoldman.org/archives/2021/01/new-op-ed-people-who-understand-section-230-actually-love-it.htm>; Eric Goldman, *Americans Would Probably Love Section 230 — If They Understood It*, Knight Foundation, June 16, 2020, <https://knightfoundation.org/articles/americans-would-probably-love-section-230-if-they-understood-it/>.

⁴ E.g., Preventing Online Censorship, Executive Order 13925 of May 28, 2020 (subsequently repealed by Pres. Biden); Makena Kelly, *Trump Vetoes \$740 Billion Defense Bill After Section 230 Complaints*, VERGE, Dec. 23, 2020, <https://www.theverge.com/2020/12/23/22197796/trump-ndaa-veto-section-230-defense-bill-facebook-twitter>.

⁵ E.g., Marcy Gordon, *For Big Tech, Biden Brings a New Era but No Ease in Scrutiny*, ASSOC. PRESS, Nov. 27, 2020, <https://apnews.com/article/donald-trump-joe-biden-laws-4fae275d903942b4368ce5472cdb6e26>.

⁶ See Section 230 Bill Tracker, https://docs.google.com/spreadsheets/d/16n15RZUvowt0kuzAgd-7QF136jd1XvwYQ_IL6Cwk-QY/.

1. Internet Exceptionalism and Section 230

Section 230 is an “exceptionalist” statute, because it treats the Internet differently, and more favourably, than other media.⁷ Regulatory exceptionalism is a tricky concept; it’s easy for regulators to overstate the differences between new and old tech, which can lead to poor outcomes.

However, in this situation, Congress got it right. Due to Section 230, we’ve seen the emergence of new and unprecedented forms of human interaction: consumer reviews, how-to videos (and cat videos) on YouTube, online marketplaces such as eBay, a peer-operated encyclopedic wiki (Wikipedia), social media platforms that enable people to share content and converse with their friends, and so much more. Over the last 25-plus years, we’ve confirmed that the Internet is indeed a unique medium, and it requires favourable regulatory exceptionalism to reach its potential.

2. Section 230 Enhances the First Amendment

The US Constitution’s First Amendment is well-known around the world for its free speech protection. But it isn’t the only U.S. law that promotes free speech. The First Amendment sets a legal floor for free speech. Legislatures can, and sometimes do, pass laws that facilitate speech above the First Amendment’s minimum. Section 230 is an excellent example of a speech-enhancing statute.

Some commentators have suggested that if Congress hadn’t enacted Section 230, the courts would have provided equivalent free speech protections due to the First Amendment.⁸ If so, Congress’ reforms to Section 230 don’t put too much speech at risk, because the First Amendment would backfill any reduction in protection.

⁷ See Eric Goldman, *The Third Wave of Internet Exceptionalism*, SANTA CLARA MAG., Winter 2008, https://blog.ericgoldman.org/archives/2009/03/the_third_wave.htm.

⁸ See Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635 (2020), Cary Glynn, Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027 (2018); Julio Sharp-Wasserman, Note, *Section 230(c)(1) of the Communications Decency Act and the Common Law of Defamation: A Convergence Thesis*, 20 COLUM. SCI. & TECH. L. REV. 195 (2018); cf. David S. Ardia, *Free Speech Savior or Shield for Scoundrels*:

This line of thinking is incomplete at best. While the First Amendment would likely backfill some parts of Section 230, Section 230 substantively covers other claims the First Amendment does not reach.⁹ More importantly, Section 230 provides crucial procedural advantages for defendants that make it possible for courts to dismiss lawsuits over third-party speech quickly and relatively cheaply.¹⁰ These procedural benefits aren't required by the First Amendment, and they absolutely affect the substantive outcomes achieved by services and their users. With the help of Section 230, Internet services stand up for their users' content in court instead of acceding to unmeritorious but expensive litigation demands.¹¹ Unfortunately, because Congress doesn't understand Section 230's mechanics, any Section 230 reforms will almost certainly eliminate these procedural advantages.

3. Section 230 Enhances Competition

Section 230 keeps the door open for entities that hope to dislodge the current Internet incumbents. With Section 230's help, new entrants can enter the market without building the same level of costly content moderation infrastructure that incumbents can afford, and new entrants don't have to earmark a portion of their initial capital for costly litigation over third-party content.

This leads to a counterintuitive conclusion: although the current Internet incumbents enjoy Section 230's benefits, reforming the law would *increase* the benefits for them by

An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act, 43 LOY. L.A. L. REV. 373, 478 (2010) (suggesting that common law may protect defendants more than Section 230 does); Brian L. Frye, *The Possible Redundancy of §230*, LAW.COM, Nov. 10, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3069794 (comparing Section 230 to defamation's republication rule).

⁹ Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 34 (2019).

¹⁰ *Id.*

¹¹ *Id.*

making it harder for rivals to emerge.¹² This might help explain why Facebook actively lobbies against Section 230.¹³

4. Section 230 Is the Law in Canada (but Not Really)

For its first 20-plus years, Section 230 was a uniquely American policy. This changed in 2019 with the adoption of the Canada-United States-Mexico Agreement (CUSMA) (sometimes called NAFTA 2.0).¹⁴ Article 19.17 of CUSMA requires each country to maintain legal rules that resemble Section 230.¹⁵ Thus, when Canada ratified CUSMA, it committed to providing Section 230-like immunity against Internet services' liability for third-party content.

In theory, Canada's judge-made common law could satisfy Article 19.17, but Canadian case law diverges from Section 230. As just one example, Canadian law has an "innocent dissemination" exception to defamation liability,¹⁶ while Section 230 would pre-empt all online defamation claims involving third-party content, whether "innocently" disseminated or not.¹⁷ Bill C-10, which proposes to impose broadcast regulations on user-uploaded videos,¹⁸ would move Canada even further away from Article 19.17.

¹² Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, BALKINIZATION, June 3, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631.

¹³ *E.g.*, Testimony of Mark Zuckerberg, Hearing Before the United States House of Representatives Committee on Energy & Commerce, Subcommittees on Consumer Protection & Commerce and Communications & Technology, Mar. 25, 2021, <https://docs.house.gov/meetings/IF/IF16/20210325/111407/HHRG-117-IF16-Wstate-ZuckerbergM-20210325-U1.pdf>; Todd Shields & Ben Brody, *Facebook Worries Smaller Rivals With Openness on Liability*, BLOOMBERG, Dec. 22, 2020, <https://www.bloomberg.com/news/articles/2020-12-23/facebook-support-for-liability-reform-has-little-guys-nervous>; *Facebook Anti-Section 230 Ad on Spotify*, Mar. 24, 2021, <https://www.flickr.com/photos/81901130@N03/51069143321/>.

¹⁴ <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aeum/text-texte/toc-tdm.aspx>.

¹⁵ Eric Goldman, *Good News! USMCA (a/k/a NAFTA 2.0) Embraces Section 230-Like Internet Immunity*, TECH. & MKTG. L. BLOG, Oct. 3, 2018, <https://blog.ericgoldman.org/archives/2018/10/good-news-usmca-a-k-a-nafta-2-0-embraces-section-230-like-internet-immunity.htm/>.

¹⁶ *E.g.*, *Crookes v. Newton*, 2011 SCC 47 [2011].

¹⁷ Eric Goldman, *An Overview of the United States' Section 230 Internet Immunity*, THE OXFORD HANDBOOK OF ONLINE INTERMEDIARY LIABILITY 155 (Giancarlo Frosio, ed. 2020).

¹⁸ <https://openparliament.ca/bills/43-2/C-10/>.

Despite this possible divergence, the United States is now so ambivalent about Section 230 that it's unlikely to demand strict compliance with Article 19.17 from its trading partners.¹⁹

5. Gutting Section 230 Won't Make the Internet Better

Regulators across the United States have put Section 230 in jeopardy, because they think they know how to fix the Internet. Many of those regulatory fixes seek to force Internet services to magically make people treat each other better. This is unrealistic. People have been terrible to each other offline for millennia —well before the Internet existed —so it's not surprising that people are terrible to each other online as well.²⁰ Like a mirror, the Internet shows us society's ugly sides. Reforming Section 230 won't erase those aspects of humanity. In effect, regulators want Internet services to achieve the impossible by preventing all anti-social interactions by their users, a standard that no institution can achieve anywhere else in our society.

Instead, Section 230 reform and other anti-Internet regulatory reforms will accelerate the end of the Web 2.0 era in the United States, as unmanageable legal risks squeeze most of the existing Internet services out of the business of user-generated content. In its place, we'll see some Internet services expand their distribution of professionally produced content, which poses less legal risk to them. To afford the licence fees for this content, these services will deploy paywalls. The widespread placement of professionally produced content behind paywalls will turn the Internet into something resembling Netflix.²¹

¹⁹ E.g., Letter from Reps. Frank Pallone, Jr. & Cathy McMorris Rodgers, the chair and ranking member of the House Energy & Commerce Committee, to Ambassador Katherine C. Tai, May 3, 2021, <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/USTR%20Letter%20re%20Section%20230%20in%20Trade%20Agreements.pdf> (“the effects of Section 230 and the appropriate role of such a liability shield have become the subject of much debate in recent years. While we take no view on that debate in this letter, we find it inappropriate for the United States to export language mirroring Section 230 while such serious policy discussions are ongoing”).

²⁰ Eric Goldman & Jess Miers, *Why Can't Internet Companies Stop Awful Content?*, ARS TECHNICA, Nov. 27, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3518970.

²¹ Eric Goldman, *The U.K. Online Harms White Paper and the Internet's Cable-ized Future*, 16 OHIO STATE TECH. L.J. 351 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438530.

We currently live in a remarkable period of human history, where everyone has the power to speak their mind —for free —and has unrestricted access to lots of high-quality amateur content —also for free. Changes to Section 230 and other anti-free-speech regulations will drive us toward a new era, in which fewer voices will have the power to speak online; those privileged voices will be less diverse and will exclude niche non-majoritarian interests; and consumers will pay more of their hard-earned dollars to access online content.²² Our children and grandchildren will never know the online freedoms we currently take for granted. Our society will be poorer for it.

²² Eric Goldman & Jess Miers, *Online Account Terminations and Content Removals*, 1 J. FREE SPEECH L. __ (forthcoming 2021).