

SECTION 230: WHAT IT MEANS AND WHAT'S NEXT



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Executive Summary

Section 230 of the Communications Decency Act of 1996 protects online intermediaries that host or republish information against a range of laws that might otherwise be used to hold an online intermediary liable for what third parties post on their online platforms. Section 230 offers two forms of immunity to protect online intermediaries. First, a provider or user of an “interactive computer service” – defined broadly to include almost any online service that publishes third-party content – cannot be treated as the “publisher or speaker” of information provided by a third party. Second, providers and users of interactive computer services cannot be liable for voluntarily taking down content if the provider believes in good faith that the information is obscene or otherwise objectionable.

Section 230 typically protects, for example, YouTube from liability for statements in videos posted by third parties, Yelp from liability for statements in user reviews, and Facebook from liability for statements in Facebook posts. But even though Section 230 has been praised by many proponents of internet freedom for making the internet possible and interpreted broadly by courts, it has been criticized recently by politicians, legislators, commentators, and some judges because some believe that Section 230’s immunity has been expanded too broadly.

Courts and legislators are actively debating the proper scope of Section 230. Court decisions, in particular, continue to evolve and often turn on factually specific questions such as the level of editorial control exercised by the company, the nature of the harms caused to a plaintiff – i.e., were they injured by a statement on the website or by a product sold on the website – or the design of a particular website or service.

In general, Section 230 is more likely to protect companies that:

1. Host informational content (e.g., Facebook, YouTube, Twitter) rather than act as an intermediary for products or services (e.g., Amazon).
2. Minimize editorial control over statements or content hosted on their platforms (although a company that limits itself to removing or refusing to post content, rather than editing content, will likely be protected by Section 230).
3. Minimize the amount of information the user must or is encouraged to provide by, for example, allowing users to choose what information they provide, rather than forcing the user to answer a pre-drafted set of questions (e.g., age, race, sex, ethnicity), or populate certain fields.
4. Maximize a user's flexibility when deciding how to use the platform, rather than designing a platform that encourages or requires users to use the platform in a certain way or for a certain purpose.
5. Minimize ownership of or control over any products sold on an online platform, and the ability to guarantee or evaluate the quality of products sold on an online platform.
6. Warn users of any known dangers from the use of the online platform.

WHEN DOES SECTION 230 PROTECT A COMPANY FROM LIABILITY FOR INFORMATION PUBLISHED ON THE COMPANY'S ONLINE PLATFORM?

Section 230 protects a company from liability if three criteria are met:

1. The company provides or uses an "interactive computer service," which is defined broadly to include any information service or system that enables multiple users to access a computer server;
2. The plaintiff seeks to hold the company liable as the publisher or speaker of the information; and
3. The plaintiff is suing the company for information provided by a third party.

Examples of Section 230 Immunizing an Internet Company from Liability:

- AOL was not liable for anonymous posts falsely accusing plaintiff of selling T-shirts glorifying the Oklahoma City bombing, even though AOL knew about the posts and that the plaintiff was receiving death threats at his home.
- Google and Facebook were not liable for ISIS terrorist attacks even though algorithms promoted ISIS content, because Google and Facebook did not create the videos or content.
- Grindr was not liable for a fake profile that resulted in plaintiff being harassed at his house.
- StubHub was not liable for scalped concert tickets because StubHub did not "effectively control" the content or ensure the creation of unlawful material.
- Armslist - a company hosting advertisements for firearm purchasers - was not liable for illegally purchased firearms because Armslist did not create the advertisement posted by a third party.
- Google was not liable for a post disparaging a business because, even though Google could remove, delete or limit access to content, Google could only decide to publish or remove the content, rather than edit the content.

Limits of Section 230

1. Company Negligently Designed Its Website or Service

Courts have held that Section 230 may not protect an internet company from claims that the company negligently designed a service or website and the negligent design caused harm to a user. For example, Section 230 did not protect Snapchat from a claim by the parents of two boys who died in a high-speed accident shortly after one of the boys used the Snapchat app to post the speed of their car using Snapchat's "Speed Filter." The court agreed that, if the Speed Filter encouraged young drivers to speed, Snapchat could be liable for developing an unreasonably safe product, similar to a manufacturer being held liable for designing an unreasonably safe product.

Limits of Section 230

2. Company “Materially Contributes” to Illegality of Information

Section 230 will also not apply if the design of an online platform “materially contributes” to the illegality or harmful nature of the content, rather than the online platform merely providing “neutral tools” for content that can be used lawfully or unlawfully. Roommates,¹ a company that matched people renting rooms with people looking to rent rooms, required users to create a profile by answering a series of pre-drafted questions about gender, sexual orientation, and whether the user has children, as well as the user’s preference for roommates as to gender, sexual orientation and children. Section 230 did not protect Roommates from claims by the Fair Housing Councils for violating the Fair Housing Act because the design “materially contributed” to the illegality by forcing users to answer pre-populated questions and allowing users to filter by sex, sexual orientation and family status.

Similarly, a website that collected and sold telephone records was not immune under Section 230 because the company solicited and paid researchers for telephone records.² Because the website encouraged the development of what was offensive about the content – publicly disclosing telephone records – Section 230 did not protect the website from liability.

Limits of Section 230

3. Company Failed to Warn User of Known Danger

Some states – notably California – impose a “duty to warn” a potential victim of third party harm if there is a special relationship between the company and the foreseeable victim or the third party likely to inflict harm. Some courts have held that Section 230 will not protect a company that fails to warn a user of a known danger. For example, Internet Brands – the host of a model networking website – could be liable after two men used the website to lure an aspiring model to a fake audition and rape her because Internet Brands knew third parties had used its online platform to lure victims but did not warn users of this known risk.

Limits of Section 230

4. Failing to Remove Content After Promising to Remove It

Section 230 will protect a company that refuses to remove content. However, Section 230 may not protect

a company that promises to remove content and then breaks its promise. For example, Yahoo could be held liable for not removing “revenge porn,” but only after Yahoo told the user that it would remove the content and then failed to remove it.

Limits of Section 230

5. Statutory Exceptions

Section 230 does not apply to federal civil rights claims, antitrust claims, Fair Housing Act claims, communications privacy law claims, or intellectual property claims. Also, in 2018, Congress passed the Fight Online Sex Trafficking Act (“FOSTA”). FOSTA carves out exceptions from Section 230 liability for civil and criminal charges of sex trafficking and for “promoting prostitution.”

SECTION 230’S APPLICATION OUTSIDE THE U.S.

Although Section 230 is a U.S. law, Section 230 immunity likely applies if a company is sued for an incident that occurs outside of the U.S.

Courts have concluded that the primary purpose of Section 230 is limiting civil liability in U.S. courts. As the Second Circuit explained, Section 230 regulates “the litigation of civil claims in federal courts” – conduct which occurs only in the U.S. *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). Thus, Section 230 immunity applies if a U.S. company is sued in U.S. federal court for an incident that occurs outside of the U.S.

Examples of the application of Section 230 to foreign incidents:

- Facebook was not liable for terrorist attacks because Hamas posted content that enabled the attack.
- Google was not liable for the Paris terrorist attacks because ISIS posted extremist content.
- Twitter was not liable to family members of deceased government contractors who were shot and killed by a Jordanian police officer after family members alleged Twitter provided material support of the terrorist organization claiming responsibility for the attack.

EFFECT OF SECTION 230 ON E-COMMERCE AND GIG ECONOMY PLATFORM

E-commerce and Gig economy platforms may be protected under Section 230 against some – but not all – claims. For example, claims based on alleged representations or omissions in a product description or advertisement are likely barred by Section 230, because that content is usually provided by a third party. However, claims based on the company’s role as a “seller” are likely not protected by Section 230 in states that hold intermediary sellers liable for defective products. Gig economy platforms may also be liable if the design of the platform encourages unlawful, illegal, or harmful conduct.

Airbnb example: Courts have concluded that because Airbnb offered booking services and accepted booking fees for the units, it was not merely acting as a “neutral tool” for finding rentals by simply listing the units.

Turo example: The rideshare company was enjoined from providing services at the airport because claims by the airport authority – that Turo violated local regulations prohibiting commercial activity without authorization – were based on information created by Turo.

THE JUDICIAL FUTURE OF SECTION 230

The scope of Section 230 will continue to change and be clarified because federal Court of Appeals and at least one justice of the U.S. Supreme Court have shown considerable interest in these cases. Here are a couple examples:

- Justice Clarence Thomas commented on the scope of Section 230 in two recent opinions related to petitions for certiorari and suggested courts have interpreted the statute too broadly; and
- The Snapchat example described on page 2 is based on a May 2021 decision by the 9th U.S. Circuit Court of Appeals overruling a lower court’s opinion that Snapchat was *not* liable.

THE LEGISLATIVE FUTURE OF SECTION 230

In the 2021-2022 session, Congress is currently considering 14 bills seeking to amend Section 230. This legislation can generally be organized into four categories:

- **Repeal:** Bills that repeal Section 230 entirely.
- **Limiting the Scope:** Bills that restrict the types of activities protected by Section 230. These bills would prohibit companies from using Section 230 as a defense under certain conditions, such as in cases of child sexual exploitation or civil rights violations.

- **Imposing New Obligations:** Bills that impose new obligations (such as a duty of care or quid pro quo requirements) on companies that wish to use Section 230 as a defense.
- **Good Samaritan:** Bills that alter the “Good Samaritan” portion of Section 230. This includes bills that attempt to address perceived political bias or censorship.

Examples of recent proposed legislation include:

- Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression (DISCOURSE) Act
- Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act
- Civil Rights Modernization Act of 2021
- 21st Century Foundation for the Right to Express and Engage in Speech Act (21st Century FREE Speech Act)
- Protecting Americans from Dangerous Algorithms Act
- Platform Accountability and Consumer Transparency (PACT) Act
- Abandoning Online Censorship (AOC) Act
- Limiting Section 230 Immunity to Good Samaritans Act
- Protecting Constitutional Rights from Online Platform Censorship Act

FACEBOOK WHISTLEBLOWER AND THE POTENTIAL THREATS OF ALGORITHMS RELATED TO ARTIFICIAL INTELLIGENCE

The recent revelations and testimony by Facebook employee Frances Haugen about perceived issues associated with the algorithms used by Facebook will likely place additional focus on Section 230. Specifically, Ms. Haugen testified that Facebook’s algorithms harm children, stoke division and weaken democracy. Ms. Haugen also testified that “[t]weaks to outdated privacy protections or changes to Section 230 will not be sufficient.” Because, according to Ms. Haugen, “no one can understand Facebook’s destructive choices better than Facebook,” the problems identified by Ms. Haugen can only be solved by “full access to data for research not directed by Facebook.”

The testimony of Ms. Haugen will undoubtedly draw further attention to issues related to Section 230 and online speech.

SUMMARY

Plaintiffs' lawyers and some courts – especially courts in California – will try to avoid Section 230 protection by:

1. Basing claims on the defective design or manufacture of products sold on a company's website, rather than a statement about the product.
2. Claiming the design of an online platform or service contributed to or encouraged the harm to the plaintiff and/or the illegal or tortious nature of the information.
3. Basing claims on information or content provided by the company, rather than a third party, and/or past instances of the company editing content.
4. Claiming the company had a duty to warn users of known dangers.
5. Identifying promises to users by the company that the company failed to uphold.

Contact your representative at The Hartford if you have more questions about Section 230.



Business Insurance
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¹ Fair Housing Council v. Roommates. Com LLC, 521 F.3d 1157 (9th Cir. 2008).

² FTC v. Accusearch, Inc., 570 F.3d 1187 (10th Cir. 2009)

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