

Santa Clara University

Can You Afford to Curate Content Under Congress' Anti-Sex Trafficking Effort?

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Section 230

“the law that gave us the modern Internet”

“the law that makes the Internet go”

The “most important law in tech”

- 1 [Google.com](#)
Enables users to search the world's information, including webpages, images, and videos. Offers...[More](#)
- 2 [Youtube.com](#)
YouTube is a way to get your videos to the people who matter to you. Upload, tag and share your...[More](#)
- 3 [Reddit.com](#)
User-generated news links. Votes promote stories to the front page.
- 4 [Facebook.com](#)
A social utility that connects people, to keep up with friends, upload photos, share links and ...[More](#)
- 5 [Amazon.com](#)
Amazon.com seeks to be Earth's most customer-centric company, where customers can find and disc...[More](#)
- 6 [Wikipedia.org](#)
A free encyclopedia built collaboratively using wiki software. (Creative Commons Attribution-Sh...[More](#)
- 7 [Yahoo.com](#)
A major internet portal and service provider offering search results, customizable content, cha...[More](#)
- 8 [Twitter.com](#)
Social networking and microblogging service utilising instant messaging, SMS or a web interface.
- 9 [Ebay.com](#)
International person to person auction site, with products sorted into categories.
- 10 [Instagram.com](#)

Alexa Top US Websites (June 2018)



Section 230

- **Section 230(c)(1): online services aren't liable for third party content**
 - Immunity doesn't depend on service's "knowledge" [but see FOSTA]
 - Immunity doesn't depend on whether the service is "active" or "passive"
 - Not limited to "neutral public forums"
 - Result: INTERNET COMPANIES CAN STRUCTURE THEIR U.S. CONTENT MODERATION POLICIES HOWEVER THEY WANT [unless FOSTA changes the calculus]
 - Yet services can (and do) adopt and enforce "house rules"
 - Section 230(c)(1) is a globally unique policy solution
 - Content moderation policies increasingly driven by international rules
- **Section 230(c)(2): safe harbor for good faith content removals**

Section 230 Exceptions (Statutory)

- ECPA/state law equivalents (may be ∅)
- Intellectual Property
 - Federal copyright (DMCA): notice-and-takedown (17 USC 512)
 - Federal trademark: notice-and-takedown (?)
 - Federal trade secret (DTSA): Section 230 applies
 - State IPs (9th Circuit): Section 230 applies
 - State IPs (outside 9th Circuit): ???
- Federal criminal prosecutions
 - Ex: online gambling ads, online pharmaceutical ads, Backpage.com
 - Mandatory reporting of child pornography
- FOSTA

Is the claim based on 3rd party content?

YES = what is the claim?

NO = Section 230 doesn't apply

Promote sex trafficking or prostitution = Section 230 may not apply

ECPA or federal criminal prosecution = Section 230 doesn't apply

IP...

Other claims = Section 230 applies

If state IP, where is the case?

If federal IP...

9th Circuit = Section 230 applies

Not in 9th Circuit = Section 230 doesn't apply

Defend Trade Secrets Act = Section 230 applies

Otherwise = Section 230 doesn't apply

Section 230 Exceptions (Common Law)

- Roommates.com:
 - “If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune”
 - Partially develop content by “materially contributing to its alleged unlawfulness”
 - “Roommate is sufficiently involved with the design and operation of the search and email systems—which are engineered to limit access to housing on the basis of the protected characteristics elicited by the registration process”
- “False advertising”
- Promissory estoppel (may be Ø)
- Failure to warn (may be Ø)

Section 230 Exceptions (FOSTA-SESTA)

- **New federal crimes**

- “intent to promote or facilitate” prostitution (or conspires/attempts) + enhancements [2421A]
- “knowingly assisting, supporting, or facilitating” sex trafficking [1591]
- [Plus the SAVE Act of 2015, which criminalized reckless advertising of sex trafficking]
- First Amendment limits?

- **Section 230 exclusions for state crimes**

- Defendant violates federal sex trafficking crime [1591]
- Defendant violates 2421A

- **Section 230 exclusions for civil claims**

- Defendant violates federal sex trafficking crime [1591]
 - [But Section 230 still applies to civil claims for 2421A]
- State AG brings “parens patriae” claim for residents affected by sex trafficking

Problems With FOSTA (Selected)

- FOSTA wasn't needed to target Backpage
- FOSTA probably wasn't needed to compensate sex trafficking victims
- FOSTA doesn't help (and may hurt) future sex trafficking victims
- FOSTA has hurt sex workers
 - One report: 13 sex workers missing, 2 dead, 2 sexually assaulted, 1 suicide
- FOSTA has shrunk the Internet
- FOSTA reinstates moderator's dilemma

The Moderator's Dilemma

- **Moderator's Dilemma: liability for imperfectly removing objectionable content**
 - Section 230 expressly overturned *Stratton Oakmont v. Prodigy* (1995)
- **FOSTA bases liability on “knowledge” of sex trafficking**
 - When does service “know” its content?
- **If removing objectionable content creates “knowledge”...**
 - Strategy #1: do a perfect job of removals & accept liability for missed items
 - Strategy #2: don't try to remove at all & hope to avoid liability
 - Strategy #3: exit industry

More Section 230/Content Moderation Reading

- The Ten Most Important Section 230 Rulings (2017), <https://ssrn.com/abstract=3025943>
- Online User Account Termination and 47 U.S.C. §230(c)(2) (2012), <https://ssrn.com/abstract=1934310>
- The Implications of Excluding State Crimes from 47 U.S.C. § 230's Immunity (2013), <https://ssrn.com/abstract=2287622>
- Sex Trafficking Exceptions to Section 230 (2017), <https://ssrn.com/abstract=3038632>
- Balancing Section 230 and Anti-Sex Trafficking Initiatives (2017), <https://ssrn.com/abstract=3079193>
- Unregulating Online Harassment (2010), <https://ssrn.com/abstract=1558681>
- The Regulation of Reputational Information (2011), <https://ssrn.com/abstract=1754628>
- Search Engine Bias and the Demise of Search Engine Utopianism (2006), <https://ssrn.com/abstract=893892>
- And, of course, <http://blog.ericgoldman.org>