

Issue Brief
**Section 230 of the
Communications
Decency Act: Research
Library Perspectives**

June 2021

By Katherine Klosek

With thanks to Jonathan Band, General Counsel at ARL; Greg Cram, Director of Copyright, Permissions & Information Policy at New York Public Library; and Judy Ruffenberg, Senior Director of Scholarship and Policy at ARL

Introduction	3
Background	3
Section 230 of the Communications Decency Act	5
Libraries and Section 230	7
FOSTA: The Allow States and Victims to Fight Online Sex Trafficking Act	9
Discussion	10
Appendix: Discussion Guide	12
Access to Information	12
Affordability	12
Anti-harassment	12
Diversity	13
Open Internet	13
Political Neutrality/Freedom of Expression	14
Privacy	14

Introduction

The 117th US Congress is holding hearings and debating bills on changes to Section 230 of the Communications Decency Act (CDA), a 1996 law that protects internet service providers and internet users from liability for content shared by third parties.

When it was enacted, Section 230 offered liability protections for then-nascent services that are integral to the development of the internet we have today. But Section 230 has come under fire from Democrats who believe internet service providers are not engaging in responsible content moderation, and from Republicans who believe that large social media companies censor conservative voices. This myopic debate ignores the longstanding role that research libraries have played as internet service providers, and the vast experience research libraries have in moderating and publishing content. More information on this topic can be found in the “Discussion” section of this brief.

There is no political consensus on the best way to reform Section 230, or even on what problem needs to be solved with 230 reform. Nevertheless, officials from former president Trump to [President Biden](#)¹ have voiced support for a complete repeal of Section 230; members of Congress have introduced more than 20 bills to reform or repeal Section 230; and [civil rights](#)² and [civil society](#)³ groups have introduced their agendas to address speech and technology, giving us an indication of what changes to 230 might look like. Recently, coalitions of [small e-commerce companies](#)⁴ and [progressive tech companies](#)⁵ have formed to influence regulatory reform for tech platforms.

Background

In 1995 the internet company Prodigy was hit with a \$200 million defamation lawsuit because a user posted untrue remarks about

brokerage house Stratton Oakmont on a Prodigy bulletin board. (Stratton Oakmont was founded by the “Wolf of Wall Street” Jordan Belfort.) The judge held that Prodigy’s decision to adopt content guidelines, restrict nudity, and screen and block obscene content made Prodigy subject to stricter liability than if it had passively hosted all content posted by users. The Prodigy decision was in contrast to another case in which a judge determined that CompuServe was not the publisher or editor of material and therefore would not be liable for defamation. Representatives Christopher Cox (R-CA) and Ron Wyden (D-OR) thought this was “[backward](#),” and that internet companies should be able to screen offensive material without the risk of expensive lawsuits.⁶ What became Section 230 is rooted in a desire to protect platforms from liability for third-party content, and to encourage responsible content moderation by platforms, which includes allowing the removal of hate speech, harassment, and other harmful content.

The [Congressional Record](#) from 1995 is useful in grounding any modern conversation about Section 230 reform; its findings and policy statements reveal themes of deregulation and fostering and protecting online speech. One congressional finding speaks to the objective of encouraging an open internet: “The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁷ Indeed, Representative Cox noted, “The Internet is a fascinating place and many of us have recently become acquainted with all that it holds for us in terms of education and political discourse. We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet.”⁸ The record states that it is the policy of the United States to “promote the continued development of the Internet and other interactive computer services and other interactive media.”⁹

Another finding is, “The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹⁰ As Cox elaborates, “it will establish as the policy of the United States that we do not wish to

have content regulation by the Federal Government of what is on the Internet, that we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet because frankly the Internet has grown up to be what it is without that kind of help from the Government.”¹¹ The record notes that it is the policy of the United States to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by State or Federal regulation.”¹²

Section 230 of the Communications Decency Act

Section 230 of the Communications Decency Act (CDA) is a legal shield that protects internet service providers and users from liability for publishing or restricting access to content posted by another party. The law applies to third-party speech like user posts on Facebook, comment sections of news sites, content posted by users of university networks and library interactive computer services, and any site that relies on user-generated content (such as Wikipedia and Yelp). The first clause holds that it is the speakers, not the platforms, who are liable for content they post. The second clause incentivizes content moderation by guaranteeing the liability protection. Together, they have allowed the internet to flourish.

Section 230(c)(1) holds that when service providers publish third-party content, they are not considered the publisher or speaker of that content (speakers of illegal content may still be held liable):

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

The statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or

educational institutions,” a definition that courts have interpreted to include platforms like Facebook, Craigslist, and Twitter. Libraries are expressly included in the statutory definition of interactive computer service. An “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”

Section 230(c)(2) states that service providers and users may not be held liable for good-faith efforts to restrict access to certain content (this good-faith requirement is not present in Section 230(c)(1)). This is the clause that provides safe harbor for a provider’s decision to filter and remove offensive content; Senator Wyden refers to this as the “sword” to the previous section’s “shield.” Without this protection, small and medium sized companies without the resources to fight lawsuits would not be able to enter the market or compete with tech giants.

No provider or user of an interactive computer service shall be held liable on account of—

- A. any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
- B. any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

Section 230(e) lists instances in which the liability protections will not apply, including violations of federal criminal law, including sexual exploitation of children; federal intellectual property law; communications privacy law; and sex trafficking law.

The courts have interpreted Section 230 broadly to shield an interactive computer service from liability for third-party speech on its system, even if the service had actual or constructive knowledge that the speech was unlawful. Cox and Wyden have asserted that this interpretation is what they intended. On the other hand, some (including Justice Clarence Thomas in a recent dissenting opinion) believe that Congress only intended to protect internet services from strict liability (that is, liability regardless of knowledge), but not from liability if they knew or should have known about the unlawful third-party speech.

The broad interpretation of Section 230 has allowed internet services that enable third-party speech to flourish. The services are not forced to monitor or filter this speech because they do not fear legal liability for this speech. At the same time, the services are encouraged to develop moderation policies because they do not fear legal liability by virtue of engaging in that moderation. Internet service providers believe that this approach has enabled them to moderate their services in a manner appropriate to their budgets and the communities they serve.

Libraries and Section 230

The current conversation around Section 230 centers around big tech, but libraries and universities would almost certainly be affected by any changes to the law. As mentioned above, libraries are included in the statutory definition of “interactive computer service” in Section 230 (f) (2):

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by **libraries or educational institutions**. [emphasis added]

Any changes to the liability protections of 230 may endanger the ability of libraries to fulfill their public service missions. Research

libraries and universities operate networks that function like internet service providers. At Duke University, for instance, 40,000 students, staff, and faculty have [network credentials](#).¹³ Network access allows students to stream lectures, submit homework, take exams, and access digitized readings. Research and public libraries also provide access to the internet through the computers and broadband connections in their buildings. All libraries serve core functions including organizing, contextualizing, and curating information. Libraries develop innovative online services, and solicit user-provided content, like the National Archives and Records Administration’s [Citizen Archivist](#) program¹⁴ and the Library of Congress’s [By the People](#) platform.¹⁵

Beyond concerns with statutory language, the debate around 230 touches on issues that libraries and higher education care about: intellectual freedom, free speech, equitable access to information, and privacy. The current public policy debate centers large social media platforms as purveyors of misinformation, and Section 230 as the law that allows users to share and spread unlawful content with impunity.

However, it is the First Amendment that [protects speech](#),¹⁶ including speech that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” as mentioned in Section 230(c)(2)(A).

In 1995 Representative Zoe Lofgren endorsed what became Section 230 for its potential to “preserve the first amendment and open systems on the Net.”¹⁷ There are at least two issues that are relevant to any discussion of the relationship between Section 230 and the First Amendment: the first is that private providers cannot violate constitutionally protected free speech because they are not state actors. Courts have [rejected](#)¹⁸ claims that social media sites should be treated as state actors and therefore subject to the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.

A second issue is that government-mandated content-moderation requirements may implicate providers' First Amendment rights. According to Eric Goldman, platforms' content-moderation decisions are protected by the First Amendment because of the constitutional [protections](#) of “freedom of speech [and] of the press;” social media companies engage in speech and press activities by republishing third-party content.¹⁹

FOSTA: The Allow States and Victims to Fight Online Sex Trafficking Act

For 22 years, Section 230 remained unchanged. Although legislators from time to time argued that it gave internet services a “free pass,” members of Congress generally supported the rapid expansion of internet services. This changed in 2018, with the enactment [FOSTA](#), which addressed sex trafficking.²⁰ Opponents of FOSTA argued that many of the offenses covered by FOSTA were already outside the Section 230 safe harbor. Moreover, FOSTA's broad language could place websites used by consensual sex workers in jeopardy. Nonetheless, Congress enacted FOSTA, creating an exception to the liability protections of Section 230 for third-party content that promotes “sexual exploitation of children or sex trafficking.”

According to FOSTA opponents, the amendment had the negative effects they anticipated. Websites that consensual sex workers used to arrange dates, and sites that helped victims of sex trafficking, closed out of fear of liability. Forced off of the internet, some sex workers returned to streetwalking in search of clients, resulting in an increase of violence against sex workers. Although FOSTA failed to meet its objective of decreasing sex trafficking, and indeed worsened conditions for sex workers, it shattered Section 230's image of being an untouchable safe harbor for internet services. Since FOSTA's passage, a slew of bills have been introduced to amend Section 230.

Discussion

During the Association of Research Libraries (ARL) 2021 Spring Association Meeting, members of the research library community discussed ways that research libraries rely on Section 230. The purpose of the conversation was to guide our advocacy strategy around Section 230, and around other policies that implicate our community's values. We framed the discussion around values that are fundamental to research libraries and higher education—the values and discussion questions are below, following a brief summary of themes that surfaced in the discussion.

One emergent theme of the discussion was that moderating content and providing platforms for third-party speech has been a core role of research libraries for centuries. Participants noted that research libraries “have what we need as a community,” and that we do not need federal laws to further constrain institutions to manage speech and to curtail harassment or hate speech. Libraries shared examples of appropriate use policies and codes of conduct to guide internet and social media use. For instance, [UC San Diego's social media guidelines](#) encourage debate while noting that personal attacks and abusive language may result in users being “blocked or banned from the site.”²¹ These institutional guidelines explicitly address hate speech, and content that may be defamatory or infringe copyright: “We don't tolerate racism, sexism, homophobia or other forms of hate-speech. Comments that could be interpreted as such may be removed. We may delete any content that may put us in legal jeopardy, such as potentially libelous or defamatory postings, or material posted in potential breach of copyright.” Further, UC San Diego Library's [Library Computer & Internet Use Policy](#) reads, “The Library has an obligation to maintain a welcoming, comfortable, safe, and harassment-free environment for library patrons and for university employees. Usage of library computers must support such an environment”; and “In keeping with the spirit of UC San Diego's [Principles of Community](#), we expect library users to be guided by courtesy, sensitivity, and respect for others when accessing and viewing Internet material and using the library

computers in general.”²²

Another clear theme of the ARL Spring Meeting discussion is that libraries are not “politically neutral,” and that we “can’t live with a law on political neutrality.” Defining neutrality is especially challenging in the current climate of misinformation and “alternate facts.” Fortunately, libraries and librarians are often seen as trustworthy by all sides. One foundational role that libraries play is helping people navigate sources of information, evaluate information for integrity, and provide a platform for exploring the truth. Rather than attempting to be neutral, libraries provide platforms for people to explore truth from a range of legitimate perspectives, and host conversations with scholars and others who are interested and curious about engaging with materials and new knowledge. This is reflected in UC San Diego’s [Principles of Community](#), which encourage students, faculty, and staff to foster understanding of individuals and groups of different race, ethnicity, sex, gender identity, age, disability, sexual orientation, religion, and political beliefs; to reject discrimination based on these differences; to pursue freedom of expression of individuality and diversity within the bounds of courtesy, sensitivity, confidentiality, and respect; and to learn and work together in an atmosphere free of abusive or demeaning treatment.²³

Appendix: Discussion Guide

Access to Information

Some Section 230 critics focus on the amplification caused by algorithms. The [Protecting Americans from Dangerous Algorithms Act](#), for example, would remove Section 230 liability protections from social media platforms when their algorithms promote certain content like international terrorism.²⁴ Rep. Tom Malinowski (D-NJ), who introduced the bill, wishes to remove liability protection for platforms that facilitate real-world harm. However, algorithms make platforms more useful by providing users with content they may want, and it may be impossible to design an algorithm that amplifies only “good” content and not “bad” content.

- Libraries may contract with vendors that use algorithms to suggest relevant content for researchers. Are there other, more direct ways that libraries rely on algorithms?
- How could reduced liability for algorithmic amplification of certain content affect research libraries?

Affordability

Some Section 230 critics target platforms with advertising-based business models. Platforms display online advertisements according to data that is generated by user activity—every click and interaction is a data point that builds a user profile. These advertisements keep services free for users. Proposals that would reform Section 230 by reducing liability protection for platforms that accept payment, like the SAFE TECH Act (S. 299), would likely [affect](#) web hosting and other free, ad-supported services.²⁵

- How might your library’s digital services be affected by increased liability for free content?

Anti-harassment

Of the [41 percent](#) of Americans who have experienced some form of online harassment, half say they have been harrassed because of their

political views.²⁶ Some Section 230 critics seek to force platforms to do more to combat online harassment, likely through more aggressive monitoring and filtering. But such actions would almost certainly capture lawful (albeit offensive) speech protected by the First Amendment. Moreover, there would be many false positives as non-harassing speech was removed along with the harassing speech. The free exchange of ideas on the internet may be less robust under such a policy. Libraries support freedom of speech while condemning hate speech, and any speech used to threaten and intimidate marginalized communities.

- How does your library protect against online harassment?
- How do you balance this with freedom of expression? Who makes these decisions?

Diversity

Some have suggested eliminating the Section 230 safe harbors if the platform had actual or constructive knowledge of unlawful third-party speech. Without the certainty that lawsuits alleging platform responsibility for user content would be quickly dismissed, internet service providers may default to a censorship regime that would be harmful to groups who have been historically marginalized, like the Black Lives Matter and #metoo movements.

- How do your library's institutional policies advance diversity?
- What are some examples of how your institution has worked to counter the historical lack of access to resources and information for underrepresented individuals and populations?

Open Internet

Complete repeal of Section 230 is politically unlikely, but would be catastrophic for the internet as we know it, the economy, and the spread of creativity and knowledge.

- How could uncertainty about your library's liability protections for user-generated content affect your

ability to provide online services, such as access to the internet and hosting digital repositories?

Political Neutrality/Freedom of Expression

Some lawmakers have proposed that eligibility for Section 230 safe harbors should turn on political neutrality; these proposals are usually a response to [false concerns](#) about conservative bias.²⁷ As written, Section 230 does not require platforms to be politically neutral in order to receive liability protections. A neutrality requirement would mean that a platform could not exclude posts relating to the American Nazi Party or climate-change denial, for example.

- How would a requirement for political neutrality online align with your institution’s free speech policies?
- Are there digital services your library would not be able to provide if you were required to be politically neutral?

Privacy

Increasing transparency and accountability around content-moderation practices is a good goal, but legal mandates to change and disclose content-moderation practices may [implicate the First Amendment](#).²⁸ In his recent [testimony](#) before the House Energy and Commerce Committee, Facebook CEO Mark Zuckerberg called for Congress to “consider making platforms’ intermediary liability protection for certain types of unlawful content conditional on companies’ ability to meet best practices to combat the spread of this content.”²⁹ Best practices that would identify speakers who engage in harmful content would threaten privacy. Proposals that require platforms to meet certain standards in order to receive liability protections may be coupled with broader proposals to address data privacy.

- Could making liability contingent on best practices affect academic freedom?
- How would transparency requirements affect your library?

Endnotes

- 1 Makena Kelly, “Joe Biden Doesn’t Like Trump’s Twitter Order, but Still Wants to Revoke Section 230,” *The Verge*, May 29, 2020, <https://www.theverge.com/2020/5/29/21274812/joe-biden-donald-trump-twitter-facebook-section-230-moderation-revoke>.
- 2 *Civil Rights, Privacy, and Technology: Recommended 2021 Oversight Priorities for the 117th Congress*, Civil Rights, Privacy and Technology Table, <https://www.civilrightstable.org/wp-content/uploads/2021/01/Civil-Rights-Privacy-and-Technology-Recommended-2021-Oversight-Priorities.pdf>.
- 3 Letter from 75 organizations to incoming Biden-Harris administration and 117th Congress, January 27, 2021, <https://drive.google.com/file/d/1pBhomRaShQQsKekEmL7Nc7NZrZy70hmq/view>.
- 4 The Coalition to Protect America’s Small Sellers, <http://www.protectsmall sellers.org/>.
- 5 Chamber of Progress, <https://progresschamber.org/>.
- 6 141 Cong. Rec. H8470 (daily ed. August 4, 1995), <https://www.congress.gov/crec/1995/08/04/CREC-1995-08-04-pt1-PgH8460.pdf#page=11>.
- 7 141 Cong. Rec. H8468 (daily ed. August 4, 1995), <https://www.congress.gov/crec/1995/08/04/CREC-1995-08-04-pt1-PgH8460.pdf#page=9>.
- 8 141 Cong. Rec. H8469 (daily ed. August 4, 1995), <https://www.congress.gov/crec/1995/08/04/CREC-1995-08-04-pt1-PgH8460.pdf#page=10>.
- 9 141 Cong. Rec. H8469.
- 10 141 Cong. Rec. H8468.
- 11 141 Cong. Rec. H8470
- 12 141 Cong. Rec. H8469.

- 13 *Hearing before the United States Senate Committee on the Judiciary Subcommittee on Intellectual Property*, 116th Cong. 5 (June 2, 2020) (testimony of David Hansen, Associate University Librarian for Research, Collections & Scholarly Communications and Lead Copyright & Information Policy Officer, Duke University), <https://www.judiciary.senate.gov/imo/media/doc/Hansen%20Testimony.pdf>.
- 14 “Citizen Archivist Dashboard,” US National Archives and Records Administration, accessed June 22, 2021, <https://www.archives.gov/citizen-archivist>.
- 15 “By the People,” US Library of Congress, accessed June 22, 2021, <https://crowd.loc.gov/>.
- 16 Daisuke Wakabayashi, “Legal Shield for Websites Rattles under Onslaught of Hate Speech,” *New York Times*, August 6, 2019, <https://www.nytimes.com/2019/08/06/technology/section-230-hate-speech.html>.
- 17 141 Cong. Rec. H8471 (daily ed. August 4, 1995), <https://www.congress.gov/crc/1995/08/04/CREC-1995-08-04-pt1-PgH8460.pdf#page=12>.
- 18 Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, Congressional Research Service, March 27, 2019, <https://fas.org/sgp/crs/misc/R45650.pdf>.
- 19 Eric Goldman, “Of Course the First Amendment Protects Google and Facebook (and It’s Not a Close Question),” Santa Clara Law Digital Commons, 2018, 1, <https://digitalcommons.law.scu.edu/facpubs/951/>.
- 20 Allow States and Victims to Fight Online Sex Trafficking Act of 2017, H.R. 1865, 115th Cong. (2017–2018), <https://www.congress.gov/bill/115th-congress/house-bill/1865/text?r=1>.
- 21 “UC San Diego Social Media Guidelines,” UC San Diego University Communications and Public Affairs, updated August 2017, <https://univcomms.ucsd.edu/images/uploads/social-media-guidelines.pdf>.
- 22 “Library Computer & Internet Use Policy,” UC San Diego Library, revised October 16, 2015, <https://library.ucsd.edu/about/policies/library-computer-use-policy.html>.
- 23 “UC San Diego Principles of Community,” UC San Diego, accessed June 4, 2021, <https://ucsd.edu/about/principles.html>.

- 24 Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021), https://malinowski.house.gov/sites/malinowski.house.gov/files/Malinowski_Eshoo_Algorithms.pdf.
- 25 Kate Cox, “Proposed Sec. 230 Rewrite Could Have Wide-Ranging Consequences,” *Ars Technica*, February 8, 2021, <https://arstechnica.com/tech-policy/2021/02/proposed-sec-230-rewrite-could-have-wide-ranging-consequences/>.
- 26 Emily A. Vogels, “The State of Online Harassment,” Pew Research Center, January 13, 2021, <https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment/>.
- 27 Paul M. Barrett and J. Grant Sims, *False Accusation: The Unfounded Claim That Social Media Companies Censor Conservatives* (New York: NYU Stern Center for Business and Human Rights, February 2021), https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/60187b5f45762e708708c8e9/1612217185240/NYU+False+Accusation_2.pdf.
- 28 Valerie C. Brannon, “Liability for Content Hosts: An Overview of the Communication Decency Act’s Section 230,” Congressional Research Service, June 6, 2019, <https://fas.org/sgp/crs/misc/LSB10306.pdf>.
- 29 *Hearing before the United States House of Representatives Committee on Energy and Commerce Subcommittees on Consumer Protection & Commerce and Communications & Technology*, 117th Cong. 7 (March 25, 2021) (testimony of Mark Zuckerberg, CEO of Facebook), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Witness%20Testimony_Zuckerberg_CAT_CPC_2021.03.25.pdf.

Association of Research Libraries

21 Dupont Circle, NW
Suite 800
Washington, DC 20036
T 202.296.2296
F 202.872.0884

ARL.org
pubs@arl.org

This work is licensed under a [Creative Commons Attribution 4.0 International License](https://creativecommons.org/licenses/by/4.0/).

