# Wrongful moderation: regulation of internet intermediary service provider liability and freedom of expression

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# Part 2: Regimes of internet intermediary liability: the European and the US approach

# 3 The US Approach

**Introduction**

As discussed in Chapter 1, providers are defined by the service they offer. Providers provide access to information by hosting, transmitting, and indexing this information.[591] Without these providers, spreading and accessing information would become more challenging. These providers allow users to encounter new information.[592] Because providers enabled users to share whatever they like to whomever they like – without any gatekeeping – they were seen as a democratising force.[593]

As discussed in Chapter 1, these providers were even granted an exception for liability from user-provided information. In the US, this exception was a response to the *Stratton Oakmont* ruling,[594] which exposed providers to publisher liability whenever they conducted any editorial control over the content of user-provided information.[595] The hearth of the US liability regime forms Section 230 codified in the Communications Decency Act of 1996, which offers immunity for liability from the content of user-provided information while also providing a safe harbour for liability from moderation decisions regarding this information.[596]

This chapter thus discusses the liability regime established by Section 230. The central question in this chapter is how the liability regime provided by Section 230 in the US protects providers from liability for (moderating) the content of user-provided information.

The first part of this chapter sees the liability regime offered by Section 230. What providers can rely on Section 230? Furthermore, for what categories of content or conduct can Section 230 shield these providers? Moreover, what does Section 230 encourages when it comes to the moderation of user-provided information with illegal content? The answer to these questions contributes to understanding how the US liability regime may incentivise over- or underregulation of user-provided information, which will be discussed in Chapter 5. However, it must be clarified what can be attributed to Section 230 and what must be attributed to other legislation. In the Section 230 debate in the US, legal scholars weigh whether providers rely on Section 230 or (ultimately) on the First Amendment to the United States Constitution, which prohibits a wide range of governmental interference in exercising freedom of expression rights.[597] Therefore, the relationship between Section 230 and the First Amendment is discussed.

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591 Perset, 2010, 'The Economic and Social Role of Internet Intermediaries', p. 9.

592 Van Eecke, 'Online service providers and liability: A plea for a balanced approach', *Common Market Law Review*, 2011, p. 1455.

593 E. Morozov, *The Net Delusion: How Not to Liberate The World*, London, Penguin Books, 2012, p. 4; Gillespie, 2018, *Custodians of the Internet*, p. 25.

594 *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

595 Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 64; G. Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, Vol. 28, No. 2, 2020, pp. 283-284; Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, pp. 404-406; Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', *Harvard Law Review*, 2018, p. 1605; Par. 4.09 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 100-101.

596 47 USCA § 230(c)(1) and (2) (West 2018, Westlaw Next through PL 116-91).

597 For example, Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review*, 2019, pp. 40-42.

As noted in Chapter 1, these providers are increasingly held (morally) responsible for the harmful content of user-provided information they allow to be spread.[598] Besides, there are allegations of political bias.[599] As discussed in this chapter, these concerns relate to numerous proposals to amend Section 230 to hold providers responsible for not interfering in illegal or unlawful content of user-provided information or alleged interference in the political debate by favouring some political speech over others.

### 3.1 Section 230

Goldman refers to Section 230 codified in the CDA in 1996[600] as an "exceptionalist statute" that "treats the internet differently than other media."[601] As discussed here, it is not hard to see why "exceptionalist" is an accurate terminology. Both how providers are handled and the (broad) immunities offered to them are exceptional. Section 230 even shields providers from civil liability for the content of user-provided information originating from others when the provider is aware of the illegal (nature of the) content and even when the provider is notified that the content in question may lead to (serious) harm.[602]

Section 230 has two features in terms of provided immunity that will be discussed here. At first, Section 230(c)(1) states that

> [n]o 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[603]

Section 230(c)(1) functions as a "legal shield" for providers for (potential) liability from the content of user-provided information by offering comprehensive protection.[604]

The second feature of Section 230 discussed here is that Section 230(c)(2) offers some protection to providers for liability arising from moderation. Section 230(c)(2) reads that providers are not to be held liable for:

> (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

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598 For example, Anti-Defamation League, 'Stop Hate for Profit', *Anti-Defamation League,* 16 June 2021, available at stophateforprofit.org (retrieved on 14 February 2022).

599 For example, US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996'.

600 47 USCA § 230 (West 2018, Westlaw Next through PL 116-91).

601 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 162.

602 Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 5.

603 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

604 See, for example, D. Wakabayashi, 'Legal Shield for Social Media Is Targeted by Lawmakers', *The New York Times,* 15 December 2020, available at nytimes.com/2020/05/28/business/section-230-internet-speech.html (retrieved on 2 February 2022); L. Nylen, B.W. Swan & C. Lima, 'DOJ proposes crackdown on tech industry's legal shield', *Politico,* 17 June 2020, available at politico.com/news/2020/06/17/doj-crackdown-tech-industry-legal-shield-325594 (retrieved on 15 February 2022).

> (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) [subparagraph (A), MK].[605]

Section 230(c)(2)(A) thus sets out the categories of the content of user-provided information that the provider can restrict in "good faith". While these categories are broadly defined ("or otherwise objectionable"), providers have to demonstrate that restrictions are taken in "good faith", which conditional nature, as shown in the following paragraphs, makes Section 23(c)(2)(A) less attractive than (c)(1). Section 230(c)(2)(B) sees to offering services to filter the categories of content that are defined in Section 230(c)(2)(A).[606]

Section 230(c) is captioned "Protection for 'Good Samaritan' blocking and screening of offensive material",[607] which forms one of the points for discussion about what Section 230 aims to protect. Is Section 230 only meant to shield providers that act responsibly regarding the content of the information shared by their users?[608] Does Section 230 require (political) neutrality with respect to content moderation?[609] Or is Section 230(c) meant to provide immunity regardless of whether or how the provider moderates?[610] As discussed in Paragraph 3.1.2, the US courts adopted the latter perspective, which sparked political and academic debates over the desirability of such extensive Section 230 protections.

In US debates on Section 230, there is much confusion in which fact and fiction are difficult to separate.[611] As Goldman observes, the approach by Section 230 "is simple and elegant, but is hardly intuitive, and it has had extraordinary consequences for the internet and our society."[612] The outcome of Section 230, in particular, is incomprehensible to many users and contrary to their intuition. Section 230, in an international context, is also exceptional. Especially in comparison with the approach provided by the EU and ECHR,[613] which are discussed in Chapter 4, Section 230 stands out as exceptional in both its protections and broad applicability.

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605 Paragraph (1) should read subparagraph (A), see 47 USCA § 230(c)(2) (West 2018, Westlaw Next through PL 116-91).

606 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 160.

607 47 USCA § 230(c) (West 2018, Westlaw Next through PL 116-91). This caption may play a role in the interpretation of (c)(1) and (c)(2). This is for example the case when the interpretation of (c)(1) and (c)(2) produce conflicting results, see *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-670 (7th Cir. 2008); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163-1164 (9th Cir. 2008).

608 Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, pp. 407-408.

609 Harmon, 2018, 'No, Section 230 Does Not Require Platforms to Be "Neutral"'.

610 Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 2; Gillespie, 2018, *Custodians of the Internet*, pp. 30-31.

611 See, for an overview, M. Masnick, 'Hello! You've Been Referred Here Because You're Wrong About Section 230 Of The Communications Decency Act', *techdirt,* 23 June 2020, available at techdirt.com/2020/06/23/hello-youve-been-referred-here-because-youre-wrong-about-section-230-communications-decency-act (retrieved on 11 July 2022).

612 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 155.

613 As observed by, for example, Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, pp. 152-153 and 159; F. Stjernfelt & A.M. Lauritzen, *Your Post has been Removed: Tech Giants and Freedom of Speech*, Cham, Springer, 2019, doi:10.1007/978-3-030-25968-6, p. 169; Jones, 'Silencing Bad Bots: Global, Legal and Political Questions for Mean Machine Communication', *Communication Law and Policy*, 2018, p. 180.

### 3.1.1 What providers are protected under Section 230?

As noted, Section 230 was a direct reaction to the possibility that courts could hold providers liable for the content of user-provided information as if the provider was a publisher or a speaker of this content itself.[614] In *Stratton Oakmont, Inc. v. Prodigy Services Co.* (1995),[615] the New York Supreme Court[616] argued that Prodigy, an online messaging board (comparable to an internet forum), should be considered the publisher of the defamatory comments posted by users. The judge argued that Prodigy presented itself as an administrator exercising editorial control. Besides, Prodigy removed and filtered some information based on its content. Since Prodigy exercised some editorial control over the content of some information, Prodigy was made responsible for all the content of user-provided information on its service.[617] The New York Supreme Court argued:

> That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards.[618]

The New York Supreme Court also discussed the distinction between publishers and distributors. The judge concluded that Prodigy must be regarded as a "publisher rather than a distributor."[619] As Wilman notes, a publisher is exposed to the same legal liability as the author of the information because it can exercise editorial control over its content.[620] By concluding that Prodigy is a *publisher* for the content of information posted by its users, the door was opened to civil liability for all user-provided information. Under the Prodigy ruling, providers could be held liable as a publisher for user-provided information. Service providers that refrain from moderation could escape the stricter publisher liability and could only be held liable as a distributor. Distributor liability for the content of user-provided information, as the United States District Court for the Southern District of New York ruled in *Cubby v. CompuServe* (1991), can only be established when the plaintiff demonstrates that the provider knows or should know of this content on its service.[621] The difference with *Prodigy* was that in *Cubby*, CompuServe did not exercise editorial control over what was uploaded to its services by others. As the District Court argued:

> CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every

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[614] Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 64; Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, pp. 283-284; Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, pp. 404-406; Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', *Harvard Law Review*, 2018, p. 1605; Par. 4.08-4.09 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 100-101.

[615] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

[616] Unlike the name might suggest, The New York Supreme Court is a trial court and not the highest appellate court in the State of New York.

[617] Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, p. 282.

[618] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

[619] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

[620] Par. 4.03 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 98.

[621] *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 139-141 (S.D. New York 1991).

> publication it carries for potentially defamatory statements than it would be for any other distributor to do so.[622]

Publisher liability thus exposes the provider to liability for all the content on its service (independent of knowledge) because the provider exercises editorial control. In contrast, distributor liability is contingent on some scienter of the provider of the existence of illegal or unlawful content.

Of course, the ruling not merely affected Prodigy but a far more extensive range of providers. According to Kosseff, any involvement with user content introduced the risk to the provider of becoming liable for user-provided information as a publisher under the *Stratton Oakmont* ruling.[623] As Klonick argues, *Stratton Oakmont* and *Cubby* "seemed to expose intermediaries to a wide and unpredictable range of tort liability if they exercised any editorial discretion over content posted on their sites."[624] All providers that moderate user-provided information could be exposed to publisher liability. The *Stratton Oakmont* ruling thus meant that providers that engage in editorial control are exposed to liability for the content of all user-provided information. In and outside the US, legal scholars are critical about what an internet under the *Stratton Oakmont* standard would mean. Holding providers liable as a publisher would cause providers to refrain from (voluntary) moderation, may cause providers to withdraw their services, and – ultimately – less freedom of expression.[625] Service providers that did engage in moderation could be held liable as a publisher because they exercised some editorial control over the content of user-provided information.

As discussed under Paragraph 3.1.3, the drafters of Section 230 wished to enable providers to self-regulate by moderating the content of user-provided information on their services.[626] Their proposal for Section 230 thus directly aimed to overturn the *Stratton Oakmont* ruling.[627] Without exempting providers from liability arising from moderation, the barrier for providers to engage in self-regulation is too high.[628] Section 230(c)(1) took down this barrier by shielding providers from liability as a speaker or publisher of the content of user-provided information.[629] Section 230 applies to every "interactive computer service"[630] dealing with third-party information.[631] Note that

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[622] *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 140 (S.D. New York 1991).

[623] Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 56.

[624] Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', *Harvard Law Review*, 2018, p. 1605.

[625] Klonick, 'The New Governors: The People, Rules, and Processes Governing Online Speech', *Harvard Law Review*, 2018, p. 1605; Par. 4.10 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 101.

[626] Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, p. 405.

[627] Par. 4.10 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 101.

[628] Perry & Zarsky, 'Who Should Be Liable for Online Anonymous Defamation?', *University of Chicago Law Review Dialogue*, 2015.

[629] 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

[630] Section 230 defines "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.", see 47 USCA § 230(f)(2) (West 2018, Westlaw Next through PL 116-91).

[631] Gillespie, 2018, *Custodians of the Internet*, p. 33.

both the provider and the user are exempted from liability for the content of third-party information.[632] According to Goldman, the courts extended this exemption from immunity to diverse content categories with only a few exceptions codified in Section 230.[633] I discuss these exceptions in Paragraph 3.1.3. However, the general rule is that providers in the US under Section 230(c)(1) cannot be held legally liable – as publisher or speaker – for the content of user-provided information.[634]

Section 230 aimed to protect active providers who exercise editorial discretion while not forcing passive providers to engage in moderation. Therefore, Section 230 provides protections to a broad range of providers. Section 230 does not only apply to providers that offer a service without any knowledge or involvement with the content of user-provided information. In one of the first Section 230 cases in which plaintiffs sought to hold AOL (a service provider) liable for the defamatory content of user-provided information on its service, the United States District Court of the District of Columbia argued that

> it would seem only fair to hold AOL to the liability standards applied to a publisher or, at least, like a book store owner or library, to the liability standards applied to a distributor. But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.[635]

While it may be counterintuitive for plaintiffs, Section 230 not merely shields passive providers but also providers that are active in varying degrees. As the wording of Section 230 suggests, its immunities do not apply to providers that are active in such a manner that they contribute to the development of the content of the provided information themselves. Such conduct would cause providers to forfeit Section 230 protections since this would cause the provider to become a content provider itself.[636] As discussed in the following paragraphs, the line between these is sometimes difficult to draw. After all, assuming too quickly that providers are responsible as a developer for the content of user-provided information would render Section 230 protections useless.

### 3.1.2 For what does Section 230 protect providers?

As noted in the previous paragraph, Section 230 offers a broad and (almost) unconditional immunity for providers for liability arising from the content of user-provided information. However, Section 230, regarding the question of what is protected, is hardly as clear and elegant as some legal scholars wish it to be.[637] Courts especially offer little clarity between the two components of Section 230. Section 230(c)(1), as Wilman puts it, protects providers from under-filtering (a hands-off approach), while Section 230(c)(2) protects providers from over-filtering (a hands-on approach).[638] I first discuss Section 230(c)(1) and then turn to Section 230(c)(2). The focus, to recall, lies on liability for user-provided information or interventions on its content.

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[632] *Barrett v. Rosenthal*, 146 P.3d 510, 526-529 (Cal. S.C. 2006); Par. 4.18 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 104-105.

[633] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 158.

[634] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 159.

[635] *Blumenthal v. Drudge*, 992 F.Supp. 44, 51-52 (D.D.C. 1998).

[636] 47 USCA § 230(f)(3) (West 2018, Westlaw Next through PL 116-91).

[637] For example, Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 155.

[638] Par. 4.16-4.17 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 104.

*Section 230(c)(1)*

As noted, Section 230(c)(1) reads:

> (c) Protection for "Good Samaritan" blocking and screening of offensive material
>
> (1) Treatment of publisher or speaker
>
> 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.[639]

According to Goldman, three distinct criteria must be fulfilled before providers[640] can rely on the immunities provided by Section 230(c)(1). First, the provider must qualify as a user or operator of an interactive computer service.[641] As Goldman notes, "in practice […] everyone online should satisfy this first element."[642] As set out in the previous paragraph, Section 230 shields users and providers from liability for third-party content that they did not develop themselves. The second criterion is that the plaintiff seeks to hold the provider responsible as a "publisher or speaker". As Goldman notes, this requirement is interpreted broadly by the courts. The courts include all causes of action that rely on holding the provider responsible for the content of user-provided information. When the user seeks to hold the provider responsible for user-provided information while using terminology such as "editor", "publisher", "distributor", or "speaker", the chances are very high that the judge will side with the provider and dismiss the claim.[643] Of course, as long as the content of the information originates from someone other than the service provider. The third criterion is this: the provider cannot rely on Section 230 when it qualifies as the information content provider. Service providers cannot rely on Section 230 when they are "responsible, in whole or in part, for the creation or development of information provided"[644] since that would render the service provider an information content provider itself. Section 230 protections only apply to a "provider or user of an interactive computer service" for liability as a publisher or speaker for "information provided by another information content provider". Providers that develop the content of the information itself thus cannot rely on the immunity provided by Section 230(c)(1). As a rule of thumb, Goldman distinguishes between information containing content authored by employees of the provider and the content of user-provided information. Section 230(c)(1) does not apply to the first, while Section 230(c)(1) shields from liability for the latter.[645]

Section 230(c)(1) renders knowledge of information with illegal or unlawful content meaningless.[646] The immunities provided by Section 230 also extend to providers aware of user-provided information's illegal or unlawful content – even when they are notified of its existence.[647] In *Zeran v. America Online, Inc.* (1997), the Third Circuit argued that a notice-based liability system

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639 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

640 Or users, but the focus in this dissertation lies on the service providers.

641 47 USCA § 230(f)(2) (West 2018, Westlaw Next through PL 116-91).

642 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 158.

643 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103-1104 (9th Cir. 2009); *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); *Zeran v. America Online, Inc.*, 129 F.3d 327, 331-334 (3rd Cir. 1997); Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 93.

644 47 USCA § 230(f)(3) (West 2018, Westlaw Next through PL 116-91).

645 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', pp. 158-159.

646 Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review*, 2019, p. 38.

647 Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, pp. 93-95.

requiring providers to review notices would "defeat the dual purposes advanced by § 230 of the CDA".[648] The court argued that "liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation".[649] The Third Circuit also mentioned that providers receiving a notification would be incentivised to remove the user-provided information in question by default to prevent liability. According to the Third Circuit, such a system would have "a chilling effect on the freedom of Internet speech."[650] Notice-based liability, thus, would not be compatible with Section 230(c)(1). Such a liability regime imposes responsibilities on a provider as publisher for the content of user-provided information, which is incompatible with the wording and the purpose of Section 230.

Even the most far-reaching real-world harms may not break through the wall of immunity provided by Section 230. For example, "negligence and gross negligence claims are barred by the CDA, which prohibits claims against Web-based interactive computer services based on their publication of third-party content." [651] A provider that does not verify the age of its users while social media functionalities cannot be held liable for negligence or gross negligence when the underage user meets with another user of the service and becomes the victim of sexual assault as a result of this meeting.[652] The other way around, an adult who uses a service to arrange a sex date with someone thought to be an adult cannot sue the provider when the sex date turns out to be underage.[653]

In *Doe v. GTE Corp.* (2009), the Seventh Circuit argued that "Congress is free to oblige web hosts to withhold services from criminals (to the extent legally required screening for content may be consistent with the first amendment)".[654] Under current law, however, "a web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet."[655] Plaintiffs sued GTE, the hosting service provider, because it hosted videos showing undressed college athletes. The videos in which the plaintiffs appeared were secretly taped without their consent.[656] Section 230(c)(1) bars such a claim because the hosting service provider is held liable as a publisher.[657] Ultimately, the plaintiffs seek to hold GTE liable for negligence, but they "do not cite any case in any jurisdiction holding that a service provider must take reasonable care to prevent injury to third parties."[658]

In a different case, Section 230 immunities did not apply. In *Doe v. Internet Brands,* Doe sued Internet Brands because the company, according to Doe, knew that there were rapists active on one of its model-scouting websites but failed to warn Doe and other users of their modus operandi.

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[648] *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (3rd Cir. 1997).

[649] *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (3rd Cir. 1997).

[650] *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (3rd Cir. 1997); This is a recurring argument against the introduction of all kinds of liability of Internet intermediaries for third-party content. An overview of empirical studies regarding the overremoval of content by internet intermediaries can be found at Keller, 2020, 'Empirical Evidence of "Over-Removal" by Internet Companies Under Intermediary Liability Laws'.

[651] *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008).

[652] *Doe v. MySpace, Inc.*, 528 F.3d 413, 420-422 (5th Cir. 2008).

[653] *Doe v. SexSearch.com*, 502 F.Supp.2d 719, 727-728 (N.D.Ohio 2007); *Doe v. SexSearch.com*, 551 F.3d 412 (6th Cir. 2008).

[654] *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

[655] *Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003).

[656] *Doe v. GTE Corp.*, 347 F.3d 655, 656 (7th Cir. 2003).

[657] *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003).

[658] *Doe v. GTE Corp.*, 347 F.3d 655, 661 (7th Cir. 2003).

Doe argued before the court that because of this negligent failure to warn, Doe was drugged and raped.[659] The Ninth Circuit concluded that Section 230 does not immunises Internet Brands for negligent failure to warn because "Jane Doe's negligent failure to warn claim does not seek to hold Internet Brands liable as the 'publisher or speaker of any information provided by another information content provider.'"[660]

As noted, Section 230(c)(1) excludes the development of the content of information by the provider from the immunity provided by this section. The question then is when a provider becomes a developer of the content of user-provided information. In case law, Section 230 is interpreted to protect a wide range of activities. Even editing the content of user-provided information does not cause the internet intermediary provider to forfeit its immunity under Section 230. The Ninth Circuit clarified in *Batzel v. Smith* (2003) when a provider could be held liable as an internet content provider. According to the Ninth Circuit, the provider its involvement, before it can be considered to be involved in the "development of information",[661] must be "more substantial than merely editing portions of an email and selecting material for publication."[662] As the Ninth Circuit puts it

> the exclusion of "publisher" liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.[663]

Section 230 offers providers that engage in publisher activities regarding user-provided information a shield from liability as a publisher. A dating website, thus, is not liable for the content of the information provided by its users – even when a user chooses to submit the personalia of someone else without this person's consent.[664] When providers engage in publisher activities, this does not mean that they directly forfeit Section 230 immunities. Plaintiffs, thus, are required to base a claim on something different than holding the provider liable as a publisher or speaker. Another option is to demonstrate that a provider is "materially contributing"[665] to the illegal or unlawful content of user-provided information, which renders the provider a developer of this content itself.

In *Fair Housing Council of San Fernando Valley v. Roommates.com* (2008), the Ninth Circuit denied Section 230(c)(1) immunity because the provider was regarded to have developed the

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[659] *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848-851 (9th Cir. 2016).

[660] *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016).

[661] 47 USCA § 230(f)(3) (West 2018, Westlaw Next through PL 116-91).

[662] *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003). Merely deleting some symbols or other portions of content does not render the provider a developer of the content, see *Ben Ezra, Weinstein, and Company, Inc. v. America Online Inc.*, 206 F.3d 980, 985-986 (10th Cir. 2000).

[663] *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

[664] In *Carafano v. Metrosplash.com* the 9th Cir. concluded that "despite the serious and utterly deplorable consequences that occurred in this case" that the provider "did not play a significant role in creating, developing or 'transforming' the relevant information." see *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003). The difference with *Roommates* is that in *Carafano* "the selection of the content was left exclusively to the user. The actual profile 'information' consisted of the particular options chosen and the additional essay answers provided." see *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

[665] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008).

content of the user-provided information.[666] Roommates.com allowed users to – as the name of the website says – find roommates. The service asked a few questions about the user's preferences to help the user find a suitable roommate. These questions were mandatory. The user only could answer these questions by choosing from predefined options. Questions were about sex, sexual orientation, whether the subscriber has children and the sexual orientation of those living in the house. Housing seekers had to specify whether they were willing to live with children or people with a given sexual orientation. They could also exclude living with males or females from the results.[667] Some of these questions were argued to violate federal or state laws against housing discrimination. As the Ninth Circuit notes, "asking questions certainly can violate the Fair Housing Act and analogous laws in the physical world".[668] The Ninth Circuit did not evaluate whether the questions were indeed illegal but only whether Section 230(c)(1) immunities would shield Roommates.com from liability for the content on its websites generated from these questions.[669] According to the Ninth Circuit, Section 230(c)(1) did not apply to Roommates.com conduct now

> By any reasonable use of the English language, Roommate is "responsible" at least "in part" for each subscriber's profile page, because every such page is a collaborative effort between Roommate and the subscriber.[670]

Because Roommates.com required users to submit their preferences by answering questions from a predefined list of options, Roommates.com is at least in part responsible for the profile pages that are generated based on these questions.[671] The Ninth Circuit clarifies that the usage of dropdown menus is not the problem:

> A dating website that requires users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality[672]

*Roommates* can be compared with *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist* (2008), in which the Seventh Circuit granted Craigslist Section 230 immunity. According to the Seventh Circuit, Craigslist did not "induces anyone to post any particular listing or express a preference for discrimination".[673] As Roommates.com was immunised for the content users entered in a free-text field captioned with "Additional Comments",[674] the Seventh Circuit concluded that Section 230(c)(1) shielded Craigslist from liability for (potential) discriminatory housing advertisements.[675] While Roommates.com, in part, was considered a developer of the content of the information provided by its users. Craigslist that did not use mandatory dropdown menus with predefined options was not.

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[666] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1166 (9th Cir. 2008); 47 USCA § 230(c)(1) and (f)(3) (West 2018, Westlaw Next through PL 116-91).
[667] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008).
[668] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).
[669] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).
[670] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).
[671] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165-1167 (9th Cir. 2008).
[672] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008).
[673] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).
[674] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1172-1173 (9th Cir. 2008).
[675] *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-672 (7th Cir. 2008).

Even when providers require users to provide information that can discriminate between others or for illegal activities, this does not necessarily render the provider a developer. For example, users can discriminate when searching for a date based on their preferences. These preferences and the users' personalia could be used to discriminate or for other illegal purposes. However, the dating website provider cannot be said to contribute to such illegality by merely asking these questions.[676]

The Ninth Circuit in *Roommates* provided some insight into when services may cross the line in contributing to illegality that causes them to lose Section 230(c)(1) immunity. For example, providers steering users to use discriminatory criteria in search or notification systems may not count on Section 230(c)(1) immunity.[677] Of course, this does not expose all search engines that can be (potentially) used to find information with illegal content to liability. A provider is not responsible for the content offered by others when it "comes entirely from subscribers and is passively displayed".[678] The United States District Court for the Northern District of California in *Goddard v. Google* (2009) revisited *Roommates*. The question was whether Google could be held liable for the content of fraudulent advertisements. These advertisements (so-called AdWords) are placed beside search results. According to the plaintiff, Google actively suggests the advertisement's content. For example, when an advertiser creates an advertisement concerning ringtones, the word "free" is suggested. This suggestion, according to the plaintiff, could contribute to the fraudulent nature of the advertisement. According to the plaintiff, users are often charged for so-called "free" ringtones. According to the plaintiff, this renders Google a developer of the content of the advertisement.[679] According to the District Court, this argument does not hold up. According to the District Court, Google "does nothing more than provide options that advertisers may adopt or reject at their discretion."[680] The District Court thus suggested a narrow reading of *Roommates*. Service providers are not quickly rendered a developer of the content of user-provided information. While denying Section 230 immunities does not automatically mean that the provider is indeed held liable, the mere fact that the court case continues may be costly for providers.[681]

Besides the fact that providers are not liable for the content of user-provided information that is offered to them, a provider is also not responsible for how users use search and filter options. However, as the *Roommates* case clarified, as long as the provider does "not use unlawful criteria to limit the scope of the searches conducted on them, nor are […] designed to achieve illegal ends".[682] For example, Section 230(c)(1) bars the enforcement of state law seeking to hold Craigslist liable for offering a "word search" functionality on its service. This search functions as a neutral tool for users to search for content on the service but can also be used to find (illegal) advertisements for prostitution.[683] In other words, the fact that it is possible to search for illegal content does not render the search engine provider a developer of the list with results – even when the results are built from an index of the search provider. However, when the provider steers users

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676 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008).
677 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).
678 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).
679 *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1197 (N.D.Cal. 2009).
680 *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193 (N.D.Cal. 2009).
681 *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1202 (N.D.Cal. 2009).
682 *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008).
683 *Dart v. Craigslist, Inc.*, 655 F.Supp.2d 961, 969 (N.D.Ill. 2009).

to illegal search queries or filtering options predefined by the search provider, based on illegal content the provider actively requested, the provider loses its Section 230 immunity. A search provider, at least, is "responsible" for the "development" of the illegal content of user-provided information when it actively solicits for this content, for example, by paying for illegally obtained documents.[684] The Ninth Circuit concluded: "The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[685]

Section 230(c)(1) protections, however, do apply to providers that do not undertake action against user-provided information that qualifies as terrorist content. In *Fields v. Twitter* (2016), the United States District Court for the Northern District of California argued that claims seeking to hold Twitter liable for terrorist content on its service are based on Twitter its status as a publisher of the content of user-provided information. Section 230(c)(1) bars such claims based on the actual content that is spread through its service but also claims based on the fact that the provider does not prevent terrorists from using its service. Both claims are based on Twitter being as a publisher liable for the content of user-provided information (that may be) offered through its service.[686]

As noted, Section 230 provides immunity to providers for failing to remove user-provided information with illegal or unlawful content after a notification. However, there is an exception. As the Ninth Circuit first argued in *Barnes v. Yahoo!, Inc.* (2009), "removing content is something publishers do".[687] Therefore, a provider cannot be held liable for failing to remove user-provided information. In *Barnes*, however, Section 230(c)(1) did not immunise Yahoo! as a publisher for the content of user-provided information. The plaintiff notified Yahoo! of defamatory content, which Yahoo! promised to take down, and Yahoo! failed to live up to this promise. The Ninth Circuit argued that holding a provider liable for failing to follow up on a "promissory estoppel" is not based on a provider being "a publisher or speaker of third-party content".[688] Instead, the provider is held liable "as the counter-party to a contract, as a promisor who has breached."[689] After *Barnes,* liability based on failing to live up to a promise is a rarity. Service providers will think twice before making such promises.

However, Section 230(c)(1) does not apply to claims based on the service provider's liability for misrepresentation because of the content of information created by the provider itself. Seeking to hold a provider liable for the misrepresentation of dating profiles as active – while they no longer are – does not seek to hold the provider liable as a publisher or speaker of the content of user-provided information. Instead, the provider is held liable as an "information content provider" itself.[690] In *Anthony v. Yahoo* (2006), the United States District Court for the Northern District of California denied Section 230 immunity for misrepresentation and fraud. While another "information content provider" may have provided the content of the dating profiles, the misrepresentation of profiles as active (while they no longer are) does not fall under Section

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[684] *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1197-1201 (10th Cir. 2009).

[685] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

[686] *Fields v. Twitter, Inc.*, 200 F.Supp.3d 964, 970-974 (N.D.Cal. 2016). Materially, it is also unlikely that service providers would be held liable for "aiding and abetting" terrorists, see *Colon v. Twitter, Inc.*, 14 F.4th 1213 (11th Cir. 2021).

[687] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009).

[688] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

[689] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

[690] *Anthony v. Yahoo Inc.*, 421 F.Supp.2d 1257, 1262-1263 (N.D.Cal. 2006).

230(c)(1) protections. Section 230(c)(1), as the District Court puts it, "does not absolve Yahoo! from liability for any accompanying misrepresentations."[691]

As noted, the *Roommates* case was about whether Section 230 immunities *would* apply to Roommates.com when the content of user-provided information which Roommates.com was argued to materially contribute to *was* illegal. While all the preceding would suggest otherwise: Roommates.com did ultimately not violate the law.[692] When a court denies Section 230 immunity, this does not automatically render the provider liable. While Roommates.com did not win a Section 230 motion to dismiss, on the merits of the case, Roommates.com did. In the process, *Roommates*, according to Goldman, left Section 230 with a common law exception. The *Roommates*-exception, however, is not the only hallow exception the Ninth Circuit added. According to Goldman, the Ninth Circuit in *Doe v. Internet Brands*[693] added an exclusion for a failure to warn. However, ultimately there was no such duty to warn for Internet Brands.[694] These exceptions may allow court cases to continue instead of stranding on Section 230 immunities but leave plaintiffs ultimately empty-handed after the case is discussed on its merits. As the saying goes: the plaintiffs did win the battle but ultimately lost the war.

In sum, Section 230(c)(1) offers broad protection to a diverse range of services. Section 230(c)(1) applies to providers that do moderate but also to providers that do not moderate. For Section 230(c)(1), the level of editorial control does not matter.[695] Service providers may, for example, select user-provided information for publication without becoming liable for its content as long as they do not materially contribute to its illegal or unlawful content.[696] Section 230(c)(1), however, only applies to a "provider or user of an interactive computer service"[697] and not to traditional media, which makes Section 230(c)(1) an exceptionalist statute.[698] Most importantly, Section 230(c)(1) immunises providers for action, holding them responsible as a publisher or speaker of the content of user-provider information.

Section 230(c)(1) makes it easy for providers to let a judge grant a motion to dismiss because claims based on publisher or speaker liability have no chance of success. Lengthy trials usually are avoided.[699]

*Section 230(c)(2)*

As Goldman notes, Section 230(c)(1) is far more critical for providers than Section 230(c)(2) because the wording of (c)(2) suggests that it applies to providers that act in good faith. Service providers relying on (c)(1) may quickly get the case dismissed, while relying on (c)(2) may lead to

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691 *Anthony v. Yahoo Inc.*, 421 F.Supp.2d 1257, 1263 (N.D.Cal. 2006).

692 *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216 (9th Cir. 2012).

693 *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016); E. Goldman, 'Failure-to-Warn Claim Against Match.com Fails–Beckman v. Match.com', *Technology & Marketing Law Blog,* 27 November 2018, available at blog.ericgoldman.org/archives/2018/11/failure-to-warn-claim-against-match-com-fails-beckman-v-match-com.htm (retrieved on 14 February 2022).

694 E. Goldman, 'The Ninth Circuit's Confusing Ruling Over Snapchat's Speed Filter–Lemmon v. Snap', *Technology & Marketing Law Blog,* 21 May 2021, available at blog.ericgoldman.org/archives/2021/05/the-ninth-circuits-confusing-ruling-over-snapchats-speed-filter-lemmon-v-snap.htm (retrieved on 14 February 2022).

695 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 159.

696 *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 406-417 (6th Cir. 2014).

697 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

698 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 162.

699 Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 159.

a lengthy procedure in which the provider has to demonstrate that it indeed was acting in good faith. The provider still may win, but the cost of litigation may be much higher than under Section 230(c)(1).[700] There are, however, some examples in which a motion to dismiss was granted, which causes Section 230(c)(2) to immunise the provider for liability.[701]

Section 230(c)(2) thus protects for liability arising from moderating decisions by the service provider.[702] In order to rely on the safe harbour offered by (c)(2), voluntary action has to be taken by the "provider or user of an interactive computer service" in "good faith" to "objectionable" content.[703] According to Goldman, Section 230(c)(2) added value for developers of anti-spyware software against claims of the developers of software that was (wrongfully) characterised as spyware.[704] As Goldman and Wilman note, providers typically rely on their terms of services that function as a contract between the provider and the user. In these terms of services, providers grant themselves an (almost) unlimited discretion regarding what content they allow and what not while exonerating themselves from any legal liability.[705] According to Wilman, usually, the only ones who sue providers for over-removal are users of the service. A contract governs the relationship between the user and the provider.[706] However, it is not unthinkable that a third party (which is not a user of the service) would sue for liability for the over-removal of user-provided information in which the third party appears.[707] In the case of such non-contractual liability claims, the safe harbour provided by Section 230(c)(2) could function as a backstop.

Section 230(c)(2) (together with (c)(1)) is put under pressure by lawmakers that seek to alter these provisions. These developments are discussed in Paragraph 3.3. For now, it is relevant to mention that Section 230(c)(2) is often mischaracterised as if this provision grants providers unlimited editorial discretion.[708] In part, this mischaracterised is caused by the wording of Section 230(c)(2)(A), which applies to moderation decisions "whether or not such material is constitutionally protected".[709] Would providers no longer be allowed to moderate user-provided information without Section 230(c)(2)? That, of course, is not the case. Section 230(c)(2) does not grant the right to moderate; it merely offers providers a safe harbour for liability arising from moderation. As discussed under Paragraph 3.2, editorial decisions are also protected under the

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[700] Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review*, 2019, p. 40.

[701] *Ebeid v. Facebook, Inc.*, 2019 WL 2059662 (N.D.Cal. 2019); *Lancaster v. Alphabet Inc.*, 2016 WL 3648608 (N.D.Cal. 2016); *Mezey v. Twitter, Inc.*, 2018 WL 5306769 (S.D.Fla. 2018). The applicability of Section 230(c)(1) to moderation efforts renders Section 230(c)(2) useless, see *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D.Fla. 2017); E. Goldman, 'Online User Account Termination and 47 U.S.C. §230(c)(2)', *UC Irvine Law Review*, Vol. 2, No. 2, 2012 (available at escholarship.org/uc/item/1hh0t3w6).

[702] Goldman, 'Online User Account Termination and 47 U.S.C. §230(c)(2)', *UC Irvine Law Review*, 2012, p. 662.

[703] 47 USCA § 230(c)(2)(A) (West 2018, Westlaw Next through PL 116-91); Goldman, 'Online User Account Termination and 47 U.S.C. §230(c)(2)', *UC Irvine Law Review*, 2012, p. 661.

[704] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 160.

[705] Par. 4.40 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 114; Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 160.

[706] Par. 4.39-4.40 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 114.

[707] For example, in the Dutch case Rb. Amsterdam (vzr.), 9 September 2020, ECLI:NL:RBAMS:2020:4435 (*YouTube*).

[708] N. Hochman, 'Conservatives Should Support Section 230 Reform', *National Review,* 16 October 2021, available at nationalreview.com/2021/10/conservatives-should-support-section-230-reform (retrieved on 15 February 2022).

[709] 47 USCA § 230(c)(2)(A) (West 2018, Westlaw Next through PL 116-91).

First Amendment – even when made by providers. Without Section 230(c)(2), providers would not be required to carry all user-provided information irrespective of its content.

*Statutory exceptions*

In terms of the actual content of the user-provided information, the provider can only be imposed with liability when it fits in one of the few exceptions to Section 230.[710] For example, Section 230 does not stand in the way of enforcing federal criminal law. Service providers can be prosecuted for user-provided child sexual abuse material when they meet the statutory requirements.[711] Besides, Section 230 does not apply to the enforcement of intellectual property law, which means providers can also be exposed to liability for user-provided information with content infringing on intellectual property law.[712] The same is true for violations of privacy laws.[713] Privacy laws form a strange exception because it seems impossible for a provider to rely on Section 230 while violating privacy laws.[714] Next to these exceptions, Section 230 does not prohibit states from enforcing state law consistent with Section 230.[715] However, Section 230 stands in the way when state criminal law is not consistent with Section 230.[716]

While these exceptions seem broad, their legal meaning is very narrow. Goldman lists a few examples of the few federal criminal law cases involving the prosecution of providers. Examples are providers fined for allowing advertisements on their platforms that violated gambling and prescription drugs laws. Goldman also mentions the prosecution of the individual behind the internet marketplace Silk Road, known for the availability of illegal goods and services. The mind behind this marketplace was sentenced to life imprisonment.[717]

While the enforcement of federal criminal statutes is exempted from Section 230 immunities, this does not mean that the provider can no longer rely on Section 230 immunity for civil liability that may arise from the violation of the criminal law.[718] Service providers cannot be sued for civil damages by users over violations of federal criminal statutes.[719] An exception forms civil claims based on violations of sex-trafficking law that are expressly exempted from the immunities provided by Section 230.[720] Noteworthy is that this exception also applies to the enforcement of criminal state law comparable to this federal legislation.[721]

According to Goldman, this codified exception for a civil action based on violations of sex-trafficking law forms "new ground"[722] as the first real exception to Section 230 immunities

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[710] Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 2.
[711] 47 USCA § 230(e)(1) (West 2018, Westlaw Next through PL 116-91).
[712] 47 USCA § 230(e)(2) (West 2018, Westlaw Next through PL 116-91).
[713] 47 USCA § 230(e)(4) (West 2018, Westlaw Next through PL 116-91).
[714] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 161.
[715] 47 USCA § 230(e)(3) (West 2018, Westlaw Next through PL 116-91).
[716] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 162.
[717] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 161; S. Thielman, 'Silk Road operator Ross Ulbricht sentenced to life in prison', *The Guardian,* 29 May 2015, available at theguardian.com/technology/2015/may/29/silk-road-ross-ulbricht-sentenced (retrieved on 15 February 2022).
[718] 47 USCA § 230(e)(1) (West 2018, Westlaw Next through PL 116-91).
[719] See, for example, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016).
[720] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', pp. 161-162.
[721] 47 USCA § 230(e)(5)(A) (West 2018, Westlaw Next through PL 116-91).
[722] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 280.

since its enactment in 1996.[723] Before the deimmunization of providers for violations of sex trafficking law, advertising illegal sex services could not lead to the service provider's liability. Because the user provided the advertisement, the provider could not be held liable as the publisher or the speaker of its content.[724]

Congress decided to add this exception after a 2016 ruling of the First Circuit.[725] In *Jane Doe No. 1 v. Backpage.com, LLC*, the First Circuit upheld Section 230 immunity for illegal sex trafficking advertisements that featured minors.[726] The argument was that Backpage.com offered features that enabled sex trafficking. For example, Backpage.com offered means to communicate anonymously, deleted advertisements that provided information against sex trafficking, and removed metadata (such as time and location) from photographs uploaded to Backpage.com.[727] At least, Backpage.com, according to the appellants, made it much easier to engage in sex trafficking. While the First Circuit found that "the appellants have made a persuasive case for that proposition", the court continued that "[s]howing that a website operates through a meretricious business model is not enough to strip away those protections."[728] The First Circuit concluded that "the remedy is through legislation, not through litigation." [729] The *Backpage* ruling was heavily criticised. Citron and Wittes, for example, argued that "[n]either the text of the statute nor its history requires sweeping immunity from liability for sites like Backpage."[730] However, the argument could be easily made the other way: what if Backpage.com would be held liable for these activities? What would that mean for other intermediaries? Unlike Roommates.com, it is hard to see how Backpage.com contributed to these advertisements other than offering the means to do so.

Sex trafficking advertisements were on the mind of legislators before *Backpage*. Before FOSTA, the SAVE Act (enacted in 2015) criminalised the advertising of sex trafficking victims by exposing providers to criminal liability when they are "knowingly assisting, supporting, or facilitating" such advertisements.[731] Congress, according to Goldman, had providers such as Backpage.com on its mind when it enacted the SAVE Act.[732] The SAVE Act did not contain a carve-out of Section 230 but relied on the pre-existing exception on Section 230 immunity for criminal law statutes.[733] The First Circuit – interpreting Section 230 before FOSTA-SESTA was enacted – held that Section 230(c)(1) offered immunity for civil liability as a speaker or publisher

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[723] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 280.
[724] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 280; *Dart v. Craigslist, Inc.*, 655 F.Supp.2d 961, 967-969 (N.D.Ill. 2009).
[725] 47 USCA § 230(e)(5) (West 2018, Westlaw Next through PL 116-91); Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 270.
[726] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20-24 (1st Cir. 2016).
[727] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016); Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, p. 407.
[728] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016).
[729] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016).
[730] Citron & Wittes, 'The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity', *Fordham Law Review*, 2017, p. 409.
[731] §1591. Sex trafficking of children or by force, fraud, or coercion, 18 USCA § 1591(a) and (b) (West 2018, Westlaw Next through PL 116-193); Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 282.
[732] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 282.
[733] 47 USCA § 230(e)(1) (West 2018, Westlaw Next through PL 116-91).

leaving the victims of sex trafficking emptyhanded even when a violation of a criminal law statute could be established.[734]

*Digital Millennium Copyright Act (DMCA)*

As noted, Section 230 does not apply to intellectual property law. Violations of intellectual property law are regulated in 17 USCA § 512.[735] The DMCA, which codified this Section 512, is seen as one of the (possible) inspirators for the e-Commerce Directive,[736] which may explain why both rely on a distinction between mere conduit, caching and hosting providers.[737] The DMCA, however, adds a fourth one called "information location tools".[738]

Similar to the e-Commerce Directive discussed in Chapter 4, the DMCA does not offer a liability regime of itself. Section 512, thus, does not contain provisions of when a provider becomes liable – it only sets out when a provider can rely on the safe harbour. Besides, the safe harbour regime offered in Section 512 is – like the e-Commerce Directive – voluntary. Non-compliance may only lead to legal liability for the user-provided information that would otherwise fall within the safe harbour protections.[739]

The conditional nature of the DMCA relies on actual knowledge or awareness of the existence of the infringing content of user-provided information of the internet intermediary service provider.[740] According to Wilman, evidence of actual knowledge under the DMCA is hard to prove by any other means than a receipt of a takedown notice.[741] The awareness test is, in fact, a "red flag" test.[742] Proof of awareness requires that the provider has specific awareness. General awareness that there is somewhere on the service user-provided information with infringing content is not enough now that such information is not identifiable. The third requirement of the DMCA requires expeditious removal of user-provided information that is infringing.[743] How fast removal must be to count as "expeditious" is not codified.[744] According to Wilman, seven days after gaining knowledge or awareness seems to count as expeditiously.[745]

Unlike the liability regime laid down in Article 14 of the e-Commerce, the DMCA regime, as Van Hoboken and Keller put it, "creates a detailed 'notice-and-takedown' system for content

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[734] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23 (1st Cir. 2016).

[735] 17 USCA § 512 (West 2010, Westlaw Next through PL 116-179).

[736] Par. 2.15 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 17-18.

[737] Compare 17 USCA § 512(a), (b) and (c) (West 2010, Westlaw Next through PL 116-179); Directive 2000/31/EC (*Directive on electronic commerce*), p. Article 12 to 14 of

[738] 17 USCA § 512(d) (West 2010, Westlaw Next through PL 116-179).

[739] Par. 5.12-5.13 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 136-137.

[740] 17 USCA § 512(c)(1)(A)(i) and (ii) (West 2010, Westlaw Next through PL 116-179).

[741] Par. 5.28 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 145.

[742] Note 13 of Van Hoboken & Keller, 2019, 'Design Principles for Intermediary Liability Laws', p. 8; Par. 5.29 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 145.

[743] Par. 5.28-5.30 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 145-146.

[744] 17 USCA § 512(c)(1)(A)(iii) (West 2010, Westlaw Next through PL 116-179).

[745] Par. 5.31 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 146.

alleged to infringe copyright."[746] For starters, the DMCA requires the provider to designate an agent to receive notices. This agent must be registered by the Copyright Office.[747] Notifications of infringing content must be sent to this agent. These notifications must fill certain substantial criteria as well. For example, the rightsholder (or person authorised by the rightsholder) must provide identification of the work(s) that are infringed, identification of the infringing user-provided information on the service and information of the location on the service of the provider.[748] A notice that fulfils the criteria laid down in Section 512(c)(3) can amount to actual knowledge, which requires providers to take down infringing user-provided information.[749] A notice that does not fulfil the criteria laid down in this article, however, does not.[750]

Providers that takedown or disable access to user-provided information because they (in good faith) believe that the content of the information was infringing are shielded from claims that may arise from this action.[751] Section 512(g)(2) sets out an exception from this exemption from liability for notice-based removal. In this case, the provider must inform the user who provided the information with infringing content.[752] The user may submit a counter-notice in which the user reveals his or her identity.[753] In the case of a counter-notice, the provider must forward this counter-notice to the original notifier with the announcement that it will restore access to the allegedly infringing information in ten business days.[754] The provider is required to restore access after ten but no later than 14 working days unless the submitter of the notification has notified the provider that it seeks a court order to prevent the user who provided the counter-notification from the infringing activity. In this case, the user-provided information is not restored.[755] A provider that follows the counter-notice is exempted from liability – even when it restores user-provided information with infringing content after a counter-notice because the notifier does not follow up with a legal procedure.[756]

These statutory exceptions show that the broad immunity offered by Section 230 is not a given. With respect to copyrighted content, the DMCA has a different approach that does not offer such immunity to providers. Of course, it is this broad immunity that makes Section 230 worthwhile. As discussed in the following paragraphs, this broad immunity is put under pressure.

### 3.1.3 What does Section 230 encourage?

Section 230 offers providers the possibility to moderate the content of user-provided information without fearing that they could be held liable for all content of user-provided information on their service.[757] Besides, Section 230 includes a provision about 'good faith' moderating which offers a safe harbour for liability for the moderation of user-provided information. As noted, Section

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[746] Van Hoboken & Keller, 2019, 'Design Principles for Intermediary Liability Laws', p. 2.
[747] 17 USCA § 512(c)(2) (West 2010, Westlaw Next through PL 116-179).
[748] 17 USCA § 512(c)(3)(A) (West 2010, Westlaw Next through PL 116-179).
[749] 17 USCA § 512(c)(1)(C) (West 2010, Westlaw Next through PL 116-179).
[750] 17 USCA § 512(c)(3)(B)(i) (West 2010, Westlaw Next through PL 116-179).
[751] 17 USCA § 512(g)(1) (West 2010, Westlaw Next through PL 116-179).
[752] 17 USCA § 512(g)(2)(A) (West 2010, Westlaw Next through PL 116-179).
[753] 17 USCA § 512(g)(3) (West 2010, Westlaw Next through PL 116-179).
[754] 17 USCA § 512(g)(2)(B) (West 2010, Westlaw Next through PL 116-179).
[755] 17 USCA § 512(g)(2)(C) (West 2010, Westlaw Next through PL 116-179).
[756] 17 USCA § 512(g)(4) (West 2010, Westlaw Next through PL 116-179).
[757] Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, pp. 284-285.

230(c)(2) is far less absolute formulated than Section 230(c)(1) by only protecting "good faith" moderation.[758]

Noteworthy is that Section 230 immunities do not actually require or encourage providers to moderate. Section 230 does not offer any stimulation to providers to engage in content moderation. Moderation, in other words, is not a requirement under the US liability regime laid down in Section 230. Section 230(c)(1) immunities for liability for the content of user-provided information also applies to providers that do not choose to moderate. Section 230 thus equally applies to services that do moderate and services that do not.[759]

Both Section 230 features, in terms of moderation, merely take away the incentive for providers to not moderate by offering two exemptions from liability.[760] Section 230(c)(1) and (2) both offer protection for liability. Section 230(c)(1) prevents providers from becoming liable for the content of user-provided information they did not or failed to moderate.[761] Section 230(c)(2) protects providers that moderate by offering a safe harbour for claims over erroneous removal of user-provided information because of its content. Section 230(c)(2) thus protects from liability for what is moderated, while Section 230(c)(1) protects providers from liability for what is not moderated. Section 230, thus, does not contain any (political) neutrality requirement in the moderation process.[762] Nor does exercising editorial control that can be equated with traditional publishers cause providers to forfeit their immunities.[763] Service providers that intervene in user-provided information because of their own preferences are thus also protected under Section 230. Fishback: "The goal was never to create an internet that was politically diverse, as some Congressmen currently believe."[764]

As Goldman notes, Section 230(c)(2) offers a solution for the so-called "Moderator's Dilemma", where moderating content would (potentially) lead to liability for the content of user-provided information that is mistakenly moderated. Service providers fearing being held liable for erroneous removal may conclude that it is better not to moderate.[765] Section 230 – of course – does not derogate from the illegal character of the content in question. Section 230 does not contain a "legalisation" of illegal or unlawful conduct on the internet. Section 230 merely shields providers from legal responsibility for this content as publishers or speakers themselves.[766] Section 230 merely takes away the fear of liability arising from moderation but does not encourage

[758] 47 USCA § 230(c)(2)(A) (West 2018, Westlaw Next through PL 116-91).

[759] Kosseff, 2019, *The Twenty-Six Words That Created the Internet*, p. 2; Gillespie, 2018, *Custodians of the Internet*, pp. 30-31.

[760] Par. 4.39-4.41 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, pp. 114-115.

[761] As was the case with Prodigy in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

[762] Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, p. 277.

[763] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', p. 159.

[764] Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, p. 295.

[765] Goldman, 2020, 'An Overview of the United States' Section 230 Internet Immunity', pp. 157-158.

[766] 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

providers to moderate. As noted, Section 230(c)(1) even protects providers that refuse to take measures after notification of defamatory content.[767]

While the user providing the information with illegal or unlawful content can still be held legally liable,[768] it is hard to sue a (pseudo)anonymous user.[769] Holding the user that provided the content legally liable may especially be burdensome in the case of user-provided information with defamatory content. As discussed under Paragraph 5.2.3, this is perhaps the most cogent criticism directed against Section 230. Section 230 has little to offer in terms of legal protections for those hurt by the content of user-provided information.

Section 230 offers a legal environment where providers can moderate user-provided information with content considered harmful but not illegal under US law without fearing liability. Section 230, however, does not obligate nor encourage providers in any way to do so. Service providers that take an active approach to safeguard the quality of the discussion on their services are generally considered preferable to a completely hands-off approach.[770] However, the First Amendment makes it hard to obligate providers to engage in such content moderation. The relationship between Section 230 and the First Amendment is central to the next paragraph.

### 3.2 Section 230 and the First Amendment

The First Amendment may offer protections that are not, or only partially, covered by Section 230. In addition, the First Amendment also provides protections that materially overlap with Section 230. Therefore, it is essential to discuss how the First Amendment relates to Section 230. As far relevant here, the First Amendment reads that "Congress shall make no law […] abridging the freedom of speech". As discussed above, some proposals are made to amend or abolish Section 230 protections. Such proposals raise some interesting First Amendment issues. First, I discuss what additional protections the First Amendment offers on top of Section 230 protections. Then I discuss the overlap between Section 230 and the First Amendment. Thirdly, I turn to what the First Amendment and related case law would protect without Section 230.

#### 3.2.1 The First Amendment complementing Section 230

First, providers may automatically generate some information of their own, which thus is not "provided by another information content provider"[771] or even considered developed by the service provider. Therefore, the provider could be held liable as a "publisher" or a "speaker" for the content of information that the provider commissioned or developed itself.[772] For example, providers that function as search engines take a more active stance towards content by aggregating,

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[767] C. Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad', *Harvard Journal of Law & Technology*, Vol. 28, No. 1, 2014, p. 304; Perry & Zarsky, 'Who Should Be Liable for Online Anonymous Defamation?', *University of Chicago Law Review Dialogue*, 2015, pp. 165-167.

[768] *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (3rd Cir. 1997).

[769] Omer, 'Intermediary Liability for Harmful Speech: Lessons from Abroad', *Harvard Journal of Law & Technology*, 2014, p. 319; Perry & Zarsky, 'Who Should Be Liable for Online Anonymous Defamation?', *University of Chicago Law Review Dialogue*, 2015, pp. 165-167.

[770] Fishback, 'How the Wolf of Wall Street Shaped the Internet: A Review of Section 230 of the Communications Decency Act', *Texas Intellectual Property Law Journal*, 2020, p. 280.

[771] 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

[772] 47 USCA § 230(c)(1) (West 2018, Westlaw Next through PL 116-91).

excerpting, and actively recommending content by deploying algorithms.[773] The results do not – necessarily – fall within the immunity provided by Section 230. Service providers, however, did successfully claim First Amendment protection for the output of their algorithms.[774] In some cases, the court may have (perhaps wrongly) denied Section 230 immunity but considered the output of the algorithms protected speech under the First Amendment.[775]

Especially important to note is that the First Amendment limits the possibility of regulating the content of user-provided information. For example, it is likely that the First Amendment would bar the government from regulating COVID-19 misinformation.[776]

### 3.2.2 Overlap between Section 230 and the First Amendment

Increasingly popular is the argument that the providers that are offering intermediary functions interfere in the freedom of expression of their users. As noted in Paragraph 3.1.2, Section 230(c)(2) is often slammed for granting providers unlimited editorial discretion.[777] As noted, Section 230(c)(2)(A) protections for moderation are extended to content "whether or not such material is constitutionally protected".[778] This provision is often misread or misunderstood as that without Section 230(c)(2), providers could no longer moderate user-provided information with constitutionally protected content.[779] Such a view on Section 230(c)(2)(A), however, could not be more wrong.

As Justice Kavanaugh argued in the majority opinion of *Manhattan Community Access Corporation v. Halleck* (2019): "the Free Speech Clause prohibits only governmental abridgment of speech. The Free Speech Clause does not prohibit private abridgment of speech."[780] According to Pollicino and Bietti, such a state action doctrine is "somewhat problematic when it comes to speech harms that occur in a highly privatized digital public sphere."[781] Pollicino and Bietti argue that such a doctrine shields a mixture of actors against liability for, for example, harmful disinformation.[782] Keller warns that it is not always evident whether the private provider or the state is responsible. States may "launder" their involvement because interventions are attributed to the service provider.[783] Even when state actors call upon private actors to take action against

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[773] E. Volokh & D.M. Falk, 'Google: First Amendment Protection for Search Engine Search Results', *Journal of Law, Economics & Policy*, Vol. 8, No. 4, 2012, p. 884.

[774] Callamard, 'Are courts re-inventing Internet regulation?', *International Review of Law, Computers & Technology*, 2017, p. 332; *Search King Inc. v. Google Technology, Inc.*, 2003 WL 21464568 (W.D.Okla. 2003).

[775] For example, *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D.Fla. 2017); E. Goldman, 'First Amendment Protects Google's De-Indexing of "Pure Spam" Websites–e-ventures v. Google', *Technology & Marketing Law Blog,* 9 February 2017, available at blog.ericgoldman.org/archives/2017/02/first-amendment-protects-googles-de-indexing-of-pure-spam-websites-e-ventures-v-google.htm (retrieved on 14 February 2022).

[776] *Cohoon v. Konrath*, 2021 WL 4356069 (E.D.Wis. 2021).

[777] Hochman, 2021, 'Conservatives Should Support Section 230 Reform'.

[778] 47 USCA § 230(c)(2)(A) (West 2018, Westlaw Next through PL 116-91).

[779] See, for an overview of common Section 230 misunderstandings, Masnick, 2020, 'Hello! You've Been Referred Here Because You're Wrong About Section 230 Of The Communications Decency Act'.

[780] *Manhattan Community Access Corporation v. Halleck*, 139 S.Ct. 1921, 1928 (2019).

[781] O. Pollicino & E. Bietti, 'Truth and Deception across the Atlantic: A Roadmap of Disinformation in the US and Europe', *Italian Journal of Public Law*, Vol. 11, No. 1, 2019, p. 55.

[782] Pollicino & Bietti, 'Truth and Deception across the Atlantic: A Roadmap of Disinformation in the US and Europe', *Italian Journal of Public Law*, 2019, p. 55.

[783] Keller, 2019, 'Who Do You Sue? State and Platform Hybrid Power over Online Speech'.

(constitutionally protected) content provided by users, this does not render the provider a state actor.[784]

Irrespective of these concerns, the First Amendment, as interpreted by the SCOTUS, is unlikely to harm editorial decisions by providers.[785] Even without Section 230(c)(2)(A), providers are likely to still moderate user-provided information as they see fit.[786] In the US, it is not possible to force providers to either carry user-provided information irrespective of its content or to take down user-provided information containing protected content.[787] Of course, Section 230, in a way, bypassed (not violated) First Amendment concerns by signalling (not obligating) providers that they could also moderate harmful content that is constitutionally protected while offering some exemptions from liability for such efforts.[788] At the same time, Section 230 represents many of the same values as incorporated in the First Amendment.[789]

However, it must be kept in mind that the First Amendment does not bind providers. Unlike federal or state actors, providers are, for example, able to respond to false speech with regulation (including removal).[790] The First Amendment is one of the causes why (new) federal regulation of providers in the US does not succeed.[791]

### 3.2.3 Liability for providers without Section 230

Providers that rely on the First Amendment to prevent liability for the moderation of user-provided information expose themselves to criticism. As Pasquale notes, Section 230 shields providers from liability as a publisher or speaker, while First Amendment protections, in contrast, apply to providers that do function as a publisher or speaker.[792] Of course, it must be noted that relying on Section 230 immunities is not made dependent on whether the provider is indeed not functioning as publisher or speaker. Section 230 merely shields the provider from liability for the content of user-provided information as a publisher or speaker – even when the provider functions as a publisher.

Without Section 230, providers are no longer shielded from publisher liability for the content of user-provided information. Abolishing Section 230 would bring back the dilemma that arose under *Stratton Oakmont*.[793] Providers that moderate may be exposed to liability for the content of all user-provided information because they function as a publisher and not merely a distributor.

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[784] *Doe v. Google LLC*, 2021 WL 4864418 (N.D.Cal. 2021).

[785] Moderation decisions that are also protected under 47 USCA § 230(c)(2)(a) (West 2018, Westlaw Next through PL 116-91).

[786] See, for, example, *e-ventures Worldwide, LLC v. Google, Inc.*, 2017 WL 2210029 (M.D.Fla. 2017).

[787] D. Keller, 'The Future of Platform Power: Making Middleware Work', *Journal of Democracy*, Vol. 32, No. 3, 2021 (available at muse.jhu.edu/article/797795), doi:10.1353/jod.2021.0043, p. 169.

[788] Par. 6.50 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 191.

[789] Par. 7.30 of Wilman, 2020, *The Responsibility of Online Intermediaries for Illegal User Content in the EU and the US*, p. 209.

[790] C.R. Sunstein, 'Falsehoods and the First Amendment', *Harvard Journal of Law & Technology*, Vol. 33, No. 2, 2020, p. 418.

[791] Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression, 2020, 'Freedom and Accountability: A Transatlantic Framework for Moderating Speech Online'.

[792] Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power', *Theoretical Inquiries in Law*, 2016, p. 494.

[793] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L Rep 1794 (N.Y. Sup. Ct. 1995).

Publisher liability may provide an incentive to providers to refrain from moderation and stimulate them to function as mere distributors for user-provided information.

Without Section 230, providers that qualify as a distributor are not liable for all user-provided information. Imposing distributors with strict liability is regarded as unconstitutional because of its chilling effects on freedom of expression rights.[794] Although the responsibilities of distributors do not go as far as those of publishers, distributors have some legal obligations with respect to the content of user-provided information that they distribute.

According to Kosseff, distributors that 1) have knowledge of the content, 2) should know about the content, or 3) distributed the content with "reckless disregard" may become liable for this content.[795] As Kosseff notes, Section 230 was enacted quickly after *Stratton Oakmont*. There is not much case law to go on regarding provider liability as content distributors.[796] However, it is not unlikely, according to Kosseff, that "the First Amendment and common law distributor caselaw likely would provide limited protection to many current online platforms."[797] Without Section 230, various providers would face new obligations regarding how they handle the content of user-provided information. Because of such obligations, they may be required to alter or cease the services they are offering. For example, providers notified of defamatory content of user-provided information would face liability when they do not take down this content because such a notification would clearly amount to knowledge. Service providers affected by such an obligation are (amongst others) services that allow reviews or social media networks. When these providers refuse to take down the content, they must go to court and argue that it is not defamatory.[798] While the provider may win the case, the risks and costs involved with such a procedure are not bearable for many providers. As Goldman notes, Section 230, in this respect, offers better protection to providers than the First Amendment because Section 230 often allows for a quick dismissal of the case. At the same time, constitutional lawsuits are often lengthy and pricy.[799]

For all providers, including search engines, the burden to moderate user-provided information would significantly increase because providers must demonstrate that they are not reckless with respect to (for example) defamatory content.[800] Apart from distributor liability, Section 230 also offers more certainty to providers. In the first place, because Section 230 declares state regulation incompatible with Section 230 inapplicable. In the second place, Section 230 applies to all common law claims based on publisher (and thus also a distributor) liability. Of course, the provider may also win publisher liability cases on First Amendment grounds, but this would (again) lead to lengthy procedures and uncertain outcomes because the First Amendment requirements differ from these common law claims.[801]

As noted, Section 230 shields providers that are functioning as publishers from liability as such. Without Section 230, the question is whether some providers (such as Wikipedia) could rely on distributor protections or whether they would be considered a publisher faced with strict

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[794] *Smith v. People of the State of California*, 80 S.Ct. 215, 219 (1959).

[795] J. Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, Vol. 35, No. 5, 2019, doi:10.1016/j.clsr.2019.105340, p. 5.

[796] Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, 2019, p. 15.

[797] Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, 2019, p. 2.

[798] Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, 2019, p. 13 and 15.

[799] Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review*, 2019, pp. 40-42.

[800] Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, 2019, p. 14.

[801] Goldman, 'Why Section 230 Is Better Than the First Amendment', *Notre Dame Law Review*, 2019, pp. 43-44.

liability.[802] Repealing or amending Section 230 in such a way that its immunities would be severely limited would throw many providers back in a state of nature.

Why seek to limit the immunities provided by Section 230? Why seek to abolish Section 230? Politicians on both the left and the right of the political spectrum have their reasons to do so. Left politicians seek to expose providers to liability for the content of user-provided information that they deem harmful. Politicians on the right seek to force providers to carry content they are arguing is being censored by providers. As noted, it is improbable that the SCOTUS would interpret the First Amendment to allow for such content-based restrictions or force a private provider to carry content it does not want to.[803]

## 3.3 Developments

### 3.3.1 Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)

As noted, the immunity offered by Section 230 was first meaningfully altered in 2018 by the FOSTA bill.[804] The House Committee on the Judiciary deemed it undesirable that Section 230 shields providers from civil and criminal liability for violations of the sex trafficking law.[805] Besides, the Committee argued that it is objectionable that Section 230 shields providers from the enforcement of criminal state law.[806] While Section 230 does not exempt providers from the enforcement of federal criminal law, the Committee argued that the tools available for prosecutors are not enough because it is hard to "demonstrate beyond a reasonable doubt that the website operators knew that the advertisements involved sex trafficking."[807] The FOSTA bill, which compromised between the (initial) House initiative FOSTA and the Senate initiative SESTA, was adopted by the House in February 2018 by the Senate in March 2018 and signed into law by President Trump on 11 April 2018.[808] FOSTA is criticised as offering little remedies for victims of sex trafficking. At the same time, it is argued to have devastating effects (both financially and in terms of safety) on sex workers who are deprived of the possibility of advertising their services online.[809]

As noted, before FOSTA, it was required to prove that an internet intermediary was "knowingly advertising sex trafficking".[810] Therefore the Committee concluded that "[a] new statute that instead targets promotion and facilitation of prostitution is far more useful to

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802 Kosseff, 'First Amendment Protection for Online Platforms', *Computer Law & Security Review*, 2019, p. 14.
803 Keller, 2021, 'Six Constitutional Hurdles for Platform Speech Regulation'.
804 Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 280. However, in 2006 there were made some adjustments to Section 230 immunities for online gambling which had in the words of Goldman an "ambiguous effect", see Note 7 of Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 280. Goldman argues that "on balance, it looks like this law may have slightly expanded ICS [interactive computer service, MK] immunization by providing some limits on ICS liability for third party criminal gambling activities.", see E. Goldman, 'Unlawful Internet Gambling Enforcement Act of 2006', *Technology & Marketing Law Blog,* 13 December 2006, available at blog.ericgoldman.org/archives/2006/12/unlawful_intern.htm (retrieved on 14 February 2022).
805 H.R. Rep. No. 115–572, pt. 1, at 5 (2018).
806 H.R. Rep. No. 115–572, pt. 1, at 5 (2018).
807 H.R. Rep. No. 115–572, pt. 1, at 5 (2018).
808 Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, pp. 283-284.
809 Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, pp. 290-292.
810 H.R. Rep. No. 115–572, pt. 1, at 5 (2018).

prosecutors."[811] FOSTA introduced two new federal crimes.[812] The new 18 USCA §2421A introduces a new federal criminal crime for whoever

> owns, manages, or operates an interactive computer service (as such term is defined in defined in section 230(f) the Communications Act of 1934 (47 U.S.C. 230(f))), or conspires or attempts to do so, with the intent to promote or facilitate the prostitution of another person shall be fined under this title, imprisoned for not more than 10 years, or both.[813]

This statute allows for a more aggregative penalty (25 years) when whoever "owns, manages, or operates an interactive computer service" uses this service to

> (1) promotes or facilitates the prostitution of 5 or more persons; or
>
> (2) acts in reckless disregard of the fact that such conduct contributed to sex trafficking, in violation of 1591(a)[814]

FOSTA also introduced a new federal crime by changing 18 USCA §1591. Section 1591 already criminalised "sex trafficking of children or by force, fraud, or coercion". However, Section 1591 was amended to include whoever "benefits, financially or by receiving anything of value, from participation in a venture",[815] which is defined as "knowingly assisting, supporting, or facilitating"[816] sex trafficking. Participating in a venture that "recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person"[817] while knowing "that such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act"[818] can be fined by a prison sentence from 10 years to life.[819] In the case of advertisement, actual knowledge is not required, but it is enough to demonstrate "reckless disregard".[820] Reckless disregard is a significantly lower bar for providers to become criminally liable for sex trafficking advertisements than knowledge.

Section 230 did not shield providers from federal prosecution before FOSTA. Even without amending Section 230, providers could not rely on Section 230 to shield them from federal prosecution.[821] Section 230, however, did shield providers from some criminal prosecution at the state level. To recall, Section 230 provides immunity for legal actions and liability under state law when these laws are inconsistent with Section 230.[822] Section 230, however, did shield providers

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811 H.R. Rep. No. 115–572, pt. 1, at 5 (2018).
812 Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 284.
813 §2421A. Promotion or facilitation of prostitution and reckless disregard of sex trafficking, 18 USCA § 2421A(a) (West 2018, Westlaw Next through PL 116-193).
814 18 USCA § 2421A(b) (West 2018, Westlaw Next through PL 116-193).
815 18 USCA § 1591(a)(1) (West 2018, Westlaw Next through PL 116-193).
816 18 USCA § 1591(e)(4) (West 2018, Westlaw Next through PL 116-193).
817 18 USCA § 1591(a)(1) (West 2018, Westlaw Next through PL 116-193).
818 18 USCA § 1591(a) (West 2018, Westlaw Next through PL 116-193).
819 18 USCA § 1591(b) (West 2018, Westlaw Next through PL 116-193).
820 18 USCA § 1591(a) (West 2018, Westlaw Next through PL 116-193).
821 47 USCA § 230(e)(1) (West 2018, Westlaw Next through PL 116-91).
822 47 USCA § 230(e)(3) (West 2018, Westlaw Next through PL 116-91).

from civil liability since most of the exemptions (until 2018) saw to (federal) enforcement of criminal law.[823]

FOSTA changed this by directly amending Section 230 by carving out immunity for state prosecution for "any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18".[824] The same applies to criminal charges based on "a violation of section 2421A of Title 18".[825] Also new is that civil claims based on violations of Section 1591 are no longer immunised by Section 230.[826] According to Goldman, the Section 230 carve-out with respect to civil claims does not apply to Section 2421A, "even though that seems inconsistent with FOSTA's purposes."[827]

Goldman and other commentators question the necessity and desirability of FOSTA. While FOSTA targets providers as Backpage.com, the brand-new Section 2421A and the modified Section 1591 were not used to prosecute the management of Backpage.com.[828] Besides, Goldman questions the necessity of amending Section 230 to enable victims to sue providers for damages because of the violations of Section 2421A and Section 1591. As Goldman notes, a successful prosecution under Section 1591 requires mandatory restitution of victims under Section 1593.[829] Goldman also points out that Section 230 protection of Backpage.com before FOSTA was not a given now evidence was provided that Backpage.com was involved in developing the content of the published advertisements.[830] To recall, Section 230 does not protect providers involved in developing the content of user-provided information.[831]

Before FOSTA became law, two court rulings denied Section 230 immunity for civil action direct at Backpage.[832] FOSTA, thus, seems to do very little to protect victims of sex trafficking, while the potential adverse effects on providers are severe. According to Goldman, FOSTA leaves providers with three options: perfect moderation, no moderation at all to prevent knowledge, or cease to offer these services.[833] Of course, near-perfect moderation is only a potential possibility for the larger providers, while the smaller ones would choose to cease their services to prevent liability.[834]

### 3.3.2 The Trump-administration

Not only FOSTA may introduce the risk that providers refrain from moderating or stopping their services. On 28 May 2020, the Trump administration issued an executive order discussing this

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[823] New is 47 USCA § 230(e)(5) (West 2018, Westlaw Next through PL 116-91). Of course, civil action for copyright violations was already possible since Section 230 does not see to intellectual property violations, see 47 USCA § 230(e)(1) (West 2018, Westlaw Next through PL 116-91).

[824] 47 USCA § 230(e)(5)(b) (West 2018, Westlaw Next through PL 116-91).

[825] 47 USCA § 230(e)(5)(c) (West 2018, Westlaw Next through PL 116-91).

[826] 47 USCA § 230(e)(5)(a) (West 2018, Westlaw Next through PL 116-91).

[827] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 285.

[828] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 286.

[829] §1593. Mandatory restitution, 18 USCA § 1593 (West 2018, Westlaw Next through PL 116-193); Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 287.

[830] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 287.

[831] *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1166-1167 (9th Cir. 2008).

[832] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 288.

[833] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, p. 288.

[834] Goldman, 'The Complicated Story of FOSTA and Section 230', *First Amendment Law Review*, 2019, pp. 288-289.

'Good Samaritan' clause. The Executive order stated that protection for liability from moderating content should only apply to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable"[835] content. Service providers that moderate other content should lose their immunity and be regarded as editors and thus publishers of this content.[836] Besides, the executive order sought to reinterpret Section 230 in such a way that good faith moderation cannot be "deceptive, pretextual, or inconsistent with a provider's terms of service" and that providers must "provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard".[837]

The Trump administration proposed legislation expanding categories of content that do not fall under the immunity provided by Section 230. The proposal, for example, included violations of anti-terrorism, child abuse and cyber-stalking laws as carved out from the immunity provided by Section 230. Besides, the proposed legislation also deimmunizes providers for civil lawsuits based on these exceptions.[838] Under current law, victims of sexual child abuse material suing providers for damages would be left empty-handed. Section 230 merely exposes providers to civil lawsuits based on criminal law violations of sex trafficking law.[839]

In September 2020, the Trump Administration also proposed legislation to codify this new understanding of 'Good Samaritan' moderation in Section 230.[840] This proposal seeks to limit this exception to the content that the provider "has an objectively reasonable belief is obscene, lewd, lascivious, filthy, excessively violent, promoting terrorism or violent extremism, harassing, promoting self-harm, or unlawful".[841] Section 230 in its current form also includes "otherwise objectionable" as a ground for removal.[842] The proposal removes this exception, severely limiting the possibility for providers to take down legal but undesirable content.

Besides, the draft includes what is referred to as a "'Bad Samaritan' carve-out" deimmunizing providers that

> acted purposefully with the conscious object to promote, solicit, or facilitate material or activity by another information content provider that the service provider knew or had reason to believe would violate Federal criminal law, if knowingly disseminated or engaged in.[843]

The draft legislation does not alter the immunity provided to providers for defamation claims.[844] For other categories of content, the draft establishes a conditional liability approach. Service

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[835] 47 USCA § 230(c)(1)(a) (West 2018, Westlaw Next through PL 116-91).

[836] The White House, 'Executive Order on Preventing Online Censorship', *The White House,* 28 May 2020, available at trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship (retrieved on 15 February 2022).

[837] The White House, 2020, 'Executive Order on Preventing Online Censorship'.

[838] § 230(f) US Department of Justice, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)', *US Department of Justice,* 23 September 2020, available at justice.gov/file/1319331/download (retrieved on 15 February 2022).

[839] 47 USCA § 230(e)(1) and (e)(5) (West 2018, Westlaw Next through PL 116-91).

[840] § 230(c)(2)(a) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[841] § 230(c)(2)(a) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[842] 47 USCA § 230(c)(1)(a) (West 2018, Westlaw Next through PL 116-91).

[843] § 230(d)(1) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[844] US Department of Justice, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Cover Letter)', *US Department of Justice,* 23 September 2020, available at justice.gov/file/1319346/download

providers that have actual knowledge may become liable when they "had actual notice of that material's or activity's presence on their service and its illegality" and failed to "expeditiously remove, restrict access to or availability of, or prevent dissemination" of user-provided information with such content.[845]

The draft legislation also proposed to codify what 'good faith' moderation is. According to the draft proposal, providers must issue clear content moderation policies which form the basis of content moderation practices of the service provider. Besides, providers are, under this proposal, obligated to notify the users of the restriction while mentioning the grounds on which this restriction took place. The user must be offered the opportunity to respond. Only user-provided information containing terrorist content or content related to criminal activities does not require such notification. Such notification is also not mandatory if it "would risk imminent harm to others".[846]

Of course, with the 2020 presidential elections, these Section 230 reform plans are archived with the rest of the administrations' websites. Although these proposals are no longer up to date, they give an idea of what adjustments to Section 230 are being considered.

### 3.3.3 The Biden-administration

After Biden became president-elect, the question arose about what this would mean for Silicon Valley and Section 230.[847] After all, Biden has also taken a firm stance on Section 230 in the past, including the statement that Section 230 protection "should be revoked because it [Facebook, MK] is not merely an internet company."[848] According to Biden, Mark Zuckerberg "should be submitted to civil liability and his company [Facebook, MK] to civil liability, just like you [the editorial board, MK] would be here at The New York Times."[849] Revoking or amending Section 230 protection for companies such as Google, Twitter and Meta is thus a recurring theme both amongst democrats and republicans in the US.

In May 2021, Biden revoked "Executive Order 13925 of May 28, 2020 (Preventing Online Censorship)" [850] issued by the Trump Administration.[851] Besides, Biden nominated Jessica Rosenworcel as the new chair of the Federal Communications Commission. Rosenworcel,

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(retrieved on 15 February 2022); § 230 (d) (3) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[845] § 230(d)(2) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[846] § 230(g)(5) US Department of Justice, 2020, 'Department of Justice's Review of Section 230 of the Communications Decency Act of 1996 (Redline)'.

[847] K. Stacey & R. Waters, 'What can Silicon Valley expect from Joe Biden?', *Financial Times,* 8 November 2020, available at ft.com/content/44f738e8-eb6f-4394-b833-6b3207ce31bf (retrieved on 20 May 2021).

[848] The editorial board of The New York Times, 'Joe Biden: Former vice president of the United States', *The New York Times,* 17 January 2020, available at nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html (retrieved on 15 February 2022).

[849] The Editorial Board of the New York Times, 2020, 'Joe Biden: Former vice president of the United States'.

[850] The White House, 2020, 'Executive Order on Preventing Online Censorship'.

[851] The White House, 'Executive Order on the Revocation of Certain Presidential Actions and Technical Amendment', *The White House,* 14 May 2021, available at whitehouse.gov/briefing-room/presidential-actions/2021/05/14/executive-order-on-the-revocation-of-certain-presidential-actions-and-technical-amendment (retrieved on 15 February 2022).

according to commentators, opposes Section 230 reform.[852] On 7 December 2021, Rosenworcel was confirmed by the Senate as the first female chair of the FCC.[853] Of course, the Biden Administration may also seek to directly amend Section 230 instead of reforming Section 230 by seeking reinterpretation by the FCC. As the Washington Post wrote in January 2021, Section 230 was "a favorite punching bag of President Trump's in the past year when social media companies removed posts and accounts", but "[d]emocrats also think the law should be amended, but for different reasons: Tech companies should be held more responsible for moderating content on their sites."[854]

**Conclusion**

Section 230 does not grant providers unlimited discretion to moderate the content of user-provided information as they see fit. Section 230 does not grant providers the right to moderate constitutionally protected speech. Nor does Section 230 exempt providers from liability for lawful but harmful content disseminated through their services. Any Section 230 carve-out or other proposed amendment to change this will ultimately stumble upon First Amendment concerns. The First Amendment guarantees that providers are allowed to make editorial decisions on their services. However, the First Amendment does not apply between the provider and the user of the service. The First Amendment, however, does apply to the relationship between the government and the service provider. Therefore, the user nor the government can force providers to carry the content of user-provided information. At the same time, the government also cannot force the provider to take down user-provided information with constitutionally protected content.

Section 230(c)(1) does not grant rights to providers; it merely grants immunities for liability that may arise from how they offer their services. In doing so, Section 230(c)(1) applies to almost all providers and users of these services ("provider or user of an interactive computer service"). Section 230(c)(1), thus, bypasses debates over what an "internet intermediary service provider" is and offers legal certainty to all providers that they can rely on this protection. Besides, Section 230(c)(1) applies to "any information provided by another information content provider." Section 230(c)(1) immunities thus merely apply to the content of user-provided information. When the provider can be regarded as the developer of the content, Section 230(c)(1) immunities do not apply. As discussed, the courts are not very inclined to assume that this is the case. Only in fairly clear-cut cases has a provider been considered as the content developer of user-provided information. Section 230(c)(1) shields providers against publisher or speaker liability which, as shown, involves the majority of the legal grounds on which users or third parties could base their claims. When a provider is held responsible for the content of user-provided information it did not create or develop itself, the chances are good that Section 230(c)(1) bars the claim. As noted,

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[852] N. Krishan, 'FCC nominee's record is at odds with Biden censorship goals', *The Washington Examiner,* 30 November 2021, available at washingtonexaminer.com/policy/fcc-nominees-record-is-at-odds-with-biden-censorship-goals (retrieved on 15 February 2022); W. Kimball, 'Biden Nominates Net Neutrality Champion Jessica Rosenworcel to Head the FCC', *Gizmodo,* 26 October 2021, available at gizmodo.com/biden-nominates-net-neutrality-champion-jessica-rosenwo-1847938641 (retrieved on 15 February 2022).

[853] R. Brandom, 'Jessica Rosenworcel confirmed by Senate to lead the FCC', *The Verge,* 7 December 2021, available at theverge.com/2021/12/7/22820873/jessica-rosenworcel-fcc-chair-confirmed-biden-net-neutrality (retrieved on 28 January 2022).

[854] R. Lerman, 'Social media liability law is likely to be reviewed under Biden', *The Washington Post,* 18 January 2021, available at washingtonpost.com/politics/2021/01/18/biden-section-230 (retrieved on 28 March 2022).

Section 230(c)(1) often allows providers to be granted a motion to dismiss, which avoids lengthy and expensive trials.

The protection offered by Section 230(c)(2) is less clear and more open to discussion in a court procedure. To successfully rely on Section 230(c)(2), the provider must demonstrate that it moderated in "good faith" and that its moderation efforts saw to "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content of user-provided information. Section 230(c)(2), thus, offers a safe harbour and does not completely immunise the provider for liability from moderation efforts. Section 230(c)(2) protections are extended over constitutionally protected content of user-provided information. Section 230(c)(2) thus requires providers to demonstrate that they 1) "restrict access to or availability of material" that it 2) "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable". As noted, providers typically rely on the contract with their users, which allows them to moderate user-provided information as they see fit, which makes Section 230(c)(2) less powerful of an instrument than Section 230(c)(1).

The question is how proposals to repeal or amend Section 230 will turn out. Smith & Alstyne, for example, propose to update Section 230 because they view the immunities as disincentivizing providers to moderate the content of user-provided information. Requiring some duty of care to rely on Section 230 protections, according to them, may remedy this situation.[855] Even when it is true that Section 230 leads to underregulation of harmful or illegal and otherwise unlawful content of user-provided information, less absolute internet intermediary liability regimes, however, may have their disadvantages.

The balance will be made up in Chapter 5. Before the pros and cons of different liability regimes can be discussed, it is necessary to discuss how the European approach toward internet intermediary liability for the content of user-provided information seeks to address these issues.

[855] M.D. Smith & M. van Alstyne, 'It's Time to Update Section 230', *Harvard Business Review,* 12 August 2021, available at hbr.org/2021/08/its-time-to-update-section-230 (retrieved on 15 February 2022).