February 27, 2020

U.S. Attorney General William P. Barr
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Barr:

Internet Association (IA) welcomes the opportunity to engage with the Department of Justice (DOJ) on the importance of the Communications Decency Act, Section 230. IA was pleased to participate in the Department's workshop titled "*Section 230 - Nurturing Innovation or Fostering Unaccountability?*" on February 19, 2020. The event put a spotlight on specific issues that have become part of the Section 230 discussion, and demonstrated an urgent need for reliable and comprehensive data regarding how Section 230 functions. IA believes that it would be premature for DOJ to reach any conclusions on whether Section 230 should be amended, or how, in the absence of such data. IA has significant concerns that proposals to amend Section 230 will have the unintended result of hindering content moderation activities that IA member companies currently perform. In light of our strong shared interest in promoting safety, we believe that avoiding such a result should be a central consideration.

Background

IA represents over 40 of the world's leading internet companies. IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA believes the internet creates unprecedented benefits for society, and as the voice of the world's leading internet companies, IA works to ensure policymakers, and other stakeholders understand these benefits.

IA member companies respect criminal laws and work diligently to promote the safety of those who use their services. All IA member companies prohibit the use of their services for illegal purposes in a Terms of Service or other rules. In fact, IA members often moderate or remove objectionable content well beyond what the law requires. All of this activity is made possible through Section 230.

Alongside governments, civil society and other stakeholders, IA member companies continually work to stop bad actors online. Many companies proactively detect and then report instances of Child Sexual Abuse Material (CSAM) to the National Center for Missing and Exploited Children (NCMEC). IA supported the CyberTipline Modernization Act of 2018 to support coordination between NCMEC, the public, law enforcement, and the internet sector to

eradicate child exploitation online and offline. IA members created technology to identify over 6,000 victims and 2,000 sex traffickers in a single year, which reduced law enforcment's investigation time by 60 percent. Member companies work with the Drug Enforcement Administration, and promote the DEA National Prescription Drug Take Back Day. Member companies also partner with the Global Internet Forum to Counter Terrorism (GIFCT) to organize collaborations between companies to share information, content identifiers, and best practices for the removal of terrorist content. These are just a fraction of the steps that IA companies take to make the online and offline world a safer place.

Benefits of Section 230

Passed as part of the Communications Decency Act in 1996, Section 230 created two key legal principles. First, online platforms are not the speaker of user-generated content posted via their services whether it consists of blogs, social media posts, photos, professional or dating profiles, product and travel reviews, job openings, or apartments for rent. And second, that online services – whether they're newspapers with comment sections, employers, universities, neighbors who run list-serves in our communities, volunteers who run soccer leagues, bloggers, churches, labor unions, or anyone else that may offer a space for online communications – can moderate and delete harmful or illegal content posted on their platform. Most online platforms – and all of IA's members – have robust codes of conduct, and Section 230 allows the platforms to enforce them.

Returning to the world before Section 230 would mean courts would, in many cases, apply publisher and distributor liability regimes to online services. It was the application of these regimes that led to the results in *Cubby v. Compuserve* and *Stratton Oakmont v. Prodigy* that spurred Congress to pass Section 230. Based on case law, absent Section 230, platforms that do not make any attempt to moderate content would escape liability, while those that engage in good-faith moderation would have the same liability as if they wrote the illegal content. This could create a stark choice. On the one hand, online services could decline to moderate because of the strong *disincentives* associated with increased risk of liability. And on the other hand, online services could opt to reduce legal risk associated with moderation by highly curating content with the result of significantly limiting the number and diversity of voices represented. The flourishing middle ground we enjoy today would cease to exist.

This flourishing middle ground is what many would call the best of the internet. Section 230 enables internet users to post their own content and engage with the content of others, whether that's friends, family, co-workers, teachers or mentors, neighbors, government officials, potential employers or landlords, fellow gamers, or complete strangers from the other side of the globe with a shared experience or interest.

Misconceptions regarding Section 230

As noted at the outset, the DOJ event put a spotlight on specific criticisms of Section 230. Going forward, further assessment of the status quo and any future policy options would benefit from a careful study and analysis of the legislative text, cases, and other aspects and outcomes of Section 230.

Participants presented conflicting views of the plain language and operation of the law. The cases cited as emblematic of Section 230's flaws warrant further examination to understand why courts reached specific outcomes, for example whether they were due to Section 230 or unrelated defects in the claims presented. In terms of outcomes, it would be constructive and important to include additional information and context regarding provider efforts to moderate content before advancing to options to "incentivize" additional moderation (or to limit moderation in the case of conservative bias). IA believes that further data is needed to allow an informed evaluation of potential problems and solutions related to Section 230, including on the following critical points:

- **Liability in the absence of Section 230.** There is an urgent need to reach a better informed foundation for discussion on:
    - **The extent to which Section 230 is the sole basis on which courts have dismissed claims against Interactive Computer Services (ICSs).** For example, terrorism cases were pointed to as one example of where Section 230 frustrates recovery for victims,[1] but the Ninth Circuit opinion in *Fields v. Twitter* declined to address Section 230 and instead found that plaintiffs failed to state a claim under the Anti-Terrorism Act because of a lack of causation.[2] Similar terrorism cases have also been dismissed because of the failure to state a claim rather than, or in addition to, Section 230.[3] Despite efforts to connect conservative bias to Section 230, cases brought by plaintiffs' claiming they were improperly censored by an ICS are frequently dismissed based on First Amendment jurisprudence which would control in Section 230 absence.[4] Defamation cases

[1] *Attorney General William P. Barr Delivers Opening Remarks at the DOJ Workshop on Section 230: Nurturing Innovation or Fostering Unaccountability?*, available at: https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-doj-workshop-section-230 (last accessed February 26, 2020)("For example, the Anti-Terrorism Act provides civil redress for victims of terrorist attacks on top of the criminal terrorism laws, yet judicial construction of Section 230 has severely diminished the reach of this civil tool.").
[2] *Fields v. Twitter*, 2018 WL 626800 (9th Cir. Jan. 31, 2018).
[3] *See, e.g.*, *Crosby v. Twitter*, 2019 WL 1615291 (6th Cir. April 16, 2019); *Clayborn v. Twitter*, 2018 WL 6839754 (N.D. Cal. Dec. 31, 2018); *Cain v. Twitter*, 2018 WL 4657275 (N.D. Cal. Sept. 24, 2018).
[4] *See, e.g., Prager University v. Google LLC,* Case No. 18-15712 (9th Cir. February 26, 2020)(*see* note 3, p. 10, for citations to additional cases with similar holdings); *affirming* 2018 WL 1471939 (N.D. Cal., Mar. 26, 2018, No. 17-CV-06064-LHK).

against ICSs are also dismissed under state Anti-SLAPP statutes[5] or for simply not qualifying as "defamation."[6]

- **What are the liability regimes that would apply in the absence of Section 230 and to what extent would application of those regimes lead to different results than Section 230?** It appears that a starting point for discussions of Section 230 reform is frequently an assumption that, by repealing or limiting the availability of Section 230, ICSs will become liable under the existing legal regimes that would be applied in 230's absence. For example, the idea that repealing Section 230 will address "conservative bias" fails to recognize the First Amendment protections that apply to publishers and distributors.[7] The discussion of Section 230 would benefit from a better understanding of traditional rules of publisher liability and tort law and how courts would apply them to the online environment.[8]
- **What would the impact of eliminating Section 230 as a method of quickly ending frivolous litigation be on small and medium-sized businesses?** Litigation is expensive, even when it lacks merit.[9] Even when defendants are awarded attorney fees after successfully defending a case, recovering those fees is difficult.[10] IA member companies are concerned about the impact on innovation and new entrants to the market. Also concerning is DOJ's view that, "[n]o longer are tech companies the underdog upstarts; they have become titans of US industry."[11] IA represents more than 40 internet industry companies of which the vast majority of which are not "titans" by any measure. The technology industry still features a vibrant pipeline of startups that fuels continued innovation.

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[5] *See, e.g.*, *International Padi, Inc. v. Diverlink*, 2005 WL 1635347 (9th Cir. Jul. 13, 2005); *Sikhs for Justice v. Facebook*, 144 F. Supp. 3d 1088 (N.D.Cal. 2015)(*affirmed*); *Eade v. Investorshub.com*, 2:11-cv-01315 (C.D. Cal. July 12, 2011); *Heying v. Anschutz Entm't Group*, Case No. B276375. (CA. St. Ct. App 2017)(unpub).

[6] *See, e.g.*, *Mosha v. Yandex*, 2019 WL 4805922 (S.D.N.Y. Sept. 30, 2019); *Darnaa v. Google*, 2017 WL 679404 (N.D. Cal. Feb. 21, 2017); *Hammer v. Amazon*, 392 F. Supp. 2d 423 (E.D.N.Y 2005).

[7] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[8] For example, at least one court declined to treat online intermediaries as "publishers" even without Section 230. *See, e.g.*, *Lunney v. Prodigy*, 723 N.E.2d 539 (NY 1999).

[9] Engine Advocacy, *Primer: The Value of Section 230*, January 31, 2019 (available at: https://www.engine.is/news/primer/section230costs)(last accessed February 26, 2020)(noting that filing a single motion to dismiss can cost between $15,000-$80,000 and that the average startup begins with around $80,000 in funds). This estimate does not account for the reality that defendants may have to file multiple motions to dismiss in the same action as a result of plaintiffs amending complaints. *See, e.g.*, *Colon v. Twitter*, Case No. 6:18-cv-00515 (M.D. Fla.)(Defendants' motion to dismiss the *third* amended complaint is pending before the court).

[10] *See, e.g.*, *Eade v. Investorshub.com* (review of the docket shows that after winning a Motion to Strike under an Anti-SLAPP statute and being awarded $49,000 in attorneys fees in 2011, defendant is still trying to recover the fees from plaintiff, an attorney, in 2020).

[11] *Attorney General William P. Barr Delivers Opening Remarks at the DOJ Workshop on Section 230.*

- **Liability under Section 230.** Similarly, event participants expressed conflicting views about how Section 230 has been applied by courts and even what the text of the exceptions means. We recommend a thorough assessment be conducted to examine:
    - **What is the plain meaning of each exception to Section 230 and how do courts apply them?** For example, one participant in the afternoon session seemed to suggest that Section 230's exception for "intellectual property" was limited to "copyright," which neither tracks the plain language of the statute, nor the application of the exception by courts, which have applied it to matters ranging from trademark[12] to the right of publicity.[13] As discussed further below, similar confusion was evident regarding federal criminal law and state enforcement exceptions.
    - **What is the impact on criminal law enforcement?** Several participants suggested that criminal laws on a wide range of topics do not apply currently to the online environment. But Section 230 does not restrict the enforcement of federal criminal law. In fact, DOJ's news releases announce numerous successes against online services for activities such as advertising of CSAM,[14] operating criminal marketplaces,[15] cyberstalking,[16] and illegal selling of drugs.[17]
    - **What is the impact on state criminal law enforcement?** The inability of state Attorneys General to successfully prosecute Backpage has left an impression that Section 230 operates as a complete bar to state criminal law enforcement against an ICS. However, this is not consistent with the plain language of Section 230, which allows state criminal law enforcement where it is consistent

[12] *Gucci Am., Inc. v. Hall & Assocs.*, 135 F. Supp. 2d 409, 413 (S.D.N.Y. 2001).
[13] *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009).
[14] https://www.justice.gov/opa/pr/dark-web-child-pornography-facilitator-pleads-guilty-conspiracy-advertise-child-pornography (last accessed February 22, 2020); *see also*, https://www.justice.gov/opa/pr/alleged-dark-web-child-pornography-facilitator-extradited-united-states-face-federal-charges
[15] https://www.justice.gov/opa/pr/russian-national-pleads-guilty-running-online-criminal-marketplace (last accessed February 22, 2020).
[16] https://www.justice.gov/opa/pr/florida-man-sentenced-prison-extensive-cyberstalking-and-threats-campaign (last accessed February 22, 2020); *see also*, https://www.justice.gov/opa/pr/new-york-man-sentenced-more-four-years-prison-engaging-extensive-four-year-cyberstalking; https://www.justice.gov/opa/pr/seattle-man-sentenced-over-two-years-prison-cyberstalking-campaign
[17] https://www.justice.gov/opa/pr/darknet-fentanyl-dealer-indicted-nationwide-undercover-operation-targeting-darknet-vendors (last accessed February 22, 2020). *See also*, https://www.justice.gov/opa/pr/administrators-deepdotweb-indicted-money-laundering-conspiracy-relating-kickbacks-sales; https://www.justice.gov/opa/pr/three-germans-who-allegedly-operated-dark-web-marketplace-over-1-million-users-face-us

with federal law.[18] In at least three of the lawsuits between Backpage and State Attorneys General (Cooper,[19] McKenna,[20] and Hoffman[21]), Backpage challenged state laws which were specifically enacted to target online intermediaries by significantly reducing *mens rea* requirements of existing aiding and abetting statutes. In each of these cases, the courts found the new criminal laws were barred by Section 230 because they assigned criminal liability to ICSs simply for display of third party content. Notably, those courts also held or noted First Amendment, Fourteenth Amendment, and Commerce Clause considerations would also prohibit such state laws. *Bollaert v. Gore* is an example of a state prosecution of an ICS where the defendant was successfully prosecuted.[22]

- **Are ICSs who contribute to the illegality of content protected by Section 230?** Many participants seemed to suggest that courts do not allow discovery into the facts necessary to determine whether ICSs play a role in the development of content at issue and that courts do not hold ICSs accountable when they do play such a role. A review of case law suggests otherwise. There are an ample number of cases where courts have required discovery before ruling on the applicability of Section 230,[23] as well as cases where courts refused to apply Section 230 because of the role of the ICS in content development.[24]
- **What does the "context" of Section 230 as part of the CDA mean for congressional intent and interpretation of the text?** Opening remarks noted that the Supreme Court's ruling finding CDA unconstitutional, "left in place an unbalanced statutory regime that preserves technology providers' liability protections, without guaranteeing corresponding protections for minors from harmful material on the Internet." A participant also advocated for a narrow interpretation of the protection for good faith removal of "otherwise objectionable" content[25] based, at least in part, on the overall intent of the CDA. Limiting application of Section 230(c)(2)(A) to indecency would have a

[18] *See* 47 U.S.C. § 230(e)(3)(stating "nothing in this section shall be construed to prevent any State from enforcing any state law that is consistent with this section.").
[19] *Backpage v. Cooper*, 939 F. Supp. 2d 805 (M.D. Tenn. 2013).
[20] *Backpage v. McKenna*, 2012 WL 3064543 (W.D. Wash. July 27, 2012).
[21] *Backpage v. Hoffman*, 2013 WL 4502097 (D.N.J. Aug. 20, 2013).
[22] *Kevin Bollaert v. Gore, 2018 WL 5785275 (S.D. Cal. Nov. 5, 2018)(denying writ of habeus corpus).*
[23] *See, e.g.*, *Florida Abolitionist v. Backpage.com LLC*, 2018 WL 1587477 (M.D. Fla. March 31, 2018); *Pirozzi v. Apple*, 913 F. Supp. 2d 840 (N.D. Cal. 2012); *Cornelius v. Delca*, 709 F. Supp. 2d 1003 (D. Idaho 2010); *GW Equity, LLC v. Xcentric Ventures*, LLC, 2009 WL 62173 (N.D.Tex. Jan. 9, 2009); *Avery v. Idleaire Tech*, 2007 LEXIS 38924 (D. Tenn, 2007).
[24] *Fed. Trade Comm'n v. Leadclick Media, LLC*, 838 F.3d 158 (2d Cir. 2016); FTC v. Accusearch, 570 F.3d 1187, 1197 (10th Cir. 2009); Enigma Software Groupv. Bleeping Computer, 194 F.Supp.3d 263 (2016); *Alvi Armani Medical, Inc. v. Hennessey*, 629 F. Supp. 2d 1302 (S.D. Fla. 2008).
[25] 47 U.S.C. § 230(c)(2)(A).

significant adverse impact on consumers by disrupting existing case law protecting providers who rely on this provision in litigation by spammers.[26]

- **What constitutional limitations apply to the conduct of government actors (and agents of government actors) when it comes to direct or indirect efforts to influence private actors' decisions on content moderation?**
    - **Conservative Bias.** The limits on the government (either through DOJ or directly by Congress) to regulate which content an ICS can be required to display is better understood by reference to the First Amendment, rather than Section 230. Last session, all nine Justices on the Supreme Court emphasized that private platforms are not "subject to First Amendment constraints."[27]
    - **CSAM.** The Tenth Circuit's holding in *U.S. v. Ackerman*[28] that NCMEC is a government actor for purposes of the Fourth Amendment resulted in a wave of criminal defendants seeking to suppress evidence gathered voluntarily on the basis that ICSs are agents of the government. Courts have generally found that ICSs are not agents of the government when they implement voluntary screening for CSAM because they do so for reasons independent of law enforcement. A change to that incentive structure threatens to exacerbate and increase these claims and directly impact the ability of law enforcement to prosecute sexual predators identified through company voluntary efforts. These voluntary efforts by ICSs contribute overwhelmingly to reports of CSAM received by NCMEC which are in turn referred to law enforcement for prosecution.[29]
    - **Prior attempts to regulate online content**. Attempts to regulate content, even illegal content, have been repeatedly struck down by the Supreme Court and other U.S. courts,[30] unless they are well crafted to meet the requirements of the Constitution. This was the case with the other sections of the Communications Decency Act, except for the surviving Section 230.[31] It was also the case for the Child Online Protection Act,[32] and the Child Pornography Prevention Act of 1996.[33] Additionally, the Supreme Court has struck down laws restricting sex offenders from using social media.[34]

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[26] *See, e.g.*, *Smith v. Trusted Universal Standards in Electronic Communication*, 2011 U.S. Dist. LEXIS 26757 (D.N.J. March 15, 2011); *Holomaxx v. Yahoo!*, 2011 U.S. Dist. LEXIS 94314, (N.D. Cal. August 22, 2011); *Holomaxx v. Microsoft*, 2011 U.S. Dist. LEXIS 94316 (N.D. Cal. Aug. 23, 2011).
[27] *Manhattan Community Access Corp. v. Halleck,* 139 S. Ct. 1921 (2019).
[28] *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016).
[29] Google, NCMEC & Thorn, *Rethinking the Detection of Child Sexual Abuse Imagery on the Internet*, p. 4 (available at: https://web.archive.org/web/20190928174029/https://storage.googleapis.com/pub-tools-public-publication-data/pdf/b6555a1018a750f39028005bfdb9f35eaee4b947.pdf)(last accessed February 26, 2020).
[30] *See, e.g.*, *Center for Democracy & Technology v. Pappert*, 337 F. Supp. 2d 606 (E.D. Pa. 2004).
[31] *Reno v. ACLU*, 521 U.S. 844 (1997).
[32] *Ashcroft v. ACLU*, 535 U.S. 564 (2002).
[33] *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).
[34] *Packingham v. North Carolina*, 137 S.Ct. 1730 (2017).

- **International implications.** Section 230 plays a critical role in protecting the ability online services to operate responsibly on a global basis. Foreign jurisdictions generally lack Good Samaritan protections for online services that moderate content. This creates exposure to liability in foreign courts for content that not only doesn't violate U.S. laws, but that is protected expression under the First Amendment. Section 230 provides important protections when international courts are willing to apply forum selection and choice law clauses from contracts and apply U.S. law. Also, under the SPEECH Act, U.S. courts are barred from enforcing foreign libel judgements when they are inconsistent with Section 230.[35] For this reason, Section 230 is a critical bulwark against foreign efforts to engage in censorship of content on U.S. platforms.

Conclusion

Stopping bad actors online can be accomplished without removing a fundamental pillar on which the modern internet was built. The actions that policy makers want online platforms to take against a wide range of inappropriate content are enabled by Section 230. IA's member companies agree on the importance of voluntarily undertaking content moderation activity to promote online and real world safety and in many instances they do – whether using hash values to identify child sexual abuse imagery, using algorithms to detect ISIS and other terrorist content, providing resources to users threatening suicide, or any of the thousands of other actions that happen daily to address harmful content. Section 230 is the law that allows that to happen.

Changes to Section 230 should be considered only after a thorough understanding of the necessity for and the practical and legal implications of such changes is established. It is critical to avoid any actions that could hinder existing industry efforts to maintain and enforce robust codes of conduct, particularly the existing system for the detection and reporting of CSAM, and to avoid establishing rules that could inadvertently support state agent claims that could shield defendant/abusers.

Thank you again for the opportunity to submit an outline of IA's views on this important topic, and IA looks forward to being a resource to the Department of Justice going forward.

Sincerely,

Elizabeth Banker
Deputy General Counsel

[35] 28 U.S.C. § 4102(c)(1). *See, e.g.*, *Joude v. Wordpress*, 2014 WL 3107441 (N.D. Cal. July 3, 2014)(court declined to enforce a foreign defamation judgment under the SPEECH Act).