Online Content Policy Modernization Act: Bad For Safe Online Communities

Key Takeaway

This bill would incentivize a hands off approach to online content by punishing those who take steps to make their online communities places for safe and positive expression. The broad set of Section 230 beneficiaries — schools, churches, local newspapers, support groups, and literally anyone else who manages or participates in an online community — will be forced to choose from an unappealing set of options: 1) host content they find offensive; 2) face the high costs of litigation; or 3) close their communities.

Section 230 was originally passed to change how traditional legal doctrines related to publisher and distributor liability were being applied by courts.

Before 230:
Moderation Brought Liability

An online provider could avoid liability for the third-party content on their service as long as they did not attempt to enforce content rules. If a provider did enforce content rules—for example if they used a technology to detect CSAM—courts would hold the provider liable for all of the third-party content on their service (regardless of whether they actually reviewed that specific content).

Section 230's authors recognized that this legal framework provided strong disincentives in the form of liability risk to providers engaging in content moderation activities.

After 230:
Moderation Is Encouraged

Providers have immunity for third-party content on their services regardless of their approach to content moderation subject to clear exceptions (e.g., violations of federal criminal law). Providers also have clear protections for offering content moderation tools to users for their own use or offering such tools as a service to online content platforms (e.g., virus/malware scanning services).

Because today's framework encourages providers to set and enforce rules for their services without fear of constant lawsuits and unbounded legal liability, providers take action against a wide range of harmful content including spam, phishing, viruses and malware, fraud, scams, harassment, stalking, nonconsensual intimate images, platform manipulation, state-sponsored disinformation campaigns, promotion of self-harm, human trafficking and child sexual exploitation, sale of illegal drugs, and much more.

Concerns With The Bill

The bill alters the operation of Section 230 by limiting the ability of providers and users to assert Section 230 protections for content removal activities. It does this in three ways:

1. **Eliminates the ability of providers and users to rely on Section 230(c)(1)** to protect editorial decisions such as which content to publish or not to publish.

2. **Removes the subjective standard in Section 230(c)(2)(A) that protects removals** based on a provider's or user's decision that content falls within one of the specified categories (e.g., obscene, lewd) and replacing it an "objectively reasonable" standard.

3. **Deletes "otherwise objectionable"** and instead adding to the limited list of types of content removals that are protected by Section 230 self-harm, terrorism, and unlawful content.

The net result of these changes is that all those who benefit from Section 230—whether users, website owners, newspapers, schools, or online services—will find it more difficult to manage and participate in safe community spaces that offer the unprecedented opportunities for expression and connection to others that exist today. Instead, providers who take a hands off approach to online content will avoid liability and providers who engage in any form of content moderation will face potentially crippling litigation costs. The bill does this by ensuring that the only immunity that would remain for removal or restriction of content cannot be asserted successfully early in litigation to secure a dismissal before the most expensive parts of litigation — discovery and a trial before a judge or a jury who will decide questions of fact. It does this by requiring that a content removal decision be made with an "objectively reasonable belief" that the content removed falls within one of the specificly named categories (e.g., pornography, excessive violence, harassment, terrorism) and without any flexibility such as that provided by "otherwise objectionable" in today's law.

230 Beneficiaries Are Left With Stark Choices:

1. Accept the costs and risks associated with content moderation.
2. Take a hands off approach to content on their service or community even if it means degrading the quality of their service or hosting content offends their values.
3. Shut down the service or community.

Examples Of How This Would Work In Practice

- **Limiting content removals to avoid litigation risk:** New social media services limit their online content policies to only prohibit illegal content or content specifically identified in Section 230(c)(2) as amended to ensure any removals fit within the Section 230 immunity and to protect against litigation risk. A site commonly used by teenagers has content go viral promoting use of an herb for weight loss. The herb is toxic in high concentrations and teens start getting ill. The service notes that the content around the herb does not fall into one of the categories in Section 230(c)(2) and thus is not prohibited by their terms of service, and so decides not to take any action because of concerns about being sued for actions removing posts.

- **Suits require full litigation to determine whether Section 230(c)(2) applies:** In the same fact pattern as scenario one, a start up service that really wants to provide a safe place for teens decides that, though they kept their terms of service limited to the categories in (c)(2) to manage litigation risk, that the content around the herb is dangerous and they should take action. They determine that they should remove it under their "self-harm" policy. A social media influencer sues after content is removed as a result of this interpretation. The service attempts to have the suit dismissed by asserting Section 230 immunity. The court refuses to dismiss the suit and allows discovery to proceed because it considers the applicability of the immunity to involve questions of fact as to whether it was "objectively reasonable" for the company to consider the content "self-harm." The service is so new it doesn't have litigation insurance and has limited funding and cannot afford to spend hundreds of thousands of dollars for a legal defense nor can it raise additional funding while the litigation is pending. It decides it must settle the suit and shuts down the service.

- **Nonprofits and churches that run online discussion forums through their websites find that they must choose to either allow all views to be expressed or to not offer the discussion forums because of litigation risk:** A church offers a safe space for their members to join online communities for the various church groups, such as the youth group. In the past, members of the various groups have on occasion posted content that was troubling to other members and contrary to the values of the church such as bullying members of the youth group who have taken a pledge to abstain from sex until married. The church maintains rules that give them broad discretion to remove content that they consider objectionable. While there had been complaints in the past when content was removed, the church was informed by legal counsel that they were protected by Section 230 and should be able to mount an efficient response if sued. When the law passes amending Section 230, a frequent violator of the church's policies lets the church leaders know that if they continue to remove their content that they will file suit now that the church's moderation decisions are no longer protected. The church decides to no longer offer the online communication mechansism for its groups to minimize its legal risk and to avoid being put in a position of allowing its website to be used to promote things that are contrary to the values of the church (e.g., the church's positions on abortion, death penalty, and premarital sexual activity).