



Separating Claims From Facts When It Comes To The EARN IT Act

✗ Claim

The EARN IT Act would only affect bad actors. Companies already doing the right thing wouldn't be impacted.

✓ Fact

EARN IT would make it harder for internet companies of all sizes to stop bad actors and jeopardize current efforts by law enforcement and industry to stop criminals. In 2019, IA members provided over 16 million Child Sexual Abuse Material (CSAM) reports to NCMEC through proactive, voluntary efforts. The changes made by the EARN IT ACT would potentially make those reports inadmissible in court, hampering the prosecution of individuals accused of distributing CSAM.

✗ Claim

The EARN IT Act will not affect encryption.

✓ Fact

The EARN IT Act does not explicitly forbid best practices related to encryption and the Commission could be used as a vehicle to regulate end-to-end encryption through its best practices. Encryption is an issue with a broad set of stakeholders and such significant impacts for the national interest that only Congress, in an open and transparent manner, should set encryption policy. End-to-end encryption protects the vital interests of our country and its citizens. Giving the government special access to user data – by building in security vulnerabilities or “backdoors” to unlock encrypted communications – is impossible without generating opportunities that would be exploited by bad actors.

✗ Claim

The EARN IT Act will be considerate of small companies when setting best practices.

✓ Fact

The technology industry features a vibrant pipeline of startups that fuels innovation, and EARN IT does not have appropriate safeguards in place to protect the important interests of maintaining an internet sector filled with companies of all sizes. The Commission will have only two members from small companies and could easily set best practices without incorporating input from smaller tech companies. The burdens and costs associated with EARN IT would be harder for startups and small businesses to absorb and are unlikely to be adequately addressed through any type of alternative best practice.

✗ Claim

The EARN IT Act would mean more child sexual exploitation enforcement by giving states and civil litigants the ability to sue.

✓ Fact

It is not at all clear that the EARN IT will result in more enforcement of CSAM laws. The new civil provisions do nothing to target sexual predators who exploit children or criminals who run underground online resources for trading CSAM. In addition, EARN IT does not allocate additional resources to states and law enforcement that are already facing record backlogs of reports. In addition to increased funding, there are other legislative means to increase enforcement of child sexual exploitation – such as extended preservation periods for CSAM reports, removal of legal barriers to the development of new tools for detection of child exploitation, and improving the quality of CyberTips that Congress could enact immediately.



✗ Claim

The EARN IT Act Commission will balance the interests of all stakeholders.

✓ Fact

A 19-member commission is not the same as elected representatives debating important issues such as encryption, security, age-gating of online content, online parental controls, and more. Government policies that would limit or weaken deployment of encryption deserve careful consideration by Congress, as do many of the other matters before the commission. The bill also gives the ultimate say on these best practices to the Attorney General, as the AG and other agencies heads must be satisfied with the best practices before they can be finalized. If best practices are not adopted and approved by Congress within four years, the changes to Section 230 will happen anyway opening companies up to new potential civil suits — this gives the AG substantial leverage to determine the content of the best practices.

There are also not sufficient procedural checks to ensure that feedback from stakeholders outside of the law enforcement community is taken into consideration. Only 14 out of 19 votes are needed for best practices to be approved. For example, if four commission members represent the internet industry most impacted by the legislation, their support is not required for the best practices to be approved. The participation by technical experts and civil liberties and constitutional experts is even more limited. There are no opportunities for public comment before the best practices are finalized and submitted to Congress for review.

✗ Claim

Claims that the EARN IT Act would violate the Fourth Amendment are only hypothetical.

✓ Fact

On an issue as important as CSAM, we have to get the details right to ensure bad actors are held accountable for their actions. In the wake of the Ackerman decision, finding that NCMEC is a government actor, there has been an undeniable uptick in criminal defendants filing motions to suppress evidence that was discovered based on company voluntary screening efforts. IA member companies and NCMEC have testified around the country to explain their practices and ensure bad actors are put behind bars. There are still cases pending and new challenges being filed.

Thus far, courts have generally viewed company efforts to search for CSAM as voluntary. But, if a government-led commission adopts best practices which require companies to take specific actions or else face a heightened risk of liability, it becomes more likely the courts would find the companies to be acting as agents of the government, like NCMEC. That would mean criminal defendants could not be prosecuted using the child exploitation evidence found through provider detection efforts. Increased litigation also diverts important enforcement resources that would otherwise be used to take on additional cases.

✗ Claim

The EARN IT Act only addresses child sexual abuse materials, which are not protected by the First Amendment.

✓ Fact

The EARN IT Act goes beyond CSAM – it has implications for a variety of legal content online. The bill directs the Commission to create best practices on topics – such as age-gating content – that have proven First Amendment implications. In fact, the Supreme Court has weighed in on several of these topics already, for example when striking down the majority of the Communications Decency Act. These constitutional questions will create significant legal delay or substantially reduce any benefits that might otherwise result from the Commission's work. Congress can instead pass legislation with an immediate positive impact on the fight against child exploitation without creating avoidable constitutional issues.

About Internet Association

Internet Association represents over 40 of the world's leading internet companies. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet. For more information, visit www.internetassociation.org