

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of )  
)  
Petition for Rulemaking of the National ) RM-11862  
Telecommunications and Information )  
Administration to Clarify the Provisions of )  
Section 230 of the Communications Act of )  
1934 )

**Comments of ITIF**

The National Telecommunications and Information Administration (NTIA) has petitioned the Federal Communications Commission (FCC or Commission) to initiate a rulemaking to clarify the provisions of Section 230 of the Communications Act of 1934,<sup>1</sup> in accordance with Executive Order 13925, “Preventing Online Censorship” (E.O. 13925).<sup>2</sup> The Information Technology and Innovation Foundation (ITIF) appreciates this opportunity to comment on this petition.<sup>3</sup> ITIF supports efforts to clarify or update Section 230 to reflect the ways the Internet has changed since the Communications Act was amended in 1996. However, it is the role of Congress, not the FCC, to provide this clarification or update.

Congress originally passed Section 230 in response to a pair of court decisions that had troubling implications for the future of the Internet. In the first of these decisions, *Cubby v. CompuServe* (1991), the U.S. District Court for the Southern District of New York ruled that an online service that has no firsthand knowledge of the third-party content published on its platform, has no control over the publication of this content, and has no opportunity to review the content is not liable for illegal third-party content on the platform.<sup>4</sup> Four years later, in *Stratton Oakmont v. Prodigy* (1995), the New York Supreme Court ruled that an online service that exercises “editorial control” over third-party content on its platform—in the form of content moderation

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<sup>1</sup> Petition of the National Telecommunications and Information Administration, Docket RM-11862, (July 2020), [https://www.ntia.gov/files/ntia/publications/ntia\\_petition\\_for\\_rulemaking\\_7.27.20.pdf](https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf).

<sup>2</sup> Exec. Order No. 13925: Preventing Online Censorship, 85 Fed. Reg. 34,079 (June 2, 2020) (E.O. 13925).

<sup>3</sup> Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF’s goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytic rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, <http://itif.org/about>.

<sup>4</sup> *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

tools such as rules for user-generated content, software programs that filter out offensive language, and moderators who enforce content guidelines—is liable for illegal third-party content.<sup>5</sup>

These decisions were counter to how Congress believed the Internet should operate. Online services that exercised no control over what was posted on their platforms and allowed any and all content—including potentially unlawful or abusive content—were protected. On the other hand, service that exercised good faith efforts to moderate content and remove potentially unlawful or abusive material were punished. Section 230 addressed this discrepancy by allowing online services to engage in content moderation without fear of liability. In doing so, the law played a significant role in creating the Internet we know it, enabling the growth of business models that rely on user-generated content, including social media platforms, smaller blogs and forums, knowledge-sharing websites, comments sections, and product and business reviews.

Given the context and history of Section 230, ITIF agrees with FCC Commissioner Geoffrey Starks’ statement that, in its petition, “NTIA has not made the case that Congress gave the FCC any role here. Section 230 is best understood as it has long been understood: as an instruction to courts about when liability should not be imposed.”<sup>6</sup>

The specific clarifications the NTIA has petitioned the FCC to make are best left either up to the interpretation of the courts, as they have been since the law’s passage, or for Congress to clarify in an amendment to Section 230.

First, the NTIA requests that the FCC clarify the relationship between Section 230(c)(1) and (c)(2). Section 230(c)(1) protects online services from civil liability for failing to remove illegal third-party content,<sup>7</sup> while (c)(2) protects them from civil liability for “good faith” content moderation in the form of removing objectionable material.<sup>8</sup> E.O. 13925 and the NTIA suggest that the FCC determine whether an online service that has not acted in good faith when removing content, as per (c)(2), would also lose its liability protection under (c)(1). This would drastically change the effect of the law. If Congress had intended for platforms that remove content in bad faith to lose not only (c)(2) but also (c)(1) liability protection, it would have written such a provision into the law. And if the way the Internet has changed since 1996 necessitates such a change, it would be Congress’ role, not the FCC’s, to make it.

Second, the NTIA requests that the FCC clarify the meaning of Section 230(c)(2), specifically when content moderation actions are considered to be “taken in good faith.” This determination has always been up to the courts to decide. If the way courts currently interpret Section 230(c)(2) is hindering the freedom of expression

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<sup>5</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

<sup>6</sup> Geoffrey Starks, “Commissioner Starks Statement on NTIA’s Section 230 Petition,” Federal Communications Commission press release, July 27, 2020, <https://docs.fcc.gov/public/attachments/DOC-365762A1.pdf>.

<sup>7</sup> 47 U.S.C. § 230(c)(1).

<sup>8</sup> 47 U.S.C. § 230(c)(2).

online, as the NTIA suggests, it would still be Congress' role to amend the law to resolve this, much as it amended the Communications Act in 1996 to address the *Cubby* and *Stratton Oakmont* rulings.

Similarly, the NTIA's other proposals to the FCC—that the Commission make further clarifications to Section 230(c)(1), establish rules on when an online service would not qualify for Section 230 liability protection, and create transparency requirements—are best left to Congress because the FCC does not have the statutory authority to make these changes.

Congress is considering reforms to Section 230 with multiple bills introduced in the last few months.<sup>9</sup> Section 230 is one of the foundational laws of the Internet, and any changes of this magnitude that would affect such a broad swath of the Internet ecosystem require the type of careful consideration that, by design, takes place in Congress. The FCC should step back and let Congress continue its work.

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<sup>9</sup> Ashley Johnson and Daniel Castro, "PACT Act Would Increase Platform Transparency, But Undercut Intermediary Liability," *Information Technology and Innovation Foundation*, August 7, 2020, <https://itif.org/publications/2020/08/07/pact-act-would-increase-platform-transparency-undercut-intermediary>.