



Insight

Section 230 as a Pro-Competition Policy

JENNIFER HUDDLESTON | OCTOBER 27, 2020

Executive Summary

- Critics of large social media platforms such as Twitter and Facebook claim they have grown too large and too powerful in part due to the “special privileges” platforms are given through Section 230 protection.
- Section 230 liability protection should instead be viewed as pro-competition policy that keeps barriers to entry low and encourages a dynamic market for platforms that host user-generated content.
- Policymakers should be careful about attempting to address content moderation concerns with ill-equipped tools, such as antitrust enforcement, as such policies threaten to hinder market competition.

Introduction

Section 230, a shield that protects online platforms from being held liable (in most cases) for content created by their users and enables them to engage in content moderation, has faced recent criticism from policymakers on both sides of the aisle. On the right, some argue that Section 230 is enabling anti-conservative bias by removing or limiting the reach of conservative voices or unfairly targeting the sharing of information critical of the left. On the left, some contend that platforms are not doing enough to stop the sharing of misinformation and hate speech, and that Section 230 allows online platforms to unfairly dominate the conversation at the expense of local media. With these concerns in mind, the CEOs of Twitter, Google, and Facebook are scheduled to testify before the Senate Commerce Committee on October 28, 2020, in a [hearing](#) entitled “Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?” The Senate Judiciary Committee also recently voted to issue subpoenas to the CEOs of Facebook and Twitter regarding

allegations of anti-conservative bias.

As policymakers express concerns about Section 230's liability protections, however, it is important to remember Section 230 plays a key role in keeping the barriers to entry low for new competitors and enables new entrepreneurial opportunities through third-party content. Changes to Section 230 may risk making it more difficult to challenge the existing giants and their policies as well as diminish many opportunities that the internet has yielded.

Section 230 Lowers Barriers to Entry

Concerns around Section 230 often are expressed with the view that it helps large social media platforms maintain their dominance. Section 230, however, is critically important to keeping barriers to entry low for new platforms that allow user-generated content.

Section 230 keeps barriers to entry low by protecting platforms from liability for user-generated content and their decisions around what content to moderate. This liability shield allows platforms that wish to compete with existing giants, such as the new Twitter competitor Parler, and platforms that may come up with completely new ways for third-party users to share content to emerge without fearing a potentially business-ending liability for hosting user-generated content. As [Engine](#) points out, without Section 230, litigation would likely be common and place significant burdens on individuals and small companies. Even a platform whose content moderation decisions were vindicated in court or was not found liable for a user's content after the fact would still have to bear many expenses to defend such a case.

Section 230 enables small platforms to focus on their product and the choices that best serve their users rather than investing in large legal teams. The result is that innovators can start new ventures on limited budgets in garages and college dorm rooms based on a good idea. It allows innovators and platforms to pursue different options for what content they allow and to develop and compete in the market they feel they can best serve. In other cases, a platform may gain popularity but still have limited staff. For example, Reddit only has [approximately 350 employees](#) but hosts a wide range of content with different standards set by each community.

In some cases, platforms may seek to serve specific audiences and moderate their content accordingly. Section 230 allows platforms to reach these audiences and tailor their choices to the specific needs. Section 230 was [never intended](#) to require all platforms to serve all content and audiences, but rather to allow platforms to find the solutions that best served their consumers' needs. This differentiation has allowed, for example, differing political

voices to be heard on a variety of websites, and has allowed social movements, such as #metoo, to leverage the power of platforms to gain attention for previously under-reported issues. The result is a diverse array of platforms that allow for more speech than ever before and a reduction in the barriers for individuals to express their opinions.

Changes to Section 230 that increase liability, and particularly those that would allow individuals to sue platforms for their users' actions, would increase the risk companies face when allowing user-generated content. This liability could discourage new platforms from providing opportunities for users to share content and cause larger platforms to engage in even more intense content moderation. The result would not be to improve opportunities for speech, but rather to limit opportunities for user-generated content. Existing giants might be able to afford the cost of compliance, but new platforms would face an uphill battle to survive such litigation and compete with the incumbents.

Third-Party Content Increases Small Business Opportunities

Section 230 not only promotes increased competition among platforms, but the explosion of user-generated content also provides new entrepreneurial opportunities that benefit both sellers and consumers. While we often think of Section 230 in terms of social media platforms, user-generated content takes many forms including review sites and online marketplaces. This type of user-generated content has created increased opportunities for small businesses to expand their reach.

Without Section 230, platforms might be less willing to allow third-party content on their website if they might be sued for this content. Online marketplaces such as Etsy and [sharing economy websites such as Airbnb](#) allow providers of goods and services to write their own descriptions and create their own content. These platforms provide opportunities for entrepreneurship at a lower cost than traditional options and connects sellers to consumers that they would have otherwise not reached. As Santa Clara University law professor Eric Goldman [notes](#), applying strict liability to online marketplace transactions and limiting the applicability of Section 230 in online markets would make such opportunities far more limited. He writes, "Online marketplaces are one of the exceptionalist [sic] achievements of the Internet—there literally is no offline equivalent where complete strangers are comfortable enough with each other to blindly transact without doing any research on each other. That basic premise has unlocked hundreds of billions of dollars of wealth in our society (both producer surplus and consumer surplus)."

The result of diminished online marketplaces would be to further increase concentration and increase the cost of doing business and the price to consumers. At a time when more businesses are having to go online, changes to Section 230 could discourage platforms from

carrying third-party content.

Distinguishing Section 230's Pro-Competition Effects from Antitrust

While policymakers are looking at amending Section 230 to address concerns about online speech or content moderation, they are also considering antitrust enforcement action. This consideration appears to rest on an assumed equivalency: Any policy with competition effects is *ipso facto* a competition or antitrust matter. While Section 230 has pro-competitive effects, it is important to note that the reverse is not true—antitrust policy is the wrong policy tool to address non-competition related concerns such as cocontent moderation. In fact, a breakup of Big Tech platforms such as Facebook or Google would fail to improve and could even exacerbate many concerns about content moderation. First, there is no guarantee that smaller platforms would develop different content moderation policies than the current large platforms. Second, these smaller [platforms would have fewer resources](#) to devote to content moderation, which would make it unlikely they would be able to better address concerns through new tools or devote additional resources to improving content moderation. While Section 230 increases competition by decreasing barriers for platforms, issues of online content moderation should be considered separately from the conversation surrounding antitrust. Policymakers must be careful not to presume that, just because Section 230 has pro-competitive effects, utilizing antitrust against tech companies provides an alternative policy mechanism to resolve concerns about online content.

Conclusion

Many critics of Section 230 argue that it unfairly protects Big Tech from liability. While many large platforms encounter the difficulty of content moderation at scale, Section 230 is a pro-competition law that keeps the barriers to entry low for platforms that carry user-generated content. As a result, it enables new platforms to provide alternative content moderation options for users if they feel current giants fail to serve their needs. It also has enabled platforms to provide opportunities for third-party business content that would be riskier if subject to liability. Policymakers should be cautious when considering changes to Section 230; beyond burdening today's tech giants, such changes may inadvertently make it more difficult for new players to arise.