



Comments for the Record

Comments Regarding NTIA Petition for Rulemaking

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I appreciate the opportunity to provide comments regarding the National Telecommunications and Information Administration's (NTIA) Petition for Rulemaking. This comment does not represent the views of any particular party or special interest group but is intended to assist regulators in their consideration of potential policy changes concerning online content moderation and Section 230. This petition for rulemaking stems from an executive order on social media. In this comment I seek to address some of the potential First Amendment concerns that could arise if the Federal Communications Commission (FCC) made such a rule.

Advocates for changes to Section 230, such as those proposed in the NTIA petition, often argue that such changes are necessary to protect free speech and First Amendment rights. In such an attempt, however, the government often seeks to intervene into the speech of private actors, thus violating the First Amendment. The NTIA petition, like many other attempts to modify Section 230, has such potential violations.

First, to properly enforce the requested changes to interpretation of Section 230 would require government intervention into currently First Amendment protected actions such as determining when content moderation is undertaken in "good faith." Private actors are not "censoring" but are more engaging a similar type of discretion that a library or bookstore may make in the physical world.^[1] The government choosing to dictate what actions those platforms must take regarding content moderation, however, can violate the First Amendment by dictating the speech of private actors.^[2] When platforms choose to engage in content moderation or to apply fact-checking or other labels to such content, these actions are protected by the First Amendment.^[3]

The petition also alleges that the privately owned platforms have engaged in censorship that harms the national discourse. Such an argument does not accurately convey the fact that these are private platforms engaged in discretion not censorship. Government, not private actors, engage in censorship as understood under First Amendment jurisprudence.^[4] The NTIA petition mislabels many concerns and fails to adequately consider the true First Amendment issue that might arise from government intervention into private platforms' decisions.

The changes to Section 230's interpretation proposed by the NTIA are unlikely to survive legal challenge. Changing or conditioning the ability to exercise such discretion would face strict scrutiny in the courts and require proof that it is narrowly tailored to a compelling government interest.^[5] Given current First Amendment precedent, the requested rulemaking would be unlikely to pass such a test.^[6] Additionally, there are likely to be challenges to the FCC's authority to undertake such a rulemaking.^[7]

The internet has provided new opportunities to create, communicate, discuss, and share ideas. Section 230 has been tremendously valuable in allowing these new opportunities to emerge and flourish. Proposed changes to Section 230 are not likely to restore “free speech” but are likely instead to chill existing speech and deter new and innovative opportunities for user-generated content online.

[1] Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 Okla. L.Rev. 635 (2020), <https://digitalcommons.law.ou.edu/olr/vol72/iss3/4/>.

[2] Jennifer Huddleston, *Content Moderation, Section 230, and the First Amendment*, American Action Forum, May 28, 2020, <https://www.americanactionforum.org/insight/content-moderation-section-230-and-the-first-amendment/>

[3] *Id.*

[4] Eric Goldman, *Comments on NTIA’s Petition to the FCC Seeking to Destroy Section 230*, Technology & Marketing Law Blog, Aug. 12, 2020, <https://blog.ericgoldman.org/archives/2020/08/comments-on-ntias-petition-to-the-fcc-seeking-to-destroy-section-230.htm>.

[5] Ben Sperry, *The First Amendment & Section 230: Protecting Free Speech on the Internet*, International Center for Law & Economics, August 2020, <https://laweconcenter.org/wp-content/uploads/2020/08/tldr-The-First-Amendment-and-Section-230.pdf>

[6] *See id.*

[7] *See* Harold Feld, *Could the FCC Regulate Social Media Under Section 230? No.*, Public Knowledge, Aug. 14, 2019, <https://www.publicknowledge.org/blog/could-the-fcc-regulate-social-media-under-section-230-no/>.