



Section 230, the once-obscure law that gives certain tech companies a partial exemption from the tort and liability laws that other companies have to follow, has recently exploded into the national conversation.

Following a pattern of abuses by Big Tech companies and concern about the power those companies exercise, a bipartisan consensus has emerged that section 230 in its current form cannot stand.

For years, Big Tech's version of section 230 has gone unquestioned. Journalists, members of Congress, and the public have assumed current practice reflects the law Congress passed in 1996. This paper challenges many of those accounts. It briefly explains what the law was before section 230, why section 230 was drafted and what it was intended to do, and how the courts—influenced by Big Tech's lawyers—distorted section 230 into something unrecognizable from the law that Congress passed.

It is long past time to revisit section 230. The law was passed 24 years ago, designed for a different internet, long before Google and Facebook. Despite its age, the need to reform section 230 would be less pressing if it had not been distorted by courts. As several legal scholars have noted, a series of “outlandishly broad interpretation[s]” by courts have given tech companies far more immunity—and far less responsibility—than Congress ever contemplated.

The True History of Section 230

■ Congress decides to impose responsibility on internet companies

Today's tech giants and the think tanks, non-profits, and activist groups they fund typically discuss section 230 as if it were a standalone statute, but section 230 was a small add-on to a much larger bill: the Communications Decency Act of 1996 (CDA). Big Tech is eager to focus solely on the immunity provision of 230, but the purpose of the CDA was much broader. In fact, it was just the opposite of what Big Tech and its allies argue. Its express design included imposing liability on internet platforms.

At the time, Congress was concerned about ensuring that the internet would be safe for children and families. Congress drafted the CDA to impose liability on internet companies that “display” obscene or indecent content to minors. The primary purpose of the bill was imposing stringent responsibilities on internet companies, not giving those companies sweeping immunity. As Senator Exon, the lead Democratic sponsor of the bill, said at the time, “The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.”

■ Congress recognizes that these responsibilities could create unintended consequences

Congress had a problem. Court decisions suggested that internet companies that complied with the new responsibility provisions they were crafting would, in an ironic twist, risk becoming more liable precisely because of their compliance.

Decades before the internet, bookstores, telegraphs, and telephones confronted the question of whether they would be liable for distributing third-party content. The law solved the problem by distinguishing between passive “distributors” and active “publishers.” Courts ruled that “publishers”—like newspapers—could be held responsible for all illegal content they published, while “distributors”—like bookstores, newspaper stands, and telephone companies—were merely passive

channels for information. Distributors could only be held responsible for the content they knew or should have known was illegal.

Internet companies posed a new challenge as they acted simultaneously as publishers and distributors. One court struggled to deal with this new scenario. In an important early case involving the online service provider Prodigy, the court said that if Prodigy edited (and thus published) any content, that would “render it a publisher” for all content.

In contrast, a different court subjected another online service provider, CompuServe, only to distributor liability because it exercised “no more editorial control ... than does a public library.”

These cases put Congress in a dilemma. It wanted to direct internet companies to take down obscene content, but under the Prodigy precedent any company that edited or moderated content, as Congress’s new law required, would risk being declared a publisher of all content, thus losing the traditional protection it had as a distributor.



The basic liability problem these companies face is not new to the internet, and it was not new in 1996.

■ Congress fixes the problem by creating limited immunity

Congress addressed this problem by drafting what it called a “Good Samaritan” statute.

Society has long been concerned that potential liability could deter people from performing good deeds. For example, a person who performs the Heimlich maneuver on a stranger who is choking might become liable if the stranger died or broke a rib. Wanting to encourage good deeds, states passed “Good Samaritan” statutes to shield helpers from liability.

Congress used this as a model for its Good Samaritan statute: Section 230.

Section 230 contains two provisions. The first reinstated the distinction between publishers and distributors. The Prodigy court had declared, that because Prodigy edited some content, it was a “publisher” even of content that it passively distributed. So Congress declared that when a company edits some content, the court must not treat a company as “the publisher or speaker” for all the other content that the company merely distributes.

The second provision gives internet companies limited protection in their role as publishers. Under this provision, whenever a company develops content “in whole or in part,” the company is considered a publisher of that content. But in its role as a publisher, the company has immunity for claims that it took down too much content. Critically, because the statute is supposed to protect “Good Samaritans,” companies receive immunity for takedown decisions only when those decisions are made “in good faith.”

Courts Upend This Compromise Between Responsibility and Immunity

■ Congress believed that these responsibility and immunity provisions together would allow speech to flourish while enabling a cleaner, safer internet for children and families. But Congress also assumed another factor: robust competition. Companies would follow Congress's directive to remove obscene and indecent content, and parents could choose to support the companies they believed moderated best. For this reason, Congress entitled section 230 the "Online Family Empowerment Provision."

Congress's careful compromise between responsibility and immunity to promote "family empowerment" did not last. Courts, at the behest of an army of lawyers, freed tech companies of their responsibility. As one scholar observed, courts "stretched Section 230's safe harbor far beyond what its words, context, and purpose support."¹ One of the original authors of section 230 has conceded that the provision is now "judge-made law" because courts have followed their own judicial inclinations "instead of the actual statute, stretching the law."²

As a result, today section 230 is a sweetheart deal for Big Tech, not families.

1. Citron, Danielle Keats. "Section 230's Challenge to Civil Rights and Civil Liberties." Knight First Amendment Institute, 6 Apr. 2018, knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties.

2. Selyukh, Alina. "Section 230: A Key Legal Shield For Facebook, Google Is About To Change." NPR, 21 Mar. 2018, www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change.

■ **The Supreme Court eliminates tech responsibility**

Just one year after Congress passed the CDA, the Supreme Court blocked most of the provisions that would have imposed responsibility on platforms. The Supreme Court determined that certain terms in the statute were not defined precisely enough to satisfy First Amendment protections for speech.

This decision upended Congress' balanced approach. Internet platforms got to keep their immunity, but were freed from the responsibility that came with it.

■ **Courts grant immunity to platforms even when those platforms distribute content they know is illegal**

Next, the courts made the situation worse by expanding those immunity provisions. First, courts eliminated “distributor” liability. The law had long distinguished between “publishers,” who were responsible for all content, and “distributors,” who were responsible only for content they knew or should have known was illegal. Recall that section 230 declares that internet companies cannot be liable as “publishers” of third-party content, but never declares that companies also should be immune as “distributors.”

Yet tech companies aggressively pushed courts to eliminate distributor liability entirely. In a case decided the year after section 230 was enacted, one court obliged—even though the CDA itself expressly imposes distributor liability. The result of this decision was extraordinary. Suddenly, tech companies were treated more favorably than traditional distributors.

■ **Courts allow companies to keep immunity even when they “develop” content**

In passing the CDA, Congress reinstated the traditional publisher-distributor distinction for online companies. It recognized, unlike early courts, that internet companies could both be a publisher for some content and a distributor for other content. It declared that companies would be “publishers” when they edited content and “distributors” when they did nothing other than transport content. Specifically, Congress provided that whenever a company helps “develop[]” content, even “in part,” such as through editing, the company could be liable because it was a publisher. But it said the company could not be held liable as a publisher if it merely distributed content passively. Companies also could remove or restrict access to content as long as they did so in good faith.

The courts distorted this distinction, granting internet companies broad discretion to exercise “editorial decisions,” including “alter[ing] content,” without becoming liable for the content. Section 230 was supposed to enable companies to remove or restrict access to content, but not to transform or change content. In short, courts allowed internet companies to act like publishers while allowing them to retain the immunity of distributors.

■ Courts nullify the "good faith" requirement

Another way the courts distorted the CDA was by broadening section 230 to nullify the good-faith provision Congress crafted. As discussed, section 230 has two immunity provisions. Broadly speaking, the first, which states that courts shall not consider platforms “publishers” of third-party content, gives platforms immunity for third-party content that they leave up. The second provides publisher immunity for content that companies take down, but it applies only when platforms act “in good faith.”

Tech companies convinced courts to nullify this good-faith requirement. Even though the second provision expressly addresses takedown claims, tech companies argued that they should also have immunity under the first provision, which lacks an express good-faith requirement. They insisted that the first provision also provides immunity for takedown claims because taking down content is something “publishers” do all the time. After failing in some courts, tech companies eventually succeeded, affording them immunity even when they take down content for malicious reasons.

■ Courts expand section 230 to block many lawsuits having little to do with publication

The courts have also construed section 230 broadly to provide immunity against a wide variety of claims that have little to do with published content. In particular, courts have interpreted section 230 to grant immunity to companies for design decisions.

Before it was shut down, Backpage.com served as a hub of ads for human trafficking. The company intentionally designed its platform to facilitate trafficking, and people died as a result. The FBI eventually shut Backpage.com down after discovering that the company was laundering money through fake shell organizations. But for years before that evidence came to light, courts construed section 230 to protect Backpage.com’s design decisions. This enabled the company to reap millions of dollars by creating a hub for modern-day slavery.

The popular social media app Snapchat has also used section 230 to evade responsibility for its design decisions. For example, the company developed a product called Speed Filter, which allows users to take a picture that displays their current speed. The filter encourages dangerous behavior, like reckless driving. Yet courts have interpreted section 230 to protect Snapchat from liability even though these lawsuits are based on website design decisions, not any particular social media post.

Advocates for today's judge-made section 230 argue that liability should fall on those who engage in bad conduct. They are wrong to assume that only content creators make harmful decisions. Section 230, as interpreted today, gives companies immunity for their own bad acts, like purposely designing a platform to monetize illegal content, taking down content in bad faith, or encouraging illegal acts. The "Good Samaritan" statute has been expanded to protect many bad actors.



Conclusion

The law Congress passed and the precedent under which today's Big Tech companies operate are two different things. As one of the authors of the text put it, section 230 is now "judge-made law."

Today's section 230 is a sweetheart deal for companies like Facebook and Google, who are treated like telephone companies and internet service providers despite their active engagement with and manipulation of the experience of their users. Originally passed as a "family empowerment" provision, section 230 now empowers the tech giants. The companies who benefited from the original section 230 were a small, fledgling industry; the biggest beneficiaries of today's judicially distorted section 230 are some of the most powerful companies in the world.