

Center for Democracy & Technology Transition Memo
Theme: Preserving Free Speech on the Internet
Issue: Promoting Innovation Without Imposing Undue Liability on Internet Intermediaries

★ **Issue/Problem.** Under Section 230 of the Telecommunications Act of 1996, Internet intermediaries such as ISPs and website operators are generally not liable for content created by others.¹ The significance of this rule can't be overstated. Without the broad immunity afforded by Section 230, some of the most dynamic and popular sites on the Internet for video sharing, social networking, blogging, e-commerce and other user-generated content could not flourish—and may not have even been created. In other words, YouTube, Facebook, Wikipedia and eBay likely would not exist without Section 230. If, for example, the operators of Wikipedia could be hauled into court whenever anyone posted a libelous comment on the site, Wikipedia simply could not afford to exist.

Some scholars are calling for Section 230's revision.² Some argue that a notice-and-takedown framework should apply to website operators who are made aware of potentially defamatory content on their sites, similar to the notice-and-takedown process created under the Digital Millennium Copyright Act, which immunizes sites from liability for hosting infringing content if they follow notice-and-takedown procedures.

However, opening up Section 230 would be very risky. Any attempt to amend Section 230 could result in the amendments allowing liability swallowing the rule granting protection to service providers. Even small changes to Section 230 would likely have a chilling effect on major service providers. President Obama should reject such risky proposals and endorse the current policy framework, which has been extremely successful in promoting innovation, economic activity and free expression.

★ **Policy History.** In 1996, Congress had the foresight to see that the Internet would need a statutory safeguard to promote free speech and innovation online. As part of the Telecommunications Act of 1996 (Public Law No. 104-104) Congress passed "Section 230" (47 U.S.C. § 230), which generally prohibits both the government and private parties from holding Internet intermediaries (such as website operators and ISPs) liable for content created by others that might be defamatory or otherwise illegal.

¹ See, e.g., the Wikipedia entry on Section 230:

http://en.wikipedia.org/wiki/Section_230_of_the_Communications_Decency_Act

² See, e.g., Doug Lichtman and Eric Posner, "Holding Internet Service Providers Accountable" (July 2004), http://www.law.uchicago.edu/Lawecon/WkngPprs_201-25/217-dgl-eap-isp.pdf; Bradley A. Areheart, "Regulating Cyberbullies Through Notice-Based Liability" (Sept. 8, 2007), <http://thepocketpart.org/2007/09/08/areheart.html>; Mark Lemley, "Rationalizing Internet Safe Harbors" (April 10, 2007), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=979836; John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (2008), <http://www.borndigitalbook.com/>; Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (2007), <http://docs.law.gwu.edu/facweb/dsolove/Future-of-Reputation/>.

One of the key operative provisions is Section 230(c)(1), which insulates ISPs and websites from liability arising because of content posted by other people. Congress explained its motivation for passing Section 230 in four relevant “findings” (Section 230(a)) and two “policy statements” (Section 230(b)).

The four findings state:

The Congress finds the following:

- (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. ...
- (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
- (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
- (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Similarly, the two policy statements provide:

It is the policy of the United States—

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation....

As a whole, the provisions of Section 230 articulate and implement a core goal of Congress, which remains as important today as it was in 1996: to promote a diverse, competitive and largely unregulated market for Internet content and services. Section 230(c)(1) ensures that Internet intermediaries can host robust forums for ideas and discourse, without the service providers fearing a constant stream of lawsuits trying to hold them liable for content posted by others.

★What the Obama Administration Should Do. (1) President Obama should endorse the current policy that protects Internet intermediaries from liability for the postings of others.

(2) President Obama should reject Congressional or agency proposals to amend Section 230 or otherwise to require website operators, Internet Service Providers (ISPs), or other communications middlemen to remove or block access to certain content. The creators of content should remain fully liable for their material.

★ **Campaign Platforms.** Preserving Section 230's broad immunity for Internet intermediaries is consistent with President Obama's campaign commitment to technology and innovation.³

★ **Other Voices.** So far, calls for narrowing Section 230's broad immunity have mainly come from law professors. Major Internet companies, such as eBay and Google, would strongly oppose changes to Section 230, fearing a direct impact on their business of hosting content created by others.

★ **For More Information.**

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Resources:

- CDT Section 230 policy post (March 31, 2008): <http://cdt.org/publications/policyposts/2008/4>
- CDT Election 2008 free speech blog post (Oct. 6, 2008): <http://blog.cdt.org/2008/10/06/next-president-must-preserve-free-speech-on-the-internet/>
- CDT Election 2008 report (June 2008): <http://www.cdt.org/election2008/speech/>

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³ http://obama.3cdn.net/780e0e91ccb6c6bf6e_6udymvin7.pdf (p. 6)