

BEYOND SPEECH: SECTION 230 AND ITS IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS



BY ABBEY STEMLER¹



¹ Assistant Professor of Business Law and Ethics, Indiana University's Kelley School of Business Faculty Associate, Berkman Klein Center for Internet & Society at Harvard University.

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Section 230's implications radiate far beyond speech. This essay discusses the ways 230 has affected state and local governments. In particular, it outlines how platforms use 230 to chill and slow regulatory efforts aimed at addressing the market failures platforms themselves create. For example, when Airbnb moves into a city, the short-term rental platform tries to use 230 to externalize the costs to public safety and housing affordability it inflicts on communities. As the case law related to 230 continues to grow, change, and diverge, the scope of 230 only becomes more confusing to local and state lawmakers. Congress must act to clarify this extremely important law and return it to its origins as a law that protects platforms from speech-related torts. Such a move is urgent and necessary to make this pillar of the modern Internet work better for all involved.

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I. INTRODUCTION

When people think about Section 230, content moderation is what often comes to mind. Less discussed are 230's implications for state and local governments. When platforms' digital operations spill into physical spaces, regulators on the ground must respond to the inevitable market failures created. Airbnb is a clear illustration of this. When the short-term rental ("STR") platform comes to a town, issues of safety, taxation, and housing affordability all must be addressed. Yet, Airbnb and similar platforms have and will continue to use Section 230 in all its abstruse glory as both a defense and a threat to local regulations.

As Congress considers whether and how to amend Section 230, it must think beyond keeping smut off the Internet and ask: How will our revisions impact community functions and resources?

II. THE USE OF 230 TO EXTERNALIZE COSTS

While Section 230 allows platforms to wash their hands of legal responsibility for user speech, which can involve anything from defamatory statements² to attempts to recruit terrorists,³ it can also be used to protect platforms from facilitating transactions that have offline consequences.

Platforms have avoided tort liability for facilitating transactions that directly lead to physical harms in numerous cases. For example, in 2020, a Massachusetts Superior Court found Section 230 protected a website, Armslist.com, from negligence liability for facilitating a gun sale to a convicted felon,⁴ the sale of which resulted in the murder of a police officer. If a gun show promoter had facilitated that same transaction *in-person*, it's unlikely they would have avoided legal responsibility. This dissonance between transactions that are legal online and illegal offline is something Chris Cox, the former U.S. Representative and co-author of Section 230, said Section 230 was never intended to create.⁵

When Section 230 reaches beyond tort law and precludes local regulators from creating and enforcing rules to curtail unwanted offline behavior, the connection between the original purpose of 230 and its interpretation is even more attenuated. Regardless, platforms continue to use 230 to avoid regulation, either by frightening regulators from regulating in the first place, or by directly opposing them when they do.

A. The Chill of 230

At the most basic level, platforms assert that their activities simply facilitate digital communication. Consequently, when regulators try to hold platforms responsible for unlawful transactions, platforms argue that to do so would improperly treat them as publishers or speakers of content provided by third parties, which Section 230 prohibits. For example, if a seller on eBay sells an unlawful item, whether it be a counterfeit, recalled, or illicit good, eBay will assert that the seller, and not eBay, provided the information associated with the listing (e.g. the description, minimum bid price, and any photos). Therefore, eBay is not the provider of any prohibited content and is protected by 230. While that seems like a simple enough argument, Section 230 is never simple.

Because of or in spite of its Tweet-length wordcount, the case law interpreting 230 is all over the place. It can take incredible amounts of time to even begin to wrap one's head around the evolution of 230 jurisprudence, its divergent interpretations, and its impact on state and local regulations.⁶ Sometimes holdings come out in favor of platforms, other times they do not. Because of this muck, platforms attempt to deter regulators by provoking fear that 230 would render their regulatory efforts futile. Airbnb's litigation strategy is a clear example of this method.

² *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

³ *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. July 31, 2019).

⁴ *Stokinger v. Armslist LLC*, 2020 WL 2617168 (Mass. Superior Ct.).

⁵ Gilad Edelman, *Everything You've Heard About Section 230 Is Wrong*, WIRED (May 6, 2021 7:00AM), <https://www.wired.com/story/section-230-internet-sacred-law-false-idol/>.

⁶ To see headaches in action, read Benjamin Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces*, 56 HARV. J. ON LEGIS. 141 (2019).

From 2008 to early 2020, Airbnb sued local and state governments eleven times. In nine of those cases, it asserted 230 as a defense.⁷ Governments across the U.S. must weigh whether the threat of litigation from the multi-billion-dollar juggernaut is enough to stop them from even attempting to regulate inside their neighborhoods. For instance, in Anaheim, CA, a city spokesperson said, “[a]fter considering federal communications law, we won’t be enforcing parts of Anaheim’s short-term rental rules covering online hosting sites.”⁸ Similarly, when Boston decided to regulate STRs, Airbnb shook the sword of 230. Before Boston even implemented its regulations, the City conceded that as a result of 230, it did not have the power to enforce its regulation requiring the platform to monitor and remove unlawful listings.⁹

As discussed below, recent caselaw developments clarify Section 230’s applicability to STR platforms, but as long as Section 230 remains in its present form, platforms today and in the future will continue to chill regulatory efforts, especially in communities with limited resources.

B. The Realities of Regulating Under 230

Platforms have successfully used 230 to avoid regulations already in effect in cases like *Jane Doe No. 1 v. Backpage.com, LLC*.¹⁰ Backpage was a classified ads platform notorious for its adult section, which was a hub for sex trafficking. In 2016, 16-year-old, Desiree Robinson, was killed after she was prostituted through Backpage’s website. To avoid liability under, among other things, Massachusetts’ Anti-Human Trafficking and Victim Protection Act of 2010, Backpage invoked 230 as a defense. It successfully argued that the content on its website was from third parties and not the company itself.¹¹ As the First Circuit Court stated: “Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers.”

Much less disturbing than the awful facts of *Backpage*, StubHub, the online ticket marketplace, was able to evade North Carolina’s anti-scalping law which prohibited the selling of tickets for more than face value plus \$3.00.¹² In *Hill v. StubHub, Inc.*, tickets for a *Miley Cyrus as Hannah Montana* concert were sold on the platform for much more than face value. StubHub was able to use 230 to avoid liability for the unlawful sale because the sellers on the platform provided the price for the tickets and thus the sellers, and not StubHub, were the content providers.

In the past few years, platforms have seen their luck inside courtrooms change with regard to 230. Courts have begun to permit regulation of platforms so long as laws focus on the platforms’ transaction processing activities. The case that opened the door for regulators here was *HomeAway v. City of Santa Monica*.¹³ After fighting and then stalling STR regulations in San Francisco for years, HomeAway (another STR platform) and Airbnb chose to sue the City of Santa Monica under 230 for STR regulations that were almost identical to San Francisco’s. Airbnb and HomeAway lost their bet in both the district court and the Ninth Circuit Court of Appeals. The courts found that 230 did not prevent Santa Monica from holding the STRs responsible for completing booking transactions for unlicensed rentals. The same principle used in *HomeAway* has been applied to Turo, a peer-to-peer car rental platform, for violations of regulations governing motor vehicle rentals on airport grounds.¹⁴

7 Olivia Carville, Andre Tartar, and Jeremy C.F. Lin, *Airbnb to America’s Big Cities: See You in Court*, BLOOMBERG (February 14, 2020), <https://www.bloomberg.com/graphics/2020-airbnb-ipo-challenges/>.

8 Lily Leung, *Anaheim Won’t Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, ORANGE CTY. REG. (Aug. 23, 2016), <http://www.ocregister.com/articles/city-726671-term-short.html>.

9 *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113 (D. Mass. May 3, 2019). Note that the court did not find that Section 230 prevented Boston imposing a fine on Airbnb for booking illegal short-term rentals. This is in line with the holding in the Santa Monica case discussed below.

10 *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. March 14, 2016).

11 As discussed below, FOSTA-SESTA’s passage in 2019 amended 230 to prevent companies like Backpage from being able to use 230 as a shield for their involvement in sex trafficking.

12 *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (2012).

13 *HomeAway v. City of Santa Monica*, 918 F.3d 676 (9th Cir. March 13, 2019).

14 *Massachusetts Port Authority v. Turo Inc.*, 487 Mass. 235 (Mass. Supreme Ct., April 21, 2021).

III. THE NEW 230

The law heralded as the one that made sure the modern Internet will not be easy to rewrite or amend, and that's fine. It shouldn't be easy. Section 230 has promoted innovations in more ways than we realize, and it will be hard to craft similar regulation that can appropriately anticipate the level of responsibility platforms should have for the harms that develop as a result of their design.

What should not be tolerated, however, are piecemeal reform efforts like the one that resulted from *Backpage*. The ruling in that case and the company's continued involvement in sex trafficking, caused Congress to revoke 230's immunity for platforms that knowingly facilitate sex trafficking. The amendment, often referred to as FOSTA-SESTA,¹⁵ caused outrage among platforms and academics who believed that the change to 230 would open Pandora's box to online censorship. While we have yet to see if the amendment has significantly caused platforms to restrict speech out of fear of ruinous litigation, it is clear that FOSTA-SESTA has unintentionally imperiled sex workers who now have to rely more on pimps and darker parts of the Internet to find safe work.¹⁶

Creating industry-specific exceptions to 230 would make iterations of the law both under- and over inclusive- and could lead to other dangerous consequences.¹⁷ Yet, we now see such amendments proposed regularly. For instance, in response to Airbnb's historic use of 230 to subvert regulation, Representative Ed Case sponsored the Protecting Local Authority and Neighborhoods Act (the "PLAN Act"). The PLAN Act was supported by the hotel lobby and sought to amend 230 so that state and local governments could enforce short-term-rental laws against platforms without ever running afoul of 230.

Section 230 reform efforts should be thorough and focus on clarifying the boundaries of 230. This is why a bill announced in February 2021 by Senators Mark Warner, Mazie Hirono, and Amy Klobuchar is worthy of attention as a starting point. While far from perfect, the Safeguarding Against Fraud, Exploitation, Threats, Extremism and Consumer Harms (SAFE TECH) Act attempts to comprehensively return 230 to its origins by reducing the heart of 230's scope to speech-related torts such as defamation. In particular, the bill replaces the word "information" with "speech" in the first part of the statute to read: "No provider or user of any interactive computer service shall be treated as the publisher or speaker of any speech provided by another information content provider." This change, along with additional clarifying language, could prevent platforms from claiming immunity from local and state regulations at the earliest stages of litigation.

If carefully done, reforming Section 230 will not blow up the Internet, afterall, laws akin to Section 230 do not exist everywhere in the world. Instead, restrained and thoughtful revisions can provide state and local regulators the help they need to shift negative externalities back to their sources.

¹⁵ The name comes from the House bill "Fight Online Sex Trafficking Act" and the Senate bill "Stop Enabling Sex Traffickers Act."

¹⁶ Samantha Cole, *Pimps Are Preying on Sex Workers Pushed Off the Web Because of FOSTA-SESTA*, VICE (April 30, 2018, 1:09PM), <https://www.vice.com/en/article/bjpqvz/fosta-sesta-sex-work-and-trafficking>.

¹⁷ This argument is also made by Danielle Keats Citron and Mary Anne Franks. *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. Chi. Legal F. 45 (2020).

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