

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Petition for Rulemaking of the)
National Telecommunications and)
Information Administration to) RM-11862
Clarify the Provisions of Section)
230 of the Communications Act of)
1934)

**STATEMENT OF THE AMERICAN ECONOMIC LIBERTIES PROJECT
REPLYING TO THE COMMENTS OF CARRIE A. GOLDBERG**

via electronic filing

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Introduction & Summary

The American Economic Liberties Project (AELP) works to ensure America’s system of commerce is structured to advance economic liberty, fair commerce, and a secure, inclusive democracy. AELP believes true economic liberty means entrepreneurs and businesses large and small succeed on the merits of their ideas and hard work; commerce empowers consumers, workers, farmers, and engineers instead of subjecting them to discrimination and abuse from financiers and monopolists; foreign trade arrangements support domestic security and democracy; and wealth is broadly distributed to support equitable political power.

We write this comment in reply to Carrie A. Goldberg’s comments filed on September 2, 2020 on the National Telecommunications and Information Administration’s (NTIA) petition for the Federal Communications Commission, to clarify provisions of Section 230 of the Communications Act of 1934, as amended. We write this comment supporting Goldberg’s comment and adding additional considerations for the FCC.¹ We take no position on the

¹ Pursuant to the Commission’s Public Notice and 47 CFR §§ 1.405, 1.47, a copy of this reply comment has been mailed to Carrie A. Goldberg and proof of mailing included in e-filing.

authority of the FCC to promulgate rules over Section 230, though we reject any attempt to weaponize the FCC to push a particular partisan agenda.²

This law was written in 1996 under a very different technological regime, where the main mechanisms to access and use online communications platforms involved dial-up modems and simple bulletin boards. Today, with so much economic activity conducted online, much of the economy falls under the catch-all terminology of that law, meaning that we are treating large swaths of commercial activity, everything from travel services to retail empires to logistics and fulfillment operations, as AOL chatrooms.

As a result, manipulation engines like Facebook use the law to avoid anti-discrimination rules, monopolists like Amazon use it as a shield to avoid liability for selling exploding batteries or hoverboards to customers, and reckless dating apps like Grindr enable stalking and harm by posing merely as a vessel for speech.³ These businesses act in this way because the law allows them to operate as ‘absentee owners,’ exploiting a legal framework that protects them from responsibility for how they make money.

The fix is simple. Policymakers should define business lines by how they make money, not whether they use a web server in doing so. If a corporation or product generates revenue by selling “access by multiple users to a computer server,” then it is an interactive computer service facilitating speech. If it makes money by selling behavioral advertising, or travel services, or data collection, or enabling commercial transactions, or otherwise monetizing the transmission of content, it is not an “interactive computer service,” and should be regulated by sector-specific rules that apply to that particular line of business, as well as general torts and state criminal law.

The concept that the commercial nature of a computer service is what controls the product category designation was implicitly recognized by Congress’s “Good Samaritan” definition in 1996. Section 230(c)(2) provides liability protections for “good faith” efforts to remove content that is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” 230(f)(4) says that such services are not a speaker or publisher of content even if they offer tools that “(a) filter, screen, allow, or disallow content; (b) pick, choose, analyze, or digest content; or (c) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” Verbs not listed by Congress as conferring immunity include transact, buy, bid, offer, advertise, addict, target, and sell.

² See e.g. *Red Lion Broadcasting Co. v. United States*, 395 U.S. 390 (1969) (upholding FCC’s “Fairness Doctrine” requiring radio and television broadcasters to give equal time to opposing sides of a debate); compare Rachel Lerman, *FCC Fines Sinclair Broadcast Record-Setting \$48 Million*, WASH. POST, May 6, 2020 with Tony Romm & Brian Fung, *Trump Criticizes FCC For Moving to Block Sinclair-Tribune Merger*, WASH. POST, July 25, 2018; see also Steve Coll, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* 36-52 (1986) (observing that the FCC acted against the preferences of state utility regulators and allowed MCI to build infrastructure to compete against AT&T in 1970s); see Victor Pickard, *AMERICA’S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 62–68 (2014) (citing Federal Communications Commission, *Public Service Responsibility of Broadcast Licensees* (1946)) (describing how the FCC in the 1940s sought to define a public interest standard in programming policy and enforce that standard fairly).

³ Colin Lecher, *How Amazon Escapes Liability for the Riskiest Products on its Site*, VERGE, Jan 28, 2020, <https://www.theverge.com/2020/1/28/21080720/amazon-product-liability-lawsuits-marketplace-damage-third-party>.

Background

Section 230 of the Communications Decency Act of 1996 encourages websites to moderate third-party users' content so as to foster a "vibrant and competitive free market" online and to "empower parents to restrict their children's access to objectionable or inappropriate online material."⁴ The law sought to correct a New York State Supreme Court decision that held that an online bulletin board could be considered liable for the ostensibly defamatory posts of its users *because* it moderated posts and therefore acted analogously to a newspaper.⁵ The principal authors of Section 230, then-Rep. Chris Cox and Sen. Ron Wyden, wanted to, in Wyden's words, give then-young online companies a "shield" and a "sword."⁶

The "shield" came in subsection (c)(1), which held that a website, or "interactive computer service," would not be considered the "publisher or speaker" of information provided by their users.⁷ The "sword" comes in the next subsection, (c)(2), which also protected sites from liability that might come from "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."⁸

Commentators today have lauded Section 230, with some calling it the "Magna Carta of the Internet," the "cornerstone of Internet freedom," and even "the one law that's the cause of everything good and terrible about the Internet."⁹ Undoubtedly, protecting truly neutral intermediaries from overly expansive responsibility for every one of their users' posts is valuable. And structuring rules so to as to encourage moderation for objectionable content can help remove dangerous, abusive, and other deleterious content from the internet.

Current Challenges

Today's challenge comes from the fact that online activity is no longer mostly messages on bulletin boards and fora. Not only are internet services far more sophisticated, but it makes little sense to distinguish between internet services and the rest of the economy. Convergence isn't

⁴ Section 230 of the Communications Act of 1934, as amended, 47 USC §§ 230(b)(2), 230(b)(4).

⁵ Alina Selyukh, *Section 230: A Key Legal Shield for Facebook, Google is About to Change*, NPR, Mar. 21, 2018, <https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change>.

⁶ Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*. CNN BUSINESS, June 9, 2020, <https://www.cnn.com/2020/06/09/perspectives/ron-wyden-section-230/index.html>.

⁷ 47 USC § 230(c)(1).

⁸ 47 USC § 230(c)(2)(A).

⁹ Noa Yachot, *The 'Magna Carta' of Cyberspace Turns 20: An Interview With the ACLU Lawyer Who Helped Save the Internet*, ACLU (June 23, 2017), <https://www.aclu.org/blog/free-speech/internet-speech/magna-carta-cyberspace-turns-20-interview-aclu-lawyer-who-helped>; Berin Szoka, *Section 230: The Cornerstone of Internet Freedom*, TECH. LIBERATION FRONT (Aug. 18, 2009), <https://techliberation.com/2009/08/18/section-230-the-cornerstone-of-internet-freedom/>; Paul Blumenthal, *The One Law That's the Cause of Everything Good and Terrible About the Internet*, HUFFPOST (Aug. 6, 2018), https://www.huffpost.com/entry/online-harassment-section-230_n_5b4f5cc1e4b0de86f488df86. All sources cited in Brief *Amicus Curiae* of the Cyber Civil Rights Initiative and Legal Scholars in Support of Petitions at 6-8, *Daniel v. Armslist* (2019), (No. 19-153), https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530_Brief.PDF.

happening, it has happened; Amazon owns warehouses and massive real estate holdings, Walmart has a thriving online marketplace, and Google and Facebook both operate large data centers and undersea cables.

Market structuring today with respect to Section 230 should begin with the premise that the internet is not solely a medium of constitutionally protected speech. As Danielle Citron and Mary Anne Franks have pointed out, “[I]n 2019, 293 million Americans were using the Internet, and they were using it not only to communicate, but also to buy and sell merchandise, find dates, make restaurant reservations, watch television, read books, stream music, and look for jobs.”¹⁰ Treating all online activity as speech might have made more sense when the internet was primarily bulletin boards and fora.¹¹ But now, as vast swaths of economic activity occurs virtually, a trend appears likely to accelerate as the COVID-19 pandemic continues, policymakers should stop treating the internet, as Citron and Franks put it, like a “magical speech conversion machine.”¹² In other words, the fact that an activity happens online shouldn’t make it speech, when the same activity wouldn’t be speech in the physical world.

Online Commerce Is Not Speech

Some courts have expanded Section 230 so as to include online activity of widely different types, with harmful consequences. For example, Armslist is an online firearms marketplace that bills itself as a type of Craigslist for guns. A Wisconsin man under a restraining order from his wife bought a gun from Armslist, circumventing the background check that would have prevented him from purchasing the gun in a brick-and-mortar store. That man then killed his wife and two of her co-workers in October 2012. Last year, the Wisconsin Supreme Court held that Armslist bore no legal responsibility for selling the guns because of Section 230.¹³

In an *amicus* brief supporting the case’s appeal to the U.S. Supreme Court, a group of law professors wrote that the double standard that Section 230 grants to online businesses lets online businesses get away with conduct that physical businesses would not. That distinction gives online businesses “an unearned, anticompetitive advantage ... over their offline counterparts.”¹⁴ The scholars note at least five other instances where Armslist facilitated illegal purchases of guns with tragic consequences.¹⁵

The risk of an online double standard extends to online commerce more broadly, beyond gun retailing. The online goliath Amazon has inappropriately tried to disguise its activities as speech.

¹⁰ Danielle K. Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, U. CHI. LEGAL F. (forthcoming 2020) at 11 (internal citations omitted), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1833&context=faculty_scholarship.

¹¹ Even then, the view was questionable. Online commerce took place when the Communications Decency Act was passed and only recently was recognized, in one sense, as analogous to brick-and-mortar commerce. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

¹² Citron & Franks *supra* note 10 at 14.

¹³ Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES, Oct. 9, 2019, <https://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html>.

¹⁴ Brief *Amicus Curiae* of the Cyber Civil Rights Initiative and Legal Scholars in Support of Petitioners at 21, Daniel v. Armslist.com, No. 19-153 (2019), https://www.supremecourt.gov/DocketPDF/19/19-153/114340/20190830155050530_Brief.PDF.

¹⁵ *Id.* at 25-27.

Amazon is dedicated to placing goods or services into the stream of commerce, but it regularly portrays itself as an interactive computer service under Section 230. Though some courts have rejected the argument that Section 230 immunizes online marketplaces and retailers from liability for defective or dangerous products or services, others have accepted it.¹⁶ Amazon, has tested arguments in court that because it simply hosts third-party sellers on its marketplace, it cannot be liable for defective products. Some courts have rejected that argument; a three-judge panel on the 4th Circuit held, “While the Communications Decency Act protects interactive computer service providers from liability as a publisher of speech, it does not protect them from liability as the seller of a defective product.”¹⁷

If online platforms and retailers are able to escape responsibility for harms that defective or dangerous products sold on their sites, victims might be unable to vindicate their right to compensation and wider public safety could suffer.

Manipulation Machines Are Not Speech

Two of the most powerful online platforms today, Facebook and Google, make the vast majority of their money from selling advertisements targeted using data gathered from a highly invasive set of surveillance architectures. Businesses pay Facebook and Google to serve ads to users. Facebook and Google encourage advertisers to continue using them and further encourage them with Facebook and Google’s ability to microtarget specific users based on the information the corporations have collected.¹⁸ Because most of their revenue comes from advertising, Facebook and Google also have an enormous motivation to keep users on their sites and services for as long as possible. As a result, the platforms tend to show users sensationalistic, outrageous, or otherwise addictive content so as to make their services more valuable to advertisers.

The algorithmic choices and user interface decisions that curate articles, videos, or sales can lead users to divisive, inflammatory, abusive, hateful, or conspiratorial content and degrade users’ lives and communal discourse. “In a targeted advertising model,” Jeff Gary and Ashkan Soltani

¹⁶ Hinton v. Amazon.com, LLC, 72 F.Supp.3d 685, 690 (S.D. Miss. 2014); Eberhart v. Amazon.com, Inc., 325 F.Supp.3d 393, 400 n.5 (S.D.N.Y. 2018) (writing in dicta that consumer’s claim that Amazon is liable for third-party seller’s representations on Amazon’s online marketplace “is preempted by § 230 of the Communications Decency Act.”); *but see* HomeAway v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019) (holding that Section 230 did not preempt local regulation of short-term property rentals); Bolger v Amazon.com, Inc., 2020 WL 4692387 (Cal. App. Ct. 2020) (holding that Section 230 did not immunize Amazon from various products liability); Erie Insurance Co. v. Amazon.com, Inc., 925 F.3d 135 (4th Cir. 2019) (holding that Section 230 did not immunize Amazon from tort liability); *see also* Sean M. Bender, *Product Liability’s Amazon Problem*, J. L. & TECH. TEX. at 24 (forthcoming 2021) (“Once in federal court, Amazon deploys a twofold defense strategy to avoid liability for the defective product. First, it asserts that it has immunity under Section 230 of the Communications Decency Act of 1996.”), <https://ssrn.com/abstract=3628921>.

¹⁷ *Id.* at 140. Amazon has escaped product liability for defective third-party products on the grounds that it does not take title to the products between the seller and the buyer. Alison Frankel, *Amazon is (So Far) Winning Its War Against Products Liability Exposure*, REUTERS, June 11, 2019, <https://www.reuters.com/article/legal-us-otc-amazon/amazon-is-winning-its-war-against-products-liability-exposure-idUSKCN1TC2HY>.

¹⁸ Natasha Singer, “*Weaponized Ad Technology*”: Facebook’s Moneymaker Gets a Critical Eye, N.Y. TIMES, Aug. 16, 2018 (“Facebook has made a mint by enabling advertisers to identify and reach the very people most likely to react to their messages.”), <https://www.nytimes.com/2018/08/16/technology/facebook-microtargeting-advertising.html>.

have written, “misinformation and conspiracy theories are often the product, not an accident.”¹⁹ Such design choices are inherent in the invasive surveillance architecture of behavioral, targeted advertising, and reflect content creation rather than mere filter. A Facebook post with a Like button is fundamentally different content than one without it.²⁰ When Facebook helps develop an advertisement and deliver it to a specific user based on data collected by Facebook, it is not clear whether Facebook retains its role as an interactive computer service or whether Facebook becomes a publisher of the advertisement. A Facebook ad is more like a business partnership between the advertiser and the platform, with the advertiser supplying the intent and Facebook supplying the timing, context, formatting choices, and delivery mechanism.

Moreover, these platforms are undergirded by complex algorithms, created and curated by the platforms themselves. These are not speech platforms passively conveying user voice, but highly sophisticated industrial processes involving specialized software and large computing centers. As Ben Thompson has noted, Facebook is a “data factory” which “processes data from its raw form to something uniquely valuable both to Facebook’s products and advertisers.” Facebook uses processed data to facilitate users connecting with each other, finding content, and forming affinity groups. It helps content providers reach readers and advertisers target users to take action.²¹ These businesses protect their algorithms with trade secrets law, making it clear that algorithms are intellectual property critical to profitably configuring the user experience to produce a range of outcomes.

For example, Google represents itself as offering the most relevant results for users, meaning that the manner in which it ranks search and advertising results are a critical part of the content itself. In 2009, YouTube executives rewrote its recommendation algorithm with the business goal of achieving a billion viewing hours a day on the site, changing the content watched and produced for the video portal.²² Such product design choices are far different than the standard bulletin-board style layout of Craigslist, whose advertising content was appropriately deemed “information provided by another information content provider” in a Seventh Circuit case in 2008.²³

The text of Section 230 says little on whether interactive computer services become speakers when they display commercial advertisements whose context they shape with development tools, proprietary algorithms, and targeted mechanisms for delivery, or when something as sophisticated as a “data factory” like Facebook or Google is involved. In 1996, the technology of bulletin boards meant that there was frequently a clear delineation between speaker and distributor. In 2020, highly sophisticated communications platforms using invasive surveillance architectures and social scientists make formatting choices designed to monetize attention.

¹⁹ Jeff Gary & Ashkan Soltani, *First Things First: Online Advertising Practices and Their Effects on Platform Speech*, KNIGHT FIRST AMENDMENT INSTITUTE, Aug. 21, 2019.

²⁰ Rose Eveleth, *The Facebook Experience Without a Like Button*, ATLANTIC, Aug. 22, 2014, <https://www.theatlantic.com/technology/archive/2014/08/what-happens-when-you-neutralize-the-like-button/378951/>.

²¹ Ben Thompson, *Data Factories*, STRATECHERY, Oct. 2, 2018, <https://stratechery.com/2018/data-factories>.

²² Mark Bergen, *YouTube Executives Ignored Warnings, Letting Toxic Videos Run Rampant*, BLOOMBERG, Apr. 2, 2019, <https://www.bloomberg.com/news/features/2019-04-02/youtube-executives-ignored-warnings-letting-toxic-videos-run-rampant?sref=ZvMMMokz>.

²³ *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

An interactive service provider, such as a social network or search engine, offers critical context that are as important for the user as the ad content itself. Google is a critical endorser of its search engine results. Testifying before Congress in July, Alphabet CEO Sundar Pichai told House antitrust subcommittee chairman David Cicilline, “We’ve always focused on providing users the most relevant users” and “when I run the company, I’m really focused on giving users what they want. We conduct ourselves to the highest standard.”²⁴ Additionally, the Google brand is trusted to deliver the most relevant results. In a March 2020 study, the search engine optimization company Moz found that most users surveyed trusted Google to inform their financial, legal, and medical decisions and to provide them with “trustworthy” information in search results.²⁵

Contextual advertising – advertising based on a specific page and not necessarily the individual user – can inflict harms on users too. News outlets have reported on scam operations paying for contextual advertisements to accompany Google search results, above so-called “organic” results. People suffering from alcohol addiction have searched for “rehab near me” or similar queries and clicked on the advertisements for predatory companies who admit them and then bill their health insurance companies exorbitant amounts.²⁶ Other scams cheat people out of health insurance altogether: *The Philadelphia Inquirer* reported last year that some websites spent millions to get the top advertising spot in Google searches for queries such as “Obamacare plans” or “ACA insurance.”²⁷ Users who thought they were buying long-term health insurance instead got plans with minimal coverage. Other people, searching for Netflix customer support, have accidentally downloaded viruses run by people who threaten to delete valuable personal files unless they get paid off.²⁸

Google’s search function is responsible for these scams. Once its search function is commercialized such that its algorithm delivers ads in response to user inquiries, search becomes commerce, not speech. Typing in a search term becomes shopping for a product or service, as much as selling a defective product confers liability on both the maker of the product and the store, offering a commercialized search function that peddles defective products should confer liability on the maker of the product and the search engine.

²⁴ *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the H. Subcomm. on Antitrust, Commercial, and Administrative Law*, 116th Cong. (2020), <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=31113>.

²⁵ Lily Ray, *2020 Google Search Survey: How Much Do Users Trust Their Search Results?*, MOZ, Mar. 2, 2020 (finding that at least 72%, 62%, and 66% of users surveyed at least “sometimes” made “important” financial, legal, and medical decisions, respectively, based on information found through Google), <https://moz.com/blog/2020-google-search-survey>.

²⁶ Cat Ferguson, *Searching for Help*, VERGE, Sept. 7, 2017, <https://www.theverge.com/2017/9/7/16257412/rehab-near-me-google-search-scam-florida-treatment-centers>.

²⁷ Sarah Gantz, *Pa. Woman was Convinced She Bought Obamacare Insurance. She Got Scammed by a Look-Alike Website*, PHIL. INQUIRER, May 22, 2019, <https://www.inquirer.com/health/consumer/google-short-term-health-plans-20190522.html>.

²⁸ *Netflix Customer Service Impersonated by Scams in Google and Bing Ads*, NBC NEWS, Apr. 25, 2014, <https://www.nbcnews.com/business/consumer/netflix-customer-service-impersonated-scams-google-bing-ads-n82346>; see also David Segal, *Fake Online Locksmiths May Be Out to Pick Your Pocket, Too*, N.Y. TIMES, Jan. 30, 2016, <https://www.nytimes.com/2016/01/31/business/fake-online-locksmiths-may-be-out-to-pick-your-pocket-too.html>.

The pecuniary motivation behind targeted advertising means that platforms will structure their design choices to curate and produce addictive content and surveil users. Moreover, treating platforms dedicated to sales and commerce as speech fora enables these entities to profit off of harmful content and point users towards defective or unsafe products, and produces an incentive to collect, store, and exploit large stores of personal information, all with no liability for the entities profiting from the harmful business model.

Digital Products Are Not Necessarily Speech

Facebook sells an experience as its product. Its users exchange their data for the experience. Advertisers exchange money for access to the users and their data, which Facebook holds and manipulates. The platform is a large commercial product catering to multiple sets of stakeholders, including clients. It is not a free speech forum rating special protection.

Data and information services are increasingly analogous to physical products. Research has shown that internet services, such as games and social media, can have qualities with physiological characteristics similar to narcotics, and social media executives knowingly took advantage of these characteristics in product design.²⁹ Some states have asked whether some types of addictive game features resemble gambling and should be regulated accordingly.³⁰ Similarly, social media sites such as Facebook designed features to addict users and maximize how long the users would stay on the site. Early Facebook investor Sean Parker said that Facebook's early goal was guided by the question: "How do we consume as much of your time and conscious attention as possible?"³¹ The better and longer these products are at holding users' attention, the more money they make.

Voluminous research has helped articulate some of the potentially negative consequences of digital products designed to dominate users' attention. Overuse of these services can result in depression, memory loss, alcoholism, and reduced empathy and social development in children.³²

Some of these addictive techniques go under the rubric of "dark patterns," which are deceptive user interface designs that trap users into making decisions that profit platforms, through "visual misdirection, confusing language, hidden alternatives, or fake urgency to steer people toward or away from certain choices."³³ Making it more difficult to cancel a subscription or opt out of

²⁹ Garrett Sloane, *Sean Parker Says Facebook was Designed to be Addictive*, ADAGE, Nov. 9, 2017, <https://adage.com/article/digital/sean-parker-worries-facebook-rotting-children-s-brains/311238#:~:text=Sean%20Parker%2C%20the%20billionaire%20early,was%20designed%20to%20consume%20people>.

³⁰ Jason M. Bailey, *A Video Game 'Loot Box' Offers Coveted Rewards, But Is It Gambling?*, N.Y. TIMES, Apr. 24, 2018, <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html?searchResultPosition=1>.

³¹ Sloane, *supra* note **Error! Bookmark not defined.**

³² Adam Alter, *IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED* (2017); *Ledger of Harms*, CTR. HUMANE TECH. (2020), <https://ledger.humanetech.com/>.

³³ Statement of Commissioner Rohit Chopra, *Regarding Dark Patterns in the Matter of Age of Learning, Inc. Commission File Number 1723186*, Sept. 2, 2020, https://www.ftc.gov/system/files/documents/public_statements/1579927/172_3086_abcmouse_-_rchopra_statement.pdf.

privacy settings is not speech, but an old-fashioned marketing scam giving new life online. Other “dark patterns” like an endless scroll are designed for addiction.³⁴

Even the basis for assuming that colors, formatting, and content are merely speech is falling apart; a judge recently ruled that a graphic sent to a writer via Twitter designed to trigger (and that did trigger) an epileptic seizure in the recipient was assault.³⁵ It makes increasingly less sense to characterize the wide variety of available digital goods and services, or goods and services with embedded digital capacity, purely as speech.

Clearly, products intended to be slot machine-style mechanisms to extract attention and/or money from users are not constitutionally-protected speech.

Recommendations for Policymakers

We recommend that policymakers clarify that “interactive computer services” means a line of business whose primary activity is selling access to the internet or to a computer service to multiple users. This would ensure that only lines of business whose primary goal is to facilitate speech will be able to adopt a legal regime with expansive immunities for the speech they convey.

Any line of business that does the following activities would not be considered an interactive computer service:

- Selling personalized advertising
- Selling contextual advertising
- Engaging in online retailing (placing items or facilitating the placement of items into the stream of commerce)
- Using trade-secret protected algorithms to monetize any use of the service
- Selling addictive digital products or whose defective design otherwise creates foreseeable harm
- Collecting data for commercial purposes other than the direct sale of the interactive computer service
- Otherwise monetizing the transmission of information by offering anything but a passive neutral vessel for communication

Additionally, any advertising sold by an interactive computer service should be clearly discernable as an ad, and the interactive computer service should be liable as a speaker for that advertising text.³⁶

³⁴ Kate Raynes-Goldie, *Dark Patterns: The Secret Sauce Behind Addictive Tech*, TECHXPLORE, Jan. 30, 2020, <https://techxplore.com/news/2020-01-dark-patterns-secret-sauce-addictive.html>; Dark Patterns, *Types of Dark Patterns*, <https://darkpatterns.org/types-of-dark-pattern.html>.

³⁵ Reis Thebault, *A Tweet Gave a Journalist a Seizure. His Case Brings New Meaning to the Idea of ‘Online Assault.’* WASH. POST, Dec. 16, 2019, <https://www.washingtonpost.com/health/2019/12/16/eichenwald-strobe-gif-seizure-case/>.

³⁶ See FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, 81 Fed. Reg. 22596 (Apr. 18, 2016).

The choice to narrow the definition of interactive computer services would recognize that web intermediaries who own these sites profit off of third-party content and activity. More importantly, platforms *structure* that content and activity by processing content and connections through proprietary algorithms into behavioral change (clicks, sales, sign-ups, views, etc). Narrowing the definition of “interactive computer service” would not render online intermediaries liable for *all* the activity that takes place on their sites. Instead, it may simply implicate other areas of law, such as consumer protection. This development may actually bring more consistency and clarity to business law. Frank Pasquale has pointed out that many online intermediaries claim to be speakers for the purposes of some areas of law, such as business torts, but “mere conduits” of information for other areas, such as intellectual property and defamation.³⁷

Perhaps one regulatory model might be to pair Section 230-style immunities with common carriage rules prohibiting advertising, online publishing, or data collection for unfair commercial purposes. Certain corporations who now take advantage of Section 230, such as Google and Facebook, operate lines of business with common carrier or public utility-style characteristics (search engines, mapping, social media, video sharing, or other essential facilities for commerce). Given that their services are broadly offered to the public and they control a monopolistic chokepoint critical for commerce or participation in society at large, traditional communications rules ensuring neutrality make sense.

Conclusion

There are legitimate questions as to the FCC’s jurisdiction over Section 230, as well as the executive order promulgated by the White House.³⁸ Nevertheless, an overly broad reading of Section 230 has inhibited the courts from helping to develop common law concepts to manage the rise of a digital economy. That Section 230 immunizes fields of online business that its authors never predicted is a challenge for policymakers today. Any approach and revision to Section 230 should look closely at how corporations’ business models, and their consequent harms, further democratic goals such as dispersed power, open markets, and public safety.

³⁷ Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power* 17 THEORETICAL INQUIRIES L. 487, 494-497.

³⁸ Jessica Rosenworcel, Commissioner, Fed. Comm’n Comm., Remarks at Rightscon Online 2020: “Section 230, Online Speech, and the FCC,” July 27, 2020 (“[A]ny legal expert worth their salt will tell you that changing the law like this is not the job of a regulatory agency like mine. It’s the job of Congress.”), <https://www.fcc.gov/document/cmr-rosenworcel-remarks-rightscon-2020-section-230-and-fcc>; Geoffrey Starks, Commissioner, Fed. Comm’n Comm., Statement on NTIA’s Section 230 Petition, July 27, 2020 (“The rules NTIA has proposed are ill-advised, and the Commission should dispose of this Petition as quickly as possible. As a threshold matter, NTIA has not made the case that Congress gave the FCC any role here.”), <https://www.fcc.gov/document/commissioner-starks-statement-ntias-section-230-petition>; Jon Brodtkin, *FCC Republican Has “Deep Reservations” About Trump’s Social Media Crackdown*, ARS TECHNICA, June 15, 2020 (reporting that FCC Commissioner Michael O’Rielly said he has “deep reservations” about whether the FCC has the legal authority to act on President Trump’s executive order).

U.S. POSTAL SERVICE

CERTIFICATE OF MAILING

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER

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