



How Broad A Shield? A Brief Overview of Section 230 of the Communications Decency Act

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The [Communications Decency Act of 1996](#) (CDA) added [Section 230](#) to the Communications Act of 1934, generally protecting online service providers from legal liability stemming from content created by the users of their services, with some exceptions. (Though the provision is found in the Communications Act, many [commonly refer to it](#) as Section 230 of the CDA.) [Some commentators have described](#) Section 230 as one of the most important provisions protecting free expression on the Internet because “interactive computer service” providers-- including entities like Facebook, Twitter, and Google that provide significant online platforms --are permitted to publish others’ content without reviewing it for criminality or other potential legal issues. However, [others argue that](#) Section 230’s liability protections are overbroad or unwarranted, and contend that Section 230’s liability shield facilitates sex trafficking and other criminal behavior by permitting online service providers to display advertisements for illegal activity without fear of liability. In response to these concerns, some Members of Congress have [introduced bills](#) to limit the provision’s scope.

Section 230’s Liability Shield

[Section 230\(c\)\(1\)](#) states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

[Reviewing courts](#) have construed Section 230(c)(1) to provide broad, but not unlimited, immunity from liability to “interactive computer service” providers for content they publish that was created by others. Courts have developed a three-part test to identify whether Section 230’s shield bars a claim of liability. Specifically, the [provision](#) is understood to “shield[] conduct if the defendant (1) is a provider or user of an interactive computer service, (2) the claim is based on information provided by another information

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content provider and (3) the claim would treat [the defendant] as the publisher or speaker of that information.” A defendant must meet all three parts of the test to gain the benefit of Section 230’s liability protections.

Part 1: Is the defendant a provider or user of an Interactive Computer Service? An [interactive computer service](#) is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet[.]” [Reviewing courts](#) have interpreted this definition to cover [many](#) entities operating online, including broadband Internet access service providers (e.g., Verizon FIOS and Comcast Xfinity), Internet hosting companies (e.g., DreamHost and GoDaddy), search engines (e.g., Google and Yahoo!), online message boards, and many varieties of online platforms. However, not all businesses that operate via the Internet may be interactive computer service providers. At least one [court](#) has expressed doubt regarding whether Section 230’s shield protects defendants against liability claims that are unrelated to online services they provide. Nevertheless, the precise contours of this definition remain unclear because, in cases questioning defendants’ interactive computer service provider status, reviewing courts have found Section 230’s protections to be unavailable on [other grounds](#).

Part 2: Is the defendant an Information Content Provider? Section 230 shields interactive computer service providers when they disseminate others’ allegedly unlawful content, but not when they are wholly or partially responsible for the production of such content. Specifically, Section 230’s shield only protects defendants when they do not act as “information content providers” with respect to disputed content. The statute defines “[information content provider](#)” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”

To assess whether a defendant is an “information content provider” with respect to the content at issue, reviewing courts generally examine whether the defendant [materially contributed](#) to the content’s alleged unlawfulness. As the U.S. Court of Appeals for the Sixth Circuit [explained](#), “A material contribution to the alleged illegality of the content does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible [in whole, or in part] for what makes the displayed content allegedly unlawful.” Courts [have deemed](#) simply editing allegedly unlawful content for grammar or punctuation insufficient to pierce Section 230’s liability shield. Similarly, courts have [held](#) that the provision of neutral tools to create or develop content does not transform an entity into an information content provider unprotected by Section 230. On the other hand, the solicitation and active participation in the development of unlawful content [makes](#) the liability shield unavailable.

Part 3: Does the liability claim treat the defendant as a publisher or speaker? [Section 230](#) prohibits treating providers or users of interactive computer services as the publisher or speaker of another entity’s content. [Reviewing courts](#), therefore, examine whether the cause of action at issue is grounded in the defendant’s performance of traditional publishing functions. If a suit would impose liability on the basis of editorial decisions such as choosing content to publish, or withdrawing content, then Section 230 [may bar](#) liability.

Liability Shield Exceptions

While Section 230’s liability shield would apply broadly to many civil actions or state criminal prosecutions brought against online service providers, the shield is not absolute. [Section 230\(e\)](#) enumerates the circumstances where the liability shield does not attach to conduct that otherwise might fall within the shield’s scope. Section 230’s shield does not apply to federal criminal law, intellectual property law, the [Electronic Communications Privacy Act of 1986](#), or state laws similar to the Electronic Communications Privacy Act of 1986. For example, Section 230 would not shield an interactive computer service provider from prosecution under [15 U.S.C. 1591](#), the federal prohibition on commercial sex

trafficking, if the elements of that offense (e.g., the provider acted with the requisite *mens rea* for liability to attach) are met.

Considerations for Congress

In recent years, [some lawmakers](#), [state attorneys general](#), and [commentators](#) have expressed concern that Section 230's shield may be too broad, particularly in [civil](#) and [state criminal](#) cases involving sex trafficking advertisements. Some Members of Congress have responded to these concerns by [introducing bills](#) to abrogate Section 230's shield in these circumstances. Two bills introduced in the 115th Congress, [H.R. 1865](#) and [S. 1693](#), seek to eliminate Section 230's shield in many sex trafficking-related civil and state criminal actions, in addition to amending the federal criminal sex trafficking statute. The House Judiciary Committee [has ordered](#) H.R. 1865 reported with amendments. The Senate Committee on Commerce, Science, and Transportation also [has ordered](#) S. 1693 to be reported to the full Senate in an amendment in the nature of a substitute.

[Some have criticized](#) these proposals, including [former Representative Chris Cox](#), one of the sponsors of Section 230 when originally enacted. Critics [contend that](#) Section 230 is an important tool to preserve and promote free expression on the Internet, and they predict that abrogating the shield could have [unintended consequences](#). As an alternative to amending the statute, former Representative Cox [suggested](#) that Congress adopt a Concurrent Resolution “restating . . . the clear intent of Congress that Section 230 was never intended as a shield for criminal behavior.”