

## Fact-Checking Mr. Neil Fried's Testimony

Below is a response to Neil Fried's testimony submitted to the House of Representatives in advance of a hearing titled "Disinformation Online and a Country in Crisis." Although Fried's testimony expresses great alarm about disinformation, misinformation, and falsehoods online, it is riddled with factual inaccuracies.

We address the most-egregious claims. For more information or detail, please do not hesitate to contact NetChoice.

**Misinformation 1:** *"I recommend restoring a duty of care online."*

**Fact:** Both before and after Congress passed Section 230, U.S. law never imposed a unique duty of care on online platforms.

- ▶ It is therefore incorrect to characterize reforms to Section 230 as a restoration of any duty of care. And to the extent that Congress seeks to require online platforms to moderate in a certain way, it is the First Amendment—not Section 230—that stands in the government's way.
- ▶ That said, Section 230 *does* impose certain obligations on online platforms. Most notably, it requires they comply with all federal criminal laws.

**Misinformation 2:** *"This would better protect users, as well as ameliorate concerns about the platforms' market power."*

**Fact:** *Limiting Section 230 stifles competition; it does not promote it.*

- ▶ Section 230 encourages competition by allowing different companies to adopt different moderation policies. Whereas Facebook might choose to avoid fact-checking the president, Twitter may decide otherwise. Users can choose which platform best supports their values.
- ▶ A government mandate to moderate a certain way will decrease competition among existing players. Even worse, it will make it too cost-prohibitive for newcomers to enter the market because none will have the resources necessary to comply with Fried's proposal. Section 230, by contrast, protects companies of all sizes from unreasonable liability, thereby creating a level playing field.

**Misinformation 3:** *"So long as platforms and online intermediaries can facilitate illicit activity with impunity, we will continue to be fighting a losing battle."*

**Fact:** Section 230 explicitly requires online platforms and intermediaries to comply with all federal criminal laws.

- ▶ And if that weren't clear already, Congress's FOSTA/SESTA Act, passed in 2018, remove any doubt.

**Misinformation 4:** *“Because of their lack of editorial discretion, however, they can only be held culpable if they knew, or should have known, about the false, defamatory statements in the content they delivered.”*

**Fact:** This is true regardless of Section 230.

- ▶ First, the Supreme Court has held that people are liable for defamation against public figures and officials only when they act with “actual malice.” That means the defendant knew or should have known that it published a false statement before publication.
- ▶ Even when public figures or officials are not at issue, intermediaries like those protected by Section 230 are liable only when they knew or should have known a statement was false.
- ▶ All Section 230 does is keep liability with the actual defendant: the user who published the defamatory content. That’s not just sensible, it’s pro-democracy. If platforms had to fact-check every single post, the internet would be subject to endless red tape. It’s hard to see how the #MeToo Movement would have gone viral had Section 230 not existed.

**Misinformation 5:** *“As often explained by Senator Wyden—one of section 230’s original authors—Congress enacted section 230 to bestow upon internet platforms a content liability shield so that they would wield a content moderation sword.”*

**Fact:** Senator Wyden continues to support Section 230 in its original form and opposes reform.

**Misinformation 6:** *“Unfortunately, despite claims that section 230 encourages content moderation, it actually does the opposite.”*

**Fact:** Although it’s hard to quantify this statement, common sense shows it’s false.

- ▶ Before Section 230, the courts held that when an online platform moderates even *some* content—no matter how small—it assumes liability for *all* content. Known as the “Moderator’s Dilemma,” this judicially created rule had the perverse incentive of discouraging platforms from moderating.
- ▶ Section 230 abolished that rule and therefore encourages companies to moderate freely.

**Misinformation 7:** *“As a result, platforms cannot be sued for what a user does over their services—regardless of the harm caused, regardless whether the platforms knew about the illicit activity, regardless whether they monetized the content and served an amplifying role, and regardless whether they engaged in adequate (or any) content moderation.”*

**Fact:** False.

- ▶ First, all platforms are subject to federal criminal laws. So if a platform knows of illicit content like child pornography, it has a legal obligation to act.
- ▶ Second, Section 230 also subjects platforms to federal intellectual property laws.
- ▶ And third, Section 230 only protects online platforms from being held liable for content their users create. If they know of illegal behavior and do nothing, they can be held liable. And if they help create that content, they can also be held liable.

**Misinformation 8:** *“Courts have construed section 230 broadly, however, as precluding platforms’ civil liability for enabling illegal conduct.<sup>19</sup> This has the effect of eliminating the duty of care over third-party behavior, even when the platforms have facilitated unlawful conduct negligently, recklessly, or knowingly.”*

**Fact:** As Fried notes in a footnote attached to those sentences, “Platforms do not receive the protection of section 230, however, if their own, affirmative actions facilitating the illicit, third-party conduct are themselves unlawful.”

**Misinformation 9:** *“But the decentralized, often anonymous, and global nature of the internet makes finding those culprits—let alone stopping them before harm has occurred—far more difficult without platform involvement.”*

**Fact:** Aside from not making sense, this ignores that platforms already actively work with law enforcement to help detect and deter criminal wrongdoing.

- ▶ As a general matter, it seems counterintuitive that if the government has difficulty finding bad actors that the onus should shift to platforms to help do the government’s investigatory work.
- ▶ That said, platforms already actively—and voluntarily—work with law enforcement to help detect and deter criminal wrongdoing. Indeed, Facebook sends millions of potential instances of alleged child pornography to NCMEC and Apple complies with thousands of law-enforcement requests for data, for example.

**Misinformation 10:** *“The platforms argue that they have market incentives to combat illicit activity, since they will lose users if they don’t. But the reality is that a few, dominant platforms have become so critical to so much of today’s social and economic fabric that many consumers and commercial users cannot realistically forgo patronage.”*

**Fact:** Without Section 230, platforms would face the Moderator’s Dilemma, as explained above.

- ▶ That would mean most platforms would acquiesce to porn, hate speech, and terrorist content on their sites because the risk of liability would be scarier (and costlier) than any lost revenue from hosting it. Of course, that would drive away some users and advertisers, the main form of income for most platforms.
- ▶ Even with Section 230, platforms are constantly under pressure from advertisers (a market force) to change their moderation policies. Indeed, few advertisers want their ads running alongside graphic, racist, sexist, or homophobic content. Speaker Pelosi recognizes much, arguing just last week that advertisers should pressure platforms to moderate differently—or, as the Speak put it, “know your power.”

**Misinformation 11:** *“Those incentives also tend to manifest themselves cyclically, so while they help when tragedies reach the public consciousness, they do not help the victims of the unnoticed tragedies that occur every day.”*

**Fact:** Companies spend billions on content moderation. As Congress often likes to say, money spent is a reflection of values. Platforms clearly care about protecting their users and righting wrongs.

**Misinformation 12:** *“Few other sectors, if any, get a pass in such circumstances, especially when they have an outsized and growing influence in social and commercial discourse—and are increasingly used to perpetrate illicit acts.”*

**Fact:** Section 230 merely codified the traditional tort liability principle that he who causes the harm should be responsible for his actions.

- ▶ Online platforms don't get a “pass.” Section 230 merely codified the traditional tort liability principle that he who causes the harm should be responsible for his actions. Aside from that, Congress has routinely passed laws that shield certain individuals or entities from liability.

**Misinformation 13:** *“Section 230 also harms competition. First, by shielding platforms from potential liability that other companies appropriately face . . .”*

**Fact:** Section 230 applies to actions, not entities.

- ▶ So it applies to any company that hosts user-created content online. That includes, for example, the *New York Times* and *Wall Street Journal*--both of which have comment sections. Thus, **no** company is liable for behavior that platforms are not liable for under Section 230.

**Misinformation 14:** *“. . . section 230 allows the platforms to ignore harms their users cause their competitors . . .”*

**Fact:** Is unclear what is even meant by this. Are online platforms responsible for other platforms' actions?

- ▶ Nevertheless, it bears repeating that online platforms *are* responsible for any actions they take. So if they direct users or create content that illegally harms competitors, Section 230 does not offer any protection.

**Misinformation 15:** *“This could be achieved by requiring platforms to take reasonable, good faith steps to curb illicit activity over their services as a condition of receiving liability protection.”*

**Fact:** This duty would hurt, not help, competition.

- ▶ Newcomers and small competitors would not have the resources to comply. Such a barrier to entry would ensure current market players become entrenched. Plus, again, Section 230 requires platforms of all sizes to comply with federal criminal laws.

**Misinformation 16:** *“They just would appropriately be held accountable on the back end if they use that discretion poorly.”*

**Fact:** Who would decide if they exercised “discretion poorly”?

- ▶ It is disingenuous to claim this is a “solution” to the alleged harms of Section 230. First, it merely subjects companies to endless litigation.
- ▶ And second, it hurts competition. Although critics may welcome the first point, it's worth noting that if companies face liability for exercising their discretion, they will eventually take overly cautious steps that leave everyone unhappy.

**Misinformation 17:** *“The second goal remains elusive, with harmful behavior on the internet continuing to proliferate at an alarming and arguably accelerating pace.”*

**Fact:** Companies comply with federal criminal laws and when they don't, they face liability (see, for example, Backpage).

- ▶ For non-illegal but socially concerning ills, companies take their roles seriously and have responded in good faith. To take one example: all the major platforms have announced new protocols for moderating disinformation during this year's elections.
- ▶ Bad behavior may be increasing, but so is the technology used to detect and stop that behavior. And all that occurs without a government mandate.

**Misinformation 18:** *“Until we have resolved concerns here, it seems irresponsible to export the problem abroad.”*

**Fact:** Section 230 would spread American values like free speech abroad by tying foreign governments' hands from weaponizing tech companies.

- ▶ That aside, if this argument is valid, then trade agreements shouldn't include protections for intellectual property because those too are currently under debate in the United States.