

The Good, the Bad, and the Ugly in Proposed “Duty of Care” Rules¹

*In Response to Duty of Care Proposals by
the International Center of Law and Economics*

The Hon. Christopher Cox

The Good:

Credit goes to authors Geoffrey A. Manne, Kristian Stout, and Ben Sperry for establishing some important guardrails as they cast about for solutions to the problem of content moderation on the internet. “As a guiding principle,” they state, “we should not hold online platforms vicariously liable for the speech of third parties.” That is the fundamental premise of Section 230, and it is essential to the functioning of the modern internet.

The authors warn that attention must be paid to how shifting the legal rules governing platform liability could “increase litigation costs, increase moderation costs, constrain the provision of products and services, increase ‘collateral censorship,’ and impede startup formation and competition.” They recognize the importance of ensuring that a platform “not be held liable simply for having let harmful content slip through, despite its reasonable efforts”—another foundational element of Section 230. Conversely, they recognize that exposing platforms to open-ended liability for user-created content could result in “chilling free expression online.”

Finally, the authors’ ambition for their own proposal for changing liability rules is that it maintain the features of Section 230 that protect platforms “from having to incur substantial litigation costs.”

These are all well-founded and important concerns going in.

The Bad:

Despite erecting some reasonable guardrails for their reform proposal, the authors’ proposal itself quickly rams through these guardrails and goes over the cliff. Its centerpiece is a “duty of care,” borrowed from negligence law, which would be grafted onto Section 230. As the authors explain, this would substitute for the current objective test in Section 230 the inherently subjective question of knowledge—what the platform knew, and when, about each specific item of user-created content. Still more subjectively, the proposal would impose liability even when platforms have no knowledge of illegality, but “should” have known of it.

¹ Manne, Geoffrey and Stout, Kristian and Sperry, Raymond, Who Moderates the Moderators?: A Law and Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet (November 15, 2021). Available at SSRN: <https://ssrn.com/abstract=3964123>

Online media are not entirely different from other forms of communication. The main distinction is that in traditional media, content emanates from a single source (broadcaster; publisher) to millions of passive consumers. The internet flips this equation: millions of users create content that converges on a single platform. It is reasonable for the law to presume that a newspaper or magazine knows everything it decides to include within its pages, and that a TV broadcaster knows what programs and guests it decides to include in its program lineup. But with millions (and in some cases billions) of pieces of content posted on a single platform in a single day, it would be manifestly unreasonable for the law to make the same assumption for internet platforms.

What does this mean in practice? Under current law, judges can assess complaints about a particular piece of online content at an early stage of litigation. The objective standard of Section 230 requires that in a lawsuit seeking to make a platform liable for user content, the plaintiff must allege the platform itself was involved, at least partly, in creating or developing the content at issue. If so, the case may proceed; otherwise not. In this way, the fact that every one of the millions of pieces of content on a platform can form the basis of a complaint does not result in an ever-growing snowball of lawsuits, each one lasting for years. But if this objective test is abandoned, and a complaint may survive a motion to dismiss by alleging that the platform “knew or should have known,” then virtually every case will move on to discovery that frequently can take years. In this way every case can generate its own settlement value, regardless of the underlying merits.

To restate only slightly the authors’ initial parameter: requiring discovery in most lawsuits over user-created content will expose platforms to open-ended liability in an ever-growing volume of litigation that few, if any, platforms could survive.

The Ugly:

The authors repeatedly state that suppressing some valuable speech is a cost that inevitably accompanies their proposal, and it is a cost they are willing to pay. While acknowledging that “it can be difficult to weed out unlawful conduct without inadvertently over-limiting lawful activity,” they nonetheless prefer a legal standard that leads to “an increase in preemptive moderation.”

Indulging this preference (a transparent example of the fallacy of *petitio principii*, or “assuming the initial point”), the authors assign a greater weight to the benefits of “demanding greater accountability from online intermediaries” than to the costs of censorship of some lawful speech.

The authors are of course entitled to their preferences. Congress itself considered this precise question of the balance between free speech and censorship of harmful speech when it adopted Section 230, and came out differently, giving greater weight to freedom of expression. In order for the internet to be “a forum for a true diversity of political discourse, unique

opportunities for cultural development, and myriad avenues for intellectual activity,” Section 230 holds that users must have maximum control over what information they receive. Furthermore, by promoting a “vibrant and competitive free market” of platforms on the internet, the law aims to give users choices among many different online communities, each with its own content moderation standards, so that individuals can patronize those they find most suitable.

The authors’ proposal rejects this approach, and would substitute mandatory content moderation standards to be overseen by a “government agency.” Platforms would have to provide proof of their compliance with these “certified” moderation standards in any lawsuit over a piece of content, effectively giving the standards the force of law.

But while platforms might allege their compliance, they would be hard pressed to overcome plaintiffs’ allegations to the contrary at the pleading stage of litigation. This is because the standards themselves would (in the authors’ conception) vary according to the specific circumstances of each case. What the standard might be in a particular case will depend upon, among other things, the size of the defendant platform, and what it knew, or should have known, about the particular piece of content at issue. Ultimately the standard would be one of subjective “reasonableness”—calling for further investigation into the specifics in almost every case.

So despite claiming to want a “uniform” standard, the authors are promoting an infinitely flexible one. “Indeed, this sort of flexibility is a benefit of adopting a ‘reasonableness’ standard, such as is found in common law negligence,” the authors claim. But a “flexible” standard is the opposite of the current objective standard that allows judges to rule on Section 230 cases at the pleading stage. A standard that waives through most lawsuits over content will result in platforms becoming much more risk-averse when it comes to hosting user-created content.

The authors acknowledge this. Their government-sanctioned, inherently protean content moderation regime will, they say, risk speech being “over-deterred.” Yet they are willing to trade off “even the most valuable speech,” because even the most valuable speech is not “infinitely” valuable.

As a result, the authors conclude, “[d]epending how speech is weighted in the calculus, some may conclude that the benefits of our proposed approach are not worth the costs.” The authors have made it clear how they weigh the freedom of speech: they believe “the scale of user-generated content need not be so vast.” That is, we already have too much speech. Since under their proposed regime “any website likely could reduce its risk of liability simply by hosting less content,” they do not see a problem.

But most Americans—and the framers of the Bill of Rights who made it the nation’s preeminent freedom—cherish the freedom of speech as the most important among all freedoms, and the most essential for the protection of democracy. For millions of Americans alive now and who

have come before, and for the Congress that adopted Section 230, the freedom of speech has not weighed in the balance so lightly.

In Conclusion

Despite laying out reasonable, and indeed admirable, parameters for their analysis, the authors fail to meet the standards they have set out for themselves. Their goal is an objective legal standard, but their proposal calls for an infinitely flexible one. They say the law shouldn't discourage internet services from moderating content, but their proposal will discourage platforms from hosting it in the first place. They claim to want to minimize litigation costs, but advance a proposal they admit will increase them. They announce their intention not to target constitutionally protected speech, but conclude that we already have more speech than we need. They shed not even crocodile tears over the fact that under their proposal, even some highly valuable speech will be "over-deterred."

Requiring the over 20 million e-commerce and nonprofit websites that are currently governed by Section 230 to risk significant new legal liability for all of the content their users create will inevitably lead many platforms to significantly reduce or eliminate entirely the user-generated content on their sites. The blow to free speech will be felt not only in viewpoint expression but also consumers' loss of product reviews, how-to videos, medical advice blogs, and countless other benefits that over 90% of America's population enjoys for free on today's internet.

The authors repeatedly make clear that the full consequences of potential outcomes are unexplored, that a different liability regime could or might have higher or lower benefits or costs, and that platforms might or might not respond to their proposal by curtailing or eliminating user-created content. This is an admission that, despite the law-and-economics patina of cost-benefit analysis, the authors' conclusions are anything but data-driven. The proposal is, rather, a risky venture into unexplored territory. Unfortunately, guessing wrong about what might happen if such a proposal does happen risks undermining the foundation of all user-created content on the internet.



The Hon. Christopher Cox, a former U.S. Representative from California, is the author, and co-sponsor with then-U.S. Representative Ron Wyden, of Section 230 of the Communications Decency Act. He recently retired as a partner in the law firm of Morgan, Lewis & Bockius.