

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)
Section 230 of the Communications Act) **RM-11862**
of 1934)

**Comments of Michael Masnick
Opposing the National Telecommunications and Information Administration’s
Petition for Rulemaking
September 2, 2020**

I am the founder and editor of a small internet media business which publishes Techdirt, an online publication that has chronicled technology law and policy for more than 20 years. As the operator of a site which relies on Section 230, not just in theory but in very real practice, I am providing this comment to urge the FCC to **reject** the NTIA’s petition for rulemaking on Section 230 of the Communications Act of 1934 (done in response to Executive Order 13925), as any reasonable analysis will show it must.

While this comment could focus on the unconstitutional nature of both the executive order and the NTIA petition, the FCC’s lack of authority to interpret Section 230, or the flagrant historical misrepresentations by the NTIA in its petition, I am sure that those issues will be covered at great length and detail in the comments by various lawyers and legal experts. The petition should be rejected for any or all of those reasons.

Instead, however, this comment will focus more specifically on my own experience on both sides of the content moderation question, as the operator of a small internet website that both has to moderate content, and has dealt with moderation by others. This comment will discuss the nature of content moderation and the importance of the editorial discretion it enables *even when* we disagree with the outcomes. Techdirt has both benefited from the ability to freely moderate user generated content on our site, as well as suffered from what it believes are mistaken or unfair content moderation decisions. And yet, even as some moderation decisions have treated us in manners that we feel are unfair and that have harmed us economically, common sense (and the law) rejects the idea that companies should be forced to moderate (or not) based on a strained reading of the law, at odds with the plain language of that law, and decades of well accepted caselaw.

This comment will focus on five key points:

1. Editorial discretion is both important and protected under the 1st Amendment
2. There will always be “mistakes” made in content moderation -- or at the very least disagreements over the appropriate outcome -- and a perfect solution is impossible
3. In managing a small internet business that hosts user generated content, I rely heavily on Section 230,
4. Mandates for transparency (instead of creating better incentives for transparency) will lead to less transparency and less free speech
5. Section 230 has been properly interpreted to flexibly handle all of the preceding points.

Editorial discretion is necessary on any website hosting speech

In March of 2019, I was invited to a luncheon with FCC Chair Ajit Pai. In the days leading up to that luncheon, one of the organizers of the event reached out to say that they were going to put me at the table with the Chairman, but specifically asked me whether or not I would “behave” while sitting at the same table as an FCC Commissioner. I can only assume this was a reference to the fact that I have, on occasion, criticized some of Chairman Pai’s actions, in writing.

I easily agreed, and had an enjoyable lunch at the same table with Commissioner Pai. I listened to him talk, but did not choose to speak to him directly, to avoid any concern of the hosts of the event. I reasonably chose not to interrupt or harass him, even if I disagreed with his comments that day. At no point was I asked to leave -- though if I had harassed him, or acted abusively in any manner, even in a legally protected manner, it would not have been surprising if the hosts of the luncheon had removed me from the event. This was a private group, holding their own event, in which they were able to invite whatever guests they wanted, and set their own rules. If someone (myself or otherwise) had chosen to disobey those rules, it would not be controversial if they were then removed from the premise.

So too is the case for various social media sites. They are private entities with the right to determine who can and should be allowed to use their platforms. While having access to the internet as a whole should be a basic human right, that should never require a single edge service provider to provide everyone access even if those users act in bad faith, abuse the service, harass others, or generally create problems.

Most websites are private property and, as such, the companies that own and operate them get to set the rules for how people use them -- and those who abuse those rules

can be blocked or “moderated.” This is not just common sense, it matches with the same rules for any private entity regarding whom it provides services to, with very limited exceptions (such as those clearly delineated in civil rights laws). The idea that Section 230 provides different rules than for any other business is simply false. Just as I was expected to “behave” when invited to sit with Chairman Pai, and would have been removed if I had violated those rules, so too are users of any private edge platform expected to behave.

Mistakes are common in content moderation

It is impossible to do content moderation at the scale of humanity without “mistakes” or without significant disagreement as to the appropriateness of the outcomes. Just as a matter of comparison, let us look at the criminal justice system. Unlike social media moderation, the criminal justice system involves multiple features that *should* limit the rate of false convictions. First, the level of due process is much more significant. There is an established process for a trial, as well as a clearly delineated, multi-level appeals process in front of a theoretically impartial judiciary. Second, you have the right to expert counsel who will advocate professionally on your behalf. Third, the process plays out over a fairly lengthy period of time, rather than requiring rash decision-making on the part of either a jury or an impartial judge. Finally, in the case of a trial, a conviction requires a unanimous conviction by a jury of your peers. There are, obviously, some limitations on how well this process works in practice, but even with all of these safeguards, it is commonly accepted that there is a significant error rate.

Indeed, recent studies have suggested wrongful conviction rates over 10%¹ in cases with a sexual assault component and over 4%² for those sentenced to death. When there are false conviction rates that high for serious crimes, even with substantial procedural due process, professional and trained advocates, and high standards of evidence, we should not be surprised if social media companies make mistakes as well.

If the criminal justice system, with its Constitutional protections, makes mistakes, moderation decisions, made at speed and in tremendous volume, often without the benefit of context, are likely to be significantly worse.

¹ “Estimating the Prevalence of Wrongful Conviction” Kelly Walsh, Jeanette Hussemann, Abigail Flynn, Jennifer Yahner, Laura Golian, May 2017: <https://www.ncjrs.gov/pdffiles1/nij/grants/251115.pdf>

² “Rate of false conviction of criminal defendants who are sentenced to death” Samuel R. Gross, Barbara O’Brien, Chen Hu, and Edward H. Kennedy, May 2014 <https://www.pnas.org/content/111/20/7230>

Even if the error rate in social media moderation were lower, it would still lead to many “mistakes” every single day. To take just one example, there are reportedly over 350 million photos uploaded to Facebook every day³ -- and that’s as of 2013. It is likely much higher today. If we assumed that content moderation rules were correctly applied 99.9% of the time, there would still be “mistakes” made on 350,000 images. Every single day.

A totally unsubstantiated claim that has become accepted fact among some is that content moderation is used in a manner that is biased against conservative commentators on social media. In fact, this unsubstantiated claim appears to be the basis for the President’s original executive order, and the NTIA’s petition at issue here. Yet, there remains no clear evidence to support this. Instead, there appears to be a significant confirmation bias among those in a fairly narrow bubble who believe that if their content was moderated, it must be because of a political bias -- and not because the content violated the rules or because it was one of the very frequent mistakes.

We should not use mere anecdotal stories of content moderation as evidence that there is somehow unfair treatment on these platforms. Indeed, if one were to look around, it is likely somewhat easy to find similar examples of content moderation for similar reasons that have nothing whatsoever to do with political bias.

To take one example, many sources, including The Federalist itself, have reported that the conservative-leaning website The Federalist was unfairly demonetized by Google⁴. This even resulted in Republican Senator Ted Cruz sending a letter to Google CEO Sundar Pichai accusing Google of trying to “censor political speech” with which it disagreed.⁵ However, as many other publications -- including our own -- have discovered, what happened to The Federalist happens to many websites that use Google advertisements as part of a monetization strategy.

³ “Facebook Users Are Uploading 350 Million New Photos Each Day” Business Insider, Cooper Smith, September 18, 2013 <https://www.businessinsider.com/facebook-350-million-photos-each-day-2013-9>

⁴ “Google Threatens to Ban the Federalist from Generating Ad Revenue after Intervention by NBC News” The National Review, Zachary Evans, June 16, 2020 <https://www.nationalreview.com/news/google-bans-the-federalist-from-generating-ad-revenue-after-intervention-by-nbc-news/>

⁵ Letter from Senator Ted Cruz to Google CEO Sundar Pichai, June 17, 2020: <https://www.cruz.senate.gov/files/documents/Letters/2020.06.17%20-%20Letter%20to%20Google%20re%20The%20Federalist%20-%20SFV.pdf>

Techdirt has experienced the exact same thing. Going back many years, Techdirt has received similar notices of policy violations⁶. Indeed, a few days after the Federalist received its notices, we received the same kinds of notice -- but without the public fanfare or any Senators coming to our defense⁷. In fact, nearly a month and a half after the incident with The Federalist, Techdirt began receiving multiple notices of policy violations every single day, to the point that we removed all Google ads from our site, rather than continuing to have to figure out what policies we had violated⁸. Ironically, among the pages deemed to have violated Google's ad policies were our tag pages for "Google" and for "content moderation."

While Google has said that these were moderated properly, it is easy to see why I believe those were mistakes in its moderation decision making. But any experience with the impossibilities of content moderation suggest that this is simply what happens when internet platforms need to moderate at scale, rather than any sort of evidence of political or other bias. Google is a private company, and as such, has every right to make decisions on who has access to its services. Google claims that the customers for its advertising services -- i.e., the firms buying advertisements -- have concerns about where their advertising appears. While I may personally not agree that Techdirt would damage the brands of the advertisers on our site, that is a decision for them to make, not me.

Along those lines, with any content moderation regime, even if results are not "mistakes," it is inevitable that many users are going to believe that the moderation results were unfair. In nearly all cases, content moderation is a zero-sum game. Nearly everyone whose content is moderated will naturally feel that their content is proper and should be allowed without moderation. It is natural then, for most people who have their content moderated to claim that it is unfair or wrong, leading to vast over-inflation of claims that content was targeted improperly or unfairly.

⁶ "No, Google Didn't Demonetize The Federalist & It's Not An Example Of Anti-Conservative Bias" Techdirt, Michael Masnick, June 16, 2020

<https://www.techdirt.com/articles/20200616/14390744730/no-google-didnt-demonetize-federalist-not-example-anti-conservative-bias.shtml>

⁷ "GOOGLE THREATENS TO DEFUND TECHDIRT? Where Are All The Politicians Complaining?"

Techdirt, Michael Masnick, June 29, 2020

<https://www.techdirt.com/articles/20200625/17375644791/google-threatens-to-defund-techdirt-where-are-all-politicians-complaining.shtml>

⁸ "Why Are There Currently No Ads On Techdirt? Apparently Google Thinks We're Dangerous" Michael Masnick, Techdirt, August 12, 2020

<https://www.techdirt.com/articles/20200810/11335745081/why-are-there-currently-no-ads-techdirt-apparently-google-thinks-were-dangerous.shtml>

Smaller sites rely on Section 230

Too much of the narrative surrounding the debate over Section 230 focuses on just a small number of the larger internet giants -- namely Google, Facebook, Twitter, YouTube and Instagram. However, Section 230 protects **all** websites that host any user-generated content, including my own publication, Techdirt.

Techdirt hosts user-generated content in the form of over nearly 2 million user comments. The protections of Section 230 are not theoretical for us. We were sued for defamation over content our site, including user-created comments⁹. The complaint encompassed a number of published articles on the site, but also some user comments. In a ruling by Judge Dennis Saylor, the claim based on user-generated comments on Techdirt were “barred by the CDA.”¹⁰

Indeed, without Section 230 it is unlikely that Techdirt would continue to host user-comments, despite it being a key part of our strategy. For years, Techdirt has talked about how the business of journalism is about enabling community¹¹ and hosting user comments is a key part of that for us as a small, independent news organization.

Section 230 has also enabled many websites to experiment with different forms of content moderation¹². This includes Techdirt, which has explored a variety of innovative forms of content moderation, many of which are not seen elsewhere. For example, rather than using off-the-shelf tools for content moderation that would simply block certain comments, Techdirt built its own content tools that mix multiple 3rd party anti-spam tools along with a user voting system that asks users to vote on whether or not comments are “insightful” or “funny” (to encourage comments of that nature) and also to “report” comments that appear to be abusive or excessively trollish.

Each week, we promote the comments that the community has decided are the funniest or most insightful in a separate post. Thus, we have enabled our community to effectively set many of the site’s standards, based on their own voting behavior. Without Section 230, this too would be nearly impossible to build, as the liability risk would be quite large.

⁹ Ayyadurai v. Floor64, Inc. (1:17-cv-10011) D. Mass.

<https://www.courtlistener.com/docket/4562420/ayyadurai-v-floor64-inc/>

¹⁰ “Memorandum and Order On Defendants’ Motions to Dismiss and to Strike” Judge Dennis Saylor, pp 31 - 34 <https://www.courtlistener.com/recap/gov.uscourts.mad.185980/gov.uscourts.mad.185980.48.0.pdf>

¹¹ “Dear Newspapers: Time To Focus On Enabling The Community; Not Limiting It” Techdirt, Mike Masnick, September 16, 2009 <https://www.techdirt.com/articles/20090916/0321506208.shtml>

¹² “Internet Immunity and the Freedom to Code” Eric Goldman, September 2019 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3443976

At the same time limiting the protections of Section 230 would only serve to benefit the internet giants, who would be in a much better position to handle the regulatory burdens and crushing legal liability. Smaller websites, such as my own, would not be positioned to survive.

Critically, such changes to the protections of Section 230 would likely push many smaller sites into the waiting arms of the large internet giants, either for acquisition, or by handing off any handling of user generated content to those third parties (for example: sites would likely hand over comments to Facebook to avoid having to self-host). Even if Facebook faced liability for those comments, it would be more able to weather such a legal threat. Thus the changes proposed by the NTIA would give even more power and control to the companies that the petition appears most worried about.

Transparency mandates would be counterproductive to speech and transparency

The NTIA petition requests that the FCC “mandate disclosure for internet transparency.” Beyond the fact that this is clearly outside the scope of the FCC’s authority over websites, such mandated disclosures would again create massive harm to sites such as Techdirt. As a small site with limited staff and resources, having to track, maintain, collate, and publish mandated transparency reports regarding content moderation would be overly burdensome.

To be clear, I and Techdirt have long argued for the importance of transparency from large internet companies, including as it relates to certain content moderation decisions. We have criticized¹³ large companies who failed to be transparent about requests from the government regarding content removals or private information. Yet, **mandated** transparency reports are actually counterproductive to both speech and transparency¹⁴. We have already seen, for example, how standardized transparency reports have been used to encourage the greater suppression of speech¹⁵ mainly by those (including governments) who argue that if a website was willing to take down *this* particular content, then it should have no objections to removing *that* particular content.

¹³ “Hear That Deafening Silence From AT&T And Verizon About NSA Surveillance?” Mike Masnick, June 13, 2013
<https://www.techdirt.com/articles/20130612/18283123436/hear-that-deafening-silence-att-verizon-about-nsa-surveillance.shtml>

¹⁴ “A Paean To Transparency Reports” Cathy Gellis, August 31, 2020

<https://www.techdirt.com/articles/20200829/10223345205/paean-to-transparency-reports.shtml>

¹⁵ “How Government Pressure Has Turned Transparency Reports From Free Speech Celebrations To Censorship Celebrations” Mike Masnick, April 17, 2018

<https://www.techdirt.com/articles/20180402/07014939543/how-government-pressure-has-turned-transparency-reports-free-speech-celebrations-to-censorship-celebrations.shtml>

In 2017, Chairman Pai claimed that the supposedly “heavy-handed, utility-style regulations” placed upon internet access providers by the FCC in 2015 resulted in “depressed investment” in internet infrastructure¹⁶. Without accepting either of those claims as accurate, it would be a stark reversal for Chairman Pai and the FCC to then turn around and place significantly more heavy-handed, utility-style regulations upon mere websites. Indeed, it would appear to be arbitrary and capricious, intended more to support the whims of whoever might be in the White House at the time, rather than any legitimate policy goal or authority of the Federal Communications Commission.

A mandate for transparency would likely burden a small site like Techdirt in multiple ways. First, it would require costly lawyers and review to make sure we were in compliance with any stated administrative rules. Second, it would likely make our moderation practices significantly worse, as we would not be able to continue to freely experiment and innovate around how we handle content moderation on the site, as any change would require careful and expensive vetting to remain in compliance.

Finally, it would likely make the experience for our community significantly worse and less useful and hospitable. Beyond limiting our ability to moderate to best serve the needs of our community, it would likely open up the opportunity for those who wish to abuse our platform, and harass and spam our users to seek out ways to “game” the system, and force us to host their speech, no matter how unwanted that speech was by us or our community. It is not uncommon for trollish actors to demand to know why they had content moderated, not for a legitimate understanding of what happened, but in order to figure out how to create havoc on the site while trying to stay within the “official” rules. Certain forms of mandated transparency would enable such malicious behavior with limited ability to adapt -- leading to a much worse overall experience for our community.

The unfortunate fact is that there are many users of various speech hosting platforms online who are deliberately seeking to make use of such private places of speech to abuse, harass and spam users. These users are not interested in truly open speech and debate. They are not interested in encouraging free speech. They seek only to annoy and inflame -- and they eagerly will look for loopholes and excuses to force third parties to retain their content. Mandated transparency rules can become a key weapon for

¹⁶ Statement from FCC Chairman Ajit Pai circulating “draft order to restore internet freedom and eliminate heavy-handed internet regulations.” November 21, 2017
http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db1121/DOC-347868A1.pdf

such bad actors, which in turn would likely lead to less speech, as websites and forums become less hospitable.

Section 230 enables all this free speech

The NTIA petition bizarrely suggests that FCC action is necessary to “protect free speech online.” Nothing in the history of Section 230, the legislative history, or, indeed, the history of the internet itself suggests that a change in how Section 230 is interpreted would help protect free speech online.

Indeed, the existing interpretation of Section 230 -- including the broad applicability of section (c)(1) to content moderation decisions by nearly all courts to rule on claims related to Section 230 -- has done a tremendous amount to protect free speech online. Any change to Section 230 is likely to do the opposite and greatly limit free speech online, against the stated claims of the NTIA petition.

The clever structure of Section 230 was designed as a “light touch” framework that promotes free speech online. It does this by making sure that the private edge providers that host such content, including smaller niche sites like Techdirt, are able to host user-generated content without fear of legal liability from hosting that content. At the same time, enabling sites to freely moderate content -- even if that moderation may appear to be unfair to a segment of users -- guarantees that there are more and varied places for speech online.

If sites were forced to host all speech, or to face liability for moderation decisions that users disagreed with, there would be tremendous incentives for sites to shut down platforms for speech, as it would not be worth the hassle -- either in dealing with a platform that was overrun with spam, harassment and abuse, or because of the sheer legal liability such a platform would face. On top of that, it would greatly limit websites’ ability to cater to narrow or niche audiences, such as our own. Only allowing moderation for a limited class of content (such as specifically offensive content) would prevent narrowly topical forums, a foundational part of free speech on the internet, from stopping off-topic discussions¹⁷.

Similarly, if sites like ours were forced to keep certain content that we, or our community, deemed as inappropriate, unhelpful, spammy, trollish, abusive, or harassing, it would greatly *discourage* participation from other users who were looking

¹⁷ “The War Between alt.tasteless and rec.pets.cats” Josh Quitner, Wired, May 1st, 1994
<https://www.wired.com/1994/05/alt-tasteless/>

to have more thoughtful and insightful conversation. Section 230 enables us to curate our comment section (and to enable our community to help out in that process) in a manner that allows for thoughtful conversation without it being totally overrun by those who purposely seek to derail the conversations.

Thus, the light touch of Section 230, as currently written and interpreted by multiple courts across the country, is exactly what promotes free speech online as described in the NTIA petition. This is true even in cases where users feel that their speech has been moderated unfairly. Indeed, I recognize that if Google were not free to moderate its advertising policies as it chooses -- even when those choices negatively impacted Techdirt's revenue -- it would be less likely to even offer third-party ad serving as a service to sites like ours. That would greatly limit the number of websites that could easily obtain advertising revenue, thus limiting outlets for free expression online.

The end result, again, would be less free speech online, rather than more.

Just as it was requested that I not pester Chairman Pai at a private luncheon, enabling him and others in attendance to engage in a free exchange of ideas, Section 230 as currently written and interpreted creates a robust framework to encourage widespread free speech online. That includes situations in which some content is moderated by private websites. However, changing the unique balance of Section 230, even if it were ostensibly designed to force websites to host more speech rather than moderate it, would likely lead to the opposite outcome. Fewer sites would be willing to host such content in the first place, and the sites that did would have less engagement and less free speech.

There are many legal and constitutional reasons why the FCC should reject the NTIA's petition. But it also must reject it for the very reasons presented in the petition itself: if the goal is to promote the most free speech online, common sense and an understanding of how Section 230 encourages free speech online demands it.

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