Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
Section 230 of the Communications Act Of 1934	)	Docket No. RM-11862

REPLY COMMENT OF THE COPIA INSTITUTE OPPOSING THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION'S PETITION FOR RULEMAKING

I. Preliminary Statement

The record developed in the opening round of comments in this rulemaking reflects many opinions about Section 230. But opinions are not facts, and many of these opinions reflect a fundamental misunderstanding of how Section 230 works, why we have it, and what is at risk if it is changed.

These misapprehensions should not become the basis of policy because they cannot possibly be the basis of *good* policy. To help ensure they will not be the predicate for any changes to Section 230, the Copia Institute submits this reply comment to address some of the recurrent myths surrounding Section 230, which should not drive policy, and reaffirm some fundamental truths, which should.

II. About the Copia Institute

The Copia Institute is the think tank arm of Floor64, Inc., the privately-held small business behind Techdirt.com. Techdirt is an online publication that has chronicled technology law and policy for more than 20 years. In this time Techdirt has published more than 70,000 posts commenting on subjects such as freedom of expression, platform liability, patents, copyright, trademark, privacy, innovation policy and more. The site

regularly receives more than a million page views per month, and its posts have also attracted more than a million reader comments, which is itself user-generated expression that advances discovery and discussion around these topics. Techdirt depends on Section 230 to both enable the robust public discourse found on its website and for its own speech to be shared and read throughout the Internet.

Meanwhile, the Copia Institute regularly produces evidence-driven white papers examining the evidence underpinning tech policy. Of particular note, and incorporated by reference into this comment, is the white paper, "Don't Shoot the Message Board," which documents how weak platform protections deter investment in technology and online services.[1]

Armed with this insight, the Copia Institute also regularly files regulatory comments, amicus briefs, and other advocacy instruments on these subjects to help educate lawmakers, courts, and other regulators – as well as innovators, entrepreneurs, and the public – and steer them towards making good policy that better promotes and sustains innovation and expression.

III. Argument

There are several recurring complaints that appear in the criticism often leveled at Section 230, including in the public comments filed in this action. Unfortunately, most of these complaints are predicated on fundamental misunderstandings of why we have Section 230 or how it works. What follows is an attempt to dispel many of these myths and to explain what is at risk by making changes to Section 230 – especially any changes born out of these misunderstandings.

One type of argument against Section 230 is based on the incorrect notion that Section 230 was intended to be some sort of Congressional handout designed to subsidize a nascent Internet. The thrust of the argument is that now that the Internet has become

[1] Michael Masnick, *Don't Shoot The Message Board*, June 2019, https://copia.is/library/dont-shoot-the-message-board/.

more established, Section 230 is no longer necessary and thus should be repealed. But there are several problems with this view.

First of all, it is technically incorrect. Prodigy, the platform jeopardized by the *Stratton Oakmont* decision, which prompted the passage of Section 230, was already more than ten years old by that point and handling large amounts of user-generated content. It was also owned by large corporate entities (Sears and IBM).[2] It is true that Congress was worried that if Prodigy could be held liable for its users' content it would jeopardize the ability for new service providers to come into being. But the reason Congress had that concern was because of how that liability threatened the service providers that already existed. In other words, it is incorrect to frame Section 230 as a law designed to only foster small enterprises; from the very beginning it was intended to protect entrenched corporate incumbents, as well as everything that would follow.[3]

Next, it is also incorrect to say that Section 230 was intended to be a subsidy for any particular enterprise, or even any particular platform. Nothing in the language of Section 230 causes it to apply to apply only to corporate interests. Section 230 applies to anyone meeting the statute's definition of a service provider.[4] Many service providers are small or non-profit, and, as we explained in our initial Comment, can even be individuals.[5] Section 230 applies to them all, and all will be harmed if its language is changed.

Indeed, the point of Section 230 was not to protect platforms for their own sake but to protect the overall health of the Internet itself. Protecting platforms was simply the step Congress needed to take to achieve that end. It is clear from the preamble language of

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[2] See https://en.wikipedia.org/wiki/Prodigy_(online_service).

[3] Indeed, the historical evidence bears out this concern. For instance, in the United States, where, at least until now, there has been much more robust platform protection than in Europe, investment in new technologies and services has vastly outpaced that in Europe. See *Don't Shoot the Message Board*, *supra* note 1, at 5-9. Even in the United States there is a correlation between the success of new technologies and services and the strength of the available platform protection, where those that rely upon the much more robust Section 230 immunity do much better than those that depend on the much weaker Digital Millennium Copyright Act safe harbors. *Id.* at 10-11.

[4] 47 U.S.C. §230(f)(2). In fact, note that the definition covering who is protected by Section 230 includes *users* of interactive computer services as well as the services themselves.

[5] See Copia Institute initial comment Section III.C.

Section 230(a) and (b), as well as the legislative history, that what Congress really wanted to do with Section 230 was simultaneously encourage the most good online expression, and the least bad. It accomplished this by creating a two-part immunity that both shielded platforms from liability arising from carrying speech,[6] as well as from any liability in removing it.[7]

By pursuing a regulatory approach that was essentially carrot-based, rather than stick-based, Congress left platforms free to do the best they could to vindicate both goals: intermediating the most beneficial speech and allocating their resources most efficiently to minimize the least desirable. As we explained in our earlier comment, even being exonerated from liability in user content can be cripplingly expensive.[8] Congress did not want platforms to be obliterated by the costs of having to defend themselves for liability in their users' content, or to have their resources co-opted by the need to minimize their own liability instead of being able to direct them to running a better service. If platforms had to fear liability for either their hosting or moderation efforts it would force them to do whatever they needed to protect themselves but at the expense of being effective partners in achieving Congress's twin aims.

This basic policy math remains just as true in 2020 as it did in the 1990s, which is why it is so important to resist these efforts to change the statute. Undermining Section 230's strong platform protections will only undermine the overall health of the Internet and do nothing to help there be more good content and less bad online, which even the statute's harshest critics often at least claim to want. While some have argued that platforms who fail to be optimal partners in meeting Congress's desired goals should lose the benefit of Section 230's protection, there are a number of misapprehensions baked into this view.

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[6] 47 U.S.C. § 230(c)(1).
[7] 47 U.S.C. § 230(c)(2), although some courts have found moderation decisions also to be shielded by 47 U.S.C. § 230(c)(1).
[8] See Copia Institute initial comment Section III.B (citing Engine, Section 230 Cost Report (last accessed Sept. 2, 2020), http://www.engine.is/s/Section-230-cost-study.pdf).

One misapprehension is that Section 230 contains any sort of requirement for how platforms moderate their user content; it does not. Relatedly, it is a common misconception that Section 230 hinges on some sort of "platform v. publisher" distinction, immunizing only "neutral platforms" and not anyone who would qualify as a "publisher." People often mistakenly believe that a "publisher" is the developer of the content, and thus not protected by Section 230. In reality, however, as far as Section 230 is concerned, platforms and publishers are actually one and the same, and therefore all are protected by the statute. The term "publisher" that appears in certain court decisions merely relates to the understanding of the word "publisher" to mean "one that makes public,"[9] which is of course the essential function of what a platform does to distribute others' speech. But content distribution is not the same thing as content creation. Section 230 would not apply to the latter, but it absolutely applies to the former, even if the platform has made editorial decisions with respect to that distribution. Those choices still do not amount to content creation.[10]

In addition, the idea that a platform's moderation choices can jeopardize their Section 230 protection misses the fact that it is not Section 230 that gives platforms the right to moderate however they see fit. As we explained in our previous comment,[11] the editorial discretion behind content moderation decisions is protected by the First Amendment, not Section 230. Eliminating Section 230 will not take away the right for platforms to exercise their discretion. What it will do, however, is make it practically impossible for platforms to avail themselves of this right because it will force them to have to expend their resources defending themselves. They might potentially eventually win, but, as we earlier explained,[12] even exoneration can be an extinction-level event for a platform.

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[9] *Force v. Facebook, Inc.*, 934 F. 3d 53, 65 (2d Cir. 2019).
[10] See *id.* at 66-67.
[11] Please see Section III.C in the Copia Institute initial Comment. Also note that a typographical error duplicated the section heading from Section III.B. The correct heading for Section III.C should read, "The NTIA's recommendation for language changes to Section 230 harms First Amendment Protected Interests of both Internet speakers and Platforms."
[12] *Id.* at III.B.

Furthermore, it would effectively eviscerate the benefit of the statute if its protection were conditional. The point of Section 230 is to protect platforms from the crippling costs of litigation; if they had to litigate to find out whether they were protected or not, there would be no benefit and it would be as if there were no Section 230 at all. Given the harms to the online ecosystem Section 230 was designed to forestall, this outcome should be avoided.

The NTIA petition must therefore be **rejected**.

IV. Conclusion

For the forgoing reasons, the NTIA petition must be **rejected**.

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Respectfully submitted,

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