

February 26, 2018

The Honorable Paul Ryan
Speaker
United States House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable Nancy Pelosi
Democratic Leader
United States House of Representatives
H-204, The Capitol
Washington, DC 20515

Dear Speaker Ryan and Leader Pelosi:

The House of Representatives is scheduled this week to consider H.R. 1865, the *Allow States and Victims to Fight Online Sex Trafficking Act of 2017* (“FOSTA”). We understand that the bill will be brought to the floor with an amendment by Representative Mimi Walters, which would add provisions nearly identical to those of S. 1693, the *Stop Enabling Sex Traffickers Act of 2017* (“SESTA”), as reported by the Senate Commerce Committee.

Public Knowledge believes it is imperative to fight sex trafficking while at the same time preserving the bedrock protections for online discourse and expression enshrined in Section 230 of the Communications Decency Act. Although the Senate has refined SESTA since its introduction, significant ambiguities remain that could undermine important elements of Section 230, threatening legitimate speech and moderation efforts. We urge the House to address these concerns before passing FOSTA with the proposed amendment.

SESTA and the Walters Amendment would expand liability based on knowledge of others’ wrongdoing but leave the requisite knowledge ill-defined.

As reported by the House Judiciary Committee, FOSTA would create new civil and criminal remedies that law enforcement could use to pursue sex traffickers, and that trafficking victims could use to seek redress. In defining the culpable conduct, FOSTA focuses liability on intent—clearly requiring that a defendant act “with the intent to promote or facilitate the prostitution of another person.”¹ This would allow for the prosecution of an online platform and its employees for the publication of sex trafficking advertisements, as long as they have the requisite intent.

In contrast, SESTA would expand liability based not on active intent but instead on mere knowledge of wrongdoing by others. The bill would exempt certain civil claims under 18 U.S.C. 1595 from the reach of Section 230. In addition, it would define (and seemingly broaden) the term “participation in a venture,” which could trigger both civil and criminal liability if it benefits a defendant financially or in other ways.² Thus, online platforms may face liability for a wide variety of conduct that “knowingly assist[s], support[s], or facilitat[es]” sex trafficking offenses by their users.³

This may seem straightforward on its face, but determining the knowledge of online intermediaries is no easy task in the real world. For example, consider a social networking site that receives an email alleging that a posting by one of its users is, in fact, an advertisement for prostitution involving an underage trafficking victim. When, if ever, does receiving such a notice mean that the website now “knows” that the

¹ H.R. 1865, 115th Cong. § 3(a) (as reported by H. Comm. on the Judiciary, Feb. 20, 2018).

² S. 1693, 115th Cong. § 4 (as reported by S. Comm. on Commerce, January 10, 2018).

³ *Id.*

posting involves sex trafficking? If the site investigates the posting and learns more about it, can this investigation create the requisite knowledge? Suppose that the site reports the post to law enforcement but does not take it down right away. Can this decision to keep the post up, even if made in good faith, amount to “knowingly assisting, supporting, or facilitating” the user’s wrongdoing? SESTA leaves these and other precise contours of knowledge ambiguous.

To handle these real-world complexities, other laws on intermediary liability—such as the Digital Millennium Copyright Act—have elaborate provisions to identify when a platform has sufficient knowledge of offending user content, and to define its obligations in specific situations. As originally reported, FOSTA avoided this morass by centering the expansion of liability on intent as opposed to mere knowledge. At a minimum, if SESTA and the Walters Amendment shift focus to the latter, the definition of knowledge should be clarified and elaborated to make its practical applications as predictable as possible.

Combining FOSTA and SESTA worsens the risks of overbreadth and unintended consequences.

In grafting SESTA on top of FOSTA, the Walters Amendment would result in more expansive legislation than either bill on its own. This combination, which has not been subject to any Committee consideration or other public deliberations, only heightens the dangers of legal confusion and overbreadth. Most notably, while the Walters Amendment follows SESTA in expanding liability under 18 U.S.C. §§ 1591 and 1595, it retains FOSTA’s creation of a new federal crime outlawing the “promotion or facilitation of prostitution . . . of another person” through the Internet, regardless of whether it involves sex trafficking (*i.e.*, of a person who is underaged and/or coerced).⁴ Thus, the amendment implicates the broadest potential range of online speech and conduct, beyond the scope of SESTA or FOSTA individually.

In weaving together a patchwork of disparate civil and criminal provisions, the Walters Amendment also risks confusion and contradiction in the case law around Section 230. For example, under current law, Section 230 does not offer blanket immunity to online intermediaries for all user-generated content. Instead, courts have distinguished “passively display[ed] content that is created entirely by third parties” from content that a platform “creates itself, or is ‘responsible, in whole or in part,’ for creating or developing.”⁵ Where a site does more than provide a “passive conduit” and “neutral tools” for user content that may or may not be illegal, and “contributes materially to the [content’s] alleged illegality,” it can already be held liable both criminally and civilly.⁶ As reported by the Judiciary Committee, FOSTA embraces this principle explicitly, making Section 230 consistent with civil actions against platforms that intentionally facilitate illegal conduct by their users.⁷ The Walters Amendment retains this premise of continuity for certain civil remedies, but then discards it for other types of claims, flatly exempting them from the scope of Section 230. This contradiction risks further confusion and ambiguity, including over the extent to which platforms may be held liable even for illegal user content to which they make no material contribution and do not otherwise encourage in any way.

Similarly, the Walters Amendment retains FOSTA’s statement that Section 230 “was never intended to provide legal protection to websites that unlawfully promote and facilitate and contribute to sex trafficking,” but then deems it necessary to carve out various criminal and civil actions against sex traffickers from the scope of Section 230. It is far from clear how courts would interpret such contradictions.

⁴ H.R. 1865 § 3(a).

⁵ *Fair v. Roommates.com*, 521 F.3d 1157, 116–63 (9th Cir. 2008).

⁶ *Id.* at 1167-69; *see also* *FTC v. Accusearch*, 570 F.3d 1187, 1198–1201 (10th Cir. 2009); *FTC v. LeadClick*, 838 F.3d 158, 176 (2nd Cir. 2016).

⁷ Sec. 3(c).

Uncertainty in intermediary liability threatens legitimate online expression and good faith moderation efforts.

Section 230 is an essential part of the legal foundation for today’s Internet. In enacting Section 230 in 1996, Congress wisely recognized that the online communications of most Americans would depend upon private platforms, which today encompasses everything from social networks and web forums to search engines, video and photo sharing sites, and beyond. Accordingly, the liability of these intermediaries for the communications of their users is far more than a matter of commercial self-interest. Section 230 recognizes the importance of incentives for the treatment of user speech, including “the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning medium.”⁸ Through Section 230, Congress succeeded in fostering the Internet as “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁹ This approach contrasts sharply with China and other authoritarian countries, who impose intermediary liability to control online speech.¹⁰ At the same time, Section 230 also eliminated disincentives for efforts by platforms to police their own services, allowing them to remove objectionable material that could crowd out other expression.

Uncertainty over the scope of liability could undermine these fundamental purposes. The mere possibility of liability may often be enough for platforms to shut down user speech or impose other measures, such as blunt automated filtering, with the same effect. Or, just as likely, platforms may curtail their own moderation to minimize the chance of knowledge that will trigger liability. Federal courts have repeatedly emphasized these risks—for example, finding that “[l]iability upon notice reinforces service providers’ incentives to restrict speech and abstain from self-regulation.”¹¹ This is a major reason why state laws targeting sex trafficking advertisements have been repeatedly overturned on First Amendment grounds.

For the foregoing reasons, the added provisions of the Walters Amendment, and in its treatment of intermediary knowledge in particular, require substantial clarification. At a minimum, the House should ensure that the expansion of civil and criminal liability for sex trafficking offenses does not sweep in legitimate speech by innocent users or good faith moderation decisions by responsible platforms. Section 230 has always been a cautious balance of interests, and FOSTA must with equal caution balance the enormous harms of illegal sex trafficking with the important protections for online expression and the Internet.

Sincerely,



Ryan Clough
General Counsel
Public Knowledge

cc: Hon. Bob Goodlatte, Chairman, House Judiciary Committee
Hon. Jerrold Nadler, Ranking Member, House Judiciary Committee

⁸ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

⁹ 47 U.S.C. § 230(a)(3).

¹⁰ See Steven Lee Myers & Sui-Lee Wee, *As U.S. Confronts Internet’s Disruptions, China Feels Vindicated*, *The New York Times* (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/world/asia/china-internet-cyber-control.html?_r=0 (discussing how Chinese “tech firms . . . face tight penalties if they fail to keep users in line”).

¹¹ *Zeran*, 129 F.3d at 333.