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SESTA becomes law after new requirement assures tech firms

The controversial Stop Enabling Sex Traffickers Act of 2017 was signed into law in the US in April 2018. Michelle W. Cohen, Member at Ifrah PLLC and Member of the *Digital Business Lawyer* Editorial Board, provides background to the Law, which despite its aims to combat the promotion of sex trafficking online initially raised objections from large digital businesses due to concerns about the watering down of the protections for online platforms provided in Section 230 of the US Communications Act.

On 11 April 2018, President Trump signed into law the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ('FOSTA'), which includes the Stop Enabling Sex Traffickers Act of 2017 ('SESTA') (collectively 'SESTA'). The new Law amends Section 230 of the Communications Act of 1934, a provision Congress enacted in 1996 as a 'safe harbor' to protect online platforms from civil liability for the content posted by third parties. SESTA modifies Section 230 to clarify that operators of websites which knowingly help or promote sex trafficking may be prosecuted. In addition, victims may sue those websites. The legislation gained momentum following investigations into the practices of the website Backpage.com, which was found to be a hub for sex trafficking of adults and children. Although SESTA initially faced opposition from several large online companies due to the concern that it would loosen the protections in Section 230, the companies eventually backed off, following the insertion of the knowledge requirement in the Law.

Background of Section 230

Internet use became increasingly popular in the early 1990s. Online service providers such as America Online ('AOL') and Prodigy offered customers internet access and specialised pages,

including message boards, chat rooms, and other sites where users could interact with others and post their own content. Some of the content posted resulted in lawsuits against the online service providers, particularly since many posters anonymised their online speech. In turn, online providers took different routes. Some did nothing, leaving the objectionable content out of the concern that if they edited the material, they might appear to be involved in the content, leading to potential liability. Others went ahead and removed objectionable content.

Court decisions were inconsistent, resulting in concerns that free speech and the development of the internet could be stifled at this early stage. For instance, in an early case, *Cubby, Inc. v. CompuServe Inc.*², the online service CompuServe faced libel and other claims for alleged defamatory content about an online newsletter. CompuServe hosted the forum but a contractor created the content. The Court held that CompuServe was a distributor rather than a publisher of the online material. Therefore, under existing precedent in other contexts, CompuServe could only be liable if the service knew or had reason to know of the defamatory content.

In contrast, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*³, a New York Court held that online provider Prodigy was liable for a user's defamatory postings because Prodigy exercised editorial control over the content. Prodigy provided content guidelines, it enforced those guidelines, and it removed offensive content. By being a 'good Samaritan,' Prodigy unfortunately subjected itself to liability.

Thus, internet 'hosts' faced legal uncertainties regarding their liability for others' speech on hosted sites. If the service providers tried to remove content, they could be liable under the *Stratton Oakmont* case. In contrast, the *CompuServe* case encouraged providers to completely stay out of any content review in order to avoid liability - i.e., look away. Online service providers and advocates of internet free speech lobbied Congress for a legislative fix. Congress passed Section 230 as part of the reform of the Communications Act in 1996.

Section 230's exemptions

Section 230(c)(1) establishes that neither a provider nor a user of an 'interactive computer service' is the publisher of another's content. Specifically, Section 230(c)(1) states: '[n]o provider or user of

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an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.' Thus, Section 230(c)(1) immunises hosts and other users. Section 230(c)(2) creates a 'good Samaritan' exception, by protecting providers and users who act to restrict objectionable content.

It provides: 'no provider or user of an interactive computer service shall be held liable on account of [...] (a) any action taken voluntarily in good faith to restrict access to [...] material that the provider or user considers [...] objectionable [...] or (b) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in [subparagraph (A)].' Finally, Section 230(e)(3) makes it clear that state law may not impose liability in conflict with these protections, by stating that 'no liability may be imposed under any State or local law that is inconsistent with this section.' The law exempts (among others) intellectual property laws and federal criminal laws. *Id.* § 230(e)(1), (2).

Following Section 230's passage, the new Law's coverage was established in *Zeran v. America Online, Inc.*⁴. In that case, a federal Court of Appeals rejected Mr Zeran's claims against AOL for postings on AOL that included Zeran's home phone number in highly provocative postings celebrating the bombing of the federal building in Oklahoma City in 1995. The Court held that Section 230 barred Zeran's lawsuit against AOL, irrespective of the fact that

Zeran had informed AOL of the postings and AOL was aware of the content. Similarly, former Clinton White House aide Sidney Blumenthal and his wife sued AOL and online site The Drudge Report when Drudge published a report alleging Mr Blumenthal beat his wife. AOL was dismissed from the lawsuit as an interactive computer service exempt from liability under Section 230⁵.

Section 230 held up well over the two decades since its enactment. Courts have largely rejected claims against internet service providers and websites for posted content, rejecting various causes of action. However, the Law came under criticism for perhaps unintended consequences, specifically the fact that websites such as Backpage.com and others hosting 'personal' ads were actually knowingly hosting sex traffickers and were attempting to evade liability by invoking Section 230.

Criminal actions stemming from Backpage.com: a push for change

The United States Senate Permanent Subcommittee on Investigations, chaired by Senator Rob Portman (R- Ohio), investigated the problem of online sex trafficking for over twenty months. This investigation resulted in the Subcommittee's focus on the website Backpage.com. According to the Staff Report on 'Backpage.com's Knowing Facilitating of Online Sex Trafficking⁶,' "Backpage is involved in 73% of all child trafficking reports that the National Center for Missing and Exploited Children receives from the general public [...]. The National Association of Attorneys

General has aptly described Backpage as a 'hub' of 'human trafficking, especially the trafficking of minors.'" The Staff Report summarised that Backpage did not deny the site was used for criminal activity, including child sex sales; rather, the website claimed it was immune from liability under Section 230 because others created the trafficking content.

The Subcommittee sought information from Backpage, including evidence that Backpage's actions were more involved than as a mere website host. Backpage refused to comply with the Subcommittee's subpoena. Subsequently, a federal Court compelled Backpage to produce the documents at issue. These documents subsequently revealed that Backpage altered ads before publication, including those words that would indicate criminality such as child sex trafficking. Users would also receive a prompt if they entered a 'banned' word, such as 'teen.' The prompt would advise the poster of the problem, suggest revisions, and then allow the upload.

Sex trafficking victims and law enforcement officials sought to hold Backpage liable for its involvement in hosting (and allegedly aiding) sex trafficking. Backpage repeatedly invoked Section 230, largely with success. For example, the US Court of Appeals for the First Circuit upheld the dismissal of a lawsuit by sex trafficking victims against Backpage. The Court ruled that although "Backpage has tailored its website to make sex trafficking easier," Backpage was still not a creator of content and

1. S. 1693 - 115th Congress: Stop Enabling Sex Traffickers Act of 2017. www.GovTrack.us. 2017. 22 April 2018, <https://www.govtrack.us/congress/bills/115/s1693> (copy of bill available at <https://www.govtrack.us/congress/bills/115/s1693/text>).
2. 776 F. Supp. 135 (S.D.N.Y. 1991).
3. 1995 WL 323710 (N.Y. Sup. Ct. 1995).
4. 129 F.3d 327 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998).
5. *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C.1998).
6. https://www.portman.senate.gov/public/index.cfm/files/serve?File_id=5D0C71AE-A090-4F30-A5F5-7CFFC08AFD48
7. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (2016).
8. 817 F.3d at 29.
9. <https://www.congress.gov/bills/115th-congress/senate-bill/1693/text>
10. <https://www.congress.gov/bills/115th-congress/house-bill/1865/text>
11. Craigslist.org's personals section now provides: 'US Congress just passed HR 1865, "FOSTA", seeking to subject websites to criminal and civil liability when third parties (users) misuse online personals unlawfully. Any tool or service can be misused. We can't take such risk without jeopardizing all our other services, so we are regretfully taking craigslist personals offline. Hopefully we can bring them back some day.' <https://www.craigslist.org/about/FOSTA>
12. <https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forum-prostitution-ads/>

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thus exempt from liability under Section 230⁷. The Appeals Court suggested that a legislative fix to Section 230 might be warranted, stating "[i]f the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation⁸."

Congress took the Court's direction. In August 2017, Senators Portman and McCaskill, along with a bipartisan group of US Senators, introduced the Stop Enabling Sex Traffickers Act (S. 1993)⁹. In the House of Representatives, the House passed a similar bill, the Allow States and Victims to Fight Online Sex Trafficking Act of 2018 (H.R. 1865), which subsequently became Law¹⁰.

Key provisions of the new Law

The Law explicitly states that 'section 230 of the Communications Act of 1934 [...] was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims.' The legislation amends the federal Criminal Code (title 18) to make it a federal crime (with imprisonment up to 10 years) to own, manage or operate an interactive computer service 'with the intent to promote or facilitate the prostitution of another person.' Aggravated offences which can result in up to 25 years imprisonment include promoting or facilitating the prostitution of five or more people or acting in 'reckless disregard' of the fact that the conduct contributed to sex trafficking. In addition,

sex trafficking victims may recover damages and attorneys' fees in federal court. Importantly, the Law amends the federal Criminal Code to clarify a phrase related to the prohibition on sex trafficking. It is unlawful to knowingly benefit from participation in a venture that engages in sex trafficking. This new Law defines 'participation in a venture' to mean 'knowingly assisting, supporting, or facilitating a sex trafficking violation.' This requirement that a person or entity have knowledge of the sex trafficking violation was key to obtaining broad industry support.

SESTA also amends Section 230 to explicitly provide that Section 230 does not limit criminal prosecutions under state law if the underlying conduct constitutes a violation of federal sex trafficking laws (including Section 1591 which applies to child sex trafficking). SESTA further empowers state attorneys general to bring civil actions to obtain relief on behalf of child sex trafficking victims. Interestingly, Congress made the Act effective upon enactment and specified that the criminalisation amendment applies to conduct alleged to have occurred prior to the Law's enactment.

Post-SESTA ramifications

It did not take long for SESTA to demonstrate its force. Various websites, including Craigslist and Reddit, shut down their 'personals' sections (or certain subpages), out of concern they would face liability, including if they were notified of illegal activities and failed to take action¹¹. The main target of SESTA, Backpage.com, quickly came under

fire. On 9 April 2018 (two days before President Trump signed SESTA into law), the US Department of Justice seized the website Backpage.com and charged seven individuals in a 93-count federal indictment with various crimes, including conspiracy to facilitate prostitution using a facility in interstate or foreign commerce, facilitating prostitution using a facility in interstate or foreign commerce, conspiracy to commit money laundering, and transactional money laundering¹².

Backpage's CEO Carl Ferrer entered a guilty plea to state and federal conspiracy and money laundering and has agreed to cooperate with federal law enforcement in the ongoing investigation. While Section 230 never immunised website operators against federal criminal charges, the new amendments offer enhanced punishment that may be applicable to Backpage's principals.

Some groups have threatened to challenge SESTA on First Amendment grounds, as well as the Law's apparent retroactivity. It is most likely such challenges would occur upon the imposition of criminal prosecutions. Some internet freedom advocates assert that SESTA has set back free speech on the internet to the *Stratton Oakmont* days, but that is not accurate. Section 230 still preserves websites' protections from liability from most claims. However, for sites that knowingly assist, support, or facilitate a sex trafficking violation, Section 230 no longer serves as a shield and victims will be able to have their day in court.