

November 6, 2017

The Honorable John Thune
Chairman
U.S. Senate Committee on Commerce, Science, & Transportation
Dirksen Senate Office Building, SD-512
Washington, DC 20510

The Honorable Bill Nelson
Ranking Member
U.S. Senate Committee on Commerce, Science, & Transportation
Hart Senate Office Building, SH-425
Washington, DC 20510

RE: Executive Session on S.1693, The Stop Enabling Sex Traffickers Act of 2017

Dear Chairman Thune and Ranking Member Nelson:

We write regarding S. 1693, the Stop Enabling Sex Traffickers Act of 2017 (SESTA), which the Commerce Committee is scheduled to consider on November 8th. Public Knowledge recognizes the imperative of fighting 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. We appreciate your efforts to refine and clarify SESTA, including Chairman Thune’s proposed manager’s amendment, which would make several important improvements to the bill. However, we still have concerns about the level of knowledge required to impose criminal and/or civil liability on Internet intermediaries, and urge the Committee to give this issue further attention.

As you well know, 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 actions and communications of their users is far more than a matter of commercial self-interest. As federal courts have explained, Section 230 recognizes the importance of incentives for how intermediaries treat user speech, including “the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning medium.”¹ In enacting 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.”² This approach contrasts sharply

¹ *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

² 47 § U.S.C. 230(a)(3).

with China and other authoritarian countries, who impose intermediary liability to control online speech.³

Under current law, Section 230 does not offer blanket immunity to online intermediaries for all user-generated content.⁴ Among other limitations, it distinguishes “passively display[ed] content that is created entirely by third parties” from content that the intermediary “creates itself, or is ‘responsible, in whole or in part,’ for creating or developing.”⁵ Where a platform 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 may be held liable both criminally and civilly.⁶

SESTA would depart from this distinction, at least for certain claims related to sex trafficking. Under the proposed manager’s amendment, the bill would exempt civil claims under 18 U.S.C. 1595 from the reach of Section 230.⁷ In addition, it would define (and seemingly broaden) the term “participation in a venture,” which can trigger both civil and criminal liability if it benefits a defendant financially or in other ways. As a result, online intermediaries may face liability not only for affirmatively and materially contributing to illegal advertisements involving trafficking victims, but also for other conduct that “knowingly assist[s], support[s], or facilitat[es]” users in the commission of a sex trafficking offense.

Thus, SESTA would focus liability heavily on an intermediary’s knowledge of its users’ illegal communications. But it leaves many of the precise contours of the requisite knowledge undefined and ambiguous. Consider the following scenarios:

1. A trafficker posts a message on a social network website. The platform does not contribute to or encourage the advertisement in any way. However, after it is posted and active, the website’s compliance department receives an email alleging that the advertisement involves an underage trafficking victim, but it provides no evidence or other supporting details. Presumably this scant notice cannot create knowledge on the part of the website operators, but the manager’s amendment does not specify this.

³ 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”).

⁴ See, e.g., *Barnes v. Yahoo!*, 570 F.3d 1096, 1100 (9th Cir. 2009).

⁵ *Fair v. Roommates.com*, 521 F.3d 1157, 1162-63 (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 Except for the “good samaritan” provision of subsection 230(c)(2)(A), which would still apply to such claims.

2. A search engine receives a flood of notifications from a single person, reporting many different web links for allegedly containing illegal advertisements. In reality, this person is acting in bad faith, reporting links to competitors' websites in an effort to get them taken down, and this bad faith intent is apparent from the content of the notifications. Again, it would make little sense to impute knowledge to the search engine operator, but the manager's amendment does not make this clear.
3. An employee for a video sharing site comes across a suspicious posting that seems like it may involve sex trafficking. The employee, being unsure of the exact nature of the posting, reports the posting to the police, but does not immediately act to take it down. The video continues to play on the site, and is displayed with other advertisements that generate revenue for the company. It would be troubling to render the video site liable for its "knowledge" based on the Good Samaritan act of reporting to the police, but this possibility remains open to interpretation under the language of the manager's amendment.

Determining the knowledge of online intermediaries is no easy task in the real world. Federal courts have repeatedly emphasized this in cases involving both sex trafficking and Section 230.⁸ And this precisely why other laws on intermediary liability--such as the notice-and-takedown provisions of the Digital Millennium Copyright Act--have elaborate provisions to provide clarity in particular situations. As it currently stands, SESA provides nowhere near this level of precision.

The resulting uncertainty could pose a serious risk to one the basic purposes of Section 230. The mere possibility of liability may often be enough for platforms to shut down user speech. Again, federal courts have repeatedly emphasized this risk--for example, finding that "[l]iability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation."⁹ This is exactly why state laws targeting sex trafficking advertisements have been repeatedly overturned on First Amendment grounds.

For the foregoing reasons, we believe that the language relating to knowledge should be clarified to ensure that courts do not misinterpret the provisions to create unexpectedly broad liability. At a minimum, members of the Committee should ensure in their analysis of the bill that the intent of the drafted language is not to sweep in the sorts of benign activities noted above.

⁸ See *Backpage.com v. McKenna*, 881 F.Supp.2d 1262, 1277-80 (W.D. Wash. 2012) (invalidating anti-sex trafficking statute on First Amendment grounds, in part because of vagueness and other problems in the requisite knowledge of intermediaries); *Backpage.com v. Cooper*, 939 F.Supp.2d 805, 828-36 (M.D. Tenn. 2013) (similar).

⁹ *Zeran*, 129 F.3d at 333.

November 6, 2017

Page 4

We appreciate the Committee's work on this difficult issue. Section 230 has always been a cautious balance of interests, and SESTA must with equal caution balance the enormous harms of illegal sex trafficking and the important protections of Section 230 for speech and the Internet. We look forward to working with you to continue to improve the legislation to meet these important goals.

Sincerely,

Ryan Clough
General Counsel
Public Knowledge

Cc: Members of the Senate Committee on Commerce, Science, & Transportation