



THE TOP TEN MYTHS ABOUT SESTA'S (S. 1693) IMPACT ON STARTUPS

MYTH Section 230 of the Communications Decency Act bars the government from prosecuting websites for criminal conduct online, and amending Section 230 is the ONLY way to go after sex traffickers.

FACT Section 230 does not grant websites any immunity for violations of federal criminal law, including sex trafficking laws. The Department of Justice has the full authority to prosecute websites that are facilitating sex trafficking. Indeed, the DOJ is currently going after the website Backpage through a federal grand jury convened in Phoenix. While grand jury proceedings are secret, the DOJ may be using a new law passed by Congress in 2015, the SAVE Act, that was also specifically designed to address companies like Backpage. The SAVE Act amended 18 U.S.C. Section 1591, the federal sex trafficking laws, to expressly include “advertising” as a criminal action. So not only can the DOJ go after Backpage without any restrictions under Section 230, but it may already be using a new law to achieve Congress’ goal without SESTA. Finally, Congress is now considering more than 30 bills referencing “sex trafficking” that do not amend Section 230, suggesting there are other ways to go after abhorrent criminals online.

MYTH SESTA is narrowly-crafted legislation that only implicates sex traffickers; SESTA will not impact well-intentioned startups in any way.

FACT While SESTA’s supporters claim that it is meant to be a narrow carveout to Section 230, the bill’s ambiguity and breadth would have far-reaching implications for all internet platforms that host user-generated content. SESTA has three broad impacts on startups by:

- Creating a knowledge standard that will make startups less likely to voluntarily police their platforms for bad behavior in fear of exposure to increased liability;
- Allowing prosecutors to go after startups on a wide variety of dubious state law claims; and
- Opening up civil liability for startups who operate online platforms.

All this together means that nothing about SESTA is “narrow.” Instead, companies of all sizes will be less likely to continue working with law enforcement to fight sex trafficking, fearing that once they identify potential criminal activity, they will have “knowledge,” exposing them to potential liability for any content on the site. This knowledge standard would expose many law-abiding platforms to litigation, deterring investors and shifting already-scarce resources to legal fees.

MYTH Startups have access to unlimited computing power and filtering tools that can easily monitor and remove questionable content related to sex trafficking.

FACT Currently, many startups engage in voluntary measures to search for and remove illegal content. Unfortunately, automated tools for filtering content are far from perfect. At best, they can only identify content by examining the physical characteristics of particular media (e.g. image, sound, and text), but they cannot actually determine whether particular content violates the law. No filtering tool can determine the intent behind a particular post or analyze whether a piece of content was posted with the subject’s consent. Those determinations require human intervention and are often costly, subjective, and difficult. And even then, it’s simply not possible to accurately identify all potentially illegal content on a website, particularly considering traffickers are actively working to evade these measures. Even the most basic content detection tools can cost a medium-sized platform \$25,000 per month in license fees alone, plus additional costs for development and personnel to review identified content. Not only are these tools ineffective for thoroughly identifying trafficking content, they are prohibitively expensive for small companies to deploy.

MYTH Startups and the rest of the tech community only oppose SESTA because it hurts their bottom line.

FACT No good actors benefit from online sex trafficking. Tech companies and startups are competing fiercely for users, and it hurts their bottom line when bad actors use their platforms to commit crimes. There is a strong economic incentive to monitor user behavior and remove sexually explicit content immediately. Not only will users be less likely to return to a platform if they see criminal activity happening, but advertisers and venture capitalists will not invest in a startup that is failing to maintain standards of moral decency. And, because SESTA will likely discourage platforms from proactively monitoring for trafficking activity, opponents of SESTA are concerned the bill’s costs are not balanced with equivalent benefits.

MYTH The internet is all grown up and Section 230 is no longer needed.

FACT Startups are constantly innovating new ways for people to share information. Section 230 has provided the legal buffer for entrepreneurs to experiment with ways to engage users online. As the pace of innovation accelerates, Section 230 is needed more than ever to ensure that startups can succeed in a competitive marketplace without the looming fear of civil and criminal charges. Startups less than five years old have reinvented the way we blog (Medium), date (Bumble), support creators (Patreon), and talk to our neighbors (NextDoor). Imagine where we’ll be in five more years!

MYTH Section 230 is a ‘loophole’ or an unintentional oversight that was never meant to shield internet services from liability when bad actors use the internet.

FACT Congress explicitly enacted Section 230 “to promote the continued development of the Internet” by limiting liability, recognizing that courts might try to “shoot the messenger” whenever a bad actor used the Internet. Section 230 was intended to not only ensure that litigation over internet speech was directed at the speakers, not the platforms, but it was intended to ensure that startups don’t have to incur the cost of defending such lawsuits. The legislation is not and never was intended to be a loophole that lets websites act criminally—it provides absolutely no immunity for violations of federal criminal law. However, if Section 230 didn’t exist, Yelp would be liable every time a user posted a defamatory statement about a business, and Kickstarter would be liable if someone posted a fake campaign to defraud users. But Section 230 is not unlimited, and that is exactly what Congress intended.

MYTH Claims that this bill will open the doors to frivolous civil lawsuits are exaggerated and overstated.

FACT The risk of burdensome and frivolous litigation is not hypothetical. We’ve seen how perfectly legitimate online platforms can be targeted by frivolous lawsuits on issues like online intermediary liability and intellectual property. The cost of defending a company from a lawsuit, even a meritless one, is enough to put many startups out of business or to keep them from launching in the first place. The drafters of Section 230 recognized this problem and wanted not only to prevent innocent startups from being legally liable for user speech but also to prevent them from having to spend scarce resources defending meritless claims in the first place. Injecting a vague “knowledge” exemption into Section 230 would make it incredibly difficult for startups to defeat vexatious claims at an early stage, since questions of knowledge can usually only be determined after a lengthy court proceeding. It’s impossible to know how many frivolous lawsuits SESTA will allow to proceed, but considering how frequently Section 230 is currently invoked to defeat meritless litigation, it’s far from a minor threat.

MYTH SESTA merely allows State Attorneys General and local prosecutors to enforce existing sex trafficking laws.

FACT SESTA does not limit states to bringing actions under federal criminal laws already exempt from Section 230. Rather, it eliminates Section 230’s limitation on liability for any state laws “targeting conduct” related to sex trafficking violations. Not only would this vague, overbroad standard subject startups to liability under 50 different criminal codes (directly contrary to the intent of Section 230’s drafters) but it would allow states to create laws tangentially related to trafficking that could disrupt the core functioning of the internet in basic ways. If, for example, a state passed a law stating “in order to fight sex trafficking, all internet users must provide accurate user identity information to any website on which they are submitting user generated content,” a website could be held criminally liable if a user misrepresented his or her identity. While this may seem far-fetched, only one state would need to pass such a law in order to fundamentally disrupt how the internet functions, and states have been known to entertain facially unworkable bills on tech issues. More than a dozen states have already introduced a bill called the “Human Trafficking Prevention Act,” which would require device manufacturers to install “pornography filters” on cell phones, tablets, and other computing devices. Not only does this bill have nothing to do with preventing trafficking, its requirements are technologically impossible. While Section 230 often served as a bar to this kind of absurd legislation, under SESTA state AGs would be free to enforce them against startups.

MYTH SESTA does nothing to the Good Samaritan provisions in Section 230.

FACT The full extent to which SESTA would impact the Good Samaritan provision of Section 230 is ambiguous at best. Currently, Section 230 has two main operative provisions. Section 230(c)(1) says websites aren’t liable for third party content, and Section 230(c)(2) says websites aren’t liable for filtering content they consider offensive. The claim that SESTA would create new exclusions only to Section 230(c)(1) and would not amend 230(c)(2) is inaccurate as the bill clearly changes both 230(c)(1) and 230(c)(2) equally. The only way startups and law enforcement can work together to stop sex trafficking is to allow startups to take proactive measures to monitor and report bad actors. Stripping startups of their Good Samaritan protections will only work to undermine these collaborative efforts.

MYTH The tech community has only been involved in opposing the SESTA bill and has not sought to be part of crafting this legislation to help victims.

FACT Startups have been active partners with law enforcement in fighting the scourge of human trafficking. Since SESTA’s introduction, the tech industry is far from the only group opposing; a wide array of free speech, human rights, business, and tech organizations, from the American Civil Liberties Union to FreedomWorks, have stated concerns with the legislation. However, prior to introduction, startups were not consulted on the specifics of the bill. Despite being left out of the process, many in the tech industry have reached out to law enforcement and victims groups to try to find real solutions to improve the Senate bill. We welcome any opportunity to participate in a collaborative effort with Congress to stop sex trafficking online, but we don’t believe that rushing to pass this flawed bill without considering alternatives is a sensible approach.