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Sex, Drugs, and Rock & Roll: Effectively and Equitably Moderating Vice and Illegal Content Online

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NOTE

Sex, Drugs, and Rock & Roll: Effectively and Equitably Moderating Vice and Illegal Content Online

The modern internet is vast, with more than 2.5 quintillion bytes of data created every day. Content is created, uploaded, downloaded, and shared across an increasingly large number of platforms. Most of this content is legal; however, some is illegal, including hate speech, child sexual abuse material, and content that violates intellectual property rights. Section 230 of the Communications Decency Act (“CDA”) provides that websites are not liable for content posted to their platform by third parties. Instead, websites determine their own content moderation policies, and the law assumes that they will do just that (given that exposure to graphic or otherwise upsetting content deters the average user).

This approach has been largely successful, but there are growing concerns about a proliferation of child sexual abuse material and sex trafficking content, and whether platforms are doing enough to prevent the spread of illegal content online. Adult content websites such as Pornhub and OnlyFans, which are hosts to legal pornography in addition to illegal content, have been a primary target of this concern. Congress’s attempts to legislate the issue have been ineffective: FOSTA-SESTA, passed in 2018, created an exception to § 230’s blanket grant of immunity for sex trafficking content, but has not been used in any prosecutions to date. Instead, private companies—most frequently, payment processors like Visa, Mastercard, and PayPal—are making decisions regarding vice and illegal content. In practice, this has involved shutting down payments to a website until the platform agrees to comply with the payment processor’s policies regarding content moderation and verification. While technically effective for victims of illegal content, this approach entails the mass disenfranchisement of legal sex workers.

This Note proposes a reconsideration of § 230’s blanket grant of immunity through a statutory revision resembling the Digital Millennium Copyright Act. The Act implements a notice-and-takedown model for copyright

infringement, and a statutory revision to § 230 could do the same for illegal content. The notice-and-takedown model creates a content moderation strategy that prevents the rapid dissemination of illegal content. This Note argues that a notice-and-takedown model of liability for illegal content would respond to the needs of both victims and platforms without undermining the foundations of the free and open internet or disenfranchising legal sex workers.

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INTRODUCTION

In 2003, the Broadway musical *Avenue Q* proclaimed that “The Internet Is for Porn:” “Why [do] you think the net was born? Porn, porn, porn.”¹ In fact, the growth of the early internet is attributed in part to sex workers, who utilized online forums as relatively safe spaces for

1. STEPHANIE D’ABRUZZO & RICK LYON, *The Internet Is for Porn, on AVENUE Q* (ORIGINAL BROADWAY CAST RECORDING) (Masterworks Broadway 2003).

interfacing with prospective clients.² Today, adult content platforms— websites specializing in pornography, cam shows, and other forms of online sex work—consistently occupy three or more spots in the top ten most visited websites worldwide.³

The internet of today is massive—in 2018, an estimated 2.5 quintillion bytes of data were created every day.⁴ This is possible largely because the platforms that comprise the largest and most frequently visited websites (YouTube, Facebook, Twitter, Pornhub, and XVideos, for example⁵) enable third-party users to upload and share content, amounting to more than ninety-five million Instagram posts and three hundred million Facebook photos per day.⁶ The popularity of a given site attracts more users and results in even more platform content.

Platforms are able to support this growth thanks to § 230, a statutory provision passed in 1998 as part of the largely defunct Communications Decency Act.⁷ Section 230 dictates that content-sharing websites are not liable for the content that third parties post to their platforms.⁸ Without legal liability under § 230, websites have the authority to determine their own content moderation policies, and the law assumes that they will. The assumption is that exposure to graphic or otherwise upsetting content will deter the average user, and that platforms will enact moderation strategies aimed at preventing this loss and retaining their user base.⁹

This approach has been largely successful for most of the internet's history, but growing concerns about an alleged epidemic of child sexual abuse material and sex trafficking content have prompted both Congress and the private industry to grapple with several

2. Sofia Barrett-Ibarria, *Sex Workers Pioneered the Early Internet—and It Screwed Them Over*, VICE (Oct. 3, 2018, 7:00 AM), <https://www.vice.com/en/article/qvazy7/sex-workers-pioneered-the-early-internet> [<https://perma.cc/M2G4-QKRA>].

3. Tiago Bianchi, *Most Popular Websites Worldwide as of November 2021, By Total Visits*, STATISTA (Nov. 30, 2022), <https://www.statista.com/statistics/1201880/most-visited-websites-worldwide/> [<https://perma.cc/MAZ8-JGVB>] [hereinafter STATISTA].

4. Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/?sh=4c3fba4660ba> [<https://perma.cc/CW4K-52Y5>]. This data is from 2018, and the quantity of daily posts is almost certainly higher today.

5. STATISTA, *supra* note 3.

6. Marr, *supra* note 4.

7. 47 U.S.C. § 230.

8. 47 U.S.C. § 230(c)(2).

9. See Stephen Engelberg, *Twenty-Six Words Created the Internet. What Will It Take to Save It?*, PROPUBLICA (Feb. 9, 2021, 2:00 PM), <https://www.propublica.org/article/nsu-section-230> [<https://perma.cc/2N2U-8FG4>] (“If [platforms moderate] too much or too little, the consumers will walk away.”).

questions.¹⁰ First, how much moderation is enough? As illegal content continues to proliferate online, how can the law incentivize existing platforms to adopt more effective moderation strategies? Second, as public and private institutions investigate new moderation policies to address illegal content, what will the repercussions be for the free internet's future?

This Note examines the issue of online content moderation as it relates to illegal content. Because the current approach to regulating illegal content disproportionately affects adult content platforms, this Note focuses on the relationship between the moderation of illegal content—namely child sexual abuse material and sex trafficking content—and the moderation of legal pornography.

This Note proceeds in three Parts. Part I provides an overview of current legal issues concerning pornography and regulation, as well as a historic account of sex work and the law. It also discusses the laws governing liability for online platforms, including § 230 and its 2018 amendment. Given the state of the internet union, Part II then asks how to moderate illegal content and discusses the strengths and weaknesses of both current and potential approaches to the issue. Part III argues for the adoption of a revised statutory approach to internet liability allocation that closely resembles the existing statutory scheme for online copyright protection. Ultimately, this Note argues that Congress should assume responsibility for deciding how much and what forms of private moderation are adequate, and for solidifying this decision in a uniform statutory scheme.

I. BACKGROUND

A. *The Pornhub Problem*

On Sunday, December 13, 2020, Pornhub—a porn website with more monthly visitors than Netflix¹¹ and the tenth most visited website in the world¹²—hosted 13.5 million videos.¹³ By Monday morning, that

10. See, e.g., Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun with Images of Child Sexual Abuse. What Went Wrong?*, NY TIMES (Sept. 29, 2019), <https://www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html> [<https://perma.cc/L8SJ-TGB4>].

11. Joel Khalili, *These Are the Most Popular Websites Right Now—and They Might Just Surprise You*, TECHRADAR (July 13, 2021), <https://www.techradar.com/news/porn-sites-attract-more-visitors-than-netflix-and-amazon-youll-never-guess-how-many> [<https://perma.cc/8DPS-HV3G>].

12. STATISTA, *supra* note 3.

13. Samantha Cole, *Pornhub Just Purged All Unverified Content from the Platform*, VICE (Dec. 14, 2020, 6:00 AM), <https://www.vice.com/en/article/jgqjyy/pornhub-suspended-all-unverified-videos-content> [<https://perma.cc/55PX-WKVG>].

number was 4.7 million.¹⁴ Overnight, Pornhub deleted over 8 million videos from its platform—a purge representing 65 percent of the site’s content.¹⁵ This change came in the wake of a *New York Times* op-ed and growing public concern regarding the site’s content, which included legal, consensual pornography as well as child sexual abuse material (“CSAM”), “revenge pornography, spy cam videos of women showering, racist and misogynist content, and footage of women being asphyxiated in plastic bags.”¹⁶

Nicholas Kristof’s article, *The Children of Pornhub*, documented the epidemic of CSAM and sex trafficking content (“STC”) taking place across the internet.¹⁷ In 2015, the National Center for Missing and Exploited Children received reports of 6.5 million “images, videos[,] and other content related to child sexual exploitation” online.¹⁸ In 2017, that number was 20.6 million, and in 2019, 69.2 million.¹⁹ Kristof’s article focused on Pornhub’s role in the crisis, but acknowledged that it was not a problem only for adult content platforms: Facebook and Twitter routinely have to remove CSAM and STC from their sites.²⁰

Pornhub is a source of free pornography but “also allows performers to upload, sell, and otherwise monetize videos they make themselves.”²¹ The problem with Pornhub, Kristof claimed, was that it was not doing enough to control content that users uploaded to its site.²² Pornhub’s parent company, the Montreal-based Mindgeek, employed about eighty moderators worldwide for its network of sites,²³ which

14. *Id.*

15. *See id.*

16. Nicholas Kristof, Opinion, *The Children of Pornhub*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html> [<https://perma.cc/J2CD-DJ5T>].

17. *Id.*

18. *Id.*

19. *Id.* Neither Kristof nor the National Center for Missing and Exploited Children (“NCMEC”) clarify whether the increase in reporting is linked to an increase in CSAM, but another source confirms an increase in CSAM online during the coronavirus pandemic, in part due to pandemic-induced limitations on internet companies’ moderation teams. Many of the 2,027,520 reports made to NCMEC in March 2020, for example, were attributed to a small number of CSAM videos that “went viral” in part due to increased boldness on the part of CSAM distributors. Olivia Solon, *Child Sexual Abuse Images and Online Exploitation Surge During Pandemic*, NBC NEWS (Apr. 23, 2020, 2:01 PM), <https://www.nbcnews.com/tech/tech-news/child-sexual-abuse-images-online-exploitation-surge-during-pandemic-n1190506> [<https://perma.cc/8ZJ8-CRY5>].

20. Kristof, *supra* note 16 (“Depictions of child abuse also appear on mainstream sites like Twitter, Reddit, and Facebook. And Google supports the business models of companies that thrive on child molestation.”).

21. Samantha Cole, *PayPal Pulls Out of Pornhub, Hurting ‘Hundreds of Thousands’ of Performers*, VICE (Nov. 14, 2019, 9:01 AM), <https://www.vice.com/en/article/d3abgv/paypal-pulls-out-of-pornhub-payments> [<https://perma.cc/5TQD-G7TA>].

22. Kristof, *supra* note 16.

23. *Id.*

includes Pornhub, YouPorn, and RedTube in addition to numerous adult film production companies.²⁴ Mindgeek's network of sites sees an estimated 115 million daily users (a ratio of one moderator for every 1,437,500 users).²⁵ Around the same time, Facebook employed 15,000 moderators for its 1.84 billion daily active users (one moderator for every 122,666 users).²⁶ In addition, the trouble with Pornhub's content—porn—is that it can be difficult for moderators to tell “whether a person is 14 or 18, or whether torture is real or fake” given the popularity of ‘barely legal’ and BDSM-type videos.²⁷

Kristof proposed that Pornhub prohibit downloads (which enable users to continuously reupload material, circumventing the platform's attempts to remove illegal content), increase moderation, and require users to be verified in order to post videos.²⁸ Kristof attributed some of the company's slight improvements in recent years²⁹ to the 2018 amendment of § 230 of the Communications Decency Act, which softened the protections from liability for CSAM and STC that adult content platforms previously enjoyed.³⁰ Kristof suggested further limiting § 230 immunity for such companies, and called for American Express, Mastercard, and Visa to join PayPal in suspending their cooperation with Pornhub.³¹

24. *Id.* (“There are other major players in porn outside the Mindgeek umbrella, most notably XHamster and XVideos, but Mindgeek is a porn titan.”); Carrie Marshall, *The Most Important Internet Companies You Haven't Heard Of*, TECHRADAR (Aug. 28, 2016), <https://www.techradar.com/news/internet/the-most-important-internet-companies-you-haven-t-heard-of-1327213> [<https://perma.cc/Z3XF-N9LM>].

25. *See* MINDGEEK, <https://www.mindgeek.com/> (last visited Feb. 23, 2023) [<https://perma.cc/3RB4-VJP8>] (citing more than 115 million daily visitors under “Mindgeek by the Numbers”); Patricia Nilsson, *The Secretive World of MindGeek: The Montreal-Based Company Behind Pornhub and RedTube*, FIN. POST (Dec. 18, 2020), <https://financialpost.com/financial-times/the-secretive-world-of-mindgeek-the-montreal-based-company-behind-pornhub-and-redtube> [<https://perma.cc/A69Z-X8GD>] (citing 115 million daily users as of December 2020).

26. Kristof, *supra* note 16; Press Release, Facebook, Facebook Reports Fourth Quarter and Full Year 2020 Results (Jan. 27, 2021), <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Fourth-Quarter-and-Full-Year-2020-Results/default.aspx> [<https://perma.cc/GGJ3-KUNH>].

27. Kristof, *supra* note 16 (explaining that, “[w]ith 1.36 million new hours of video uploaded a year to Pornhub, . . . each moderator would have to review hundreds of hours of content each week”).

28. *Id.*

29. Pornhub “doubled the number of moderators in the last couple of years,” “began voluntarily reporting illegal material to the National Center for Missing and Exploited Children,” and “compiled a list of banned content.” *Id.*

30. *Id.*; *see also* 47 U.S.C. § 230.

31. Kristof, *supra* note 16; *see also* Cole, *supra* note 21. PayPal announced that it would “no longer support[] payments” to the site in November 2019 following publication of a similarly scathing *New York Times* op-ed. Cole, *supra* note 21.

The *New York Times* published Kristof's article online on December 4, 2020, and in print on December 6, 2020.³² On December 7, 2020, Visa and Mastercard announced they would be investigating their relationships with Pornhub.³³ By December 10, 2020, Visa and Mastercard fully withdrew from Mindgeek's entire suite of sites.³⁴ On December 13, 2020, in a scramble to regain the support of financial institutions, Pornhub executed a purge of all unverified content.³⁵ Visa later reinstated service to some of Mindgeek's sites—the ones that offer “professionally produced adult studio content.”³⁶ As of May 10, 2023, Pornhub itself can only accept payment via direct bank transfer and certain forms of cryptocurrency,³⁷ which has real consequences for performers who rely on uploading paywalled content to Pornhub as a primary source of income.

B. A Brief History of Sex Work and the Law

This is not the first time that public outcry about sex trafficking has resulted in major sociopolitical change. In the early 1900s, shifting cultural attitudes, rapid urbanization, and increasing numbers of women joining the workforce triggered a “full-fledged moral panic.”³⁸ Thanks in part to a rise in sensationalized newspaper reporting, rumors swirled about women “being forced into prostitution and shuttled around the country by vast networks controlled by immigrants, who were arriving in the U.S. by the millions.”³⁹ The hysteria surrounding this “white slavery” resulted in the passage of the Mann Act, also known

32. Kristof, *supra* note 16.

33. Eshe Nelson, *Visa and Mastercard to Investigate Financial Ties to Pornhub*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/business/visa-mastercard-pornhub.html> [<https://perma.cc/DLL9-MUBJ>].

34. Gillian Friedman, *Mastercard and Visa Stop Allowing Their Cards to Be Used on Pornhub*, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/business/visa-mastercard-block-pornhub.html> [<https://perma.cc/EP3Y-RSH9>].

35. Cole, *supra* note 13.

36. *Visa Continues Pornhub Ban, to Allow Card Use on Some of Its Parent's Sites*, REUTERS, <https://www.reuters.com/article/us-pornhub-visa/visa-continues-pornhub-ban-to-allow-card-use-on-some-of-its-parents-sites-idUSKBN28X2D0> (last updated Dec. 23, 2020, 12:49 PM) [<https://perma.cc/4APL-6MCP>].

37. *What Type of Payment Methods Are Accepted?*, PORNHUB HELP CTR., <https://help.pornhub.com/hc/en-us/articles/4419848614035> (last visited Feb. 19, 2023) [<https://perma.cc/JK73-FTNP>].

38. Eric Weiner, *The Long, Colorful History of the Mann Act*, NPR (Mar. 11, 2008, 2:00 PM), <https://www.npr.org/templates/story/story.php?storyId=88104308> [<https://perma.cc/WV86-M7MZ>].

39. *Id.*

as the “White Slave Traffic Act of 1910.”⁴⁰ The Mann Act criminalized the transportation of women across state lines “for the purpose of prostitution or debauchery, or for any other immoral purpose.”⁴¹ The “immoral purpose” clause has been used for—perhaps predictably—problematic ends, including the enforcement of social norms wholly unrelated to sex trafficking.⁴² Moreover, the Mann Act “led to the marriage of prostitution and sex trafficking in both the public eye and federal legislation.”⁴³

The fact that both federal and state law distinguish between prostitution and other forms of sex work, including pornography, only further complicates the already unsteady legal status of sex workers. As defined in most state statutes, prostitution is the act of engaging in sexual activity for money; it is almost universally illegal in the United States.⁴⁴ By contrast, participating in pornography, or appearing in content that depicts sexual acts in exchange for money, is not only legal—it is constitutionally protected free speech.⁴⁵ The primary case cementing the distinction between legal pornography and illegal prostitution is *People v. Freeman*, in which the California Supreme Court effectively legalized the creation of pornography in the state⁴⁶.

In *Freeman*, defendant Harold Freeman “hired and paid actors to perform in a . . . commercial film which portrayed sexually explicit acts”; authorities charged Freeman with pandering, or the

40. *Id.*; White-Slave Traffic (Mann) Act, ch. 395, § 4, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C.A. §§ 2421–24); *Classification 31: White Slave Traffic Act*, NAT'L ARCHIVES, <https://www.archives.gov/research/investigations/fbi/classifications/031-white-slave-traffic.html> (last updated Aug. 15, 2016) [<https://perma.cc/B3CX-J6NB>].

41. § 4, 36 Stat. 825.

42. In 1913, Jack Johnson, the first African American heavyweight boxing champion, was charged under the act for transporting a prostitute across state lines, and he was convicted—however, the “prostitute” was in fact his white girlfriend. Weiner, *supra* note 38.

43. Morgan Wiersma, *What the History of Prostitution Can Teach Us About Human Trafficking*, DRESSEMBER, <https://www.dressember.org/blog/what-the-history-of-prostitution-can-teach-us-about-human-trafficking> (last visited Feb. 1, 2023) [<https://perma.cc/245M-6EU3>].

44. *E.g.*, TENN. CODE ANN. § 39-13-512 (2021) (“engaging in, or offering to engage in, sexual activity as a business”); ME. STAT. tit. 17-A, § 851 (2021) (“engaging in, or agreeing to engage in, or offering to engage in a sexual act or sexual contact . . . in return for a pecuniary benefit to be received by the person engaging in prostitution or a 3rd person”). Nevada is the only jurisdiction in the United States to allow legal prostitution via regulated brothels, which are currently only located in seven counties. See NEV. REV. STAT. ANN. § 201.354 (2021) (“Unlawful for customer to engage in prostitution or solicitation for prostitution except in licensed house of prostitution”); Neil Shouse, *Counties Where Prostitution Is Legal in Nevada*, LAS VEGAS DEF. GRP. (Aug. 24, 2021), <https://www.shouselaw.com/nv/blog/prostitution/counties-where-prostitution-is-legal-in-nevada/> [<https://perma.cc/Y6W3-N5TS>] (listing the ten Nevada counties where brothels are legal and indicating that only seven of those ten counties contain brothels).

45. See, e.g., *People v. Freeman*, 758 P.2d 1128 (Cal. 1988), *cert. denied*, 488 U.S. 1311 (1989) (holding that “a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment”).

46. See *id.*

“procurement of persons for the purposes of prostitution.”⁴⁷ The California Supreme Court cited *Joseph Burstyn, Inc. v. Wilson*, in which the U.S. Supreme Court held that motion pictures fall within the First Amendment’s guarantee of free speech.⁴⁸ The *Freeman* court clarified that motion pictures depicting sexual acts—pornographic films—are similarly entitled to First Amendment protection so long as they are not found to be “obscene.”⁴⁹ Under California’s obscenity laws, “obscene matter” is material that “depicts or describes sexual conduct in a patently offensive way.”⁵⁰ The sexual acts depicted in Freeman’s film “were completely lawful . . . [t]he sexual conduct was between consenting adults and occurred in a place not open to the public,” and the film was held to be a nonobscene motion picture.⁵¹ The court reversed Freeman’s conviction, holding that “the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.”⁵²

Sex workers were some of the earliest adopters of innovative forms of technology and communication. For example, in the early 1990s, many sex workers placed ads in physical mediums, such as the Yellow Pages, “girly magazines,” and “alt-weeklies.”⁵³ In an attempt to quash sex work, states threatened publications that printed these ads with prosecution; the publications, in turn, ceased printing ads for sex work. This experience led sex workers to rely instead on the internet as a means of accessing an audience, “populat[ing] early chat rooms [and] fuel[ing] the rise of e-commerce that began with online porn.”⁵⁴ Sex workers became “some of the first to use the internet commercially.”⁵⁵

Some sex workers utilized their own websites and third-party platforms, such as Craigslist and Backpage, to advertise their services to potential clients. In this way, the internet served (and continues to serve) as a method of harm reduction for sex workers engaging in traditional prostitution because they were able to interface with potential clients online and “choose how to work and whom to work

47. *Freeman*, 758 P.2d at 1129.

48. 343 U.S. 495, 501–02 (1952).

49. *Freeman*, 758 P.2d at 1131.

50. CAL. PENAL CODE § 311 (West 2023).

51. *Freeman*, 758 P.2d at 1134.

52. *Id.* at 1131; see also *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (holding that because a film was not “obscene,” it was constitutionally protected as an expression of free speech); *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene materials do not enjoy First Amendment protection and establishing a three-part test for obscenity).

53. Barrett-Ibarria, *supra* note 2.

54. *Id.*

55. *Id.*

with.”⁵⁶ Others pioneered new forms of sex work: occupations such as camming (performing live shows online) and selling self-made pornographic images and videos (via sites like OnlyFans) became a huge market online.⁵⁷ As sex work helped drive online commerce, the internet enabled sex workers to expand their business models and monetize their content from the safety of their home.

C. § 230

Section 230 of the Communications Decency Act “is the basis of the free internet as we know it.”⁵⁸ Prior to § 230’s enactment, if a website or internet provider “remained passive and uninvolved in filtering third-party material from its network, the provider could not be held liable for any offensive content it carried from third parties.”⁵⁹ This meant that “once a service provider undertook to filter offensive content from its network, it assumed responsibility for any offensive content it failed to filter, even if it lacked knowledge of the content.”⁶⁰ When Congress enacted § 230, it provided an entirely new framework for understanding internet content and moderation, stating that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”⁶¹ These twenty-six words singlehandedly immunized websites, platforms, and internet service providers from liability for any content posted by a third party—with only a few exceptions⁶²—and “made possible the explosive growth of the modern internet.”⁶³

56. Melissa Gira Grant, *7 Sex Workers on What It Means to Lose Backpage*, THE CUT (Apr. 10, 2018), <https://www.thecut.com/2018/04/7-sex-workers-on-what-it-means-to-lose-backpage.html> [<https://perma.cc/ET5H-TNAA>].

57. See Gabrielle Drolet, *The Year Sex Work Came Home*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/style/camsoda-onlyfans-streaming-sex-coronavirus.html> [<https://perma.cc/DKL9-Q2FR>].

58. Emily Stewart, *The Next Big Battle over Internet Freedom Is Here*, VOX (Apr. 23, 2018, 12:20 PM), <https://www.vox.com/policy-and-politics/2018/4/23/17237640/fosta-sesta-section-230-internet-freedom> [<https://perma.cc/ZBC2-3LAZ>].

59. Enigma Software Grp. USA, LLC v. Malwarebytes, Inc., 946 F.3d 1040, 1046 (9th Cir. 2019).

60. *Id.*; see also Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

61. 47 U.S.C. § 230(c)(1).

62. See discussion *infra* Part II.C (regarding FOSTA-SESTA).

63. Engelberg, *supra* note 9.

1. *Stratton Oakmont* and “Cyberporn”

Section 230 was Congress’s attempt to repair the damage that *Stratton Oakmont, Inc. v. Prodigy Services Co.*⁶⁴ inflicted on the state of the internet union. In the case, an anonymous user of Prodigy’s “Money Talk” online bulletin board posted statements accusing Stratton Oakmont, a brokerage firm, of criminal and fraudulent acts. Stratton Oakmont⁶⁵ sued for libel, and the court held that because Prodigy’s operator had conducted *some* moderation (filtering out pornography, for example), Prodigy was liable for *all* content posted to its platform, including the allegedly libelous statements in question.⁶⁶ Rather than encouraging platforms to more thoroughly filter harmful content, the *Stratton Oakmont* decision actually incentivized platforms to fling open the moderation doors entirely. For platforms, making no attempt to regulate content was the best means of avoiding liability for anything that might slip through the cracks.⁶⁷

Stratton Oakmont was decided in 1995, the same year that *Time* magazine published a hugely controversial cover story entitled “Cyberporn.”⁶⁸ In his article, Philip Elmer-Dewitt reported on a study by Marty Rimm of Carnegie Mellon entitled “Marketing Pornography on the Information Superhighway,” which was published in the *Georgetown Law Journal*.⁶⁹ The study examined the download records of internet users and found that “there’s an awful lot of porn online.”⁷⁰ This is perhaps an unsurprising conclusion in 2022, but the study went a step further and claimed to find a trend towards the extreme:

Perhaps because hard-core sex pictures are so widely available elsewhere, the adult [computer bulletin-board system] market seems to be driven largely by a demand for images that can’t be found in the average magazine rack: pedophilia (nude photos of children), hebephilia (youths) and what the researchers call paraphilia—a grab bag of “deviant” material that includes images of bondage, sadomasochism, [and other fetishes.]⁷¹

64. *Stratton Oakmont*, 1995 WL 323710.

65. See generally *THE WOLF OF WALL STREET* (Paramount Pictures 2013).

66. *Stratton Oakmont*, 1995 WL 323710, at *3–5.

67. See, e.g., Engelberg, *supra* note 9 (“What this [ruling] basically meant is that the way to shield yourself from liability if you were a platform or an online service was to do no moderation at all.”).

68. *Cyberporn*, *TIME* (July 3, 1995), <http://content.time.com/time/covers/0,16641,19950703,00.html> [<https://perma.cc/WWN4-8YFH>].

69. Philip Elmer-Dewitt, *Online Erotica: On a Screen Near You*, *TIME* (July 3, 1995), <http://content.time.com/time/subscriber/article/0,33009,983116,00.html> [<https://perma.cc/Y3HP-NQWY>].

70. *Id.*

71. *Id.*

The study was the subject of immediate backlash, with statisticians pointing out that a survey of “private adult-bulletin-board systems that require credit cards for payments” and that are off-limits to minors is not equivalent to a survey of the internet as a whole.⁷² In a later retrospective, Elmer-Dewitt acquiesced to a description of the article as “one of the more shameful, fear-mongering and unscientific efforts that [*Time*] ever gave attention to.”⁷³ But the damage was done, and the public-hysteria-to-legislation pipeline that led to the Mann Act was in motion once again—and the Communications Decency Act of 1996 was passed.

2. The Communications Decency Act of 1996 and § 230

The bulk of the CDA, as originally formulated, amended existing communications law to make it illegal to send to or show minors obscene or indecent content online.⁷⁴ Representatives Cox and Wyden introduced § 230 to the CDA in order to respond directly to *Stratton Oakmont* and its effect on online content moderation.⁷⁵ Shortly after the CDA’s passage, the Supreme Court invalidated the Act’s indecency provisions,⁷⁶ but Cox and Wyden’s contribution—§ 230—survived.⁷⁷

Section 230 aimed to allow websites to avoid the “grim choice” between taking responsibility for every single piece of content posted, published, or sent by third-party users of the site and deleting no problematic content at all—essentially, burying their heads in the digital sand.⁷⁸ Section 230, then, allowed websites “to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn’t edit or delete.”⁷⁹ The fundamental idea was a market-based strategy of content moderation: websites can conduct whatever amount of moderation they require in order to maintain their user base without fear of liability for

72. Scott L. Powers, *Controversy Continues Over Time’s Story on ‘Cyberporn’ and the Internet*, BALT. SUN (July 22, 1995, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1995-07-23-1995204095-story.html> [<https://perma.cc/6S5R-ZH5J>].

73. Philip Elmer-Dewitt, *Finding Marty Rimm*, FORTUNE (July 1, 2015), <https://fortune.com/2015/07/01/cyberporn-time-marty-rimm/> [<https://perma.cc/6EBF-TSSJ>].

74. Communications Decency Act, S. 314, 104th Cong. (1995).

75. *Section 230: Legislative History*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Feb. 1, 2023) [<https://perma.cc/PGV2-X8LZ>].

76. *Reno v. Am. C.L. Union*, 521 U.S. 844, 875 (1997) (“[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults.”).

77. ELEC. FRONTIER FOUND., *supra* note 75.

78. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

79. *Id.*

anything they might overlook. If websites moderate too much or too little, they risk losing users.⁸⁰

With this strategy in mind, § 230's "safe harbor" or "Good Samaritan" provision states that

[n]o provider or user of an interactive computer service shall be held liable on account of: any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁸¹

In practice, this means that Facebook is not liable for hosting a page called "Third Palestinian Intifada," which called for Muslims to rise up and kill the Jewish people,⁸² or for the actions of one user posting private images and video of another user without the subject's consent.⁸³ Twitter is not liable for suspending a user's account for violation of the platform's hateful content rules⁸⁴ or for permitting members of terrorist organizations to create accounts.⁸⁵ And, critically, Pornhub and other adult content platforms are not liable for any CSAM or STC that third-party, unverified users upload to their sites.

This is not to say that these websites allow user-generated content to run rampant—they *do* moderate. Facebook, for example, employs fifteen thousand moderators who review the "posts, pictures, and videos that have been flagged by AI or reported by users"—about three million per day.⁸⁶ The reason Facebook is *Facebook* is because it provides a place for people to express themselves without encountering "beheading videos."⁸⁷ But mistakes happen: Mark Zuckerberg admitted that moderators "make the wrong call in more than one out every 10 cases."⁸⁸ Section 230 allows platforms like Facebook to build "their business models on being large platforms for user content,"⁸⁹ without fearing liability for those mistakes. Section 230's "protection from legal

80. Engelberg, *supra* note 9.

81. 47 U.S.C. § 230(c)(2).

82. Klayman v. Zuckerberg, 753 F.3d 1354, 1355 (D.C. Cir. 2014).

83. Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056 (N.D. Cal. 2016).

84. Murphy v. Twitter, Inc., 274 Cal. Rptr. 3d 360 (Ct. App. 2021).

85. Fields v. Twitter, Inc., 217 F. Supp. 3d 1116 (N.D. Cal. 2016).

86. John Koetsier, *Report: Facebook Makes 300,000 Content Moderation Mistakes Every Day*, FORBES (June 9, 2020, 8:08 PM), <https://www.forbes.com/sites/johnkoetsier/2020/06/09/300000-facebook-content-moderation-mistakes-daily-report-says/> [<https://perma.cc/4Y6Z-E99J>].

87. Engelberg, *supra* note 9.

88. Koetsier, *supra* note 86.

89. Barbara Ortutay, *AP Explains: The Rule that Made the Modern Internet*, AP NEWS (Oct. 28, 2020), <https://apnews.com/article/what-is-section-230-tech-giants-77bce70089964c1e6fc87228ccdb0618> [<https://perma.cc/2MVR-3UF5>].

liability proved essential to the explosive growth of . . . internet platforms,” and, in turn, “made possible the . . . modern internet.”⁹⁰

3. FOSTA-SESTA

Though Congress has left § 230’s key “Good Samaritan” provision unchanged, it has amended § 230 twice.⁹¹ In 1998, Congress added a provision requiring providers of interactive computer services to notify customers about any available parental control protections.⁹² Congress altered § 230 much more significantly when it enacted the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA-SESTA”), which added an additional exception to § 230’s broad immunity protections.⁹³

Section 230 already contained provisions advising that the section did not affect federal criminal law, intellectual property law, state law, or communications privacy laws. FOSTA-SESTA added a fifth exception, providing:

(5) No effect on sex trafficking law: Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant’s promotion or facilitation of prostitution was targeted.⁹⁴

Congress found that § 230 “was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims,” and that FOSTA-SESTA simply clarified that § 230 did not provide them such protection.⁹⁵

The impetus for FOSTA-SESTA’s enactment traces back to a 2017 congressional investigation into the online classified website Backpage, which had been accused of facilitating sex trafficking. At the time, several individuals had initiated lawsuits against the platform, alleging liability for facilitating sex trafficking; however, multiple

90. Engelberg, *supra* note 9.

91. 47 U.S.C. § 230.

92. 47 U.S.C. § 230(d).

93. 47 U.S.C. § 230(e)(5).

94. *Id.*

95. S. REP. NO. 115-199, at 3 (2018).

courts found in favor of Backpage, citing § 230's expansive protections for platforms.⁹⁶ Many legislators took issue with these holdings, including Senator Rob Portman, a member of the Backpage investigation and eventual sponsor of FOSTA-SESTA. Senator Portman critiqued interpretations of § 230 that protected Backpage, stating that “[e]very day that online sex traffickers continue to be protected by federal law is a failure of Congress.”⁹⁷

Following the investigation into Backpage, FOSTA-SESTA passed with broad support: ninety-seven senators voted in favor of its enactment, and then-President Trump signed it into law.⁹⁸ That is not to say that the amendment was free from criticism. One of the two votes in opposition to the bill came from Senator Ron Wyden, who was an original author of § 230.⁹⁹ Concerned that FOSTA-SESTA would create excessive liability for platforms and would undermine the benefits of § 230, Wyden offered an amendment that would have distinguished a failure to moderate from active facilitation of criminal activity; the Senate rejected this amendment.¹⁰⁰ Ultimately, in response to general concerns that altering § 230 immunity would upend the free internet, Portman claimed that FOSTA-SESTA “only removes immunity protections from websites that *knowingly* facilitate, support or assist online sex trafficking.”¹⁰¹

FOSTA-SESTA also found critics among the general public. The law was met with immediate backlash from activists, who argued it would “literally kill” consensual sex workers by forcing them off of the

96. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016):

Congress did not sound an uncertain trumpet when it enacted the CDA, and it chose to grant broad protections to internet publishers If 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 litigation;

see also *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F.Supp.3d 149 (D. Mass. 2015).

97. Rob Portman, *History Will Judge Those Who Don't Stop Sex Trafficking*, *GUARDIAN* (Sept. 19, 2017, 6:00 AM), <https://www.theguardian.com/commentisfree/2017/sep/19/stop-sex-trafficking-bill-rob-porter> [<https://perma.cc/94EQ-ZEGT>].

98. *Roll Call Vote 115th Congress - 2nd Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1152/vote_115_2_00060.htm (last visited Feb. 22, 2023) [<https://perma.cc/YUX8-6GUN>].

99. *Id.*

100. John Samples, *Wyden's FOSTA Fix*, *CATO INST.* (Mar. 19, 2018, 2:28 PM), <https://www.cato.org/blog/wydens-fosta-fix> [<https://perma.cc/C7G5-LJYN>]; Colin Lecher, *Senate Passes Controversial Anti-sex Trafficking Bill*, *VERGE* (Mar. 21, 2018, 3:23 PM), <https://www.theverge.com/2018/3/21/17147688/senate-sesta-fosta-vote-anti-sex-trafficking> [<https://perma.cc/P7MF-7W8J>].

101. *Id.*

internet and back “on the streets.”¹⁰² Others argued that the law would “threaten[] the future of the internet as we know it.”¹⁰³

At the same time, FOSTA-SESTA seemed poised to “allow sex trafficking victims to get justice against websites that knowingly facilitate crimes against them” and “allow state and local law enforcement to prosecute websites that violate federal sex trafficking laws,” as Portman promised.¹⁰⁴ Despite this promise, however, FOSTA-SESTA has not given rise to any successful criminal prosecutions in the five years since its enactment.¹⁰⁵

II. ANALYSIS

It is undeniable that the nature and scale of the modern internet enables illegal content such as CSAM and STC to proliferate, especially when platforms are engaging in insufficient moderation.¹⁰⁶ The victims of these crimes want and deserve legal recourse, but holding the content’s individual uploader liable is often difficult and frequently impossible.¹⁰⁷ On most websites, users can employ a number of techniques (false personas, disposable email accounts, VPNs, etc.) that enable them to remain largely anonymous.¹⁰⁸ The inquiry is therefore how the powers that shape the internet—the law and the market—might prompt platforms to more effectively moderate illegal content online.

Section 230 attempted to answer this question by shielding platforms from liability in the hopes that the demands of their users

102. Samantha Cole, *Trump Just Signed SESTA/FOSTA, a Law Sex Workers Say Will Literally Kill Them*, VICE (Apr. 11, 2018, 10:31 AM), <https://www.vice.com/en/article/qvxeyq/trump-signed-fosta-sesta-into-law-sex-work> [<https://perma.cc/96U7-65R6>]; Kitty Stryker, *What the FOSTA/SESTA Anti-sex Trafficking Bill Means*, TEEN VOGUE (Mar. 27, 2018), <https://www.teenvogue.com/story/fosta-sesta-anti-sex-trafficking-bill> [<https://perma.cc/U3HZ-T52G>].

103. Aja Romano, *A New Law Intended to Curb Sex Trafficking Threatens the Future of the Internet as We Know It*, VOX, <https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom> (last updated July 2, 2018, 1:08 PM) [<https://perma.cc/4R4D-BMJQ>].

104. Portman, *supra* note 97.

105. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-385, SEX TRAFFICKING: ONLINE PLATFORMS AND FEDERAL PROSECUTIONS (2021), <https://www.gao.gov/assets/gao-21-385.pdf> [perma.cc/W6G8-D6BS] [hereinafter GAO REPORT].

106. See Kristof, *supra* note 16 (describing the proliferation of CSAM and STC on Pornhub due to the platform’s lack of moderation).

107. See *id.* (“Pornhub allows these videos to be downloaded directly from its website. So even if a rape video is removed at the request of the authorities, it may already be too late: The video lives on as it is shared with others or uploaded again and again.”).

108. Aliza Vigderman & Gabe Turner, *How to Remain Anonymous on the Internet*, SECURITY.ORG, <https://www.security.org/vpn/anonymity/> (last updated Jan. 20, 2023) [<https://perma.cc/4ERZ-86LB>].

would produce an efficient and effective amount of moderation.¹⁰⁹ FOSTA-SESTA attempted to chip away at § 230 immunity specifically to better address the problem of STC online.¹¹⁰ Private companies, especially payment processors, currently play a more direct role in regulating moderation, as they can withhold financial support and payment processing abilities until the platform in question complies with their content moderation policies.¹¹¹ Section 230 could be amended again, either in response to the market-based regulation currently taking place or in response to public opinion and demands.¹¹² Finally, other areas of internet regulatory models, such as intellectual property law, may lead us towards a solution.¹¹³

A. Statutory Allocation of Liability: § 230, FOSTA-SESTA, and EARN IT

One potential method to prompt platforms to moderate illegal content is to effectively allocate legal liability for such content via statute. This is what § 230 and its amendments were designed to accomplish, with varying degrees of success.

1. Blanket Immunity Under the Original § 230

Section 230 of the CDA represents a legislative attempt to solve the moderation puzzle by providing blanket immunity for platforms and allowing them to moderate in the capacity necessary to retain their users.¹¹⁴ The assumption underlying this market-based approach is that most users do not want to see illegal content, and so platforms will undertake to filter it at the rate required to retain and grow their user base.¹¹⁵ This approach is relatively straightforward for a platform like Instagram, which does not allow nudity or adult content and thus does not attract users seeking such content. The market-based approach,

109. Engelberg, *supra* note 9.

110. 47 U.S.C. § 230(e)(5).

111. *Credit-Card Firms Are Becoming Reluctant Regulators of the Web*, ECONOMIST (Oct. 12, 2021), <https://www.economist.com/finance-and-economics/credit-card-firms-are-becoming-reluctant-regulators-of-the-web/21805450> [<https://perma.cc/4RTC-NB9C>]; Jazmin Goodwin, *Mastercard, Visa and Discover Cut Ties with Pornhub Following Allegations of Child Abuse*, CNN, <https://www.cnn.com/2020/12/14/business/mastercard-visa-discover-pornhub/index.html> (last updated Dec. 14, 2020, 4:36 PM) [<https://perma.cc/JLU3-KKLT>].

112. Samples, *supra* note 100.

113. See Benjamin Volpe, *From Innovation to Abuse: Does the Internet Still Need Section 230 Immunity?*, 68 CATH. U. L. REV. 597, 617 (2019).

114. Engelberg, *supra* note 9.

115. See *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008).

however, becomes less effective on a site like Pornhub, where illegal content often closely resembles the site's legal content. The illegal content therefore may not readily offend the average Pornhub user the same way it might offend a user of a different platform; Pornhub users are accordingly less likely to act in a way that incentivizes increased moderation by the platform.¹¹⁶

While the market interaction between platform and user on adult content platforms is not necessarily failing, as the platform *is* generally moderating in response to user preferences, the market-based incentive structure is not adequately accounting for external concerns from the general public and legislators.¹¹⁷ In other words, though users and nonusers alike may have valid concerns about CSAM and STC adult content platforms, § 230's market-based approach does not incentivize Pornhub to eliminate that content unless the content harms user retention. This, in turn, prevents victims of crimes from obtaining recourse under the law and permits the proliferation of CSAM and STC. These limitations in § 230's incentive structure¹¹⁸ prompted the enactment of FOSTA-SESTA in 2018.

2. Chipping Away at § 230 Immunity: FOSTA-SESTA and EARN IT

In 2018, FOSTA-SESTA professed to create a tool for prosecutors and victims of online sex trafficking, with its proponents hailing it as the solution to the proliferation of STC online.¹¹⁹ The Act amended § 230 to state that its blanket immunity should not be read to limit or impair sex trafficking claims,¹²⁰ with Congress finding that § 230 “was never intended to provide legal protection to websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims,” and that this clarification would ensure that § 230 did not provide them such protection.¹²¹ But did it successfully increase moderation of STC? And did its narrowing of § 230's blanket

116. See Kristof, *supra* note 16 (“Because it’s impossible to be sure whether a youth in a video is 14 or 18, neither Pornhub nor anyone else has a clear idea of how much content is illegal.”).

117. See Kristof, *supra* note 16; <https://traffickinghubpetition.com/> [PERMA] (hosting a petition to shut down Pornhub, launched in February 2020, which has received over 2 million signatures to date).

118. See, e.g., *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 29 (1st Cir. 2016) (holding that Section 230 immunity protected Backpage from liability for alleged human trafficking advertisements); *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 161 (D. Mass. 2015) (holding that Section 230 immunity precluded Trafficking Victims Protection Reauthorization Act claims against Backpage).

119. S. REP. NO. 115-199, at 2 (2018).

120. 47 U.S.C. § 230(e)(5).

121. S. REP. NO. 115-199, at 1.

liability for platforms harm the state of the free internet, as critics charged?

According to a June 2021 report by the Government Accountability Office (“GAO”), FOSTA-SESTA’s impact on the function of free internet was relatively limited.¹²² The GAO’s report identified that following the federal seizure of Backpage and the passage of FOSTA-SESTA, the online sex market underwent fragmentation.¹²³ Mainstream websites seem to have changed their moderation policies in the wake of FOSTA-SESTA: YouTube, for example, banned an independent erotic film production company after it posted interviews with sex workers, citing “violation of community guidelines.”¹²⁴ But for the most part, the internet apocalypse feared by many simply did not happen—at least, not as an immediate consequence of FOSTA-SESTA.

On the other hand, it is unclear the extent to which FOSTA-SESTA has been effective in achieving its purpose of limiting the availability of STC online. According to the same 2021 GAO report, FOSTA-SESTA has not given rise to any successful criminal prosecutions.¹²⁵ Specifically, “criminal restitution has not been sought and civil damages have not been awarded under section 3 of FOSTA-SESTA.”¹²⁶ Notably, the handful of (unsuccessful) cases brought under FOSTA-SESTA did not include the charges against Backpage, despite the law’s retroactive—and thus potentially unconstitutional¹²⁷—application. Instead, Backpage’s founders are being tried for prostitution and money laundering under the Travel Act—not sex trafficking.¹²⁸ They are set for a retrial in June 2023 after the first attempt at trying them ended in a mistrial because prosecutors made “too many references to child sex trafficking in a case where no one faced such a charge.”¹²⁹ The GAO reports that “[a]ccording to DOJ

122. GAO REPORT, *supra* note 105, at 25.

123. *Id.* at 15.

124. Emma Garland, *The Future of Porn Is Only Getting Worse*, VICE (Aug. 15, 2018, 10:50 AM), <https://www.vice.com/en/article/zmk89y/how-fostasesta-will-change-the-future-of-indie-and-feminist-porn> [<https://perma.cc/8BH6-VDXC>].

125. GAO REPORT, *supra* note 105, at 4.

126. *Id.* at 25.

127. See Letter from Stephen E. Boyd, Assistant Att’y Gen., U.S. Dep’t of Just., to Robert W. Goodlatte, Chairman, Comm. on the Judiciary, U.S. House of Reps. (Feb. 27, 2018), https://morgangriffith.house.gov/uploadedfiles/doj_letter.pdf [<https://perma.cc/G5UF-YU62>] (expressing concern that FOSTA violates “the Constitution’s Ex Post Facto Clause”); see also *TechFreedom: Yes, SESTA Is Probably Unconstitutional After All*, MEDIUM (Mar. 21, 2018), <https://medium.com/@TechFreedom/yes-sesta-is-probably-unconstitutional-after-all-d9f58ffb0927> [<https://perma.cc/4YRY-WRBE>].

128. *New Trial Set for Backpage Founders After Recent Mistrial*, ASSOCIATED PRESS (Oct. 5, 2021), <https://apnews.com/article/trials-money-laundering-4d6bb51607af13013243e41173b0ad07> [<https://perma.cc/72L8-PR4W>].

129. *Id.*

officials, one reason federal prosecutors have not brought more cases with charges under [FOSTA-SESTA] is that the law is relatively new,” and “prosecutors have had success using racketeering and money laundering charges against those who control such online platforms in the past.”¹³⁰

Congress enacted FOSTA-SESTA in 2018. Another act that is attempting to curtail § 230’s broad immunity was introduced in 2022—the EARN IT Act.¹³¹ Where FOSTA-SESTA dealt with sex trafficking laws, the EARN IT Act would create a virtually identical amendment to § 230 dealing with child sexual exploitation laws.¹³² The Act passed out of committee, expired at the end of the 117th Congress, and was recently reintroduced in April 2023.¹³³ It is unclear how effective the EARN IT Act will be (if passed) in comparison to FOSTA-SESTA. The Act would, however, create a National Commission on Online Child Sexual Exploitation Prevention with a directive to produce and recommend “best practices” for platforms “to prevent, reduce, and respond to the online sexual exploitation of children,” which is a departure from FOSTA-SESTA’s more simplistic amendment approach.¹³⁴

B. Regulation by Private Companies

There *is* a shift happening in the online content moderation sphere, but it is not clear that FOSTA-SESTA is to blame (or credit). Rather, it seems that private companies, such as payment processors and investment firms, are driving current shifts in platforms’ moderation practices.¹³⁵ This is the case for Pornhub: it was the coordinated withdrawal of the major financial companies—Visa, Mastercard, and Discover¹³⁶—that effectively pushed Pornhub to make changes.¹³⁷ This exodus led Pornhub to radically alter both its existing content and its upload, download, and verification processes.¹³⁸ In this

130. GAO Report, *supra* note 105, at 26–27.

131. EARN IT Act, S. 3538, 117th Cong. § 5 (2022).

132. *Id.*

133. *Id.*; Press Release, U.S. Senate Committee on the Judiciary, “Graham, Blumenthal Reintroduce EARN IT Act,” (April 19, 2023), <https://www.judiciary.senate.gov/press/rep/releases/graham-blumenthal-reintroduce-earn-it-act> [<https://perma.cc/AL6V-M6TB>].

134. *Id.*

135. Goodwin, *supra* note 111.

136. *Id.*

137. Samantha Cole, *Pornhub Announces ‘Biometric Technology’ to Verify Users*, VICE (Feb. 3, 2021, 3:35 AM), <https://www.vice.com/en/article/m7a4eq/pornhub-new-verification-policy-biometric-id> [<https://perma.cc/E3RJ-D5LK>].

138. *Id.*

way, what happens on the internet “is increasingly up to financial companies,”¹³⁹ and it is not only porn sites that are affected.

This approach is potentially beneficial in some respects, as private companies are detached from any one government and have a global reach beyond any one country’s legislative framework or court system. At the same time, private companies are just that—private—and are free to decide what forms of content they support and what resources they provide. Financial institutions certainly seem to be the primary driving force of change when it comes to the moderation of illegal content online, especially for adult content platforms, which may be indicative of general market preferences. At the same time, these private companies seem to take an all-or-nothing approach for adult content, which can be catastrophic for the platforms and legitimate performers involved.

Social networking website Tumblr was founded in 2007, and adult content was “pivotal” to its growth: “from erotic fanfiction to NSFW GIFs, sex creators flocked to the platform to safely post their content.”¹⁴⁰ This approach was successful: in 2013, Yahoo bought the platform for \$1.1 billion.¹⁴¹ But on November 16, 2018, Apple abruptly banned Tumblr’s app from the iOS App Store after the app’s database reportedly failed to filter out CSAM.¹⁴² In response, Tumblr opted to completely ban all adult content across the platform.¹⁴³ Creators and users worldwide mourned the end of Tumblr as they knew it, as the platform was “home to a myriad of sex-positive and body-positive blogs, in addition to indie porn blogs and curated archives that provide[d] something not found on Pornhub, YouPorn, or any of the other mainstream adult portals.”¹⁴⁴ Tumblr’s porn ban led to the platform’s “almost immediate fade into obscurity.”¹⁴⁵ Users left, traffic to the site

139. ECONOMIST, *supra* note 111.

140. Jennimai Nguyen, *Tumblr Died a Slow and Painful Death. Here’s How TikTok Can Avoid the Same Fate*, MASHABLE (Feb. 2, 2021), <https://mashable.com/article/tumblr-mistakes-tiktok-teen-creators> [<https://perma.cc/5E6V-8E2U>].

141. *Id.*

142. Jon Porter, *Tumblr Was Removed from Apple’s App Store Over Child Pornography Issues*, VERGE (Nov. 20, 2018, 3:29 AM), <https://www.theverge.com/2018/11/20/18104366/tumblr-ios-app-child-pornography-removed-from-app-store> [<https://perma.cc/W3QY-KAHZ>].

143. Shannon Liao, *Tumblr Will Ban All Adult Content on December 17th*, VERGE (Dec. 3, 2018, 11:26 AM), <https://www.theverge.com/2018/12/3/18123752/tumblr-adult-content-porn-ban-date-explicit-changes-why-safe-mode> [<https://perma.cc/39VN-XW6V>].

144. Shannon Liao, *Tumblr’s Adult Content Ban Means the Death of Unique Blogs that Explore Sexuality*, VERGE (Dec. 8, 2018, 11:00 AM), <https://www.theverge.com/2018/12/6/18124260/tumblr-porn-ban-sexuality-blogs-unique> [<https://perma.cc/5HWA-6ZVJ>].

145. Paige Leskin, *A Year After Tumblr’s Porn Ban, Some Users Are Still Struggling to Rebuild Their Communities and Sense of Belonging*, BUS. INSIDER, <https://www.businessinsider.com/tumblr-porn-ban-nsfw-flagged-reactions-fandom-art-erotica-communities-2019-8> (last updated Dec. 20, 2019, 12:23 PM) [<https://perma.cc/SW9E-SHBF>].

declined, and the platform was purchased in 2019 for less than \$3 million.¹⁴⁶

The fact that Tumblr flourished while allowing adult content,¹⁴⁷ even with reports of CSAM evading its automated moderation system¹⁴⁸, indicates that Tumblr users themselves had some tolerance for a margin of error within § 230's market-based approach. It was Apple, which is a step removed from the platform–user interaction, that made an executive decision to cut Tumblr off from the marketplace, potentially at its own expense.¹⁴⁹ The resulting departure of users and decline in the value of Tumblr¹⁵⁰ seems to indicate that no one, save potentially Apple, was happy with the outcome. Further, Tumblr's supposed solution to its dilemma was to develop an overly broad and comically unhelpful content moderation system—automated filtering mechanisms that flagged everything from design patents to Tumblr's own examples of acceptable content, which raised questions about whether it was even able to identify the CSAM it was designed to catch.¹⁵¹ In this case, regulation by private companies failed victims, disappointed users, and nearly bankrupted the platform itself, thus providing an inefficient model of regulation by the private sector.

Patreon has grappled with a similar issue. Patreon is an online platform that employs “a subscription-style payment model” to enable fans, or patrons, to “pay their favorite creators a monthly amount of their choice in exchange for exclusive access” to content.¹⁵² On June 21, 2018, Patreon informed Four Chambers, an ethical porn production company, that it would need to remove all nudity from its page by the end of the month.¹⁵³ Vex Ashley, the UK-based pornographer behind the project, was “confident that [FOSTA-SESTA was] to blame,”¹⁵⁴ but when Patreon began shutting down pages containing adult content, it

146. *Id.*

147. Nguyen, *supra* note 140.

148. Porter, *supra* note 142.

149. *Id.*

150. Nguyen, *supra* note 140.

151. *What Tumblr's Ban on 'Adult Content' Actually Did*, ELEC. FRONTIER FOUND., <https://www.eff.org/tossedout/tumblr-ban-adult-content> (last visited Feb. 19, 2023) [<https://perma.cc/J4K5-SUF3>].

152. *The Story of Patreon*, PATREON, <https://www.patreon.com/about> (last visited Feb. 19, 2023) [<https://perma.cc/8SH4-2ZJC>].

153. Jenavieve Hatch, *Anti-sex Work Law May Be Hitting Artists Who Rely on Crowdfunding*, HUFFINGTON POST (July 4, 2018, 5:46 AM), https://www.huffpost.com/entry/patreon-artists-sex-work-crowdfunding_n_5b3bf03fe4b05127cced65b1 [<https://perma.cc/E7MH-XDBQ>].

154. *Id.*

blamed its payment processors for the policy change.¹⁵⁵ Per a Patreon spokesperson, the site was “ramping up [its] proactive review of content on Patreon due to requirements from [its] payment partners,” changing its guidelines to make clear that “[y]ou can’t use Patreon to raise funds in order to produce pornographic material such as maintaining a website, funding the production of movies, or providing a private webcam session.”¹⁵⁶ Patreon has since struggled with its profitability, in part because of the content it chooses to support and in part because of its model for paying creators,¹⁵⁷ while creators like Vex Ashley must struggle with the realities of being deplatformed.

Patreon’s situation raises broader questions about the ability of private financial companies to effectively generate solutions to obscenities like CSAM and STC while also responding to the demands of the market. Start-ups like Patreon rely on venture capital firms for support, and these investors “seek out universities, endowments[,] and nonprofit institutions as backers of their funds.”¹⁵⁸ As such, many firms make agreements with their investors placing restrictions on the use of their funds, disallowing investments in areas “such as sex, tobacco[,] or historically illegal drugs” via contractual terms such as vice clauses.¹⁵⁹ Companies like Patreon require these investments to operate, and so the result is a heavily censored platform.

Payment processors are similarly risk-averse—PayPal, Visa, Mastercard, and Discover have all enacted policy changes that widely impact the adult content industry, with PayPal “bar[ring] people from using the service for transactions involving ‘certain sexually oriented materials or services.’”¹⁶⁰ Mastercard heightened its requirements for

155. Samantha Cole, *Patreon Is Suspending Adult Content Creators Because of Its Payment Partners*, VICE: MOTHERBOARD (June 28, 2018, 4:00 PM), <https://www.vice.com/en/article/vbqwwj/patreon-suspension-of-adult-content-creators> [https://perma.cc/2FH5-MNRV].

156. *Id.*

157. See Brandon Gomez, *Patreon CEO Says the Company’s Generous Business Model Is Not Sustainable as It Sees Rapid Growth*, CNBC (Jan. 23, 2019, 3:41 PM), <https://www.cnbc.com/2019/01/23/crowd-funding-platform-patreon-announces-it-will-pay-out-half-a-billion-dollars-to-content-creators-in-2019.html> [https://perma.cc/53ZR-QQYS].

158. Alex Konrad, *Inside OnlyFans’ Limited Venture Capital Options—And How VC Would Handle an OnlyFans 2.0*, FORBES (Aug. 23, 2021, 9:53 AM), <https://www.forbes.com/sites/alexkonrad/2021/08/23/inside-onlyfans-limited-venture-capital-options/> [https://perma.cc/4X3R-DNAG].

159. *Id.*

160. Massoud Hayoun, *PayPal Blocking Transactions of Porn Professionals*, AL JAZEERA AM. (Apr. 30, 2014, 5:30 PM), <http://america.aljazeera.com/articles/2014/4/30/adult-stars-paypalblockingpornprofessionalstransactions.html> [https://perma.cc/3MAN-EYVJ].

adult content platforms, requiring verification, content review processes, and complaint resolution and appeals processes.¹⁶¹

This risk aversion is understandable—Visa and Mastercard possess a “near-duopoly” on payment processing, making them “prime targets for protesters.”¹⁶²

Payment companies face a philosophical dilemma. “On one hand they try to be very open, accepting, willing to facilitate payments for whomever. They’re not taking any sort of political or moral stance,” says Lisa Ellis of MoffettNathanson, a research firm. “But on the other hand, they also feel like they have a very strong responsibility in making sure that they’re not aiding and abetting any sort of crime.”¹⁶³

This dilemma is especially fraught when it comes to adult content, which is both a legal issue and a moral issue (even for legal content) for many people. In 2019, Mastercard’s chairman said, “[i]f it is lawful, then we need to respect that transaction.”¹⁶⁴ This stance seems incongruous with the company’s subsequent blacklisting of Pornhub,¹⁶⁵ which supported many verified, legal adult filmmakers in addition to a host of problematic content.¹⁶⁶

Private companies’ ability to broadly regulate—systematically preventing legal sex workers from receiving payment via mainstream means across the internet as a whole—raises questions about the incentives driving private regulation. Perhaps § 230, both in its original form and as modified by FOSTA-SESTA, does not do enough to respond to the realities of CSAM and STC. But private industry’s blanket ban on supporting transactions related to adult material comes with the significant cost of keeping legal adult content producers, and consumers of legal pornography, out of the market entirely.

That said, payment processors are trending away from outright bans and towards policies with strict verification and content approval requirements, as indicated by Mastercard’s recent policy change.¹⁶⁷ In 2021, OnlyFans—another creator-driven start-up—seemed poised to go the same direction as Tumblr and Patreon but ultimately managed to

161. John Verdeschi, *Protecting Our Network, Protecting You: Preventing Illegal Adult Content on Our Network*, MASTERCARD.COM (Apr. 14, 2021), <https://www.mastercard.com/news/perspectives/2021/protecting-our-network-protecting-you-preventing-illegal-adult-content-on-our-network/> [<https://perma.cc/XD2H-GUVS>].

162. See ECONOMIST, *supra* note 111 (discussing the factors credit-card companies consider when creating guidelines for customers).

163. *Id.*

164. *Id.*

165. See Friedman, *supra* note 34 (detailing Mastercard’s termination of business with Pornhub).

166. See Cole, *supra* note 13 (discussing Pornhub’s efforts to verify content in response to backlash).

167. See Verdeschi, *supra* note 161.

retain its financial backers, payment processors, and its adult content creators.¹⁶⁸

The London-based OnlyFans is a content subscription service platform, resembling Patreon, that was founded in 2016.¹⁶⁹ The site allows adult performers to upload content from the comfort of their homes while charging fans a subscription fee for access, much like premium or paywalled content on Pornhub.¹⁷⁰

In 2020, when “all film production—adult or otherwise—shuttered during the pandemic,” OnlyFans exploded.¹⁷¹ Its revenue increased 540% through November 2020, the number of creators on the platform “quintupled to 1.6 million,” and “the total number of paying fans rose more than 500% to 82 million.”¹⁷² The platform even earned a shout-out from Beyoncé: “Hips TikTok when I dance / On that Demon Time, she might start an OnlyFans.”¹⁷³

Then, on August 19, 2021, OnlyFans announced it would soon ban sexually explicit videos starting in October—creators would only be allowed to post nude photos.¹⁷⁴ OnlyFans’ founder, Tim Stokely, blamed “unfair” treatment by banks for the change, saying: “[W]e had no choice—the short answer is banks.”¹⁷⁵ Then, mere days later—and as creators were beginning to leave the platform in droves—OnlyFans completely reversed its decision, announcing that it had “secured assurances necessary to support [its] diverse creator community and [had] suspended the planned October 1 policy change,” indicating that

168. See Jacob Bernstein, *OnlyFans Reverses Its Decision to Ban Explicit Content*, N.Y. TIMES, <https://www.nytimes.com/2021/08/25/style/onlyfans-ban-reversed.html> (last updated Sept. 14, 2021) [<https://perma.cc/2SQC-VTXN>].

169. See Thomas Brewster & David Dawkins, *The Shady, Secret History of OnlyFans’ Billionaire Owner*, FORBES (June 16, 2021, 6:30 AM), <https://www.forbes.com/sites/thomasbrewster/2021/06/16/the-shady-secret-history-of-onlyfans-billionaire-owner/?sh=31896d1c5c17> [<https://perma.cc/6ZAL-7NCC>].

170. See *id.* OnlyFans’ subscription model allows creators to set a price that fans can pay in order to access and view their content and acknowledges that creators retain the intellectual property rights in their content, which discourages fans from disseminating it for fear of legal action. See *Terms of Service*, ONLYFANS, <https://onlyfans.com/terms> (last visited Feb. 5, 2022) [<https://perma.cc/ZT85-6SDX>].

171. Brewster & Dawkins, *supra* note 169.

172. *Id.*

173. MEGAN THEE STALLION & BEYONCÉ, *Savage Remix (feat. Beyoncé)*, on GOOD NEWS (1501 Certified Ent. 2020).

174. Lucas Shaw, *OnlyFans to Bar Sexually Explicit Videos Starting in October*, BLOOMBERG (Aug. 19, 2021, 1:44 PM), <https://www.bloomberg.com/news/articles/2021-08-19/onlyfans-to-block-sexually-explicit-videos-starting-in-october> [<https://perma.cc/2T45-EVZG>].

175. Patricia Nilsson, *OnlyFans Founder Blames Banks for Ban on Porn*, FIN. TIMES (Aug. 24, 2021), <https://www.ft.com/content/7b8ce71c-a87a-440e-9f3d-58069ca0480b> [<https://perma.cc/DFC6-WQLK>].

the platform was able to either secure alternative funding or strike a compromise with its existing financial supporters.¹⁷⁶

The resolution of the OnlyFans turmoil might signify that market-based governance by financial companies has finally found the balance between increased responsibility for victims of CSAM and sex trafficking and the demand for legitimate adult content, which may indicate that it is a more tenable approach moving forward. The fears, however, remain the same: private companies are not held accountable the same way that the government is. The OnlyFans situation seems to have resulted in a positive outcome for all interests involved, but what about Pornhub, which still remains cut off from mainstream payment processors even after drastically altering its content moderation?¹⁷⁷

Market-based regulation is inherently ad hoc and thus far has either resulted in blanket bans on all adult content¹⁷⁸ or otherwise inconsistent policies across the platforms that have been specifically targeted.¹⁷⁹ It seems more likely that financial companies will prioritize profit without considering the other legitimate interests involved, unless widespread backlash causes them to reevaluate. For these reasons, market-based regulation by financial companies may not be the most efficient or equitable solution for combatting the problem of CSAM and STC online.

C. *The Wyden Amendment—Revising FOSTA-SESTA*

FOSTA-SESTA, as previously discussed, has not been effective in distributing legal liability for STC in a way that actually assists victims.¹⁸⁰ If private, market-based regulation is an ineffective solution to the problem, perhaps revising FOSTA-SESTA to improve its usefulness would render it more efficient. One potential model for its revision comes from Senator Wyden's proposed amendment.¹⁸¹

His amendment would have added the following language to FOSTA-SESTA:

The fact that a provider or user of an interactive computer service has undertaken any efforts (including monitoring and filtering) to identify, restrict access to, or remove

176. See Bernstein, *supra* note 168.

177. See *What Type of Payment Methods Are Accepted?*, PORNHUB HELP CTR., <https://help.pornhub.com/hc/en-us/articles/234692747-What-type-of-payment-methods-are-accepted> (last visited Feb. 5, 2023) [<https://perma.cc/5T3K-F5H4>].

178. See REUTERS, *supra* note 36.

179. See Bernstein, *supra* note 168 (discussing OnlyFans' ability to keep its financial partners); Cole, *supra* note 13 (stating that Visa and Mastercard refused to work with Pornhub even after Pornhub banned all unverified users from uploading content to the site).

180. See GAO REPORT, *supra* note 105, at 25–29.

181. Samples, *supra* note 100.

material the provider or user considers objectionable shall not be considered in determining the criminal or civil liability of the provider or user for any material that the provider or user has not removed or restricted access to.¹⁸²

FOSTA-SESTA's requirement of knowledge—that platforms may not knowingly assist, facilitate, or support sex trafficking—has been confusing to many, including the prosecutors who are meant to enforce the law.¹⁸³ Wyden's amendment would “explicitly distinguish[] moderation from facilitating criminal activity,”¹⁸⁴ which would encourage platforms to regulate effectively without motivating blanket bans on certain content for fear of being made liable for anything that does slip through the cracks. Further, this amendment could assist victims by preventing active facilitation of sex trafficking without running the risk of a constructive knowledge claim against platforms. After all, the reality of our vast and prolific internet means that CSAM and STC is routinely uploaded to all websites, not just those that host adult content—in 2019, Facebook removed 11.6 million pieces of content involving child nudity and sexual exploitation in just three months,¹⁸⁵ and yet these platforms are not being systematically demonetized by their payment processors or financial backers.

FOSTA-SESTA, in its current form, is not the effective tool its advocates claimed it to be.¹⁸⁶ It is possible that future prosecutors and courts will more frequently invoke the statute as it becomes better understood, but it is also possible that an amendment to FOSTA-SESTA or to § 230 would add much needed clarity, responding to the concerns of both financial services companies and the platforms themselves.¹⁸⁷ “If it is lawful, then we need to respect that transaction,” said Mastercard's chairman in 2019, but “[i]f it is something that is swimming against the tide of society, it's for the society to rise up and change the law.”¹⁸⁸

182. Mike Masnick, *Can SESTA Be Fixed?*, TECHDIRT (Mar. 19, 2018, 3:14 AM), <https://www.techdirt.com/articles/20180316/17175539438/can-sesta-be-fixed.shtml> [<https://perma.cc/Z3JE-VKG2>].

183. *Id.*

184. Samples, *supra* note 100.

185. Michael Nuñez, *Facebook and Instagram Removed More than 12 Million Pieces of Child Porn*, FORBES (Nov. 13, 2019, 2:29 PM), <https://www.forbes.com/sites/mnunez/2019/11/13/facebook-instagram-child-porn-removal-mark-zuckerberg-ook-and-instagram-was-wider-than-believed/?sh=5f986c112158> [<https://perma.cc/R8KD-9U5A>].

186. See GAO REPORT, *supra* note 105.

187. See ECONOMIST, *supra* note 111.

188. *Id.*

D. Models from Intellectual Property

Because the legal and financial structures governing adult content platforms have transformed dramatically within the last five years, legal scholarship on the matter is limited; however, legal academia has extensively analyzed the problem of liability for intellectual property infringement online, and models from that arena may provide useful solutions for the problem at hand.

Congress enacted The Digital Millennium Copyright Act (“DMCA”) in 1998 both to implement two international treaties signed by the United States in 1996 and “to provide limitations on copyright liability relating to material online.”¹⁸⁹ To accomplish this latter aim, the DMCA added § 512 to Title 17 of the United States Code, which comprises federal copyright law.¹⁹⁰

Section 512’s “Safe Harbor” provision mirrors much of § 230—which itself specifically provides that “[n]othing in this section shall be construed to limit or expand any law pertaining to intellectual property”¹⁹¹—except that § 512 provides immunity from claims of copyright infringement if (and only if) online service providers meet the requirements it imposes.¹⁹² Specifically, § 512 creates a notice-based liability model:¹⁹³

Its “immunity” provision protects service providers from monetary liability due to third-party copyright violations as long as (1) the service provider is unaware of the alleged copyright infringement on its website or service and (2) the service provider adheres to the “take down” provision by promptly, upon notice, removing or blocking access to the allegedly infringing material. Moreover, because the burden is on the complaining party to give notice, a service provider is not required to actively monitor its website or internet service for copyright violations.¹⁹⁴

Section 512 “empowers copyright owners” to submit takedown requests, which “bypasses judicial oversight over copyright disputes” and is a key tool of “content providers for managing online infringement because it is fast, cheap, and efficient.”¹⁹⁵ Section 512’s notice-and-takedown model of liability has “served as the template for the enactment of similar defenses” worldwide,¹⁹⁶ indicating the existing value of such a model.

189. S. REP. NO. 105-190, at 1–2 (1998).

190. Digital Millennium Copyright Act of 1998 § 202, 17 U.S.C. § 512.

191. 47 U.S.C. § 230(e)(2).

192. 17 U.S.C. § 512.

193. Volpe, *supra* note 113, at 617.

194. *Id.*

195. Daniel Seng, *The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices*, 18 VA. J.L. & TECH. 369, 376 (2014).

196. *Id.* at 373–74.

Rather than continually chipping away at § 230's blanket protection of platforms from liability,¹⁹⁷ it may be more efficient to rethink the statutory model of internet liability for illegal or obscene content in much the same way the statutory model for copyright infringement liability was revised by the DMCA. The internet has enabled the rapid dissemination of both copyrighted material and illegal sexual imagery; perhaps the same model that addresses the proliferation of copyrighted material can address the proliferation of CSAM and STC.

Financial companies are already taking guidance from a notice-and-takedown model of liability in their revised guidelines for moderation, such as Mastercard's new terms for adult content moderation on the websites it supports.¹⁹⁸ Mastercard's new guidelines require platforms to implement a "[c]omplaint resolution process that addresses illegal or nonconsensual content within seven business days" as well as an "[a]ppeals process allowing for any person depicted to request their content be removed."¹⁹⁹ These guidelines are virtually identical to the requirements DMCA imposes for copyright infringement.²⁰⁰ Such a model, if adopted by payment processors more broadly, could provide a suitable amount of agency and responsiveness for victims without unduly impacting the online adult content economy as a whole.

III. SOLUTION

Instead of enacting piecemeal amendments narrowing § 230's blanket immunity for specific areas of concern²⁰¹ or leaving regulation in the hands of private companies²⁰² with limited accountability to sex workers or consumers of their content, Congress should create a universal solution to the illegal content moderation problem via statute. Congress should model this universal solution on the DCMA's notice-and-takedown model of liability. Much like how the DMCA's model balances the needs of platforms, third parties, and copyright owners,²⁰³ a comparable model of statutory liability for the illegal distribution of CSAM and STC would respond to the needs of both victims and

197. See 47 U.S.C. § 230(e)(5); EARN IT Act, S. 3538, 117th Cong. § 5 (2022).

198. Verdeschi, *supra* note 161.

199. *Id.*

200. 17 U.S.C. § 512.

201. See, e.g., 47 U.S.C. § 230(e)(5); S. 3538.

202. ECONOMIST, *supra* note 111.

203. See Seng, *supra* note 195, at 376 (describing the DMCA's notice-and-takedown process).

platforms without undermining the foundations of the free and open internet.²⁰⁴

The proliferation of illegal content online poses complex questions of liability and regulatory authority, requiring a balancing of interests. Before § 230, courts imposed strict liability on online platforms for content posted on their site.²⁰⁵ The *Stratton Oakmont* decision meant that if a website conducted even some moderation of third-party content, it became liable for everything it hosted.²⁰⁶ The result was not more stringent moderation but a complete abandonment of any attempt to regulate.²⁰⁷ Section 230's original formulation created broad immunity for platforms and facilitated the development of the internet as we know it.²⁰⁸

As the modern internet developed, however, the sheer quantity of content uploaded daily has changed the landscape of content moderation—for many platforms, it is simply not economically feasible for a team of moderators to view every piece of content before it is uploaded. A strict liability model therefore seems untenable and undesirable, not to mention impractical.

At the same time, selectively carving out areas of § 230 immunity seems unwise. FOSTA-SESTA has yet to result in any successful prosecutions,²⁰⁹ but its passage inspired several other proposed bills, such as the EARN IT Act,²¹⁰ that would continue to chip away at the immunity that enables the internet to function. This ad hoc approach is not only inefficient but has resulted in a confusing jumble of statutory provisions: § 230's Good Samaritan provision remains unchanged in its explicit grant of broad, unconditional immunity for platforms hosting third-party content, but FOSTA-SESTA adds to an ever-growing list of exceptions to that immunity—thus rendering it conditional after all.²¹¹

Mastercard's new requirements for adult content platforms²¹² are the most promising of the private sector approaches. Mastercard's requirements include:

204. See, e.g., Engelberg, *supra* note 9.

205. See, e.g., *id.*; Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008).

206. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *3–4 (N.Y. Sup. Ct. May 24, 1995).

207. *Id.*; Engelberg, *supra* note 9.

208. Engelberg, *supra* note 9.

209. GAO REPORT, *supra* note 105.

210. EARN IT Act, S. 3538, 117th Cong. § 5 (2022).

211. See 47 U.S.C. § 230.

212. Verdeschi, *supra* note 161.

Documented age and identity verification for all people depicted and those uploading the content...[c]ontent review process prior to publication...[c]omplaint resolution process that addresses illegal or nonconsensual content within seven business days...[a]ppeals process allowing for any person depicted to request their content be removed.²¹³

These policies are very similar to the DCMA's notice-and-takedown requirements, particularly the provision that requires platforms to "[r]espond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement."²¹⁴ Furthermore, these requirements avoid a blanket ban while holding platforms to a higher—but still reasonable—standard for content moderation and verification.

The problem with this approach is that it would not be effective or efficient to persuade other private financial companies to adopt terms similar to Mastercard. Because of this inconsistency, online platforms dependent on these financial services firms would have to adapt to each firm's inconsistent moderation policies or risk losing that firm's support. Rather, the best legal solution would be to revise the statutory grant of immunity itself, which would mitigate the need for private companies to conduct ad hoc regulation while providing more consistent results for platforms and recourse for victims.

A statutory solution approximating the DMCA would grant online platforms immunity from liability for illegal content that third parties post to their platforms²¹⁵ with key stipulations, each aimed at ensuring a baseline level of platform moderation. First, the platform would only maintain its protection from liability as long as it is not aware of or actively engaging in the hosting or dissemination of the illegal content.²¹⁶ Additionally, to maintain its protection from liability, the platform must: (i) adopt and implement a policy that provides for the termination of account holders who are repeat infringers, (ii) facilitate efforts by victims to identify and remove illegal sexual content, and (iii) establish a notice, takedown, and counter notice process.²¹⁷ This latter point is crucial. It would require platforms to designate agents to process takedown notices, follow the statutorily prescribed notification process by promptly removing illegal material once notified, and establish a counter notice process to manage false reports.²¹⁸

213. *Id.*

214. 17 U.S.C. § 512.

215. Note that this is what Section 230, as originally formulated, does. See 47 U.S.C. § 230.

216. This is essentially the goal of FOSTA-SESTA as far as sex trafficking is concerned. See 47 U.S.C. § 230(e)(5).

217. See 17 U.S.C. § 512.

218. See *id.*

This solution would be powerful not only because it would create more standardized and predictable outcomes for all involved, but because it already exists. Platforms like Pornhub, Facebook, and Instagram already must comply with the DMCA and its international equivalents in the copyright context. Many of these platforms could readily adapt their established notice-and-takedown protocols for copyright infringement to CSAM, STC, and other illegal content.

Under the DMCA, copyright owners can issue takedown requests themselves, but they are instead frequently handled by a designated agent of the copyright owner; under these arrangements, an independent company or lawyer submits takedown requests on the copyright owner's behalf.²¹⁹ As applied to illegal material, takedown requests could be issued by victims, their families, or third parties authorized by the victim. Congress could also task an organization such as the National Center for Missing and Exploited Children with issuing takedown requests on behalf of the public.

Critics have described the DMCA's notice-and-takedown provision as an anticompetitive tool, enabling rival companies to harm competitors through fraudulent takedown requests.²²⁰ Though this criticism is valid in the copyright context, it likely does not translate to the context of illegal sexual material—there is less incentive for someone to make false claims regarding CSAM and STC. Furthermore, limiting the parties authorized to issue takedown notices to victims and a finite list of authorized agents would reduce the likelihood of false or spurious takedown requests. Finally, account verification ensures that verified content posted to a legal sex worker's verified account could be nearly takedown proof or at least subject to an additional layer of scrutiny before removal. This would protect the interests of legitimate sex workers and shield them from any anticompetitive takedown requests.

The time is ripe to reevaluate § 230's nearly unlimited grant of immunity. Congress seems willing to make considerable statutory revisions to § 230, as the passage of FOSTA-SESTA²²¹ and the attempted introduction of the EARN IT Act²²² demonstrate. Regrettably, Congress is offering these revisions on an ad hoc basis, and

219. See *The DMCA Notice and Takedown Process*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/the-digital-millennium-copyright-act-dmca/dmca-notice-takedown-process/> (last visited Feb. 23, 2023) [<https://perma.cc/2C7G-E59S>] (explaining DMCA notice-and-takedown procedures).

220. See, e.g., *Takedown Hall of Shame*, ELEC. FRONTIER FOUND., <https://www.eff.org/takedowns> (last visited Feb. 23, 2023) [<https://perma.cc/S563-VM2E>] (documenting “[b]ogus copyright and trademark complaints [threatening] creative expression”).

221. See 47 U.S.C. § 230(e)(5).

222. See EARN IT Act, S. 3538, 117th Cong. § 5 (2022).

these revisions appear unlikely to improve outcomes for victims of CSAM and STC.²²³ A statutory revision to § 230 immunity resembling the DMCA's notice-based allocation of liability targeted towards illegal content such as CSAM and STC would more effectively address the growing issue of illegal content online. It would give more tangible recourse to victims without disenfranchising large numbers of consensual, legitimate sex workers in the process.

CONCLUSION

As recent events involving Pornhub²²⁴ and OnlyFans²²⁵ have demonstrated, content moderation online requires a complex balancing of interests, especially when both legal pornography and illegal sexual material exists on the same platform. With ineffective legislation in place²²⁶ to prevent the proliferation of CSAM and STC online, private actors are making tough decisions about the moderation of such content, to varying results. As this Note has discussed, several possible solutions exist to address this problem, ranging from amending § 230 yet again²²⁷ to relying on the current market-based regulatory scheme as imposed by private actors.²²⁸ The most effective solution would be a reconsideration of § 230's blanket grant of immunity, with careful thought given to the importance of immunity in the creation of the free internet as it exists today. A statutory revision resembling the DMCA's notice-and-takedown model for copyright infringement²²⁹ would fit into the existing statutory scheme without disruption, as platforms already must conform with the DMCA. Creating a statutory provision that essentially applies the DMCA's Safe Harbor provision to illegal content

223. See GAO REPORT, *supra* note 105.

224. See, e.g., Cole, *supra* note 13.

225. See Bernstein, *supra* note 168.

226. See 47 U.S.C. § 230(e)(5); GAO REPORT, *supra* note 105.

227. See Samples, *supra* note 100; S. 3538.

228. ECONOMIST, *supra* note 111.

229. See 17 U.S.C. § 512.

such as CSAM and STC content would provide the necessary recourse for victims of such content without entirely disenfranchising legal, consensual sex workers in the adult content industry.

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