



The Honorable Lindsay Graham  
Chairman  
Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510

The Honorable Diane Feinstein  
Ranking Member  
Senate Judiciary Committee  
Hart Senate Office Building  
Washington, DC 20510

**Re: S. 4632, The Online Content Policy Modernization Act**

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Committee:

The Electronic Frontier Foundation (EFF) writes to express its concern that the Online Content Policy Modernization Act both violates the First Amendment and creates a haven for copyright trolls. We urge the Senate Judiciary Committee not to advance the bill.

EFF is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has over 30,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

**The Online Content Policy Moderation Act punishes online services for exercising their First Amendment rights to decide for themselves the type of content they want to host and in what form.<sup>1</sup>**

The Online Content Policy Modernization Act gives platforms an untenable ultimatum: allow misinformation or other objectionable user-generated content to flourish on their services or lose legal protections under 47 U.S.C. § 230 (“Section 230”) when they exercise their First Amendment rights to moderate users’ speech.

Under the current law, Section 230 protects services from liability for moderating user-generated content, or deleting posts the platform considers objectionable. That’s true even though those posts can’t be censored by the *government*, due to the First Amendment.

Title II of the OCPM Act would amend this section to revoke this protection except where the platform has an “objectively reasonable belief” that the content falls into a narrow list of categories. More importantly, Title II would create new civil liability if the platform “editorializes or affirmatively and substantively modifies” its users’ content. Effectively, this means that by flagging disinformation, platforms risk expensive lawsuits.

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<sup>1</sup> *Trump Executive Order Misreads Key Law Promoting Free Expression Online and Violates the First Amendment* (May 28, 2020), <https://www.eff.org/deeplinks/2020/05/trump-executive-order-misreads-key-law-promoting-free-expression-online-and>.

The First Amendment prohibits Congress from directly interfering with intermediaries' decisions regarding what user-generated content they host and how they moderate that content. The OCPM Act seeks to coerce the same result by punishing services that exercise their rights. This is an unconstitutional condition. The government cannot condition Section 230's immunity on interfering with intermediaries' First Amendment rights.<sup>2</sup>

### **Content Moderation is fundamentally broken, but more liability won't fix it.**

Congress is right to be concerned with content moderation practices. But, as we explained in our amicus brief in *Prager University v. Google*, the answer to bad content moderation practice is not more government regulation, or more liability for platforms.<sup>3</sup>

As a practice, content moderation relies on people in far-flung (and almost always economically less well-off) locales to make decisions about the content users see. Most major platforms outsource the work to companies abroad, where some workers are reportedly paid as little as \$6 a day and others report traumatic working conditions.<sup>4 5</sup>

Companies have tried replacing human moderators with automation technology and that has resulted in even more mistakes. Automated technology doesn't work at scale; it can't read nuance in speech the way humans can, and for some languages it barely works at all.<sup>6</sup> Over the years, we've seen the use of automation result in numerous wrongful takedowns.<sup>7</sup> On top of that, these automated tools are usually secret, meaning errors, including false positives, may never see the light of day.

In short: content moderation is complicated and platforms routinely make mistakes. Facebook, Twitter, Google, and others have made, and will continue to make, wrong decisions to take down content, and we will continue to call them out for it.<sup>8</sup>

Yet the OCPM Act's definition of "good faith" moderation sets up all platforms for

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<sup>2</sup> EFF *EARN IT Act First Amendment Letter to SJC* (March 9, 2020), <https://www.eff.org/document/eff-earn-it-act-first-amendment-letter-sjc>.

<sup>3</sup> EFF's *Amicus Brief in Prager University v. Google* (November 7, 2018), <https://www.eff.org/document/prager-university-v-google-eff-amicus-brief>.

<sup>4</sup> Reuters. *Some Facebook content reviewers in India complain of low pay, high pressure* (February 28, 2019), <https://www.reuters.com/article/us-facebook-content-india-feature/some-facebook-content-reviewers-in-india-complain-of-low-pay-high-pressure-idUSKCN1QH15I>.

<sup>5</sup> The Verge, *The Trauma Floor: The secret lives of Facebook moderators in America* (February 25, 2019), <https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona>.

<sup>6</sup> Reuters. *U.N. investigators cite Facebook role in Myanmar crisis* (March 12, 2020), <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN>

<sup>7</sup> For a list of uneven special moderation enforcement and content takedowns, see EFF's takedowns page: <https://www.eff.org/tossedout>.

<sup>8</sup> The Santa Clara Principles, <https://santaclaraprinciples.org/>

failure. The Act demands that services execute their own policies flawlessly on penalty of losing Section 230's protections. Title II would no longer allow a platform to make any mistakes in their moderation - if a platform restricts some user content for violating services terms but doesn't do it to others with similar content, they are no longer acting in "good faith."

But requiring perfect moderation practices to avoid liability will result in more spam, more disinformation and "fake news," and more lawsuits against websites, both large and small.

**New copyright courts would just enable copyright trolls.**

The OCPM Act also revives and incorporates the CASE Act. This bill would create a new Washington D.C.-based quasi-court that will allow for unprecedented lawsuits to be filed against Internet users for everyday activity. The new "Copyright Claims Board" will be able to fine people up to \$30,000, yet doesn't have proper court notice requirements or due process for defendants. No less disturbing, the bill allows an ultra-fast proceeding for cases of \$5,000 or less, which can be heard by a single "Claims Officer." The determinations of this copyright quasi-court can't be appealed.

The bill won't help the battle against copyright infringers, since sophisticated infringers already easily avoid litigation. The CASE Act will be a bonanza for "copyright trolls," who, in the words of a U.S. Magistrate Judge, file infringement lawsuits "as a profit-making scheme rather than a deterrent."<sup>9</sup> Using the threat of statutory damages, copyright trolls are able to demand cash settlements priced below the cost of defending oneself.

Congress should avoid creating new incentives for the abuse and exploitation of individual Internet users by unscrupulous litigation businesses. This bill, which passed the House without any debate or a single hearing, is far overdue for real scrutiny.

The Online Content Policy Modernization Act is fundamentally flawed, and the Senate Judiciary Committee should not advance this bill.

Sincerely,

India McKinney  
Director of Federal Affairs  
[india@eff.org](mailto:india@eff.org)

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<sup>9</sup> Malibu Media, LLC v. John Doe, No. 8:15-cv-3185, ECF No. 36, Report and Recommendation (D. Md. Jan. 5, 2018)