

Before the
Federal Communications Commission
Washington, D.C.

In the matter of

Section 230 of the Communications Act
of 1934

RM-11862

**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the Federal Communications Commission (FCC)'s August 3, 2020 Public Notice,¹ the Computer & Communications Industry Association (CCIA)² submits the following comments. By requesting that the FCC regulate based on Section 230, NTIA has acted beyond the scope of its legal authority. Granting this request would similarly exceed the authority delegated to the FCC. The FCC has no role in regulating speech on the Internet, and NTIA's proposed narrowing of the phrase "otherwise objectionable" would lead to the proliferation of objectionable content online.

I. Federal Agencies Must Act Within the Bounds of Their Statutory Grant of Authority

On May 28, 2020, the Administration issued an Executive Order on "Preventing Online Censorship,"³ which directed NTIA to file a petition for rulemaking with the FCC requesting that the FCC expeditiously propose regulations to clarify elements of 47 U.S.C. § 230. As an independent government agency,⁴ the FCC is not required to adhere to the directives of the

¹ Public Notice, Consumer & Governmental Affairs Bureau – Petition for Rulemakings Filed, Report No. 3157 (Aug. 3, 2020), available at <https://docs.fcc.gov/public/attachments/DOC-365914A1.pdf>.

² The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 45 years, to promoting innovation and preserving full, fair and open competition throughout our industry. Our members employ more than 1.6 million workers and generate annual revenues in excess of \$870 billion. A list of CCIA members is available at <https://www.copianet.org/members>.

³ Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020), available at <https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/>.

⁴ Dissenting Statement of Commissioner Robert M. McDowell, Re: Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices, Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management," File No. EB-08-IH-1518, WC Docket No. 07-52 (Aug. 20, 2008) ("We are not part of the executive, legislative or judicial branches of government, yet we have quasi-executive, -legislative and -judicial powers."), available at <https://docs.fcc.gov/public/attachments/FCC-08-183A6.pdf>; see also Harold H. Bruff, *Bringing the Independent*

Executive branch. By issuing this Executive Order, the President has taken the extraordinary step of directing NTIA to urge the FCC, an independent government agency, to engage in speech regulation that the President himself is unable to do.

As explained below, NTIA is impermissibly acting beyond the scope of its authority because an agency cannot exercise its discretion where the statute is clear and unambiguous, and the statute and legislative history are clear that the FCC does not have the authority to promulgate regulations under Section 230.

A. NTIA Is Acting Beyond Its Authority

NTIA’s action exceeds what it is legally authorized to do. NTIA has jurisdiction over telecommunications⁵ and advises on domestic and international telecommunications and information policy. NTIA is charged with developing and advocating policies concerning the regulation of the telecommunications industry, including policies “[f]acilitating and contributing to the full development of competition, efficiency, and the free flow of commerce in domestic and international telecommunications markets.”⁶ Nowhere does the statute grant NTIA jurisdiction over Internet speech. When Congress has envisioned a regulatory role for NTIA beyond its established telecommunications function, it has done so explicitly.⁷ Therefore, NTIA’s development of a proposed national regulatory policy for Internet speech is outside the scope of NTIA’s Congressionally-assigned responsibilities. Accordingly, the very impetus for this proceeding is an organ of the Administration acting beyond the scope of its authority.

B. An Agency Cannot Exercise Its Discretion Where the Statute Is Clear and Unambiguous

Even worse, NTIA’s *ultra vires* action involves a request that another agency exceed its authority. NTIA’s petition either misunderstands or impermissibly seeks to interpret Section 230 because it requests the FCC to provide clarification on the unambiguous language in 47 U.S.C. § 230(c)(1) and § 230(c)(2). Specifically, NTIA’s petition asks for clarification on the terms “otherwise objectionable” and “good faith.” The term “otherwise objectionable” is not unclear because of the applicable and well-known canon of statutory interpretation, *ejusdem generis*, that

Agencies in from the Cold, 62 Vand. L. Rev. En Banc 62 (Nov. 2009), available at https://www.supremecourt.gov/opinions/URLs_Cited/OT2009/08-861/Bruff_62_Vanderbilt_Law_Rev_63.pdf (noting the independent agencies’ independence from Executive interference).

⁵ 47 U.S.C. § 902(b).

⁶ 47 U.S.C. §§ 901(c)(3), 902(b)(2)(I).

⁷ See, e.g., 17 U.S.C. § 1201(a)(1)(C) (providing a rulemaking function which articulates a role for “the Assistant Secretary for Communications and Information of the Department of Commerce”, which is established as the head of NTIA under 47 U.S.C. § 902(a)(2)).

the general follows the specific. Propounding regulations regarding the scope of “good faith” would confine courts to an inflexible rule that would lend itself to the kind of inflexibility that was not intended by the original drafters of the statute.⁸ Courts have consistently held that Section 230 is clear and unambiguous, with the Ninth Circuit noting that “reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition” and there is a “consensus developing across other courts of appeals that § 230(c) provides broad immunity. . . .”⁹

Under *Chevron*, when a statute is clear and unambiguous an agency cannot exercise discretion but must follow the clear and unambiguous language of the statute.¹⁰ The Administration cannot simply, because it may be convenient, declare a statute to be unclear and seek a construction that is contrary to the prevailing law and explicit Congressional intent.

C. The FCC Does Not Have the Authority to Issue Regulations Under Section 230

Neither the statute nor the applicable case law confer upon the FCC any authority to promulgate regulations under 47 U.S.C. § 230. The FCC has an umbrella of jurisdiction defined by Title 47, Chapter 5. That jurisdiction has been interpreted further by seminal telecommunications cases to establish the contours of the FCC’s authority.¹¹

Title 47 is unambiguous about the scope of this authority and jurisdiction. The FCC was created “[f]or the purpose of regulating interstate and foreign commerce in *communication by wire and radio*”¹² and “[t]he provisions of this chapter shall apply to all interstate and foreign

⁸ 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (“We want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see. . . . We can go much further, Mr. Chairman, than blocking obscenity or indecency, whatever that means in its loose interpretations. We can keep away from our children things not only prohibited by law, but prohibited by parents.”).

⁹ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (citing *Green v. America Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000); *Zeran v. America Online*, 129 F.3d 327, 328-29 (4th Cir. 1997)); see also *Fair Housing Coun. of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1177 (9th Cir. 2008) (McKeown, J., concurring in part) (“The plain language and structure of the CDA unambiguously demonstrate that Congress intended these activities — the collection, organizing, analyzing, searching, and transmitting of third-party content — to be beyond the scope of traditional publisher liability. The majority’s decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the Internet.”) (*emphasis added*).

¹⁰ *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

¹¹ See, e.g., *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

¹² 47 U.S.C. § 151 (*emphasis added*).

communication by wire or radio”.¹³ The statute does not explicitly envision the regulation of online speech. When the FCC has regulated content, like the broadcast television retransmission rule, the fairness doctrine, and equal time and other political advertising rules, it has involved content from broadcast transmissions, which is essential to the FCC’s jurisdiction. What NTIA proposes is not included in the scope of the FCC’s enabling statute, which only gives the FCC the following duties and powers: “The Commission may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent with this chapter*, as may be necessary *in the execution of its functions*.¹⁴ Additionally, Section 230(b)(2) explicitly provides that the Internet should be “unfettered by Federal or State regulation.”¹⁵ Even the legislative history of 47 U.S.C. § 230, including floor statements from the sponsors, demonstrates that Congress explicitly intended that the FCC should not be able to narrow these protections, and supports “prohibiting the FCC from imposing content or any regulation of the Internet.”¹⁶ Indeed, the FCC’s powers have regularly been interpreted narrowly by courts.¹⁷

The FCC’s 2018 Restoring Internet Freedom Order (the Order),¹⁸ reaffirms that the FCC is without authority to regulate the Internet as NTIA proposes. In the Order, the FCC said it has no authority to regulate “interactive computer services.”¹⁹ Although the FCC considered Section 230 in the context of net neutrality rules, its analysis concluded that Section 230 renders further regulation unwarranted.²⁰ If the FCC had sufficiently broad jurisdiction over Internet speech under Section 230 to issue NTIA’s requested interpretation, litigation over net neutrality, including the *Mozilla* case, would have been entirely unnecessary. As *Mozilla* found, agency

¹³ 47 U.S.C. § 152 (*emphasis added*).

¹⁴ 47 U.S.C. § 154(i) (*emphases added*).

¹⁵ 47 U.S.C. § 230(b)(2).

¹⁶ H.R. Rep. No. 104-223, at 3 (1996) (Conf. Rep.) (describing the Cox-Wyden amendment as “protecting from liability those providers and users seeking to clean up the Internet and prohibiting the FCC from imposing content or any regulation of the Internet”); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (rebuking attempts to “take the Federal Communications Commission and turn it into the Federal Computer Commission”, because “we do not wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet”).

¹⁷ See, e.g., *Am. Library Ass’n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005); *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

¹⁸ Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018), available at https://transition.fcc.gov/Daily_Releases/Daily_Business/2018/db0104/FCC-17-166A1.pdf.

¹⁹ *Id.* at 164-66.

²⁰ *Id.* at 167 and 284.

“discretion is not unlimited, and it cannot be invoked to sustain rules fundamentally disconnected from the factual landscape the agency is tasked with regulating.”²¹

The D.C. Circuit explained in *MPAA v. FCC* that the FCC can only promulgate regulations if the statute grants it authority to do so.²² There is no statutory grant of authority as Section 230 does not explicitly mention the FCC, the legislative intent of Section 230 does not envision a role for FCC, and the statute is unambiguous. As discussed above, the FCC lacks authority to regulate, and even if it had authority, the statute is unambiguous and its interpretation would not receive any deference under *Chevron*.

II. The FCC Lacks Authority to Regulate The Content of Online Speech

Even if the FCC were to conclude that Congress did not mean what it explicitly said in Section 230(b)(2), regarding preserving an Internet “unfettered by Federal or State regulation”,²³ NTIA’s petition asks the FCC to engage in speech regulation far outside of its narrow authority with respect to content. Moreover, NTIA’s request cannot be assessed in isolation from the Administration’s public statements. It followed on the President’s claim, voiced on social media, that “Social Media Platforms totally silence conservatives voices.”²⁴ The President threatened that “[w]e will strongly regulate, or close them down, before we can ever allow this to happen.”²⁵ NTIA’s petition must therefore be analyzed in the context of the President’s threat to shutter American enterprises which he believed to disagree with him.

Within that context, NTIA’s claim that the FCC has expansive jurisdiction — jurisdiction Commission leadership has disclaimed — lacks credibility. When dissenting from the 2015 Open Internet Order, which sought to impose limited non-discrimination obligations on telecommunications infrastructure providers with little or no competition, FCC Chairman Pai characterized the rule as “impos[ing] intrusive government regulations that won’t work to solve a problem that doesn’t exist using legal authority the FCC doesn’t have”.²⁶ It is inconsistent to contend that the FCC has no legal authority to impose limited non-discrimination obligations on infrastructure providers operating under the supervision of public service and utilities

²¹ *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, J., concurring).

²² *Motion Picture Ass’n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).

²³ 47 U.S.C. § 230(b)(2).

²⁴ Elizabeth Dwoskin, *Trump lashes out at social media companies after Twitter labels tweets with fact checks*, Wash. Post (May 27, 2020), <https://www.washingtonpost.com/technology/2020/05/27/trump-twitter-label/> (orthography in original).

²⁵ *Id.*

²⁶ Dissenting Statement of Commissioner Ajit Pai, Re: Protecting and Promoting the Open Internet, GN Docket No. 14-28, available at <https://www.fcc.gov/document/fcc-releases-open-internet-order/pai-statement>, at 1.

commissions, while also arguing that the FCC possesses authority to enact retaliatory content policy for digital services whose competitors are a few clicks away.

The FCC has an exceptionally limited role in the regulation of speech, and the narrow role it does possess is constrained by its mission to supervise the use of scarce public goods. As the Supreme Court explained in *Red Lion Broadcasting Co. v. FCC*, whatever limited speech regulation powers the FCC possesses are rooted in “the scarcity of radio frequencies.”²⁷ No such scarcity exists online.

Rather than engaging with the precedents that narrowly construe the FCC’s role in content policy, NTIA’s petition relies upon a criminal appeal, *Packingham v. North Carolina*, in asserting that “[t]hese platforms function, as the Supreme Court recognized, as a 21st century equivalent of the public square.”²⁸ But the Supreme Court did not recognize this. The language NTIA quotes from *Packingham* presents the uncontroversial proposition that digital services collectively play an important role in modern society. If there were any doubt whether the *dicta* in *Packingham*, a case which struck down impermissible government overreach, could sustain the overreach here, that doubt was dispelled by *Manhattan Community Access Corp. v. Halleck*.²⁹ In *Halleck*, the Court held that “[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor.”³⁰

III. NTIA’s Proposal Would Promote Objectionable Content Online

As discussed, neither NTIA nor the FCC have the authority to regulate Internet speech. Assuming arguendo, the FCC did have the authority, NTIA’s proposed regulations “interpreting” Section 230 are unwise. They would have the effect of promoting various types of highly objectionable content not included in NTIA’s proposed rules by discouraging companies from removing lawful but objectionable content.³¹

Section 230(c)(2)(A) incentivizes digital services to “restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively

²⁷ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

²⁸ Petition for Rulemaking of the Nat’l Telecomms. & Info. Admin. (July 27, 2020), available at https://www.ntia.gov/files/ntia/publications/ntia_petition_for_rulemaking_7.27.20.pdf (hereinafter “NTIA Petition”), at 7, note 21 (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017)).

²⁹ *Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

³⁰ *Id.* at 1930.

³¹ Matt Schruers, *What Is Section 230’s “Otherwise Objectionable” Provision?*, Disruptive Competition Project (July 29, 2020), <https://www.project-disco.org/innovation/072920-what-is-section-230s-otherwise-objectionable-provision/>.

violent, harassing, or otherwise objectionable.” NTIA, however, would have the term “otherwise objectionable” interpreted to mean “any material that is *similar in type* to obscene, lewd, lascivious, filthy, excessively violent, or harassing materials”³² — terms that NTIA’s proposed rules also define narrowly — and confine harassment to “any specific person.”

Presently, a digital service cannot be subject to litigation when, for example, it determines that the accounts of self-proclaimed Nazis engaged in hate speech are “otherwise objectionable” and subject to termination, consistent with its Terms of Service. Digital services similarly remove content promoting racism and intolerance; advocating animal cruelty or encouraging self-harm, such as suicide or eating disorders; public health-related misinformation; and disinformation operations by foreign agents, among other forms of reprehensible content. Fitting these crucial operations into NTIA’s cramped interpretation of “otherwise objectionable” presents a significant challenge.

Under NTIA’s proposed rules, digital services therefore would be discouraged from acting against a considerable amount of potentially harmful and unquestionably appalling content online, lest moderating it lead to litigation. Avoiding this scenario was one of the chief rationales for enacting Section 230.³³

The term “otherwise objectionable” foresaw problematic content that may not be illegal but nevertheless would violate some online communities’ standards and norms. Congress’s decision to use the more flexible term here acknowledged that it could not anticipate and legislate every form of problematic online content and behavior. There are various forms of “otherwise objectionable” content that Congress did not explicitly anticipate in 1996, but which may violate the norms of at least some online communities. It is unlikely that Congress could have anticipated in 1996 that a future Internet user might encourage dangerous activity like consuming laundry detergent pods, or advise that a pandemic could be fought by drinking bleach. Section 230(c)(2)(A)’s “otherwise objectionable” acknowledges this. Congress wanted to encourage services to respond to this kind of problematic — though not necessarily unlawful — content, and prevent it from proliferating online.

³² NTIA Petition, *supra* note 28, at 54 (emphasis supplied).

³³ H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (“One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”); 141 Cong. Rec. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (explaining how under recent New York precedent, “the existing legal system provides a massive disincentive” and the Cox-Wyden amendment “will protect them from taking on liability such as occurred in the Prodigy case in New York”).

NTIA’s proposed rules “clarifying” the phrase “otherwise objectionable” would also open the door to anti-American lies by militant extremists, religious and ethnic intolerance, racism and hate speech. Such speech unquestionably falls within Congress’s intended scope of “harassing” and “otherwise objectionable” and thus might reasonably be prohibited by digital services under their Terms of Service. NTIA’s petition, however, proposes confining harassment to content directed at *specific* individuals. This tacitly condones racism, misogyny, religious intolerance, and hate speech which is general in nature, and even that which is specific in nature provided the hateful speech purports to have “literary value.”

IV. Conclusion

For the foregoing reasons, the FCC should decline NTIA’s invitation to issue regulations on Section 230.

Respectfully submitted,

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