



SHEA M. RHODES, ESQUIRE
DIRECTOR
CHARLES WIDGER SCHOOL of LAW
Institute to Address Commercial Sexual Exploitation

EARN It Act

A bipartisan group of U.S. Senators led by Judiciary Committee Chairman [Lindsay Graham](#) (R-SC) and Senator Richard Blumenthal (D-CT) introduced the “Eliminating Abusive and Rampant Neglect of Interactive Technologies Act,” [EARN IT Act](#), in early March 2020. The [bipartisanship](#) demonstrates the necessary abandonment of typical party lines for the important cause of curbing online sex trafficking. The EARN IT Act is another step in the fight to finally hold technology companies accountable for facilitating online sexual exploitation. Since the passage of the Communications Decency Act (CDA) in 1996, courts have ruled that due to CDA section 230, victims of online sexual exploitation cannot hold companies civilly liable for having exploitative content on their sites. However, the EARN IT Act revokes this immunity with regard to child sexual abuse material (CSAM, also known as child pornography). The reform is a necessary step in the movement to end sexual exploitation.

On July 2, 2020, the Senate Judiciary Committee [strengthened](#) the bill, and by a vote of 22-0, referred it to the full Senate for consideration. Besides revoking the immunity that interactive computer services (ICSs) have enjoyed regarding CSAM, the EARN IT Act establishes a new National Commission on Online Child Sexual Exploitation Prevention (“the Commission”). This Commission will develop best practices for ICSs including Facebook,

Instagram, and Twitter to prevent grooming and sex trafficking as well as CSAM. Consequently, the EARN IT Act incentivizes technology companies to maintain best and diligent practices in monitoring child sexual exploitation online.

I. Background-Communications Decency Act

In response to the growth of the internet, Congress passed the Communications Decency Act of 1996. For purposes of the EARN IT Act, the most relevant provision of the CDA is [§ 230\(c\)](#), which reads: “no 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.” Additionally, a provision of § 230(c) known as the “Good Samaritan” clause finds that “no provider or user of an interactive computer service shall be held liable on account of: an action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene . . . [or] any action taken to enable or make available to information content providers or others the technical means to restrict access to material described [above].” Effectively, courts interpreted §230 to hold that a technology company is not civilly responsible for inappropriate content posted by individual users on the platform. While §230 carves out exceptions to this immunity provision for certain crimes, technology companies have successfully used §230 in the courts to fully avoid civil liability for inappropriate content.

II. Positive Impact on Trafficking Prevention

The EARN IT Act is a necessary legislative action. Sexual exploitation on the internet is a pervasive issue that desperately needs federal attention. From 2008 to 2019, the number of child sexual abuse material images reported went from 600,000 to 70 million. Further, in 2018, of the 18.4 million reports, 17 million came from Facebook. Unlike other platforms, Facebook screens

for child sexual abuse content—how many images are missed simply because the platform on which they are hosted does not take this basic step?

No federal legislation has been enacted to curb this astronomical growth. In 2019, the [National Center for Missing & Exploited Children](#) received [sixteen million tips](#) of suspected child sexual exploitation on the internet. These reports contained approximately seventy million exploitative images and videos. All of these images were posted on easily accessible, mainstream sites like Instagram and Facebook. The influx of reports of child exploitation to law enforcement is so overwhelming that the FBI has prioritized only the exploitation of [infant and toddler children](#). Law enforcement should never have to make this choice. Currently, even if a child notifies a technology company of their exploitation, there is not civil or criminal recourse against the company for ignoring that notice. Without the threat of liability, large technology companies [have virtually no incentive to monitor exploitation](#) on platforms where direct contact between predators and victims is facilitated.

The onus of combating child sexual exploitation should not solely be on underfunded law enforcement and non-profit agencies. If technology companies are creating a field of unfettered free expression, those same companies should be equipped to eliminate reprehensible conduct in a way law enforcement agencies cannot. To protect business profits and free speech at the [expense of sexually exploited children](#) is not acceptable. Big Tech has repeatedly said it can maintain two priorities, privacy and child protection, at the same time. The EARN IT Act puts this claim to the test. Meanwhile, best-practice guidelines from the EARN IT Act commission will provide much needed standards for prosecutors, judges, law enforcement agencies, and technology companies to refer to as accountability, not indifference, becomes the norm in online culture.

III. Legislative Responses and Concerns about the EARN IT Act

First Wave-FOSTA-SESTA

In 2018, the [Fight Online Sex Trafficking Act \(“FOSTA”\)](#) and the [Stop Enabling Sex Traffickers Act \(“SESTA”\)](#) (known as “FOSTA-SESTA”) became law. It [allows criminal and civil actions](#) against websites that violate federal and state sex trafficking laws to move forward into litigation. Effectively, technology companies [can no longer](#) point to § 230 interpretations to avoid liability for facilitating trafficking on their websites. FOSTA-SESTA helped satisfy the legislative goal of curbing online sex trafficking, an ever-growing method of exploitation. What convinced Congress of the need for this legislation was the fact that dangerous websites like Backpage.com used the Communications Decency Act to avoid liability for knowingly facilitating sex trafficking. Since the passage of FOSTA-SESTA, litigation against Backpage.com has [moved forward](#) into discovery proceedings against the website.

Since users can post content on sites without technology companies’ knowledge, the companies claim they are not publishers and thus, cannot be held liable for that content. The potential for unending streams of litigation ultimately led these companies to oppose FOSTA-SESTA. Additionally, companies like Google that grew as a result of § 230 vehemently argued that saddling liability on interactive computer services would inhibit the free exchange of ideas essential for internet dynamism.

Second Wave-EARN IT Act

[Technology companies](#), their trade organizations, and some NGOs oppose the EARN IT Act for many of the same reasons FOSTA/SESTA faced strong resistance. Their primary concern is the possibility that the EARN IT Act undermines privacy protection initiatives, especially encryption, in exchange for child protection measures. [Amnesty International](#)

[submitted a statement](#) to the [Senate Judiciary Committee](#), arguing that the EARN IT Act would lead to an “encryption backdoor,” meaning that websites would be secure, but not from government access. Since the EARN IT Act does not currently place conditions on what constitutes best practices, the government could **theoretically** mandate government access to encrypted communications. Without encryption, [criminal hackers and oppressive governments](#) could more easily regulate and punish idea expression. To organizations opposing the EARN IT Act, this is a high price to pay for a solution that allegedly [does not effectively combat](#) child sexual exploitation online. Critics demand a more [nuanced approach without proposing one and without acknowledging that this nuance could easily be accomplished through the civil remedies proposed by the EARN IT Act](#).

Evidence that the legislation balances industry concerns with anti-exploitation goals can be seen in the detailed makeup of the Commission. Two of its nineteen members must have experience in “matters related to consumer protection, civil liberties, civil rights, or privacy.” Two other members must have experience in computer science and data security in a non-governmental capacity. Four of the members will be survivors of online sexual exploitation or advocates with experience working with survivors of exploitation. Fourteen of the nineteen members of the Commission must approve of the best practices before anything is officially set in motion. The tech industry will **undoubtedly** have a voice in the Commission’s final best practices guide.

Anti-EARN IT Act advocates also argue that removal of sex-related content from the internet “chills” the free expression of prostituting persons. If internet companies fear liability for allowing sexually exploitative content, monitors may delete posts from prostituting people, even those from individuals experiencing dangerous conditions and needing access to critical health

care services. Consequently, prostituting people might fear internet silencing and therefore will not use the internet to find necessary help. As with FOSTA/SESTA, these types of concerns demonstrate the rampant panic regarding the legislation's requirements, without full understanding of what the bill proposes.

IV. Support from the Institute to Address Commercial Sexual Exploitation

The [CSE Institute](#) fully supports passage of the EARN IT Act. The aforementioned privacy concerns are too tenuous and the goal of stopping internet sexual exploitation too important to inhibit passage. The guaranteed technology representation on the Commission quells fears that the EARN IT Act will strip internet companies of their ability to provide a forum for free expression.

Regardless of privacy concerns, holding companies liable for, at the very least, recklessly facilitating sexual exploitation should be the utmost concern, not only for anti-exploitation advocates, but for society as a whole. When a user shares exploitative content on one, easily accessible, site another user can view that content, share, and expose the victim to other users. This unfettered growth generates a domino effect providing illegal and exploitative content to millions of viewers. **To allow internet users to post criminal content without any consequences to the corporate owners not only sends a national and international message that the United States believes exploitation to be inevitable, but also communicates to victims that their experiences are not worthy of legal protection.** The CSE Institute believes the EARN IT Act is a necessary solution to move toward elimination of child sexual abuse material on the internet. Once ICSs begin policing for CSAM, we believe they will become more accountable for other predatory practices on their platforms, beginning to see sexual exploitation

for what it is: traumatizing, life changing pain for its victims. To support the CSE Institute's work in ending sexual exploitation, please visit [our website](#).