

## EARN IT Act Legal Analysis *NCOSE Law Center*

Legal immunity makes it almost impossible to successfully sue websites. Fearing that the nascent internet would be destroyed through lawsuits, Congress enacted the Communications Decency Act in 1996, which has since been interpreted expansively to bar most civil claims against websites or other internet service providers for third-party content. The internet, of course, has since exploded, and child sexual abuse material (CSAM) with it, with the result that even tech giants such as Amazon or Twitter cannot be held accountable for what users post or sell.

The [Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020](#) (EARN IT) Act of 2020 would primarily do two things: establish a National Commission on Online Child Sexual Exploitation Prevention (the Commission), and end immunity for interactive computer service (ICS) providers as to CSAM on their platforms.<sup>1</sup> On July 2, 2020, EARN IT passed the Senate Judiciary Committee with a Manager’s Amendment that decoupled the immunity from the Commission. While the original bill would have forced ICS providers to “earn” their immunity by following Commission-established best practices as to CSAM, the amended bill removes the immunity altogether.

### **Ending Immunity**

The [immunity provision](#) currently states: “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.”<sup>2</sup> This means that websites and apps that allow users to post or upload users’ own content, such as Facebook or Instagram, cannot usually be sued for that content - even if the websites are aware of it or refuse to take it down.

Several exceptions to the immunity already exist:

- A website or other ICS (rather than a third party) creates or develops the content at issue
- Intellectual property law violations
- Communications privacy law violations
- Federal criminal prosecutions
- Federal civil suits based on sex trafficking violations<sup>3</sup>

Federal law [makes it illegal](#) to possess, access, create, sell, receive, or distribute materials involving the sexual exploitation of minors,<sup>4</sup> [or to receive](#), distribute, reproduce, advertise, promote, present, solicit, sell, access, produce, or possess child pornography.<sup>5</sup> EARN IT would amend Section 230 to [end immunity](#) for civil claims based on violations of these statutes, and for

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<sup>1</sup> Additionally, EARN IT would amend the entire Federal code’s terminology, [changing](#) “child pornogrpahy” to “child sexual abuse material,” and [updating](#) the process for ICS providers to report to the Cybertipline.

<sup>2</sup> 47 U.S.C. § 230(c)(1). An interactive computer service is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet[.]” 47 U.S.C. § 230(f)(2).

<sup>3</sup> 47 U.S.C. § 230(d). This was added in 2018 with the passage of FOSTA-SESTA. *See* <https://www.congress.gov/115/plaws/publ164/PLAW-115publ164.pdf>.

<sup>4</sup> 18 U.S.C. § 2252.

<sup>5</sup> 18 U.S.C. § 2252A.

criminal prosecutions or state civil lawsuits based on “the advertisement, promotion, presentation, distribution, or solicitation” of CSAM.

### **Creating Best Practices**

The Commission’s [main duty](#) is to develop recommended best practices for ICS providers “to prevent, reduce, and respond to the online sexual exploitation of children, including the enticement, grooming, sex trafficking, and sexual abuse of children and the proliferation of online child sexual abuse material.” These best practices [would address](#), among other things, identifying and reporting child exploitation, removing abuse material, age rating and age gating systems, parental controls, training content moderators, and providing transparency reports.

The best practices [must take into account](#) factors such as the ICS provider’s size, product or service type (including susceptibility to being used to exploit children), and whether it is primarily storing or otherwise handling information for third parties. Best practices must be [approved](#) by 14 of the 19 Commission members, and be [updated](#) and published every five years.

The Commission [would be composed](#) of the following 19 members:

- The Attorney General (or representative)
- The Secretary of Homeland Security (or representative)
- The Chairman of the Federal Trade Commission (or representative)
- Four people from each of these four categories:
  - Four online child sexual exploitation investigators (two with prosecutorial experience and two with law enforcement)
  - Four online child sexual exploitation survivors or direct service providers
  - Four experts, two in “consumer protection, civil liberties, civil rights, or privacy” and two in “computer science or software engineering related to matters of cryptography, data security, or artificial intelligence[.]”
  - Four current ICS employees with experience in child safety and preventing online child sexual exploitation, two at companies with fewer than 10 million monthly users, and two at companies with more than 30 million monthly users.<sup>6</sup>

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<sup>6</sup> The Senate Majority Leader, Senate Minority Leader, Speaker of the House, and House Minority Leader would all choose one person from each of those four categories. Each Commissioner’s appointment would be for 5 years.