

EARN IT (S. 3398)

Section-by-Section Breakdown

Section (Blue = Permalink to bill text)	Concern
Sec 1. Short title: Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020	
Sec 2. Definitions	
<p>Summary: The term “interactive computer service” means 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 and such systems operated or services offered by libraries or educational institutions.</p> <p>Here is a little more from a 4th Circuit case: “It has been uniformly held that Internet service providers are “interactive computer service” providers.(7) Courts have concluded that a Web site operator, search engine, or other entity was or was not a provider of an “interactive computer service” depending on whether there was a sufficient indication before the court that it “provided or enabled computer access by multiple users to a computer server” within the meaning of the definition found at § 230(f)(2). (Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003), summarily aff'd, 2004 WL 602711 (4th Cir. 2004)</p>	<ul style="list-style-type: none">• No one has ever tried to narrow the definition of ICS in court because prior to FOSTA, the government never used 230 to criminalize, but instead 230 provided defendants with immunity. Because of this, companies have always tried to expand the definition of who is an ICS, because everyone wanted to be included to access that immunity. ICS now includes listservs, apps, chatrooms, websites, internet providers, intranet providers - anything giving multiple people access to a single server including tech we haven't even envisioned yet. In short, this is <u>very</u> broad.
Sec 3. National Commission on Online Child Sexual Exploitation Prevention	
<p>Summary: The commission, detailed in the following sections, will develop recommended best practices for websites regarding all elements of online sexual exploitation of minors. The commission will consist of 19 members from the AG's office, DHS, and the FTC, as well as 16 members</p>	<ul style="list-style-type: none">• Commission lacks anyone from the sex industry, including internet/cam/porn performers, in-person sex workers who use the internet to advertise, community groups who use online platforms to organize• Commission lacks anyone who understands harm reduction, including those who do outreach using the

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<p>from law enforcement/prosecutors, survivors of CSAM, tech and security, and internet platforms. The commission will be chaired by the Attorney's General.</p>	<p>internet, understand harm reduction in terms of vulnerabilities of the internet</p> <ul style="list-style-type: none">• AG Barr, as the Chairperson, "has made it very clear he would like to ban encryption, and guarantee law enforcement "legal access" to any digital message."
<p>Sec 4. Duties of the Commission</p>	
<p>Summary:</p> <ul style="list-style-type: none">• The Commission will have 18 months to develop and submit to the Attorney General recommended best practices for websites addressing all stages of trafficking of minors into commercial sex, child sexual abuse, and the distribution of CSAM, and to whom these standards would apply.• The mandate of this commission covers all aspects of prevention, identification, disruption and reporting, including working with outside entities, retention of metadata and content, training of websites, age ratings and gradings for content, parental controls, and practices between websites and third parties.• The commission is asked to consider cost, and the impact on competition, technology and law enforcement.• These recommendations will be codified into law through a fast-track procedure, to be certified by the DOJ annually.	<ul style="list-style-type: none">• The fast track procedure is atypical and means that there will also be a lack of transparency with Congressmembers, media and the public.• The mandate is incredibly broad and means the commission has the ability to basically regulate anything it wants without explanation.• "Age ratings and gradings" alone means that this could cover pretty much any content.• Similar to things like the Department of Treasury's FinCen guidelines which look for red flags for "Trafficking" but has a clear targeting of the sex trade more generally and has resulted in sex workers losing access to financial platforms, the lack of even a consideration for sex workers within this means that there isn't even anyone who understands, let alone cares, about the impact. The overbreadth of these guidelines, married to a complete lack of transparency/accountability mean that sex on the internet is basically going to be regulated by 19 randos with AG Barr at the helm and pose the threat of civil liability of anyone who doesn't comply.• There is zero accountability - if this goes wrong, we have to wait five years for the same pack of yahoos to try and tweak this. There are no metrics for success, no metrics for

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	whether there will be a disproportionate impact on anything, no measures of transparency for Congress to even review the impact.
Sec 5. Enforcement	
Summary: If immunity is falsified, both civil and criminal penalties apply (max two years).	<ul style="list-style-type: none">• We shouldn't expand the criminal code.• Certification deputizes private companies to surveil people beyond what law enforcement would be allowed to do under the Fourth Amendment (search and seizure Amendment)- this is the gov making private companies do what is illegal for the gov to do
Sec 6. Earning Immunity	
Summary: <ul style="list-style-type: none">• For ICSs who do not go through the certification procedure described above, they would lose the rigor of existing 230 protections; currently there is a standard where they would have to "knowingly" move/distribute CSAM to be liable, but this would change to a significantly lower "recklessly" standard for liability.• Amends section 230 to newly allow fourteen kinds of federal civil suits against interactive computer services (ICSs). (For comparison, FOSTA allows only one new kind of civil claim against ICSs.)• Creates a new civil claim targeting ICSs for "distribution" or "transportation" of child pornography (as well as several other kinds of conduct) using a recklessness standard.	<ul style="list-style-type: none">• The threat of civil action against companies is extremely incentivizing• Because civil suits only require a plaintiff to prove the defendant "more likely than not" broke the law (unlike criminal claims that require proof beyond a reasonable doubt), and because the recklessness standard here means that a company doesn't have to *know* their tech was used to distribute child pornography, this creates SWEEPING liability• FOSTA's sponsors tried to pass a criminal provision using a "recklessness" standard for websites and it was amended out because legislators widely agreed that it was too broad• A recklessness standard, if any companies don't get certified and thus become subject to this liability, would likely incentivize very intensive monitoring of user content - so basically this bill ensures private surveillance of ICS users will happen whether or not companies choose to

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	<p>get certified by the commission</p> <ul style="list-style-type: none">• Websites - Facebook, IG, Seeking Arrangements – already demonstrate due diligence to try and preserve their liability by kicking off sex workers. There is no safeguard, no resource, and no support for when these companies are forced to look for elements of transactional sex. Sex workers are routinely kicked off platforms, lose access to basic tools of communication, etc.
<p>Sec 7. Use of term “child sexual abuse material”</p>	
<p>Summary: Replaces “child pornography” with “Child sexual abuse material” in existing statutes, but retains the same definition.</p>	<ul style="list-style-type: none">• While the bill states that this language means exactly the same thing, if that were true there would be no need to change it. My guess is that it is legally the same but publicly more stigmatizing. – Extension of the “no such thing as a child prostitute” kind of fights. Rhetorical in nature.
<p>Sec 8. Modernizing the CyberTipline</p>	
<p>Summary:</p> <ul style="list-style-type: none">• This section expands the amount of information required to be turned over to NCMEC when reporting potential instances of CSAM, namely location information.• The bill also offers a very narrow provision of limiting liability against Federal indictment for websites exclusively for participation in these efforts around child sexual abuse - but not even to any of the other ways that these websites operate.	<ul style="list-style-type: none">• The more information websites are required to collect and hold, the more vulnerable sex workers are. Geolocation information and metadata is something users often struggle to turn off/delete, and this would mean that all of that information will not only be discoverable by private entities, but also held for a period of time in order to be useable - which means that detailed information for a community who faces disproportionate levels of harassment, stalking and violence will be held by all forms of websites.
<p>Sec 9. Rule of construction</p>	

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Summary: This is an explicit claim that <i>*this*</i> bill will not <u>require</u> ICSs to monitor for CSAM.	<ul style="list-style-type: none">• This is actually kind of a wild claim because it seems as though, in practice, complying with the bill definitely requires monitoring by uncertified ICSs (see section 6) and the Commission may make an explicit requirement as well.• This is kind of “no one’s making you but if you don’t you’ll regret it. Wouldn’t want to see anything happen to your nice dating app...”
Sec 10. Authorization of appropriations	
Summary: There are authorized to be appropriated such sums as may be necessary to carry out this Act.	Standard
Sec 11. Severability	
Summary: If one section of the act is found unconstitutional, the rest are not necessarily unconstitutional.	Standard

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Glossary and relevant definitions

AG: Attorney's General, head of the Department of Justice and appointed by the President.

Child Pornography: (est in the Child Pornography Prevention Act of 1996, since amended) : Any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such [visual depiction](#) involves the use of a [minor](#) engaging in [sexually explicit conduct](#);

(B) such [visual depiction](#) is a digital image, [computer](#) image, or [computer-generated](#) image that is, or is [indistinguishable](#) from, that of a [minor](#) engaging in [sexually explicit conduct](#); or

(C) such [visual depiction](#) has been created, adapted, or modified to appear that an [identifiable minor](#) is engaging in [sexually explicit conduct](#).

Civil: (Thanks Lawshelf.com, where this is copied from) Civil law deals with the disputes between individuals, organizations, or between the two, in which compensation is awarded to the victim. Criminal law is the body of law that deals with crime and the legal punishment of criminal offenses. In digestible terms, anyone can bring a civil suit and you usually get a money settlement, but criminal law can only be charged by the state, and can be punished with jail time or parole.

CSAM: Child sexual abuse material, defined in the legislation as child pornography. Section 7 is about changing all references from child pornography to CSAM.

DOJ: Department of Justice

DHS: Department of Homeland Security, which is one of the many departments with an anti-trafficking mandate, and hosts "The Blue Campaign" about public awareness.

EARN IT: Shortened title of the Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020

FOSTA/SESTA: A bill passed in 2018 which expanded criminal and civil liability for internet services which facilitated prostitution, but did not define "facilitation of prostitution."

FTC: Federal Trade Commission; a consumer protection agency

Fast-Track Procedure: An accelerated process to move things through Congress

FinCen: This the short name for the Financial Crimes Enforcement Network (FinCEN), a governmental group established to give guidance to banks and financial institutions on their obligations under the Bank Security Act regarding cybercrime. Guidelines were released around trafficking in 2014, which can be found here:

<https://www.fincen.gov/resources/advisories/fincen-advisory-fin-2014-a008>.

<https://www.congress.gov/bill/116th-congress/senate-bill/3398>

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ICS: Interactive computer service, as established in the Communications and Decency Act. Because the definition was written early on, it covers everything from websites to apps to intranets.

Knowingly: A standard of your awareness of how much you caused/participated in a crime (which is known as a mens rea standard). This is the second highest standard out of four (generally), and it says that you have to be fully aware that your actions would have a certain outcome or consequence, but not one that you intended to cause. I know that going to the bank will make me late for picking up my kid and the teacher will yell at me, but I am not going to the bank for the purpose of making the teacher yell at me.

Metadata: (From Wikipedia) Metadata is defined as the data providing information about one or more aspects of the data; it is used to summarize basic information about data which can make tracking and working with specific data easier.^[12] Some examples include: Means of creation of the data, Purpose of the data, Time and date of creation, Creator or author of the data, Location on a [computer network](#) where the data was created, [Standards](#) used, File size, Data quality, Source of the data, Process used to create the data

NCMEC: National Center on Missing and Exploited Children. While it is technically its own NGO, it was established by Congress and gets its funding from an established Congressional budget line. They are incredibly political/anti-sex work and have never shown concern for the impact of their efforts more broadly. They were established with the purpose of identifying and helping aid in the recovery of abducted children, but now do things like run the Cybertip hotline.

Recklessly: A standard of your awareness of how much you caused/participated in a crime (which is known as a mens rea standard). This is the second lowest standard out of four (generally), and one lower than Knowingly. It says that you were reckless when you didn't intend to cause harm, but you ignored the very good chance of a consequence. You know that going to the bank might make you late to pick up your kid and the teacher would yell at you, but if there's no line you'll make it – but lets be honest, you know that this bank is always busy around 3pm.

Senate: One of the two halves that make up Congress. A bill must be passed by both the House of Representatives and the Senate before it goes to the President for signature into law.

Trafficking: *Under the law, sex trafficking is the term used, but colloquially try and use “trafficking into commercial sex” to align with all other forms of human trafficking.* Trafficking into commercial sex is where a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age. Trafficking occurs across many forms of labor, formal and informal, criminalized and non-criminalized.

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UC: Unanimous Consent, where there are zero No votes on a piece of legislation.
Generally worked out and agreed to ahead of time.