



Section 230: Cost Report



What is the Value of Section 230 to Startups?

For startups, Section 230 of the Communications Decency Act accomplishes two critical goals: it gives platforms the freedom to moderate user content without fear of liability and prevents them from facing costly lawsuits any time a user says something potentially illegal online. The latter is particularly important for early-stage companies, since the cost of defending even a frivolous claim can exceed a startup's valuation. As the Ninth Circuit has said, without Section 230, startups would face “death by ten thousand duck-bites” fighting off lawsuits.¹ Section 230 allows startups to end such lawsuits at an early stage, avoiding ruinous legal costs.

To better understand the value of Section 230 to startups, we conducted interviews with in-house attorneys and outside counsel about the actual costs of litigating claims based on user speech at various stages in a lawsuit. As the responses show, even with Section 230's protections, defending such lawsuits can be prohibitively expensive.

Lawsuit Costs: Pre-complaint (\$0 to \$3,000)

Even before a lawsuit is filed, threats of litigation can present significant costs. A startup which receives a threatening demand letter based on user speech may be inclined to respond in an effort to avoid a lawsuit. Defending even a meritless lawsuit is often too costly for the typical early-stage company, so startups have a strong incentive to resolve potential disputes before they turn into full-fledged lawsuits. The legal costs of responding to a demand letter can run up to \$3,000 or more, depending on the depth of the response required. Of course, responding to a demand letter is often unproductive since many plaintiffs sending such letters already know their claims are meritless thanks to Section 230 and are merely seeking nuisance value settlements.

Critically, merely receiving notice that a lawsuit is likely triggers costs for the startup well beyond the cost of just responding to a demand letter. If a company believes litigation is likely, it is legally obligated to issue a litigation hold—the process of instituting document preservation practices for information that may be relevant to the case. The costs associated with establishing a litigation hold and preserving documents aren't trivial and can hurt resource-constrained startups.

Lawsuit Costs: Motion to Dismiss (\$15,000 - \$80,000)

Once a lawsuit is actually filed, the first opportunity a startup has to end the case comes in the form of a motion to dismiss. To succeed, the startup must show that even if the plaintiff's factual claims were true, it is not legally liable for the speech at issue. Section 230 establishes that a website can't be held liable for user speech that it did not create or develop. Thus, if the plaintiff alleges that a user posted the content at issue, the startup can usually seek to dismiss the claim on Section 230 grounds.

Using Section 230 at this stage can be a helpful way to dispose of meritless claims targeting user speech that a website did not create, but it isn't inexpensive. Filing a motion to dismiss—even one focused solely on a Section 230 defense—typically costs between \$15,000 and \$40,000 and potentially as high as \$80,000. Since the plaintiff is almost always given the opportunity to amend the complaint to allege that the startup did develop the content (even if it didn't), spending money on a motion to dismiss against an intentionally deceitful plaintiff can end up being a sunk cost.

¹ *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008).



Lawsuit Costs: Early Motion for Summary Judgment (\$15,000 - \$150,000+)

When there are undisputed facts that the court can rely on to make a conclusive determination, parties can file a motion for summary judgment asking the court to rule on the case without the need for a full trial. Parties typically file such motions after they have finished the discovery process, having spent exorbitant sums of money paying lawyers to review every document conceivably related to the questions at issue. In some circumstances where the case rests on a few small factual questions—such as which party posted a particular piece of content to a website—a defendant can file an early motion for summary judgment. Some attorneys prefer to file an early motion for summary judgment rather than a motion to dismiss because courts rarely grant the motion without giving the plaintiff a chance to correct the pleading. But early motions for summary judgment come with increased costs and risks as well.

Most courts disfavor or prohibit multiple motions for summary judgment, meaning filing an early motion may forfeit a party's right to file one later. Since failure to get a case dismissed on summary judgment means the parties must litigate through a trial—an incredibly expensive option—or settle the case, the high stakes of an early summary judgment motion using Section 230 warrants thorough (and costly) legal work. Pre-motion discovery is generally minimal, limited to information about the identity of the user and the website's role in developing the speech at issue. Nevertheless, according to the surveyed practitioners, even this minimal discovery can cost around \$30,000. Even without discovery costs, the legal work required to prepare an early motion for summary judgment can easily cost between \$30,000 and \$70,000, depending on the complexity of the arguments.

Lawsuit Costs: Through Discovery (\$100,000 - \$500,000+)

Most of the attorneys we surveyed were only able to provide general guesses for the costs of defending a Section 230 through the entire discovery process and into trial. Lawsuits against websites for user speech are rarely meritorious, and the cost of fully litigating even questionable claims usually exceeds the potential liability by a wide margin. The few attorneys that have brought such lawsuits to trial reported six-figure costs, since discovery and motion costs can quickly escalate. Given these costs, proceeding through discovery is a lose-lose proposition for virtually all startups, since parties have to pay their own legal expenses, regardless of who ultimately wins. A startup facing the prospect of a trial will almost always try to settle the case, even if it is likely to win at trial.

Where are we now?

Section 230 protects startups not only by preventing massive monetary judgments for hosting user-generated content but, more importantly, by sparing them from the high legal costs of defending even meritless lawsuits. Weakening Section 230 or creating ambiguity around its protections will make it more difficult for startups to rely on it early in a lawsuit, before litigation costs escalate to the point where settling is less expensive than actually winning. As this cost survey highlights, Section 230 is only useful to startups if they can rely on it to dismiss meritless claims early in litigation.

Questions?

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