



July 26, 2023

Chair Cantwell  
U.S. Senate Committee on Commerce,  
Science, and Transportation  
Washington, DC 20510

Ranking Member Cruz  
U.S. Senate Committee on Commerce,  
Science, and Transportation  
Washington, DC 20510

*Re: July 27 Markup in Senate Committee on Commerce, Science & Transportation*

Dear Chair Cantwell and Ranking Member Cruz:

On behalf of the Computer & Communications Industry Association (“CCIA”),<sup>1</sup> I write to raise concerns with legislation scheduled for markup on July 27, 2023 and request that this statement be included in the record.

The digital sector shares the goal of making the internet safer and more trustworthy for young people. Unfortunately, S. 1409, the Kids Online Safety Act (KOSA), and S. 1418, the Children and Teens’ Online Privacy Protection Act (CTOPPA), raise serious First Amendment concerns, would lead to broad restrictions of online speech, contain vague knowledge standards, and would create confusing compliance problems for businesses’ efforts to protect young people online. For these reasons, we respectfully request that you oppose passage.

#### Vague Knowledge Standards

The most updated KOSA language imposes a contradictory knowledge standard using the term “knows” which suggests actual knowledge but defines the term as also including “knowledge fairly implied on the basis of objective circumstances.” CTOPPA also removes the “actual knowledge” standard, adopting a similarly ambiguous pseudo-knowledge standard. As current technology does not provide effective mechanisms to determine the age of internet users without compelling them to upload federal or state identification, these knowledge standards risk holding companies liable for the presence of minors that they cannot readily identify.

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<sup>1</sup> CCIA is an international, not-for-profit trade association representing a broad cross-section of technology and communications firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit [www.ccianet.org](http://www.ccianet.org).



## First Amendment Concerns

KOSA raises significant First Amendment concerns and will significantly impact current content moderation efforts by services as they will seek to block any violative content. Online companies already use automated technology to examine billions of posts in order to properly flag and block content, including hate speech and harassment, that violates their terms of service. Unfortunately, technology cannot always accurately distinguish between content that, for example, promotes eating disorders from materials that provide counseling, help, and support for those suffering from such conditions. To avoid potential liability under KOSA, companies would likely overblock any content, including helpful resources, relating to eating disorders, bullying, and anxiety.

CTOPPA also raises serious First Amendment concerns due to its broadened scope and lack of specificity for content with mixed audiences, which means a majority of content created principally for grown-ups could be classified as directed to teens. This provision, along with the uncertainty created by the vague restrictions around advertising and marketing, could infringe upon the rights of users and companies and act as an impermissible form of prior restraint.

## Default Settings

KOSA also requires that companies use as default settings the “most protective level of control” for all users of the website unless they are confirmed as adults. This provision, along with KOSA’s use of vague language, such as the definitions of “geolocation” and “de-identified data”, creates difficult compliance challenges for all organizations. Companies often develop and test new features and products for Americans with higher risk profiles: those traveling abroad, government officials, executives, celebrities, and other individuals at particular risk for a cyber intrusion. These functions would potentially be considered the “most protective level of control” but would not be useful, effective, or scalable for the entire user base, including children.

## Audit Concerns

The audit/report requirements of KOSA depart from the EU Digital Services Act (DSA) framework by placing many risk assessment responsibilities, such as discussions with civil society and experts, with the third-party auditor rather than completed by the platform itself. The language is not clear about whether the platform or the third-party auditor is designated to undertake the risk assessment.



FTC Determination on Knowledge

KOSA tasks the FTC with the role of issuing guidance for determining whether a covered platform has “knowledge fairly implied on the basis of objective circumstances that a user is a minor”, taking into account the totality of the circumstances, including “whether the operator, using available technology, exercises reasonable care”. This would give the FTC significant authority to determine whether a platform’s use of end-to-end encryption or other protective measure would constitute a failure of using reasonable care.

Carve-Outs

Given the dynamic nature of digital services, duties should be consistent across all services that may include young users. However, new language has been inserted into KOSA that has exempted “video conferencing” and “wireless messaging” from the obligations of KOSA, and also applied lower obligations for “video streaming services.” These terms are not future-proof, and efforts to carve-in or carve-out particular lines of business are certain to create confusion over time. Devising obligations that vary based on product types will create uncertainty about what rights young people have and what responsibilities businesses have, depending on subject judgements about whether certain features are “predominant” or “incidental.” A more holistic and broadly applicable obligation that works for all product types will better serve online safety goals.

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Protecting young people online is an essential undertaking that can succeed with cooperation and coordination between government, industry, civil society, and families. Unfortunately, KOSA and CTOPPA’s many dangerous unintended consequences would threaten the constitutional rights of Americans. Rather than pass these flawed bills, we advocate Congress pass a broad federal privacy bill based on the bipartisan proposal from last Congress, the American Data Privacy and Protection Act, that contains robust federal privacy protections for children.

Respectfully submitted,

Joshua Rogin  
Vice President of Federal Affairs  
Computer & Communications Industry Association