



2009

## Landlords Needed, Tolerance Preferred: A Clash of Fairness and Freedom in Fair Housing Council v. Roommates.com

Adam Weintraub

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Civil Rights and Discrimination Commons](#), and the [Internet Law Commons](#)

---

### Recommended Citation

Adam Weintraub, *Landlords Needed, Tolerance Preferred: A Clash of Fairness and Freedom in Fair Housing Council v. Roommates.com*, 54 Vill. L. Rev. 337 (2009).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol54/iss2/5>

This Note is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

“LANDLORDS NEEDED, TOLERANCE PREFERRED”: A CLASH OF  
FAIRNESS AND FREEDOM IN *FAIR HOUSING*  
*COUNCIL v. ROOMMATES.COM*

“Th[e] [Internet’s] dynamic—jumbled, anonymous, instantaneous communication—raises some fundamental questions; not least among them those that challenge our comfortably settled understanding of the First Amendment and our right to express ourselves freely.”<sup>1</sup>

I. INTRODUCTION

The emergence of the Internet has thoroughly changed the way our society conducts business and engages in commerce.<sup>2</sup> Billions of users can buy, sell, and trade with an unprecedented level of ease and convenience.<sup>3</sup> With such accessibility and freedom available to so many users, abuses of the various channels of communication are inevitable.<sup>4</sup> Many fear the Internet has become a virtual wild west, a place where wrongdoers run rampant without recourse.<sup>5</sup> Moreover, such abuses often conflict directly with

---

1. See Bruce W. Sanford & Michael J. Lorenger, *Teaching an Old Dog New Tricks: The First Amendment in an Online World*, 28 CONN. L. REV. 1137, 1140 (1996) (describing Internet’s legal implications on constitutional rights).

2. See Mark A. Lemley, *Digital Rights Management: Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 101 (2007) (describing vast amount of commerce occurring on Internet with automatic processing of third-party content). One commentator notes that from 1985 to 1995 alone, the number of host computers connected to the Internet rapidly increased from 1,000 to approximately 4,000,000. See Paul H. Arne, *New Wine in Old Bottles: The Developing Law of the Internet*, 416 PLI/PAT 9, 15 (1995) (acknowledging rapidly growing number of computers both using and providing access to Internet).

3. See Lemley, *supra* note 2, at 101-02 (indicating number of users and transactions occurring on Internet).

4. See Jon Burns, *Doe v. SexSearch.com: Placing Real-Life Liability Back Where it Belongs in a Virtual World*, 9 N.C. J.L. & TECH. 69, 70-71 (2007) (describing various abuses and horrors encountered on Internet). Some of the abuses include action fraud, non-delivery, check fraud, credit or debit card fraud, computer fraud, confidence fraud, financial institutions fraud, identity theft, investment fraud, and child pornography. See NAT’L WHITE COLLAR CRIME CTR. & FBI, 2006 INTERNET CRIME REPORT 3 (2006), available at [http://www.ic3.gov/media/annualreport/2006\\_IC3\\_Report.pdf](http://www.ic3.gov/media/annualreport/2006_IC3_Report.pdf) (outlining various crimes committed on Internet in 2006 and extent of these crimes’ occurrences).

5. See, e.g., *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc) (discussing potential for Internet to become “a lawless no-man’s-land”); see also *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 (D.D.C. 1998) (describing Internet as lacking territorial boundaries with “‘no there there,’ the ‘there’ is everywhere there is Internet access.” (citing *Digital Equip. Corp. v. Altavista Tech., Inc.*, 960 F. Supp. 456, 462 (D. Mass. 1997))); Assaf Hamdani, *Who’s Liable For Cyberwrongs?*, 87 CORNELL L. REV. 901, 902 (2002) (stating that “the booms and busts of the Internet have been accompanied by new opportunities . . . and new challenges for law enforcement”); Sanford & Lorenger, *supra* note 1, at 1141

our legal system, including legislation designed to protect our country's deepest values.<sup>6</sup>

Specifically, some Internet abusers are practicing housing discrimination through the use of online housing advertising, an activity that conflicts with the Fair Housing Act (FHA).<sup>7</sup> In the wake of the civil rights movement of the 1960s, Congress passed the FHA to prevent discriminatory practices by individuals selling or renting homes.<sup>8</sup> Although not always effective, the FHA was a major breakthrough in protecting the rights of minorities.<sup>9</sup> Yet with the passage of time, new technology is providing an expanding playing field for discrimination, one that is difficult to regulate.<sup>10</sup>

As a response to the growing and unpredictable nature of the Internet, Congress passed the Communications Decency Act (CDA), which

---

(describing Internet as lacking "gatekeepers" who control distribution of information).

6. See, e.g., 47 U.S.C. § 223 (2006) (prohibiting "by means of a telecommunications device . . . any comment, request, suggestion, proposal, image, or other communication which is obscene or child pornography, with intent to annoy, abuse, threaten, or harass another person"); 47 U.S.C. § 231 (2000) (restricting "any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors"), *invalidated by* ACLU v. Ashcroft, 322 F.3d 240, 247 (3d Cir. 2003).

7. 42 U.S.C. § 3604 (2006). See Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 1010 (2002) (acknowledging that "[s]ince the passage of the Fair Housing Act . . . the astronomical growth of the Internet has anointed cyberspace the newest battleground in the struggle to make equal access and diversity a reality in American neighborhoods").

8. See § 3604 (protecting classes of individuals from housing discrimination). The FHA specifically prohibits discrimination of individuals based on race, color, religion, sex, familial status, disability, and national origin. See *id.* (prohibiting discrimination of specified classes of people). An amendment to the FHA in 2005 added sexual orientation as an additional protected class. See H.R. 288, 109th Cong. (1st Sess. 2005). For a general discussion of studies that have analyzed the cause of rental discrimination, see Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 J. MARSHALL L. REV. 455, 475-85 (2007).

9. See Jeffery M. Sussman, Note, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 195-96 (2007) (discussing ongoing housing discrimination despite government's thirty-year history of enforcing FHA). In 2006 alone, 10,328 complaints were filed with the Office of Housing and Urban Development regarding allegations of housing discrimination. See U.S. DEPT. OF HOUS. & URBAN DEV., THE STATE OF FAIR HOUSING, FY 2006 ANNUAL REPORT ON FAIR HOUSING 3 (2007), available at <http://www.hud.gov/offices/fheo/fy2006rpt.pdf> (indicating number of housing discrimination incidents). Additionally, the number of reported incidents of housing discrimination steadily increased from 1998 to 2006. See *id.* (indicating current trends in housing discrimination incidents).

10. See Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 819 (2007) (detailing difficulty of policing Internet and regulating its uses).

contains a section providing Internet Service Providers (ISPs) immunity from liability for illicit content posted by third parties.<sup>11</sup> ISPs provide a variety of online services; in particular, a number of ISPs provide a convenient means for homeowners and landlords to advertise properties for sale and for rental.<sup>12</sup> Certain users of these services have taken advantage of the unrestricted nature of the Internet by posting housing advertisements that may discriminate against minorities.<sup>13</sup> Consequently, a debate has emerged over whether ISPs are responsible for curbing illicit content, such as discriminatory housing postings, or whether they are immune from liability in order to promote the unfettered and unhindered growth of the Internet.<sup>14</sup>

Since the passage of the CDA, courts have generally held ISPs immune from liability for content posted by third party users.<sup>15</sup> Recently, however, the Ninth Circuit in *Fair Housing Council v. Roommates.com*<sup>16</sup> held Roommates.com, an online housing service provider, liable for discriminatory housing advertisements posted by its subscribers.<sup>17</sup> This narrow interpretation of the CDA's immunity provision may have dire consequences for ISPs, creating additional possibilities of liability for them.<sup>18</sup>

This Note discusses interpretations of the CDA and concludes that the holding in *Roommates.com*, finding an ISP liable for third-party content,

---

11. See *Batzel v. Smith*, 333 F.3d 1018, 1026-30 (9th Cir. 2003) (detailing background leading to adoption of CDA).

12. See Chang, *supra* note 7, at 970-72 (discussing rapid expansion of Internet and online housing related services).

13. See Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1623-24 (1995) (noting that Internet's "decentralized nature of information distribution generates substantially lower barriers to entry for independent information [content] providers").

14. See Kurth, *supra* note 10, at 806 (describing tension between two Congressional acts); see also, *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc) (examining situation where FHA and CDA collide in court). For a comprehensive study of the problems faced when determining liability in the online world, see Hamdani, *supra* note 5, at 902-58. One commentator noted that "the Internet was the equivalent of two tin cans and a string when the Fair Housing Act was passed back in 1968." Chang, *supra* note 7, at 970 (quoting Bill Pietrucha, *HUD Takes Housing Discrimination Battle to Net*, NEWSBYTES, Apr. 14, 1998).

15. See Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. & TECH. L. REV. 247, 248 (2000) (explaining that, generally, in decisions after the enactment of CDA, federal courts interpreted Act to bar virtually all liability from acts from third-party users, such as defamation).

16. 521 F.3d 1157 (9th Cir. 2008) (en banc).

17. See *id.* at 1165 (finding that CDA did not bar liability to Roommates.com for illegal content).

18. See *id.* at 1167-68 (finding exception to CDA immunity when ISP contributes in part to objectionable content posted on Internet).

is inconsistent with the CDA's adoptive purpose.<sup>19</sup> Additionally, this Note argues that the importance of both unrestricted growth of commerce and free speech on the Internet counsels against requiring ISPs to censor third-party content such as housing advertisements.<sup>20</sup> Part II summarizes the history and background of both the FHA and the CDA.<sup>21</sup> Next, Part III examines the circumstances giving rise to *Roommates.com*, investigates the Ninth Circuit's approach in determining liability for certain ISPs when third party advertisements violate the FHA, and summarizes the dissent's findings.<sup>22</sup> Part IV compares and contrasts the Ninth Circuit's approach in *Roommates.com* with that of the Seventh Circuit in *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist*,<sup>23</sup> examines conclusions in law, and analyzes the impact of Ninth Circuit's holding.<sup>24</sup> Finally, Part V concludes that *Roommates.com* will negatively impact the Internet's growth and functionality.<sup>25</sup>

## II. POURING THE LEGISLATIVE FOUNDATION: THE LEGAL HISTORY AND BACKGROUND

The call for fair housing legislation grew out of the civil rights movement and its attack on segregation and discriminatory housing practices.<sup>26</sup> Specifically, the FHA was adopted to enforce equal housing opportunities.<sup>27</sup> Later, the rise of the Internet created the need for additional legis-

---

19. For a discussion of why *Roommates.com*'s holding is inconsistent with Congressional intentions in passing § 230, see *infra* notes 146-49 and accompanying text.

20. For a discussion that concludes that unfettered growth of the Internet outweighs the need to filter housing advertisements, see *infra* notes 157-59 and accompanying text.

21. For a general discussion of the history of the Fair Housing Act, see *infra* notes 26-46 and accompanying text. For a general discussion of the history of the Communications Decency Act, see *infra* notes 47-67 and accompanying text.

22. For a general discussion of the facts giving rise to *Roommates.com*, see *infra* notes 68-80 and accompanying text. For a discussion of the Ninth Circuit's methodology in determining liability to ISPs for third-party content in *Roommates.com*, see *infra* notes 81-106 and accompanying text. For a discussion of the dissenting opinion in *Roommates.com*, see *infra* notes 107-19 and accompanying text.

23. 519 F.3d 666 (7th Cir. 2008).

24. For a discussion of the Seventh Circuit's decision in *Craigslist* and a comparison with the Ninth Circuit's decision in *Roommates.com*, see *infra* notes 120-39 and accompanying text. For a discussion of the conclusions in law stemming from both the *Roommates.com* decision and the *Craigslist* decision, see *infra* notes 140-49 and accompanying text. For a discussion of *Roommates.com*'s future impact on the state of the Internet, see *infra* notes 150-68 and accompanying text.

25. For a general discussion of this Note's concluding remarks, see *infra* notes 169-74 and accompanying text.

26. For a general discussion of the background of the FHA, see *infra* notes 26-46 and accompanying text.

27. See 42 U.S.C. § 3604 (2006) (preventing individuals from discriminating in renting and selling property).

lation to protect Internet service providers from excessive liability.<sup>28</sup> Thus, § 230 of the CDA was adopted to limit liability as to these service providers for illegal content created by their users.<sup>29</sup> The backgrounds and goals of these acts have led to interpretations that have caused collisions in the courts.<sup>30</sup>

A. *Constructing Equal Housing Opportunities: The Fair Housing Act*

The unfair treatment of minorities in the United States stretches back at least as far as the country's founding, and is attributable to the historical exploitation of African American slaves.<sup>31</sup> After the Civil War, the rights of newly freed slaves were limited as a result of discrimination, primarily in the southern states.<sup>32</sup> In response, Congress passed the Civil Rights Act of 1866, aiming to protect the rights of citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude."<sup>33</sup> Despite these efforts, segregated housing practices continued through the turn of the twentieth century.<sup>34</sup>

---

28. For a general discussion of the background of the CDA, see *infra* notes 47-67 and accompanying text.

29. See 47 U.S.C. § 230 (2000) (immunizing ISPs from liability for publishing content produced by individual users).

30. See Kurth, *supra* note 10, at 806 (stating that "[a] tension exists between the goals of Congressional legislation, such as the Fair Housing Act, designed to protect individuals from unfair discrimination, and the Communications Decency Act, which seeks to promote freedom of the Internet by protecting host Web sites from liability for the posts of their users").

31. See Schwemm, *supra* note 8, at 498 (citing GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 5 (2002)) (finding that "awareness of the racial 'otherness' of blacks is embedded in the social consciousness owing to the historical fact of slavery and its aftermath").

32. See STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 13-15 (2000) (discussing state of racial relations during period after Civil War). Many states, primarily in the South, adopted "Black Codes" that served to control the rights of African Americans and restrict their freedoms. See Jessica McElrath, *The Black Codes of 1865*, ABOUT.COM, <http://afroamhistory.about.com/od/blackcodes/a/blackcodes1865.htm> (detailing provisions of Black Codes). For example, Mississippi required that the newly freed slaves could not become lessees anywhere in the state except for in towns and cities. See ELLIS PAXSON OBERHOLTZER, *A HISTORY OF THE UNITED STATES SINCE THE CIVIL WAR VOL. I* 128 (1936) (noting Black Codes as method by which white leaders maintained control over newly freed slaves).

33. Civil Rights Act of 1866, ch. 32, § 1, 14 Stat. 27, 27-30 (1866).

34. See MEYER, *supra* note 32, at 1-2 (discussing state of housing segregation in first half of twentieth century). The National Association of Real Estate Boards (NAREB) taught its members in the real estate industry to avoid racial mixing in residential neighborhoods. See Kurth, *supra* note 10, at 807 (discussing real estate industry's involvement in promoting segregation). Local governments contributed to segregation by enacting zoning ordinances enforcing restrictive covenants that prevented integrated neighborhoods. See *id.* (discussing local governments' practices in preventing integration in neighborhoods). Private citizens have additionally played a part in segregation by making pacts to refuse to sell homes to African-Americans. See *id.* (acknowledging contributions of private citizens toward proliferation of housing segregation).

In 1948, the Supreme Court, in *Shelley v. Kraemer*,<sup>35</sup> determined that deliberate housing segregation covenants, as enforced by any government entity, including the courts, constituted a denial of equal protection under the Fourteenth Amendment.<sup>36</sup> Still, through the 1960s, some individuals persistently sought ways to circumvent the *Kraemer* ruling, effectively continuing to perpetuate housing segregation.<sup>37</sup> Racial tensions grew, with violence erupting during the civil rights movement, and fair housing becoming a primary focus of the movement.<sup>38</sup> Eventually, Congress passed

---

35. 334 U.S. 1 (1948).

36. *See id.* at 23 (holding housing covenants promoting discrimination against minorities unconstitutional). The Supreme Court found that race-based restrictive covenants on the ownership of property are not themselves violations of the Equal Protection Clause of the Fourteenth Amendment, but that state court enforcement of the covenants is a violation. *See id.* at 8-9 (holding government participation in promoting discrimination unconstitutional). The Court has additionally found that statutes barring occupancy by African-Americans violate the Fourteenth Amendment. *See Harmon v. Tyler*, 273 U.S. 668, 668 (1927) (holding that landlord's refusal to rent property to minority tenants violated Fourteenth Amendment); *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (holding that intent of ordinance to prevent alienation of property to person of color was not legitimate exercise of state police power); *see also Glover v. Atlanta*, 96 S.E. 562, 563 (Ga. 1918) (holding that ordinance preventing persons of color from buying lots in white-dominated locations was unconstitutional); *Jackson v. State*, 103 A. 910, 911 (Md. 1918) (holding that ordinance seeking to make ownership or occupancy of property in particular localities dependent on race of persons was unconstitutional attempt to limit property rights of individuals on account of race); *Clinard v. Winston-Salem*, 6 S.E.2d 867, 870 (N.C. 1940) (holding that ordinance prohibiting landowners from selling or leasing property to certain races was unconstitutional); *Allen v. Okla. City*, 52 P.2d 1054, 1058 (Okla. 1935) (enjoining city from enforcing ordinance prohibiting black persons from purchasing lots in area where majority of residences were occupied by white persons); *Liberty Annex Corp. v. Dallas*, 289 S.W. 1067, 1069-70 (Tex. Civ. App. 1927) (holding city-adopted ordinance designating areas in city for occupancy by various racial groups void); *Irvine v. Clifton Forge*, 97 S.E. 310, 310 (Va. 1918) (holding city segregation ordinance in conflict with Fourteenth Amendment and therefore void).

37. *See Leonard S. Rubinowitz & Ismail Alsheik, A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 How. L.J. 841, 872-74 (2005) (identifying continuing discrimination in housing despite court rulings in 1960s). The finite number of fair housing cases indicates that civil rights litigators focused with greater intensity on resolving more visible issues such as segregation in schools, voting rights, and public transportation discrimination. *See id.* at 872 (discussing limited court rulings on fair housing issues). In one case, after popular musician Nat King Cole purchased a home in a wealthy Los Angeles neighborhood, white neighbors attempted to take back the property and planted signs on the lawn reading "Nigger Heaven." *See MEYER, supra* note 32, at 94-95 (describing outrageous practices white individuals undertook to maintain housing segregation in certain neighborhoods).

38. *See MEYER, supra* note 32, at 117 (describing state of unrest during civil rights movement). Violence erupted across the country as white neighborhoods reacted to the forced integration mandated by the Supreme Court. *See id.* (describing response to mandated integration by individuals seeking status quo). At that time, the city of Chicago endured three bombings, ten arson incidents, and eighty-one incidents of terror and intimidation toward black individuals. *See id.* at 118 (indicating extreme measure of violence individuals practiced in one city toward minorities).

the Civil Rights Act of 1964, which proved to be a major breakthrough in the reduction of segregation, but which provided few provisions for the enforcement of fair housing.<sup>39</sup>

In 1968, at the behest of President Lyndon B. Johnson, Congress enacted Title VIII of the Civil Rights Act, also known as the Fair Housing Act.<sup>40</sup> The FHA expressly prohibits the refusal to “rent after the making of a bona fide offer, or to refuse to negotiate for the . . . rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color . . . or national origin.”<sup>41</sup> Additionally, § 3604(c) of the FHA prohibits the following:

To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.<sup>42</sup>

This provision expressly creates liability for publishers who propagate housing advertisements that are discriminatory in nature.<sup>43</sup> The statute

---

39. See Rubinowitz & Alsheik, *supra* note 37, at 841-42 (discussing lack of enforcement for fair housing stemming from Civil Rights Act of 1964). In addressing Congress after taking office, President Johnson stated: “I urge you, as I did in 1957 and again in 1960, to enact a civil rights law so that we can move forward to eliminate from this nation every trace of discrimination based on race or color.” See Ted Gittinger & Allen Fisher, *LBJ Champions the Civil Rights Act of 1964*, PROLOGUE, Summer 2004, at 10, 15, available at <http://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-1.html>.

40. 42 U.S.C. §§ 3601-3631 (2006).

41. § 3604(a). The latter portion of the statute has proven substantial enough to render the “bona fide offer” requirement of little significance in the enforcement of the Act. See Schwemm, *supra* note 8, at 461 n.24 (citing ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION, app. C (2006)). Courts have recognized one notable exception to § 3604(a), known as the “Mrs. Murphy” exception, which states that discrimination is acceptable by an owner that lives at the home and rents to no more than three other people or families. See James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605, 605-06 (1999) (outlining exception to § 3604(a) in which discrimination practiced by individual homeowners is not necessarily illegal).

42. § 3604(c). It should be noted that the “Mrs. Murphy” exception does not apply to discriminatory advertisements under § 3604(c). See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1886 (2006) (noting that “permitting Mrs. Murphy landlords to publish discriminatory advertisements ‘created a public impression that segregation in housing is legal, thus facilitating discrimination by . . . other property owners and requiring a consequent increase in [civil rights] organizations’ educational programs on the illegality of housing discrimination.” (quoting *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 30 (D.C. Cir. 1990))). For a general explanation of the “Mrs. Murphy” exception, see Walsh, *supra* note 41, at 605-06.

43. See Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out The Welcome Mat For Fair Housing Suits Against Roommate-*



further aims to help promote integrated communities and encourage members of protected classes to freely pursue housing opportunities.<sup>44</sup> In their effort to enforce § 3604(c), courts have since held that the provision applies to an assortment of media.<sup>45</sup> Yet with the rise of the Internet and the CDA, Congress has expressed an intention to treat online media differently.<sup>46</sup>

### B. *Insulating the Internet's Growth: The Communications Decency Act*

With the rapid expansion of the Internet in the 1990s, there emerged an increased concern that obscene content such as pornography would be easily accessed and distributed.<sup>47</sup> Accordingly, in 1995, Congress passed

---

*Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 335 (2008) (discussing meaning behind § 3604(c) of FHA). Those found liable under § 3604(c) generally include both those individuals who originate the unlawful content by writing the discriminatory advertisements and additionally those who publish the advertisements. See *id.* (identifying individuals who traditionally are held liable under FHA provision).

44. See *Hous. Opportunities Made Equal v. Cincinnati Enquirer*, 943 F.2d 644, 652 (6th Cir. 1990) (discussing purpose of FHA “to eradicate housing discrimination and to promote integrated housing”). The Sixth Circuit stated that “[w]ithout the regulation of advertisements, realtors could deter certain classes of potential tenants from seeking housing at a particular location, effectively discriminating against these classes without running afoul of the FHA’s prohibition against discriminatory housing practices.” *Id.* (describing reasoning behind addition of § 3604(c) of FHA). The Fourth Circuit has stated that the “[w]idespread appearance of discriminatory advertisements in public or private media may reasonably be thought to have a harmful effect on the general aims of the Act; seeing large numbers of ‘white only’ advertisements in one part of a city may deter nonwhites from venturing to seek homes there.” *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972) (recognizing vast potential of harm from discriminatory advertising).

45. See, e.g., *United States v. Space Hunters, Inc.*, 429 F.3d 416, 420 (2d Cir. 2005) (holding that housing service that treated disabled people differently from non-disabled people violated FHA); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991) (finding that newspaper publication of housing advertisements consisting of models of potential customers of particular race could indicate racial preference); *Hunter*, 459 F.2d at 211 (holding that newspaper publishing classified advertisement for apartment rental denominated as “white home” violated FHA); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1289-91 (C.D. Cal. 1997) (finding that apartment complex rule restricting children’s play activities even when they were not causing unnecessary noise or annoying anyone violated FHA); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1057-69 (E.D. Va. 1987) (holding that advertising brochure depicting apartment complexes with only white individuals in photos violated FHA); *Wheatley Heights Neighborhood Coal. v. Jenna Resales Co.*, 447 F. Supp. 838, 842 n.3 (E.D.N.Y. 1978) (finding that real estate listing service could violate FHA if causal nexus is shown between service activities and racial steering).

46. For a general discussion of the background of the CDA, see *infra* notes 47-67 and accompanying text.

47. See Kurth, *supra* note 10, at 818 (pointing to surveys stating that Internet ballooned from 40 million users in 1996 to 513.41 million users in 2001). A 1994 Dateline NBC story about online pedophiles and generally “disgusting material” on the Internet sparked an intense reaction and calls for regulation. See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L.

an amendment to Title V of the Telecommunications Act, also known as the Communications Decency Act, which provided sanctions for anyone who “(i) makes, creates, solicits, and (ii) initiates the transmission of any . . . communication which is obscene, lewd, lascivious, filthy, or indecent.”<sup>48</sup> That same year, the Supreme Court of Nassau County, New York, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,<sup>49</sup> found online service providers to be content publishers rather than distributors, leading it to hold Prodigy Services liable for not filtering defamatory comments posted by a user.<sup>50</sup> Yet *Stratton Oakmont* was decided on seemingly paradoxical logic: online service providers that voluntarily filtered some content could be held liable, whereas those that ignored all objectionable content escaped liability.<sup>51</sup> The fear of the backlash of liability to service providers created

---

& TECH. 163, 172 (2006) (discussing news story about online pedophiles contributing to changes in Internet legislation). The NBC Dateline story led Senator James Exon to propose a law that would stand alone in an attempt to “modernize” obscenity regulation “for the digital world”; ultimately, the law was not passed. *See id.* (discussing first attempts at regulation of obscenities on Internet). Other complaints of deviant behavior extensively reported include fraud, identity theft, espionage, and intellectual property infringements. *See* NAT’L WHITE COLLAR CRIME CTR. & FBI, 2006 INTERNET CRIME REPORT 3 (2006), available at [http://www.ic3.gov/media/annualreport/2006\\_IC3Report.pdf](http://www.ic3.gov/media/annualreport/2006_IC3Report.pdf).

48. *See* 47 U.S.C. § 223. The primary goal of the Act, introduced by Senator James Exon of Nebraska, was to regulate the exposure of minors to indecent material. *See* Communications Decency Act, Pub. L. No. 104-104, Title V, 110 Stat. 56, 133-39 (1996); *see also* H.R. REP. NO. 104-458, at 81-91 (1996); S. REP. NO. 104-230, at 187-93 (1996); S. REP. NO. 104-23, at 9 (1995). The sanctions were to be regulated by the FCC. *See* CHARLES A. GIMON, INFO NATION, EXON AMENDMENT PASSES THE SENATE, available at <http://www.gimonca.com/personal/archive/exon.html> (recounting method of enforcement of original CDA).

49. No. 31063/94, 1995 WL 323710, at \*1 (N.Y. Sup. Ct. May 24, 1995), *abrogated by* 47 U.S.C. § 230 (2006).

50. *See id.* at \*17-18 (holding online service provider liable as publisher of content provided by third-party user). One who repeats or republishes a libel is subject to liability as a “publisher” as if he or she had published it originally. *See id.* at \*6 (discussing plaintiff’s burden to establish liability for libel). In contrast, a “distributor” such as a book store or library only can be liable for defamatory statements if they knew or had reason to know of the specific statements at issue. *See id.* (detailing condition to establish liability for distributor). Although Prodigy had shown that it had the ability to filter user content, it did not apply that ability in all situations. *See id.* at \*9 (describing Prodigy’s capability of controlling user content through selective filtering). The court followed the reasoning of the Southern District of New York in *Cubby, Inc. v. CompuServe, Inc.*, where an ISP was not found liable because it had little control over the content that the users provided. *See id.* (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991)). Because Prodigy had filtered some objectionable material, the court found that the service had control of the content, and was therefore liable as a publisher for controlling the access to the material. *See Prodigy*, 1995 WL 323710, at \*17-18 (finding ISP liable for all objectionable user content due to service’s past regulation of content).

51. *See* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (discussing implications for ISPs following *Prodigy*). In discussing *Stratton Oakmont*, Representative Christopher Cox stated: “The court said . . . ‘You . . . are going to face higher, stricter [sic] liability because you tried to exercise

a substantial disincentive for ISPs to create filtering software for illicit content.<sup>52</sup>

Recognizing the implications of *Stratton Oakmont*, Congress passed § 230 of the Telecommunications Act.<sup>53</sup> In that section, Congress specifically stated its intentions for adopting the Act by including policy goals such as “promot[ing] the continued development of the Internet” and “preserv[ing] the vibrant and competitive free market that presently exists for the Internet.”<sup>54</sup> Most significantly, § 230(c)(1) states that “[n]o 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>55</sup> Accordingly, this passage has been recognized by

---

some control over the offensive material.’ Mr. Chairman, that is backward.” 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (indicating reverse logic in *Stratton Oakmont* decision, which led to passage of § 230 amendment).

52. See Myers, *supra* note 47, at 173 (finding that holding Prodigy liable for defamatory content in *Stratton Oakmont* created disincentive to produce software that permits user comments); see also 141 CONG. REC. H8469-70 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (discussing reasoning behind push for legislation for protection of ISPs from liability for third-party content posted online).

53. See Stephen Collins, *Saving Fair Housing on the Internet: The Case For Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471, 1479-82 (2008) (noting that *Stratton Oakmont*’s implications caused push for legislation to protect ISPs from liability stemming from third-party content). Section 230 was introduced into the House by Representatives Christopher Cox of California and Ron Wyden of Oregon due to their concerns for “hamper[ing] the development of the Internet.” See 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Section 230 focused on alleviating the burden on ISPs that serve third-parties who post content. See Kurth, *supra* note 10, at 821 (discussing Congress’s reasoning in addressing Internet publication issue).

54. 47 U.S.C. § 230(b) (2000). Specifically, Congress listed the goals of the statute:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

*Id.* (outlining policy goals of § 230). Congress hoped that tying this “get out of liability free” card to good faith attempts to block illicit content would allow websites to develop and use self-regulatory technologies. See Recent Case, *Texas District Court Extends § 230 Immunity to Social Networking Sites*, 121 HARV. L. REV. 930, 931 n.12 (2008) (discussing Congress’s motivation in adopting § 230).

55. 47 U.S.C. § 230(c)(1).

some courts as providing immunity from liability to ISPs to the extent that they only publish information provided by a third party.<sup>56</sup>

Finding such liability hinges on whether the ISP is determined to be an “interactive computer service” or “information content provider.”<sup>57</sup> The Act defines an “interactive computer service” as “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.”<sup>58</sup> In contrast, § 230 defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>59</sup> Courts are therefore left with the dilemma of deciding whether, under the purposes of the CDA’s immunity clause, a website is an “information content provider” acting as a developer or merely an “interactive computer service” acting as a “publisher.”<sup>60</sup> The greater the service’s role in providing content, the greater potential for liability to the service.<sup>61</sup>

In 1997, the Supreme Court found that the amendments to § 223, referring to lewd content, violated the First Amendment and were thus unconstitutional; the amendments made to § 230, however, continue to be enforced.<sup>62</sup> Since the passage of § 230, case law has been generally

---

56. See, e.g., *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (finding that § 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role”). *Zeran* was the first decision on the matter since the passage of § 230; the holding began the era of broad immunity for ISPs. See Sussman, *supra* note 9, at 203-04 (discussing beginning of courts’ recognition of § 230 immunity toward ISPs). For a general discussion analyzing the background case law on ISP liability and finding consistency in the courts’ holdings, see *id.* at 203-07.

57. See Burns, *supra* note 4, at 73-74 (explaining that “[t]he central issue that courts confront when applying the CDA for purposes of immunity is the breadth of the definitions of ‘information content provider’ and ‘publisher’ as two key terms within the CDA”).

58. See § 230(f) (2) (defining interactive computer service).

59. See § 230(f) (3) (defining information content provider).

60. See Burns, *supra* note 4, at 73-74 (discussing dilemma for courts in determining liability). The courts use the term “in whole or in part” to clarify the breadth of the immunity provided by the statute. See *id.* at 74 (discussing key term used to identify potential liability for ISPs).

61. See *id.* (explaining that “[t]he greater extent to which an interactive computer service—which could be an ISP such as America Online . . . or a website such as Craigslist—is seen to be merely a publisher of information from a third-party information content provider . . . the greater the immunity from liability”). A court is left to decide in the continuum between two extreme readings of the statute: (1) a service is liable so long as it is responsible for any part of the development; or (2) a service is not liable so long as a third-party is responsible for any part of the development. See *id.* (discussing expansive potential readings courts must consider when making judgments on § 230 immunity).

62. See *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (finding that vagueness of § 223 posed “chilling effect on free speech” that raised special First Amendment concerns). The Court noted that this section, which prohibited “obscene or inde-

consistent in finding a comparatively expansive definition of “interactive computer service” and a narrow definition of “interactive content provider.”<sup>63</sup> The Ninth Circuit exemplified these interpretations in *Carafano v. Metrosplash.com, Inc.*,<sup>64</sup> holding that an Internet matchmaker was not an information content provider because none of its matchmaking profiles had any content until a user actively created it.<sup>65</sup> The court noted that “the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a ‘developer’ of the ‘underlying misinformation.’”<sup>66</sup> Thus, leading up to *Roommates.com*, the Ninth Circuit, like other courts, had generally held ISPs immune from liability for content posted by third parties.<sup>67</sup>

### III. ROOMMATES.COM: BUILT ON SHAKY GROUND?

#### A. Framing the Case: The Facts and Procedure

Roommates.com is a for-profit ISP that hosts a website that allows individuals to advertise spare rooms for other individuals to rent.<sup>68</sup> The service has accumulated over 150,000 active postings, and receives roughly

---

cent” communications to minors, “effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.” *Id.* at 874 (finding burden on adult speech to be “unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve”); *see also* United States v. Playboy Entm’t. Group, 529 U.S. 803, 826-27 (2000) (finding that § 561 of Telecommunications Act of 1996 contained content-based restrictions that violated First Amendment).

63. *See* Sussman, *supra* note 9, at 207 (stating that although debate continues as to whether “the broad definition of ‘interactive computer service’ and the narrow definition of ‘information content provider’ reflect Congress’s intention when it passed § 230, there appears to be uniformity across court reasoning”).

64. 339 F.3d 1119 (9th Cir. 2003).

65. *See id.* at 1124-25 (finding that “Matchmaker did not play a significant role in creating, developing or ‘transforming’ the relevant information”). Although Matchmaker provided a menu of pre-prepared responses to users, the court found that Matchmaker lacked responsibility for the “underlying misinformation.” *See id.* (finding that providing pre-prepared responses to users does not render service an Internet content provider).

66. *See id.* at 1124 (finding ISP to be immune from liability without creating any content). The court noted that “despite the serious and utterly deplorable consequences that occurred in this case, we conclude that Congress intended that service providers such as Matchmaker be afforded immunity from suit.” *Id.* at 1125 (recognizing that negative implications cannot override Congress’s purposes).

67. *See* Butler, *supra* note 15, at 248 (describing how courts generally find that CDA grants ISPs immunity from liability from third-party content).

68. *See* Fair Hous. Council v. Roommates.com, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc) (discussing services that Roommates.com provides). The service has both a free service and an upgraded service requiring a monthly fee that provides additional features. *See id.* at 1162 (describing types of subscriptions available to users). Subscribers to the upgraded service could read emails from other users and view other subscribers’ “Additional Comments.” *See id.* (differentiating types of subscriptions available to Roommates.com users).

one million hits a day from Internet users.<sup>69</sup> Part of the service's objective is to address and capitalize upon the inherent difficulties and inefficiencies in the roommate selection process.<sup>70</sup> To become a member of Roommates.com, each subscriber is required to answer a series of questions including the subscriber's contact information, such as name, email address, and availability.<sup>71</sup> Further, a "Housing Description" section requires each subscriber to specify their gender, occupation, level of cleanliness, smoking habits, the total number of occupants in the home, and whether children or pets are present.<sup>72</sup>

Additionally, users can optionally select desired characteristics in a roommate, including age range, gender, and level of cleanliness.<sup>73</sup> Finally, the service provides an optional "Additional Comments" section, where users can describe themselves and indicate personal preferences in an open-ended form.<sup>74</sup> The service then compiles all of the user's information into a "profile page" that displays the user's name, description, and preferences as answered in the questionnaire.<sup>75</sup>

---

69. See *id.* at 1161 (discussing widespread use of Roommates.com service).

70. See Klein & Dосkow, *supra* note 43, at 335-36 (describing inefficiency of targeting housing advertising). Bryan Peters of Roommate.com testified that "[b]y referencing . . . beliefs in their profiles, users avoid the need to contact and interview dozens of incompatible people." See Fair Hous. Council of San Fernando Valley v. Roommates.com, 489 F.3d 921, 932 (9th Cir. 2007) (Reinhardt, J., concurring in part, dissenting in part).

71. See *Roommates.com*, 521 F.3d at 1180-81 (McKeown, J., dissenting) (describing user and housing information that Roommates.com's service required of users).

72. See *id.* at 1181 (describing additional information that Roommates.com service requested). The service made no request for information regarding the users' race or religion. See Fair Hous. Council of San Fernando Valley v. Roommate.com, No. 03-09386PA(RZX), 2004 WL 3799488, at \*1 (C.D. Cal. Sept. 30, 2004) (noting that Roommate.com did not request certain types of information).

73. See *Roommates.com*, 521 F.3d at 1181 (McKeown, J., dissenting) (describing section on website where users could optionally enter roommate preferences).

74. See *id.* at 1161 (majority opinion) (describing additional section where users could optionally enter any information in free form).

75. See *id.* at 1161-62 (describing how user information is utilized on Roommates.com service). Under the terms of service, Roommates.com informed all users that it does not screen their postings and that the users are "entirely responsible" for the information they post on the website. See *Roommate.com*, No. 03-09386PA(RZX), 2004 WL 3799488, at \*2 (describing pertinent terms of use for users signing up to use Roommates.com's service). Although Roommates.com did not screen the text of users' profiles, the service did review photographs to screen images violating the terms of use. See *id.* (discussing service's attempts at screening other forms of offensive content). The following is a sample member profile page:

The Basics

Rent: \$ 800 per month + \$ 800 deposit

Lease: 6 month

Date available: 09/01/04 (14 days)

Utilities included: N/A

Features: Private bedroom, Private bathroom

Residence & Vicinity

Building: House, 2 bed, 1.5 bath

The Fair Housing Councils of San Fernando Valley and of San Diego (Councils) filed suit against Roommates.com in a California federal court, alleging that the Roommates.com service violated the FHA and California housing discrimination laws due to discriminatory preferences displayed by its users' advertisements.<sup>76</sup> The Councils claimed that Roommates.com was effectively brokering housing online in a manner that otherwise would be illegal in offline print form.<sup>77</sup> The district court found Roommates.com immune from liability for illegal postings under § 230 of the CDA and dismissed the claims without considering whether any of Roommates.com's actions had violated the FHA.<sup>78</sup> The district court further declined to exercise supplemental jurisdiction over the California law claims.<sup>79</sup> The Councils appealed to the Ninth Circuit, arguing wrongful dismissal of the FHA violation claim; Roommates.com cross-appealed the denial of its attorneys' fees.<sup>80</sup>

B. *The Ninth Circuit Ruptures the Foundation of the  
Communication Decency Act*

The Ninth Circuit in *Roommates.com* began its analysis by turning to § 230 of the CDA and recognizing its guarantee of immunity for ISPs against liability from third parties' content.<sup>81</sup> The court acknowledged

---

Features: N/A

Location: (Central) Long Beach, CA

Household

Occupant: 1, Age 26, Male (straight)

Occupation: Student

Smoking habits: Outside smoker

Cleanliness: About average

Children: Children will not be living with us

Pets: Dog(s)

Preferences

Age group: 18-99

Gender: Male (straight or gay), Female (straight or lesbian)

Smoking: Smoking okay

Cleanliness level: Clean, Average, Messy

Pets: Dog okay, Cat okay, Caged pet okay

Children: Children okay

Comments

LOOKING FOR CHILL ROOMMATE [sic] TO SHARE 2 BR HOUSE  
WITH DOG AND FERRET - RENT 800/mo+util.6mo.lease.

*See Roommates.com*, 521 F.3d at 1181 n.9 (McKeown, J., dissenting) (outlining example user profile page).

76. *See id.* at 1162 (majority opinion) (discussing procedural history of case).

77. *See id.* (explaining additional procedural history).

78. *See id.* (analyzing district court's holding and reasoning).

79. *See id.* (discussing court's reasoning for refusing to render decision on issues pertaining to California law).

80. *See id.* (discussing appeal bringing case before federal circuit court).

81. *See id.* (describing relevant statute and its effect). For a general discussion of the history of the Communications Decency Act, see *supra* notes 47-67 and accompanying text.

that immunity is granted only to an “information content provider,” defined as a person “responsible, in whole or in part, for the creation or development of” the offending content.<sup>82</sup> After briefly discussing the background of § 230’s adoption, the court turned to the Councils’ three arguments that Roommates.com violated the FHA and California law.<sup>83</sup> The Councils alleged that Roommates.com violated the FHA through its use of a questionnaire, its publication of profile pages, and its encouragement of its customers to use the “Additional Comments” section.<sup>84</sup>

### 1. *The Questionnaire*

First, the Ninth Circuit addressed the Councils’ argument that the questions Roommates.com asked during the registration process violated the FHA and California law because they required subscribers to disclose sex, sexual orientation, and family status.<sup>85</sup> The Councils alleged that such questioning “indicate[d]” an intention to discriminate against certain users in violation of § 3604(c) of the FHA.<sup>86</sup> The court asserted that asking questions *can* be a violation of the FHA, reasoning that if it would be illegal for a real estate broker to ask such questions in the physical world, then those questions should not become suddenly legal when asked in electronic form.<sup>87</sup> The *Roommates.com* court went on to state that the

---

82. *See id.* (describing circumstances under which service provider can be implicated for offensive content).

83. *See id.* at 1162-64 (discussing background history of § 230 and analyzing Councils’ three contentions).

84. For a general discussion of the Councils’ arguments that Roommates.com violated the FHA, see *infra* notes 84-106 and accompanying text.

85. *See Roommates.com*, 521 F.3d at 1162-64 (detailing Councils’ first point of contention). The FHA forbids any “statement . . . with respect to the sale or rental of a dwelling that indicates . . . an intention to make [a] preference, limitation, or discrimination” based on a protected status. 42 U.S.C. § 3604(c). California law forbids “any written or oral inquiry concerning the” protection of a home seeker’s status. CAL. GOV’T CODE § 12955(b) (West 2005).

86. *See Roommates.com*, 521 F.3d at 1164 (indicating actions performed by service allegedly violated FHA). Previously, the Ninth Circuit had concluded that tasking users to provide information about themselves and their roommate preferences was a “statement . . . with respect to the sale or rental of a dwelling that indicates . . . an intention to make [a] preference, limitation or discrimination.” *Fair Hous. Council of San Fernando Valley v. Roommates.com*, 489 F.3d 921, 927-28 (9th Cir. 2007) (quoting 42 U.S.C. § 3604(c)); *see also Jancik v. Dep’t of Hous. & Urban Dev.*, 44 F.3d 553, 557 (7th Cir. 1995) (holding that landlord violated FHA by indicating preference based on family status and race in both print advertisements and interviews); *Soules v. Dep’t of Hous. & Urban Dev.*, 967 F.2d 817, 824-26 (2d Cir. 1992) (finding that landlord did not violate FHA because landlord’s questioning did not indicate pretextual reasoning for denial of housing).

87. *See Roommates.com*, 521 F.3d at 1165 (finding that asking questions electronically is sufficient to render service provider liable analogously to similar conduct in physical world); *see also, e.g., Jancik*, 44 F.3d at 557 (holding that questions on race pursuant to preferences in tenants rendered landlord in violation of FHA).



CDA “was not meant to create a lawless no-man’s-land on the Internet.”<sup>88</sup> The court therefore concluded that requiring the questionnaire was an active act on the part of Roommates.com, thus negating any immunity that the CDA would grant to them.<sup>89</sup>

## 2. *The Profile Page*

Second, the court addressed the Councils’ charge that Roommates.com’s compilation and publication of a profile page providing the users’ personal information was itself a violation of the FHA.<sup>90</sup> The court acknowledged that it was the users who provided the information, but held that because the service helped “‘develop,’ at least ‘in part,’” the profile information, the ISP was thus subject to liability.<sup>91</sup> The court found that unlawful questions in the questionnaire necessarily “develop[ed]” unlawful answers and therefore created a discriminatory method of conducting business.<sup>92</sup>

The court discussed at length the meaning of the word “develop” as it pertains to § 230.<sup>93</sup> The court found a “passive conduit” or “co-developer” as remaining immune to liability because such parties do not sufficiently “develop” content.<sup>94</sup> According to the court, however, any website that

---

88. See *Roommates.com*, 521 F.3d at 1165 (finding that Congress did not intend for CDA to bar liability for all occurrences of illegal conduct on Internet). The court noted that the Internet is no longer a fragile new piece of technology but has instead become the dominant means through which commerce is conducted. See *id.* at 1164 n.15 (finding that Internet no longer needs such stringent protections).

89. See *id.* at 1165 (summarizing conclusion to first alleged violation of FHA).

90. See *id.* (addressing Councils’ second point of contention).

91. See *id.* (addressing Roommates.com’s involvement in publication process). The court referenced its prior holding in *Batzel v. Smith*, where it concluded that “the party responsible for putting information online may be subject to liability, even if the information originated with a user.” *Id.* (quoting *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003)). In *Batzel*, a defamatory email was incorrectly forwarded to an international message board by an ISP. See *Batzel*, 333 F.3d at 1020-22 (outlining facts of case). The court held that despite being an ISP pursuant to § 230, the poster could be liable because the email was sent from an email address not associated with the service. See *id.* at 1033-35 (outlining specific circumstance causing court to find ISP liable for third-party content).

92. See *Roommates.com*, 521 F.3d at 1166 (finding that Roommates.com’s questions necessitated discriminatory answers that run afoul of FHA requirements). The court likened the situation to a real estate broker saying in real life, “Tell me whether you’re Jewish or you can find yourself another broker.” *Id.* (analogizing Roommates.com’s questioning to illegal real life situation). The court found that where a business extracts such information as a condition to accepting clients “it is no stretch to say that the enterprise is responsible, at least in part, for developing that information.” See *id.* (finding Roommates.com responsible for conditional questions for users to create profile pages).

93. See *id.* at 1166-72 (finding that Roommates.com was developer of content pursuant to under § 230).

94. See *id.* at 1167-68. (discussing statutory meaning of “develop” under § 230). The court referred to the example that a user performing a search on a search engine for a “white roommate” would not cause liability for the search engine because the service did not contribute to any unlawfulness in the individual’s

contributes materially to the alleged illegality of the content unlawfully “develops” the content.<sup>95</sup> The court found that Roommates.com’s filtering process, which limited search results of listings to users based on sex, sexual orientation, and presence of children, was sufficient to constitute a violation of the FHA.<sup>96</sup>

The court differentiated the current case from its earlier holding in *Carafano*, where the operator of the challenged website had little involvement with the user’s decision to enter information.<sup>97</sup> Conversely, in *Room-*

---

conduct. *See id.* at 1169 (describing situation where service remains immune to liability for unlawful activity of user). The court stated that a website owner that corrects spelling, removes obscenity, or edits for length (provided that the edits are unrelated to the illegality) remains immune from liability. *See id.* (discussing situation where ISP remains immune from liability despite making changes to illegal content).

95. *See id.* at 1169-70 (discussing actions sufficient to be a “developer” under § 230). The court iterated that the same selective criteria that is not immune for housing services would otherwise retain immunity under § 230 for an online dating service. *See id.* at 1169 (noting legality of discrimination based on race, sex, sexual preference, or amount of children in dating situations).

96. *See id.* (finding that service limited listings available to subscribers based on sex, sexual orientation, and presence of children). The court maintained that Roommates.com selectively hid certain listings based on discriminatory criteria and therefore violated the FHA. *See id.* (finding that service could selectively filter content and had ability to control postings by users). The court contrasted this case with *Stratton Oakmont, Inc. v. Prodigy Services Co.*, where the service provider Prodigy removed some but not enough of the wrongful content at issue in that case. *See id.* at 1170 (finding that service provider’s liability stemmed from creation of “a website designed to solicit and enforce housing preferences that are alleged to be illegal”). The court additionally found its reasoning consistent with its prior decision in *Batzel*, where the editor of the online service made the determination of posting defamatory content online. *See id.* (citing *Batzel*, 333 F.3d at 1033) (finding that editor of message board made conscious decision to post defamatory content that was disassociated with message board itself, rendering him liable).

97. *See id.* at 1171-72 (finding that ISP involvement differentiated instant case from prior holding); *see also Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (finding website not liable for user entering false information into online dating service). In *Carafano*, a user entered the information of a popular actress into a dating service resulting in an abundance of harassing calls and email to the actress’s personal phone and email accounts. *See id.* at 1121-22 (describing background details behind *Carafano*). The court found that § 230 prevented liability from attaching to the ISP because a profile has no content until a user creates it. *See id.* at 1124 (finding that robust immunity applied to online Internet dating service in case of fraud); *see also Universal Sys. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (finding that third-party’s defamatory comments made without encouragement by ISP renders service immune from liability); *Green v. Am. Online*, 318 F.3d 465, 470-71 (3d Cir. 2003) (finding ISP immune from liability for derogatory comments and malicious software sent through chat room without encouragement by the service); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) (finding ISP immune from liability for relaying inaccurate stock price information received from other vendors because service did not solicit other vendors to provide inaccurate data); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332-33 (4th Cir. 1997) (finding ISP immune from liability for defamatory and harassing message board postings because service did not solicit or encourage wrongful postings).

mates.com, the court found that Roommates.com had provided the framework for improper purposes and had developed the discriminatory questions, thus rendering the service directly involved with a system subjecting users to allegedly discriminatory housing practices.<sup>98</sup> Further distinguishing *Carafano*, the court noted that “[t]he mere fact that an interactive computer service ‘classifies user characteristics . . . does not transform [it] into a developer of the underlying misinformation.’”<sup>99</sup>

### 3. The “Additional Comments”

Finally, the court turned to the Councils’ argument that any discriminatory statements within the encouraged “Additional Comments” section of the profile pages should render Roommates.com liable.<sup>100</sup> The “Additional Comments” section of the profile page provided additional and less restrained methods for users to post discriminatory content.<sup>101</sup> The Ninth Circuit noted that Roommates.com had encouraged users to post in the section, and that the service posted the content in this section as written, and lacked guidance as to what the section should contain.<sup>102</sup> The court went on to describe provocative examples of content that various users had inserted into the “Additional Comments” section.<sup>103</sup> Because the

---

98. See *Roommates.com*, 521 F.3d at 1172 (finding that service elicited and aggressively used “allegedly illegal content . . . in conducting its business,” thus providing necessary framework for improper use by users). The court noted that the discriminatory questions and answers were “directly related to the alleged illegality of the site.” See *id.* (indicating connection between Roommates.com and alleged discriminatory content).

99. See *id.* (distinguishing current issue with that in circuit’s previous decisions involving immunity for ISPs under § 230). The *Roommates.com* court mentioned that it was adopting a common sense term of the word “develop” as specified in § 230. See *id.* (specifying court’s meaning of statutory language). The court also stated that any broader reading of the term “develop” “would sap section 230 of all meaning.” See *id.* (indicating effect of broad interpretation of statute).

100. See *id.* at 1173 (identifying court’s third and final point of analysis in determining potential liability for ISP).

101. See *id.* at 1173-74 (discussing “Additional Comments” section of service’s profile page). The service prompts paying subscribers to “tak[e] a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate.” *Id.* (describing Roommates.com’s encouragement of users to add additional optional roommate preferences). The “Additional Comments” section is described as a blank text box allowing users to freely type whatever they wish. See *id.* (discussing form of “Additional Comments” section).

102. See *id.* (finding that service asked subscribers to provide personal information or preferences for potential roommates in free form). The court specifically noted that Roommates.com made no request for any discriminatory content to be placed in the “Additional Comments” section. See *id.* (indicating Roommates.com did not encourage users to create and post discriminatory content on service).

103. See *id.* at 1173 (detailing content that users inserted into “Additional Comments” section). One example the court gave of illicit information entered in the “Additional Comments” section includes a user requesting that “[t]he person applying for the room MUST be a BLACK GAY MALE.” See *id.* (indicating potentially discriminatory statement put on user profile in “Additional Comments” section).

content posted in the “Additional Comments” section was generally passively performed, the court ultimately found Roommates.com immune under § 230 from any discriminatory postings in this section.<sup>104</sup>

Although the Ninth Circuit found Roommates.com liable for user content, the court nevertheless asserted that its decision preserved freedom of speech on the Internet while still enforcing laws such as the FHA.<sup>105</sup> The court stated that its decision was coherent with Congress’s purpose in adopting § 230, as it was intended to encourage ISPs to provide a “neutral tool” for posting content online, without fear of their “good samaritan . . . screening of offensive material,” creating liability for illicit third party content.<sup>106</sup>

C. *Reinforcing the Communication Decency Act’s Structure:  
The Dissenting Opinion*

Judge McKeown began his dissent to the Ninth Circuit’s opinion in *Roommates.com* by stating that the majority opinion’s expansion of liability for ISPs threatens to slow the “robust development” of the Internet.<sup>107</sup> Judge McKeown found that the majority opinion undermined Congress’s purpose in adopting § 230 as a means to provide “robust immunity” for ISPs in order to prevent them from being held liable for publishing third-

---

tion). Other examples of statements with potentially discriminatory preferences that have been used in the “Additional Comments” section include:

“looking for an ASIAN FEMALE OR EURO GIRL”; “I’m looking for a straight Christian male”; “I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage brokers”; and “Here is free rent for the right woman . . . I would prefer to have a Hispanic female roommate so she can make me fluent in Spanish or an Asian female roommate just because I love Asian females.”

*See* Fair Hous. Council of San Fernando Valley v. Roommates.com, No. 03-09386PA(RZX), 2004 WL 3799488, at \*2 (C.D. Cal. Sept. 30, 2004) (outlining examples of potentially discriminatory advertisements placed by users on Roommates.com’s service).

104. *See Roommates.com*, 521 F.3d at 1173-75 (finding that ISP’s lack of participation in online postings renders it immune from liability for unlawful postings). The court found that any encouragement the website gave to users to add comments to the “Additional Comments” section was not sufficient to render them liable for user content in that section. *See id.* at 1174 (finding that lack of encouragement to post discriminatory comments maintained ISP’s immunity from liability for comments). The court also asserted that it would be impossible to distinguish unlawful discriminatory preferences in the “Additional Comments” section without reviewing every essay. *See id.* at 1174 (finding difficulty for ISP to filter user content on large scale).

105. *See id.* at 1175 (justifying court’s decision as consistent with Congress’s intent in adopting § 230).

106. *See id.* (quoting 47 U.S.C. § 230(c) (2006)) (summarizing that § 230 provides immunity to ISPs only when website provides “neutral” tools for users to create content).

107. *See id.* at 1176 (McKeown, J., dissenting) (declaring that expansion of liability for ISPs is harmful to Internet’s future growth).

party content.<sup>108</sup> As Judge McKeown argued, though traditional publishers retained liability for similar publishing acts in the real world, Congress through § 230 specifically chose to treat ISPs differently by providing them with immunity.<sup>109</sup>

The dissent acknowledged that the adopters of § 230 did not envision today's technologies, but reasoned that Congress's intentions remained as applicable today as in the mid-1990s.<sup>110</sup> Judge McKeown stated that the Ninth Circuit, as well as a majority of other circuits, has recognized the "robust" immunity that § 230 provides to ISPs.<sup>111</sup> Therefore, Judge McKe-

108. *See id.* (finding that expansion of liability for ISPs is contrary to Congress's intent in adopting § 230).

109. *See id.* at 1176-77 (acknowledging difference in treatment for ISPs). Judge McKeown recalled the Ninth Circuit's decision in *Batzel v. Smith*, where the court explained:

[Section] 230(c)(1) overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law. As a matter of policy, "Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations . . . ." Congress . . . has chosen to treat cyberspace differently.

*Id.* at 1176 (quoting *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003)).

110. *See id.* at 1176-77 (acknowledging that surge in technology has made today's Internet "a far cry from web technology in the mid-1990s").

111. *See id.* at 1179-80 (describing differential treatment given to ISPs); *see also* Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (finding that an online information system must not "be treated as the publisher or speaker of any information provided by" someone else); Universal Commc'n Sys. v. Lycos, Inc., 478 F.3d 413, 420 (1st Cir. 2007) (finding that "notice of the unlawful nature of the information provided on the Internet is not enough to make it the service provider's own speech"); *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (finding that § 230 "'precludes courts from entertaining claims that would place a computer service provider in a publisher's role,' and therefore bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content'" (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000) (finding that § 230 "creates a federal immunity to any cause of action that would hold service providers liable for information originating with a third party") (emphasis added); *Zeran*, 129 F.3d at 330 (holding that § 230 was "enacted . . . to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum"); *see also* *Whitney Info. Network, Inc. v. Xcentric Ventures*, No. 2:04-cv-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at \*35-36 (M.D. Fla. Feb. 15, 2008) (finding immunity for website that provided template for users to classify consumers' complaints for companies such as "con artists" or "corrupt companies"); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 851-52 (W.D. Tex. 2007) (finding immunity for ISP for not preventing user from posting false age information and resulting in sexual assault), *aff'd*, 528 F.3d 413 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 600 (2008); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (holding ISP not liable for postings of copyright owner's photos online); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50-53 (D.D.C. 1998) (finding ISP not liable for defamation stemming from comments provided by user of service); *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006) (finding ISP immune from liability from alleged libel by maliciously distributing statements in e-mails

own declared that the court should not make the policy decision of whether § 230(c)(1) trumps the FHA, but rather should leave such a judgment to Congress.<sup>112</sup>

Additionally, Judge McKeown asserted that the majority misapplied the terms “interactive computer service” and “information content provider.”<sup>113</sup> An interactive computer service is not liable as a “publisher” of information supplied by an information content provider.<sup>114</sup> The dissent found that because a third-party provided the information, the webhost should not be liable for any inflammatory content posted by the third-party.<sup>115</sup> According to the dissent, Roommates.com’s users were therefore “information content providers” because they created the information in their profiles and, at their option, added information as to their roommate preference.<sup>116</sup>

Moreover, Judge McKeown concluded that providing drop-down menus for users to enter information did not “develop” the information, as the users still chose the content they entered themselves.<sup>117</sup> Even if the

---

and Internet postings); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 717-18 (Cal. Ct. App. 2002) (holding that imposition of liability on ISP for failing to provide certificate of authenticity with collectables was inconsistent with § 230); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 42-43 (Wash. Ct. App. 2001) (holding ISP immune from liability for negative comments about author posted on site by visitors to website).

112. See *Roommates.com*, 521 F.3d at 1177 (McKeown, J., dissenting) (stating that determination of ISP liability under FHA is policy decision best reserved for Congress).

113. See *id.* at 1180-82 (finding that users were “information content providers” whereas Roommates.com was “interactive computer service”). The CDA defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . .” 47 U.S.C. § 230(f)(2) (2006). An information content provider is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computers service.” § 230(f)(3). Judge McKeown stated that the users solely create the profiles without intervention by the service and therefore are the “information content providers.” See *Roommates.com*, 521 F.3d at 1182 (McKeown, J., dissenting) (asserting that only creators of profiles can legitimately qualify as “information content providers”). The dissent additionally noted that in the twelve years since the CDA’s enactment, reviewing courts had “adopt[ed] a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’” See *id.* at 1180 (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)).

114. See § 230(c)(1) (stating that “[n]o 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”).

115. See *Roommates.com*, 521 F.3d at 1180-82 (McKeown, J., dissenting) (describing process by which users create content on site).

116. See *id.* at 1182 (finding that users identify information that they choose to display and are thus sole creators of that provided information).

117. See *id.* at 1181-82 (asserting that Roommates.com is not “developer” as specified in § 230). The dissent argued that providing a form with standardized answers does not “develop” the answers, and without the user’s participation, there would be no information presented at all. See *id.* (finding that providing users

drop-down menus were interpreted as encouraging information from users, the CDA does not bar immunity from encouragement or solicitation of such information.<sup>118</sup> Finally, Judge McKeown asserted that the ramifications of the majority's decision would be far reaching and would chill speech on the Internet, interactive computer services, and other interactive media.<sup>119</sup>

#### IV. THE NINTH CIRCUIT BREAKS GROUND BUT HOBBLER THE COMMUNICATION DECENCY ACT'S BROAD IMMUNITY

Until *Roommates.com*, a vast majority of courts recognized and enforced the "robust immunity" provided to ISPs.<sup>120</sup> The Ninth Circuit's holding in *Roommates.com* has thus created a new precedent that conflicts with the majority of case law stemming from both its own decisions and those of other circuits.<sup>121</sup> In contrast, the Seventh Circuit's holding in

---

standardized options does not constitute "development" of information). The dissent additionally stated that the process of searching, sorting, and transmitting user information, without altering the content, cannot transform the service into an "information content provider." *See id.* at 1184-85 (noting that management of information is not sufficient to create liability for ISP); *see also Carafano*, 339 F.3d at 1124-25 (finding that "classif[ying] user characteristics into discrete categories and collect[ing] responses to specific essay questions does not transform [the ISP] into a 'developer' of the 'underlying misinformation'"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (noting that attempts "to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred"); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 706 (Cal. Ct. App. 2002) (holding that compiling false or misleading content created by users does not transform ISP into Internet content provider).

118. *See Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting) (concluding that encouraging entries of specific user information was not sufficient to render ISP as creator of such content); *see also Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("Congress has made a different policy choice by providing immunity even where the interactive service provider has an *active, even aggressive role* in making available content prepared by others.") (emphasis added).

119. *See Roommates.com*, 521 F.3d at 1187-89. (McKeown, J., dissenting) (arguing that majority's decision will hinder Internet's development and growth). Judge McKeown argued that the majority's decision would open every interactive website to liability for soliciting and sorting information. *See id.* at 1188-89 (finding limitless potential of liability for websites with users entering information).

120. For a general discussion of court decisions finding immunity for ISPs, see *supra* note 97 and accompanying text.

121. *Compare Roommates.com*, 521 F.3d at 1167-68 (finding an exception to CDA immunity where an ISP contributes in part to objectionable content posted on Internet), *with Carafano*, 339 F.3d at 1124 (holding that "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity *regardless of the specific editing or selection process*") (emphasis added); *Zeran*, 129 F.3d at 331 (finding that § 230 provided immunity to service providers from liability for each message republished by their services to prevent them from having to restrict number and type of messages posted); *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (finding "critical in applying [§ 230 is] the concern that lawsuits could threaten the 'freedom of speech in the new and burgeoning Internet medium.'" (quoting *Zeran*, 129 F.3d at 330)).

*Craigslist* represents the archetypal methodology and interpretation of § 230 as it applies to ISPs and discriminatory housing postings.<sup>122</sup>

A. *The Seventh Circuit Hit the Nail on the Head in Craigslist*

The Seventh Circuit in *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist* also heard a case involving a similar accusation of FHA violations against an ISP, yet it reached a far different conclusion than that of the Ninth Circuit in *Roommates.com*.<sup>123</sup> The Seventh Circuit case was brought against Craigslist, an ISP that provides, among other things, an online bulletin board for people to buy, sell, or rent housing services.<sup>124</sup> The issue in *Craigslist* arose out of the defendant's advertisement creation process, which required users to enter both suggested and required fields comprising the content of the post, including price, location, contact, and description.<sup>125</sup>

The Chicago Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) filed suit against Craigslist for notices posted by users that were allegedly in violation of the FHA.<sup>126</sup> Craigslist responded by

122. See *Chicago Lawyers' Comm. for Civil Rights Under Law v. Craigslist*, 519 F.3d 666, 671 (7th Cir. 2008) (finding that broad interpretation of § 230 prevented Craigslist from assuming liability for its users discriminatory housing postings); see also *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) (finding broad immunity granted to Lycos despite facilitating defamatory postings of others on Internet); *Green v. Am. Online*, 318 F.3d 465, 473 (3d Cir. 2003) (finding that broad reading of § 230 protected America Online from liability from bulk and unsolicited email); *Batzel*, 333 F.3d at 1036 (holding that broad reading of § 230 rendered e-mail newsletter operator as immune from liability); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 987-88 (10th Cir. 2000) (using broad interpretation of § 230 to find America Online immune from defamation charges arising out of users' content); *Zeran*, 129 F.3d at 335 (finding that § 230 plainly immunized ISPs like America Online for information that originated with third parties).

123. Compare *Craigslist*, 519 F.3d at 671-72 (finding protection for online service provider from being treated as publisher or speaker of any information provided by someone else), with *Roommates.com*, 521 F.3d at 1175-76 (finding that CDA does not provide immunity to online service provider for discriminatory content when service provides assistance in creating content).

124. See *Craigslist*, 519 F.3d at 668 (describing how Craigslist's service is used for advertising purposes). Craigslist provides classifieds and allows advertising for a variety of services to more than 550 cities in over fifty countries. See Craigslist factsheet, <http://www.craigslist.org/about/factsheet> (last visited Mar. 3, 2009). There are more than fifty million users and twelve billion page views on the Craigslist service each month. See *id.* (outlining vast amount of user traffic on Craigslist service).

125. See *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 684-85 (N.D. Ill. 2006) (describing user website creation process on Craigslist service). When an individual accesses Craigslist seeking to purchase or rent and searches for criteria or preferences on Craigslist's website, they reach the seller or renter's page and obtain the necessary contact information. See *id.* at 685 (describing how potential customers meet sellers or renters through Craigslist's service).

126. See *Craigslist*, 519 F.3d at 668 (outlining bases for action against Craigslist); see also 42 U.S.C. § 3604(c) (banning housing notices that indicate prefer-



asserting that whether the content was objectionable under the FHA was irrelevant, as § 230 of the CDA provided “broad immunity from liability for unlawful third-party content.”<sup>127</sup>

The Seventh Circuit in *Craigslist* identified the issue as whether Congress intended § 3604 to be excluded from the reach of § 230.<sup>128</sup> The court declared that although the reasoning behind the adoption of § 230 was to provide immunity for ISPs that selectively filtered illicit content, the scope of a law will often differ from its genesis and provide greater protection.<sup>129</sup>

Though Craigslist undoubtedly played a causal role in providing the forum for discrimination, the Seventh Circuit concluded that such role was not sufficient to render the service a “cause” of discrimination as specified in § 3604(c).<sup>130</sup> Additionally, the service did nothing to induce its users to express a preference for discrimination, such as offering a lower price to people who include discriminatory content in their postings.<sup>131</sup>

---

ence based on race, color, religion, sex, handicap, familial status, or national origin). Some of the notices on Craigslist include phrases such as “NO MINORITIES” and “No children.” See *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 685-86 (N.D. Ill. 2006) (citing examples of illicit postings on Craigslist that potentially violated FHA). The Lawyers’ Committee argued that an information content provider must perform “blocking and screening” or all of § 230(c) would be irrelevant. See *Craigslist*, 519 F.3d at 669 (describing Lawyers’ Committee’s argument against allowing immunity to apply to Craigslist).

127. See *Craigslist*, 519 F.3d at 669 (arguing for immunity from liability for third-party content for ISPs under § 230). Craigslist also asserted that the effort to filter or screen the discriminatory content either by automated efforts or through human labor would be unnecessary due to the immunity provision in § 230. See *id.* (arguing that ISPs do not need to perform “blocking and screening”); see also 47 U.S.C. § 230(c) (declaring that “[n]o 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”).

128. See *Craigslist*, 519 F.3d at 671 (finding that Congress writes general statutes to avoid considering all potential sources of liability); see also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1974) (concluding that legislation does not need to think about subject for law to affect it and that effect of general rules continues unless limited by superseding enactments).

129. See *Craigslist*, 519 F.3d at 671 (noting that broad interpretation is appropriate for statute not necessarily adopted for purpose at hand). Additionally, the court noted that the statute uses the word “information,” which encompasses a broad range of material, rather than a more specific phrase such as “sexually oriented material.” See *id.* (recognizing broad approach Congress used in phrasing § 230).

130. See *id.* at 671 (finding Craigslist’s level of contribution in any discriminatory postings to be insufficient to hold service liable as developer of discriminatory content). The court noted that it would be similarly absurd to claim that people who save money in a bank “cause” a bank robbery because without banks there would be no bank robberies. See *id.* (indicating that calling ISPs “the cause” of harm points blame at wrong parties).

131. See *id.* at 671-72 (finding lack of inducement to make discriminatory statements as evidence of non-causal role in posting of statements). The court asserted that if Craigslist were to be held liable for “causing” the discriminatory

Finally, the court asserted that rather than sue the service, the Lawyers' Committee could identify and track down any landlords or owners who engage in discrimination, and prosecute them directly.<sup>132</sup>

The primary difference between *Roommates.com* and *Craigslist* stems from the differing methods that the two websites use to obtain information from their users.<sup>133</sup> *Roommates.com*'s drop-down menus, with built-in answers allowing users to transmit potentially discriminatory content, proved to be the Ninth Circuit's primary reason in finding *Roommates.com* at fault.<sup>134</sup> In contrast, *Craigslist*'s method of free posting allowed entry of content without the service's assistance, similar to the "Additional Comments" section in *Roommates.com*'s profile creation page.<sup>135</sup>

Yet although *Roommates.com* provided the drop-down answers, it was still the *Roommates.com* users, rather than the service, who chose the content of their profiles.<sup>136</sup> The users themselves were creating the content,

---

notices, then the firms that create the computers and software should be as well. *See id.* at 672 (finding that holding ISPs liable for third-party content creates endless source of liability for anyone else providing means for people to create illicit content).

132. *See id.* at 672 (noting that anyone experiencing discrimination through online housing services has other available methods for seeking justice); *see also* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (holding that "testers" experiencing discriminatory housing practices still have standing to sue under FHA's provisions); *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 102-03 (1979) (holding that plaintiff need not be "person aggrieved" to have standing to sue for violations of Civil Rights Act).

133. *Compare Roommates.com*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc) (stating that service required users to specify, using drop-down menu personal information), *with* *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 684-85 (N.D. Ill. 2006) (requiring users to submit information into required fields that list rent or price, specific and general location, title of advertisement, contact email address, and description, with capability to add pictures).

134. *See Roommates.com*, 521 F.3d at 1169-70 (finding that "Roommate's connection to the discriminatory filtering process is direct and palpable: Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children."). The court found that the website's selection process was designed in a manner that solicited and enforced housing preferences alleged to be illegal. *See id.* at 1170 (indicating that website's design mandated liability for any discriminatory content).

135. *See Craigslist*, 461 F. Supp. 2d at 685-86 (allowing users to freely enter user information without any predetermined answers); *see also Roommates.com*, 521 F.3d at 1173-74 (finding that "Additional Comments" section "does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences").

136. *See Roommates.com*, 521 F.3d at 1182 (McKeown, J., dissenting) (declaring that "[t]he profile is created solely by the user, not the provider of the website"). The Ninth Circuit has already found that merely "selecting material for publication" does not constitute "development" of information. *See Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding that development of information requires actions more substantial than merely editing and selecting material). Similarly, in *Donato v. Moldow*, a New Jersey state appellate court determined that a message

without encouragement from the service as to what specific content they should enter.<sup>137</sup> Further, the service made no proven attempt to solicit or persuade users to enter information containing discriminatory content.<sup>138</sup> Any alleged discriminatory preferences posted online therefore began and ended with the users; the Roommates.com service merely provided a means for the users to publish the content.<sup>139</sup>

### B. *A House Divided*

The Ninth Circuit's holding has created confusion in the formerly stable interpretation of the CDA.<sup>140</sup> Judge McKeown, in his dissent in *Roommates.com*, correctly argued that the Ninth Circuit's majority holding misguidedly fused the publisher's role and the developer's role in an on-line service's publication process.<sup>141</sup> In finding that Roommates.com partially created the alleged discriminatory content, the Ninth Circuit pushed the boundary of "developer" as defined in § 230.<sup>142</sup> Such a commingling

---

board operator was immune under § 230, despite the plaintiff's argument that the operator controlled the illegal content through highlighting and deleting certain messages. *See* 865 A.2d 711, 725-26 (N.J. Super. Ct. App. Div. 2005) (finding that "selectively choosing which messages to delete and which to leave posted" on message board was "exercise of a publisher's traditional editorial functions, namely, whether to publish, withdraw, postpone or alter content provided by others").

137. *See Roommates.com*, 521 F.3d at 1161 (stating that it is users that choose preferences in their roommates).

138. *See id.* at 1178 (McKeown, J., dissenting) (noting that "there has been no determination that Roommate's questions or standardized answers are illegal").

139. *See id.* at 1181 (stating that "Roommate's users . . . are responsible for creating the information in their user profiles and, at their option—not the website's choice—in expressing preferences as to roommate characteristics"). For instance, when a user identifies himself as a "Straight male" from the service's drop-down menu, it is the user that has "identified himself and provided that information to Roommate to publish." *Id.* at 1182 (indicating that users are sole creators of information published on Roommates.com's website).

140. *See* Sussman, *supra* note 9, at 207 (finding uniformity across court interpretations).

141. *See Roommates.com*, 521 F.3d at 1177 (McKeown, J., dissenting) (declaring that "the majority rewrites the statute with its definition of 'information content provider,' labels the search function 'information development,' and strips interactive service providers of immunity"). Judge McKeown indicated that violating the FHA is completely distinct from the issue of whether the service provider is entitled to immunity under the CDA. *See id.* (asserting that "[w]hether the information at issue is unlawful and whether the webhost has contributed to its unlawfulness are issues analytically independent of the determination of immunity").

142. *See id.* at 1181-82 (arguing that service is not "developer" in statutory sense). Judge McKeown asserted that there were two reasons why a close reading of the statute would render Roommates.com not an information content provider: "(1) providing a drop-down menu does not constitute 'creating' or 'developing' information; and (2) the structure and text of the statute make plain that Congress intended to immunize Roommate's sorting, displaying, and transmitting of third-party information." *See id.* at 1182 (discussing dissent's interpretation of statute). The Ninth Circuit itself has stated that providing pre-prepared responses for Internet users to enter information does not render an ISP to be an Internet content

of roles creates confusion as to what level of assistance online services may provide for users to develop their content without the services becoming “developers” of the content themselves.<sup>143</sup>

The confusion created by the *Roommates.com* decision will likely lead to an increase in litigation until the boundaries of the ISP’s role are more clearly defined.<sup>144</sup> The affected sites will not only be limited to those providing housing services, but also to social networking sites such as MySpace, online auction sites such as eBay, blogging sites such as LiveJournal, and even major ISPs such as AOL.<sup>145</sup>

Moreover, in passing § 230, Congress expressly stated its intention to promote the “vibrant and competitive free market . . . that exists for the Internet . . . unfettered by Federal or State regulation.”<sup>146</sup> Additionally, Congress plainly illustrated its objective: “to promote the continued development and growth of the Internet and other interactive computer services.”<sup>147</sup> Thus, finding *Roommates.com*, or any other online service provider, liable for content created by a third party is in direct conflict with Congress’s purpose and goals in adopting the statute.<sup>148</sup> Furthermore, because the statute represents Congress’s attempt to tackle both a national and international issue, the courts’ narrow reading of § 230 would effectively diminish Congress’s power under the Commerce Clause.<sup>149</sup>

---

provider. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (finding that ISP lacked responsibility for illegal content despite providing menu of pre-prepared responses to users).

143. See Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 598 (2008) (describing over-precaution that will be practiced by risk averse ISPs due to confusion of roles). For example, a service may provide its users only the simplest possible tools for the creation of content as to avoid being labeled a “developer” and thereby risk liability for the users’ published content. See *id.* (detailing example action potentially taken by ISP due to confusion as to which tools given to subscribers would render service liable for subscribers’ content).

144. See Burns, *supra* note 4, at 84-85 (discussing legal ramifications resulting from holding ISPs liable for third-party content in some situations but not in others).

145. See *id.* (discussing widespread consequences that liability will have by affecting all forms of Internet services).

146. 47 U.S.C. § 230(b).

147. See *id.* (detailing Congress’s goal in adopting legislation to promote future growth of Internet).

148. See *id.* § 230(b)(1) (stating Congress’s broad goals “to promote the continued development of the Internet and other interactive computer services”); see also *id.* § 230(b)(2) (stating that statute was adopted “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”).

149. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 334 (4th Cir. 1997) (finding that restrictive reading of § 230 would lessen Congress’s ability to command in field whose international character is apparent). The Commerce Clause specifically gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

C. *The Internet's Protective Shelter is Left Leaking*

The Ninth Circuit's holding in *Roommates.com* made small strides in protecting fair housing while greatly hampering the potential growth of the Internet.<sup>150</sup> There is valid apprehension among commentators that the Internet will be a place of refuge for all individuals seeking to practice discrimination in housing, as well as in other forums.<sup>151</sup> Housing discrimination continues to permeate our society and there is no doubt that the FHA is an important piece of legislation for providing a remedy for these crimes.<sup>152</sup> Furthermore, the Internet provides tools that potentially allow individuals to practice discrimination on a far greater scale than ever before, reaching an ever larger number of people.<sup>153</sup> Without a remedy for individuals whose rights have been infringed, the concern that the Internet could potentially be a safe haven for all violators of statutes such as the FHA is legitimate.<sup>154</sup> Nevertheless, those individuals experiencing dis-

---

150. See 47 U.S.C. § 230 (adopted "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

151. See, e.g., Sussman, *supra* note 9, at 217 (arguing that "progeny of cases dealing with immunity under the CDA continue[s] to grow to the detriment of plaintiffs facing discrimination."). But see Chang, *supra* note 7, at 1012 (arguing that given "legislative silence and the complete absence of an insurmountable conflict between the two statutes, the CDA cannot be applied to create a safe haven for housing discrimination on the Internet").

152. See, e.g., *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1005 (2d Cir. 1991) (finding that FHA was adopted to prevent racially motivated advertisements that include those with only white models indicating racial preference); *United States v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972) (finding that "publication of discriminatory classified advertisements in newspapers was precisely one of the evils the Act was designed to correct"); *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972) (finding that restrictive covenant was racially motivated and therefore surely fell in line with goals that FHA was adopted to prevent). For a comprehensive look at how housing discrimination continues to pervade in the United States today despite the enforcement of the FHA, see *Rubinowitz & Alsheik, supra* note 37, at 903-12.

153. See *ACLU v. Reno*, 929 F. Supp. 824, 837 (E.D. Pa. 1996) (acknowledging that "Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about that person or organization, which are available to everyone on the Web"). Many publishers attempt to disseminate their information to the widest possible audience on the Internet. See *id.* (discussing methods publishers implement to reach wider audiences).

154. See, e.g., *Zeran*, 129 F.3d at 329-30 n.1 (finding that plaintiff was unable to identify original offending party due to AOL's failure to maintain adequate records of its users). Despite some victims being incapable of recovering for harms in the online world, free speech often restricts individuals from recovery from harms in the offline world as well. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1025 (5th Cir. 1987) (preventing plaintiffs from recovering from magazine for incitement due to death of teenager practicing auto-erotic asphyxiation described in magazine); *Olivia N. v. Nat'l Broad. Co.*, 178 Cal. Rptr. 888, 892 (Cal. Ct. App. 1981) (restricting plaintiffs from recovering from television show producers for rape that perpetrators performed based on television show).

crimination, as well as groups promoting equal rights, are not without a means to enforce the FHA, and may still employ methods to track down the individual authors of discriminatory postings to seek civil remedies.<sup>155</sup> Although suing the landlord or seller directly would remove the ISP's deeper pockets from involvement, holding individual users responsible would appropriately punish the party actually causing the harm.<sup>156</sup>

Additionally, finding ISPs liable for acts of third parties carries with it an unjustifiable encumbrance on free speech on the Internet.<sup>157</sup> Due to fear of potential liability, online service providers may increasingly limit their services to avoid any association with the customers' content.<sup>158</sup> Also, larger services, such as search engines, could be hamstrung from providing helpful search results for fear of being deemed a "publisher" of the search result content that reaches the user.<sup>159</sup>

Moreover, the uncertainty as to liability created by the Ninth Circuit will lead to online services "over-complying" with the standard, leading to a decrease in innovative and beneficial services in the future.<sup>160</sup> Fewer online service providers will implement publishing capabilities for their

---

155. See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008) (discussing various methods that can be implemented to collect damages from landlords or owners who engage in discriminatory conduct); see also Sussman, *supra* note 9, at 217 (conceding that "fair housing still remains the law of the land and is still enforceable through civil actions").

156. See *Craigslis*t, 519 F.3d at 672 (stating that "given § 230(c)(1) [one] cannot sue the messenger because the message reveals a third party's plan to engage in unlawful discrimination"). The *Craigslis*t court stated that if *Craigslis*t "causes" the discriminatory notices, then so do phone companies and courier services, yet no one would contend that they would be liable for "causing" discriminatory advertisements. See *id.* (arguing that suing messenger is placing blame on wrong party).

157. See *Zeran*, 129 F.3d at 331 (recognizing that Congress's primary intention in passing § 230 was to avoid chilling effects on free speech stemming from extending tort liability to ISPs).

158. See *Ziniti*, *supra* note 143, at 613 (arguing that not precluding distributor liability "would force a reversion to the 'walled garden'-style Internet services of the late 1990s in which portal sites like AOL strived to keep users within their world and keep others' content out"); see also Michael Geist, *Pull Down the Walled Gardens*, BBC NEWS, Aug. 15, 2007, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/technology/6944653.stm> (discussing problems with social networking sites creating only localized communities or "Walled Gardens").

159. See *Ziniti*, *supra* note 143, at 610 (arguing that "Internet search is inherently editorial—even if algorithms do the editing—because it involves content-based decision-making as to relevance, display and usability" and "bias against editorial functions in determining liability thus risk hindering search").

160. See *Hamdani*, *supra* note 5, at 905 (arguing that "holding ISPs strictly liable for the full social harm produced by user misconduct would induce them to adopt excessive levels of monitoring and employ overly zealous censorship policies"); see also *Zeran*, 129 F.3d at 331 (noting that when "[f]aced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted"); *Ziniti*, *supra* note 143, at 607 (stating that "to avoid liability, companies would err on silencing speech").

users, thus curtailing much of the creative and social potential of the Internet.<sup>161</sup> Unfortunately, difficult tradeoffs are often necessary to justify the protection of fundamental rights, with many individuals suffering harm in the name of free speech.<sup>162</sup> Yet the fundamental right of free speech does need protection, especially because the Internet provides a massive forum for individuals to express themselves and practice free speech.<sup>163</sup>

Finally, there are financial and privacy consequences to Internet users stemming from the loss of immunity for ISPs.<sup>164</sup> ISP liability will precipitate increased costs for filtering user postings; users will bear those costs in the form of increased subscription fees.<sup>165</sup> Additionally, users will face privacy problems if ISPs are forced to monitor and screen their content.<sup>166</sup> Those arguing against immunity contend that ISPs should not profit from third-party content, including obscene postings, while enjoying freedom from liability for that content.<sup>167</sup> The Internet is not

---

161. See Ziniti, *supra* note 143, at 600-01 (stating that effect that some providers will avoid creating new Web 2.0 services to avoid liability potentially cuts off the "long tail" and eliminates much of the social value of the Web 2.0). One commentator argues that under a regime where ISPs would face massive payouts, "the Internet might be about where digital cable systems are, with lots of downstream content and very little opportunity for interactivity, much less individual publishing." See Jim Harper, *Against ISP Liability*, 28 REG. 30, 32 (2005), available at <http://ssrn.com/abstract=807545> (arguing that ISPs should not be "liable for copyright violation, obscenity, and defamatory statements put out by their clients").

162. See Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1322 (1992) (arguing that "[i]f free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech"); Ziniti, *supra* note 143, at 614 (declaring that protecting free speech "can sometimes result in unfortunate victims, who, especially when the original provider of the information at issue evades identification, pay the price for the free speech and growth" that broad immunity enables); see also *id.* (recognizing that "the Supreme Court has explained that free speech is paramount to American democracy").

163. See *Zeran*, 129 F.3d at 331 (noting that Congress specifically wanted to avoid "the specter of tort liability in an area of such prolific speech" and "obvious chilling effect" such liability would have on Internet); see also 47 U.S.C. § 230 (seeking "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

164. For a general discussion of liability determination of ISPs from an economic standpoint, see Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 206-08 (2002). For a general discussion of privacy issues stemming from ISP liability, see Harper, *supra* note 161, at 31.

165. See Schruers, *supra* note 164, at 207 (stating that "[r]elative to the available alternatives, the current regime, in which ISPs are almost completely immune, is the most efficient").

166. See Harper, *supra* note 161, at 31 (arguing that "[p]art of what users bargain for when they engage an ISP is privacy: the assurance that the data they transmit will not be monitored, copied, held in storage, or shared beyond what is necessary to provide good service and comply with law").

167. See Siva Vaidhyanathan, *Me, 'Person of the Year'? No Thanks*, MSNBC, Dec. 28, 2006, <http://www.msnbc.msn.com/id/16371425/> (arguing that "Google, for instance, only makes money because it harvests, copies, aggregates, and ranks bil-

alone in this context, however; print distributors such as booksellers and phone companies likewise retain relaxed liability standards, while also profiting from third-party content in the process.<sup>168</sup>

## V. CONCLUSION

The rapid growth and the quick dissemination of information on the Internet will always be a key difference that distinguishes it from print media.<sup>169</sup> Congress expressly showed its recognition of this distinction when it passed § 230, aiming to protect the Internet's growth and minimize regulation.<sup>170</sup> Although promoting equal housing opportunities will always be a concern of utmost importance in the United States, it makes little sense to hold ISPs responsible for the discriminatory conduct of relatively few third-party users.<sup>171</sup>

ISPs provide extremely valuable utilities, creating forums for people to freely express themselves and engage in commerce with unprecedented ease.<sup>172</sup> Though the Ninth Circuit's opinion in *Roommates.com* represents a small limitation to the prevailing broad interpretation of § 230, it poses significant risks of further attacks on services that provide valuable tools for their users.<sup>173</sup> Such constraint presents a grim forecast, decreasing the

---

lions of Web contributions by millions of authors who unknowingly grant Google the right to capitalize or 'free ride,' on their work").

168. See Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1074 (2000) (noting that despite fact that companies "free ride" and enrich themselves without compensation to those who enrich them, "[t]his . . . cannot be the justification for restricting speech").

169. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (recognizing "the speed with which information may be disseminated and the near impossibility of regulating information content" on Internet).

170. See *id.* (noting that "Congress decided not to treat providers of interactive computer services like other information providers such as newspaper magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others").

171. See *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1176-77 (9th Cir. 2008) (en banc) (McKeown, J., dissenting) (deeming it inappropriate to join ISPs "at the hip with third-party users, [where] they rise and fall together in liability for Internet sortings and postings").

172. See Kurth, *supra* note 10, at 819 (noting that "the sheer number of World Wide Web pages, chat rooms, e-mail 'list servs,' message boards and other forms of interactive communication provide unprecedented ability to exercise free speech of unlimited scope").

173. See Ziniti, *supra* note 143, at 595 (arguing that Internet services without immunity will face "draining legal battles to which they would react in predictable ways—diminishing the value and promise of Web 2.0").



beneficial functions that ISPs may provide while diminishing free speech in the online world.<sup>174</sup>

*Adam Weintraub*

---

174. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (finding that Congress chose to immunize ISPs after recognizing that “[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect”).