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## Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat For Fair Housing Act Suits Against Roommate-Matching Websites

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## ARTICLE

# HOUSINGDISCRIMINATION.COM?: THE NINTH CIRCUIT (MOSTLY) PUTS OUT THE WELCOME MAT FOR FAIR HOUSING ACT SUITS AGAINST ROOMMATE-MATCHING WEBSITES

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## INTRODUCTION

Let us posit a hypothetical young, single, unattached working woman. She rented an apartment in West Hollywood with two friends a year or two ago. The rent is more than she can afford alone, and when one of her friends moves in with his boyfriend, and the other moves back to Ohio, she finds herself in need of roommates if she does not want to move out.

She obviously has preferences about the persons with whom she wants to share her living space. Suppose, after her experiences in college and afterward, she has concluded that she is “not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage brokers.”<sup>1</sup> While in the past she might have placed an ad in local and college newspapers, or hung a sign in a laundromat or coffee shop, today she would surely go online. One of the online businesses that matches those seeking roommates with those seeking shared living situations is Roommate.com.

When our roommate-seeker registers at [www.roommates.com](http://www.roommates.com) she will be asked a series of questions, and taken through a series of drop-down menus. Her answers to these questions, and her responses to more freeform queries about what she is looking for, will then be posted online for housing seekers to view. The service will also match her with prospective roommates on the basis of her answers to those questions (and match them with her the same way). The content of those questions, and the online publication and use of the answers, has created a question of unlawful housing discrimination, and has brought two strong public policies—housing antidiscrimination law and Internet

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<sup>1</sup> This language appeared in an actual Roommate.com ad. See Fair Housing Council of San Fernando Valley v. Roommate.com, LLC (*Fair Housing Council*), No. CV 03-09386PA(RZK), 2004 WL 3799488, at \*2 (C.D. Cal. Sep. 30, 2004). The Ninth Circuit opinion is captioned Fair Housing Council of San Fernando Valley v. Roommates.com, LLC (*Roommates.com I*), 489 F.3d 921 (9th Cir. 2007). However, in the papers filed by Roommate.com, the entity is identified as it is in the district court opinion (with “Roommate” in the singular). See, e.g., Brief of Appellee at \*1, Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007) (Nos. 04-56916, 04-57173) 2005 WL 2598925. In the first Ninth Circuit opinion, the entity is incorrectly identified as “Roommates.com,” perhaps because the website is [www.roommates.com](http://www.roommates.com) (italics added), and it is captioned inconsistently in the Ninth Circuit en banc opinion. The Court remarked, “For unknown reasons, the company goes by the singular name ‘Roommate.com, LLC’ but pluralizes its website’s URL, [www.roommates.com](http://www.roommates.com).” Fair Housing Council of San Fernando Valley v. Roommate.com, LLC (*Roommate.com II*), 521 F.3d 1157, 1161 n.2 (9th Cir. 2008) (en banc). In this Article, the entity will be referred to throughout as “Roommate.com,” except where the first Ninth Circuit opinion is referred to by its title. The Ninth Circuit decisions will be referred to as *Roommates.com I* (three judge panel decision) and *Roommate.com II* (en banc decision) to simplify references to the two Ninth Circuit decisions, while maintaining consistency with the captions on the two decisions.

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service provider immunity—into conflict.<sup>2</sup> The Fair Housing Council litigation against Roommate.com brings this conflict to the federal court.<sup>3</sup>

Two fair housing organizations, Fair Housing Council of the San Fernando Valley and the Fair Housing Council of San Diego, have alleged that the information collected and disseminated by Roommate.com violated the provision of the federal Fair Housing Act (“FHA”) that prohibits the advertisement of housing rentals that indicate any “preference, limitation or discrimination” with respect to membership in a number of protected categories. Roommate.com obtained a summary judgment in its favor on the basis of its immunity under the Communications Decency Act (“CDA”), which protects interactive computer service providers by preventing their treatment as “publishers” of content provided by third parties.

In *Fair Housing Council v. Roommate.com, LLC (Roommate.com II)*,<sup>4</sup> the Ninth Circuit has taken an important step in articulating how the antidiscrimination policies of the FHA<sup>5</sup> are to be harmonized with the robust speech protections embodied in the immunity provisions of the CDA.<sup>6</sup> After a “brain trust” panel of the Ninth Circuit Court of Appeals—Judges Alex Kozinski, Stephen Reinhardt, and Kozinski’s former clerk, Sandra Ikuta—determined that Roommate.com is an “information content provider” in *Fair Housing Council v. Roommates.com (Roommates.com I)*,<sup>7</sup> reversing the district court,<sup>8</sup> the Ninth Circuit en banc panel,<sup>9</sup> in a majority opinion again written by Judge Kozinski, reached the same result. On this basis, in the Ninth Circuit at least, Roommate.com and services like it do *not* enjoy completely unfettered immunity from publisher liability for violating an important civil rights law, simply because the discriminatory advertising is disseminated over the Internet, rather than on paper.<sup>10</sup> In these times of troubling civil rights retrenchment,<sup>11</sup> the Ninth Circuit decision makes

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<sup>2</sup> See generally [www.roommates.com](http://www.roommates.com)

<sup>3</sup> See *Fair Housing Council*, 2004 WL 3799488, at \*2-5.

<sup>4</sup> *Roommate.com II*, F.3d at 1157.

<sup>5</sup> 42 U.S.C. §§ 3601-09, 3631 (enacted in 1968, amended in 1974 and 1988), Pub.L. 90-284, 82 Stat. 73-92; Pub.L. 93-383, 88 Stat. 633 (1974 Amendment); Pub.L. 100-430, 102 Stat. 1619 (1988 Amendment).

<sup>6</sup> 47 U.S.C. §§ 230, Pub.L. 104-104, 110 Stat. 137 (1996); Pub.L. 105-277, 112 Stat. 2681 (1998).

<sup>7</sup> *Roommates.com I*, 489 F.3d at 927.

<sup>8</sup> See *Fair Housing Council*, 2004 WL 3799488, at \*4.

<sup>9</sup> Unlike most circuits where all active judges hear an en banc case, the Ninth Circuit assigns the Chief Judge and ten randomly selected active judges to sit on en banc panels. 9TH CIR. R. 35-3.

<sup>10</sup> *Roommate.com II*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc).

<sup>11</sup> See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1* (and its

it possible to carry the ever-more-urgent mandate of the Fair Housing Act forward into the Internet age, and as such, it should be applauded.

On remand, the federal district court for the Central District of California is poised to determine whether Roommate.com's software questionnaire and drop-down menus, used to match possible roommates based on information sought and provided about membership in protected classes such as race, color, religion, sex, handicap, familial status, and national origin, violates § 804(c) of the Fair Housing Act.<sup>12</sup> This Article illuminates the bases of the Ninth Circuit's decision and clarifies the issues on remand.<sup>13</sup>

In Part I, the substantive non-discrimination provisions of the FHA, § 804(a), (b), and (f),<sup>14</sup> subject to the exemptions of § 803(b)(2),<sup>15</sup> are contrasted with the exceptionless non-discriminatory advertising provision, § 804(c). This section also sets out the policy rationales for this apparent inconsistency and inefficiency in the law. Part II explores § 230(c) and § 230(f) of the Communications Decency Act, their purposes, and the scope of the immunity they provide as understood by recent cases. Part III brings the FHA and the CDA together, analyzing both the Seventh Circuit case addressing § 230 immunity and the Fair Housing Act, *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v.*

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companion case, *Meredith v. Jefferson County Board of Ed.* (Louisville, Kentucky), 127 S.Ct. 2738 (2007). In striking down Seattle's voluntary desegregation plan, even the majority opinion acknowledged "the effects of racially identifiable housing patterns on school assignments," *Id.* at 2747. Justice Breyer's dissent argued more forcefully that "the distinction between de jure segregation (caused by school systems) and de facto segregation (caused, e.g., by housing patterns or generalized societal discrimination) is meaningless in the present context" (i.e., permissible remedies in education)." *Id.* at 2802. Some, of course, would deny any discrimination with respect to housing either. *See, e.g., id.* at 2769 (Thomas, J., dissenting) ("Although presently observed racial imbalance *might* result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, including *voluntary* housing choices") (emphasis added). Few can doubt, however, that in an environment free of housing discrimination, racial "imbalance" among neighborhood schools would be less pernicious.

<sup>12</sup> 42 U.S.C.A. § 3604(c) (Westlaw 2008). Section 804(c) of the FHA will be generally be referred to herein as § 3604(c).

<sup>13</sup> Some scholars suggest that no judicial interpretation will be satisfactory. Robert G. Schwemm, University of Kentucky College of Law professor, argues that "'However the courts go, Congress is going to have to return to the Fair Housing Act regarding media that is covered or not covered'. . . . Clearly, he says, the Internet should not have an exemption, but the Communications Decency Act makes things difficult because it shields Web operators whose content is provided by users." Stephanie Francis Ward, *With Roomies—Be Careful How You Ask For Them: 9th Circuit opinion applies fair housing rule on discrimination to Web site*, ABA J. E-REPORT, May 25, 2007. *See also* Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 211 (2001).

<sup>14</sup> 42 U.S.C. § 3604(a)-(b),(f) (Westlaw 2008). Sections 804(a) and (b) will also be referred to herein as § 3604(a) and (b).

<sup>15</sup> 42 U.S.C.A. § 3603(b) (Westlaw 2008). Section 803(b)(2) will also be referred to herein as § 3603(b).

*Craigslist, Inc.*, and *Fair Housing Council v. Roommate.com (Roommate.com II)*. The analysis of *Roommate.com II* includes theories of liability, the initial result in the district court, the first Ninth Circuit opinion in *Roommates.com I* (including Judge Reinhardt's partial concurrence and partial dissent, and Ikuta's concurrence), and the en banc decision. Part IV addresses some lingering First Amendment issues that may reappear in the litigation, and Part V discusses whether *Craigslist* and *Roommate.com II* have created a Circuit split ripe for U.S. Supreme Court review.

#### I. WHEN IS IT LAWFUL TO DISCRIMINATE, BUT NOT TO ADVERTISE THAT YOU DO? WHEN YOU'RE LOOKING FOR A ROOMMATE [§ 3604(C) OF THE FAIR HOUSING ACT]

The federal Fair Housing Act contains a loophole big enough to drive a Mack truck full of roommate-seekers through—and that loophole is both the background to this lawsuit and the key to Roommate.com's business model. The core of the FHA is a set of substantive anti-discrimination provisions. Under § 3604(a), (b), and (f), it is illegal to discriminate in selling or renting a dwelling (or in the terms and conditions of such sale or rental), on the basis of race, color, religion, sex, familial status, national origin, or handicap.<sup>16</sup> However, under § 3603(b) (the so-called “Mrs. Murphy” exemption<sup>17</sup>), persons renting out a room or unit of an owner-occupied building of 4 families or fewer (including persons seeking a “roommate,” typically in an apartment), are exempt from these requirements.<sup>18</sup> The “Mrs. Murphy” exemption operates as an affirmative defense to a charge of violation of § 3604(a), (b), and (f).<sup>19</sup> However, although this exemption permits certain forms

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<sup>16</sup> 42 U.S.C.A. § 3604(a)-(b) (Westlaw 2008) (race, color, religion, sex, familial status, national origin); 42 U.S.C.A. § 3604(f) (Westlaw 2008) (handicap).

<sup>17</sup> The original idea was that the statute did not reach an imagined “Mrs. Murphy’s boardinghouse,” run by a Mrs. Murphy who did not wish to rent to Blacks. 114 Cong. Rec. 2495, 3345 (1968). Some scholars have recommended abolishing the exemption, “which. . . became part of the FHA, [although] it was originally introduced as part of the public accommodation act of Title II.” Theresa Keeley, *An Implied Warranty of Freedom from Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 U. MICH. J. L. REFORM 397, 422 & n.140. See, e.g., 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 (1999). Amusingly, one of the few recent cases to make out a prima facie case of national origin discrimination was brought by—you guessed it—a “Mrs. Murphy,” specifically, Mrs. Catherine Murphy, against a co-op board. *Murphy v. 253 Garth Tenants Corp.*, 579 F.Supp. 1150 (S.D.N.Y. 1983).

<sup>18</sup> 42 U.S.C.A. § 3603(b)(2) (Westlaw 2008). Section 3603(b)(1) contains an exemption applicable to certain housing sales.

<sup>19</sup> *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005).

of discrimination by those actually renting out certain classes of residential space, the FHA also contains a global anti-discrimination provision applicable to all persons *advertising* available housing.

Section 3604(c) makes it unlawful, without exception,

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>20</sup>

Note that this provision also expressly creates *publisher* liability for those who disseminate discriminatory advertisements (“publish, or cause to be. . . published”), not just those who place the ads. The law expands the class of those held legally responsible for non-discrimination in housing to include not just housing providers, but those who publish their advertisements. Put another way, it makes publishing discriminatory advertisements a distinct, actionable form of wrongdoing, separate from and in addition to either *placing* such ads, or simply denying housing to persons for unlawful reasons, with or without advertising. Under the FHA, the “actual wrongdoers” are not limited to those “who originate the allegedly unlawful content”—by writing and placing the ads—but also those who publish them.<sup>21</sup>

Those who fall within the § 3603(b) exemption are permitted to discriminate in the selection of their roommates or fellow tenants, in all sorts of ways that would be prohibited if they were simply selling the house, or renting a unit in a building they happened to own but not occupy. Persons renting out apartments or rooms in sufficiently intimate circumstances are thus exempt from the general non-discrimination provisions of the FHA. What they are *not* permitted to do, however, is advertise these preferences. Persons seeking a roommate are subjected to the same restrictions in advertising for that roommate, as are persons renting or selling residential real estate of all kinds, and those who publish those ads are subject to a uniform non-discrimination standard.

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<sup>20</sup> 42 U.S.C.A. 3604(c) (Westlaw 2008).

<sup>21</sup> It is therefore a mistake to argue, as do the amici in *Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006), that “the federal Fair Housing [sic] laws *should* have force in the online world” (emphasis in original) but should not apply to publishers. Brief for Amazon.com, Inc., et al. as Amicus Curiae in Support of Craigslist’s Motion for Judgment on the Pleadings, *Craigslist*, 461 F.Supp.2d 681 (N.D. Ill. 2006) (No. 06 C 0657), 2006 WL 1794487. The federal fair housing laws, to “have force in the online world,” must apply to publishers, as they did prior to the Internet (and do still, “offline”). .



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This creates an obvious, built-in inefficiency, because housing advertisements cannot be targeted to a desirably limited population. If the proverbial Mrs. Murphy wants to populate her boardinghouse exclusively with able-bodied white Irish Catholic bachelors between thirty and forty (or bisexual dyslexic Asian single mothers under twenty-five, for that matter), she cannot simply say so in a newspaper classified ad. Because § 3604(c) requires an advertisement to be vague and non-discriminatory, it may invite inquiries, visits, and so on, from persons Mrs. Murphy will not rent to (for whatever reason). It would obviously be much easier, and more efficient, if Mrs. Murphy could simply advertise for what she is actually looking for – it saves time all the way around.<sup>22</sup> It therefore seems irrational to require housing providers like Mrs. Murphy to place advertisements that appear to make housing available to many persons in whom she has no interest. This is an inefficiency Roommate.com sought precisely to avoid, and indeed, capitalize upon.<sup>23</sup>

This overbreadth in the FHA is not an inadvertent oversight. From the beginning, courts that have addressed it have unanimously declined to apply the exemption of § 3603(b) to § 3604(c).<sup>24</sup> For example, in *Holmgren v. Little Village Community Reporter*,<sup>25</sup> a federal district court in Illinois in 1971 held that an ad stating a preference for renters of various nationalities (“Polish, Bohemian, Slavish [sic], German, Spanish and American”) constituted impermissible national origin discrimination, under § 3604(c), although actually *selecting* a tenant on this basis would not violate the FHA, because the exemption applied.<sup>26</sup>

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<sup>22</sup> It also avoids the dignitary injury suffered by one who calls to inquire about, or attempts to look at, housing, only to be told by the landlord, “I don’t rent to X’s.” I thank my daughter, Siobhan Mahaffey, for pointing this out, emphasizing (as a teenager would) how “embarrassing” or “awkward” this would be. I would like to think landlords might find it more difficult to discriminate face-to-face, but perhaps I am wrong about that.

<sup>23</sup> For example, as Bryan Peters of Roommate.com testified by declaration, “Some Roommate.com users have religious beliefs that impact their selection of roommates. Many are Christians. . . . By referencing these beliefs in their profiles, users avoid the need to contact and interview dozens of incompatible people.” *Roommates.com I*, 489 F.3d 921, 932 (9th Cir. 2007) (Reinhardt, J., concurring in part, dissenting in part). A sensitive and sophisticated discussion of the efficiencies and inefficiencies associated with the FHA can be found in Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1867-8, 1886-1887, 1893-1894 (2006).

<sup>24</sup> See, e.g. *Campbell v. Robb*, 162 Fed.Appx. 460, 465 n.7, (6th Cir. 2006); *U.S. v. Hunter*, 459 F.2d 205, 213-14 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972); *Gonzalez v. Rakkas*, No. 93 CV 3229 (JS), 1995 WL 451034, at \*5 (E.D.N.Y. July 25, 1995) (“The ‘four-unit’ exemption, also referred to as the ‘Mrs. Murphy’ exemption, of Section 3603(b)(2) does not apply to statements proscribed under Section 3604(c)”).

<sup>25</sup> 342 F. Supp. 512 (N.D. Ill. 1971).

<sup>26</sup> *Id.* at 513-514. (“This decision does not, however, preclude the same sellers and landlords

In 2005, the Second Circuit adjudicated *U.S. v. Space Hunters, Inc.*, a case in some ways quite similar to *Fair Housing Council v. Roommate.com*, and made clear that § 3604(c) liability was not to be trimmed to fit the § 3603(b)(2) exemption.<sup>27</sup> Defendant John McDermott, through his company, “Space Hunters, Inc.,” operated what now seems an almost quaintly old-fashioned version of Roommate.com’s online enterprise.<sup>28</sup> As the Second Circuit described it,

Space Hunters, in its capacity as a housing information vender [sic], compiles information from classified advertisements about rooms for rent in New York City, advertises the availability of rooms for rent, communicates with owners or landlords of rooms for rent, and refers prospective tenants according to their preferred neighborhood and price range. Space Hunters charges prospective tenants a fee for its services, usually \$100 for an individual and \$125 for a couple.<sup>29</sup>

Space Hunters operated out of a small one-man office, communicating with housing seekers by telephone and via in-office visits.<sup>30</sup>

The U.S. Attorney, following up on complaints filed with the U.S. Department of Housing and Urban Development, alleged violations of the substantive provisions of the FHA (§ 3604(a), (b), and (f)), as well as violations of § 3604(c). The district court dismissed most of the claims, holding, among other things, “that section 804(c) of the FHA (42 U.S.C. § 3604(c)) applies only to dwelling owners and their agents. The [district] court found that Space Hunters is neither an owner nor an agent, and, thus, the Government failed to state a section 804(c) claim.”<sup>31</sup> According to the Second Circuit, the district court erroneously

reached this conclusion by relying on what it said to be the ‘purpose’ of the statute: ‘to prevent expressions that result in the denial of housing, not to prevent all discriminatory expression.’ Because it

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who are no longer permitted to express national origin preferences in newspaper ads from exercising such a preference in personal negotiations with prospective buyers and tenants, provided, of course, that the sellers and landlords come within the terms of 42 U.S.C. § 3603(b)”). It might, however, violate the Civil Rights Act of 1866, which bars all racial discrimination in the sale or rental of property. *JESSE DUKEMINIER, ET AL., PROPERTY* 379 (6th ed. 2006). See also 42 U.S.C. § 1982. At least in 1866, “German” would likely have been treated as a “race,” and that is the relevant year for interpreting that term.

<sup>27</sup> *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 416 (2d Cir. 2005).

<sup>28</sup> “Space Hunters, Inc.” is a one-man operation. “McDermott is the sole employee of Space Hunters and has never denied that he was the Space Hunters representative on all the telephone calls at issue in this case.” *Id.* at 420 n.2.

<sup>29</sup> *Id.* at 419.

<sup>30</sup> *Id.* at 422.

<sup>31</sup> *Id.* at 421.

found that defendants are neither owners nor agents and that applying section 804(c) to them ‘would not further the purpose of the statute,’ the district court dismissed Claims Three and Seven.<sup>32</sup>

The Second Circuit rejected this interpretation, and held McDermott, as a “housing information vendor” who compiled and sold information drawn from classified ads about rooms for rent in New York City, liable under § 3604(c), notwithstanding whether the rooms advertised were located in residences covered by the § 3603(b)(2) exemption.<sup>33</sup>

The Second Circuit’s decision clarified both the scope of § 3604(c) and some of its purposes:

The district court’s assessment of the ‘purpose’ of section 804(c) is inconsistent with the statute’s plain language, which applies broadly to ‘any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates’ a discriminatory preference on prohibited grounds. 42 U.S.C. § 3604(c) (emphasis added). Nothing in this language limits the statute’s reach to owners or agents or to statements that directly effect a housing transaction. Indeed, this language ‘does not provide any specific exemptions or designate the persons covered, but rather . . . applies on its face to anyone’ who makes prohibited statements.<sup>34</sup>

The Second Circuit was unequivocal in endorsing the uniform application of § 3604(c).

The Second Circuit also identified one of the broader purposes of § 3604(c):

[T]he district court’s view that section 804(c)’s purpose is to ‘prevent expressions that result in the denial of housing’ is too narrow. The statute also ‘protect[s] against [the] psychic injury’ caused by

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<sup>32</sup> *Id.* at 424.

<sup>33</sup> *Space Hunters*, 429 F.3d at 416.

<sup>34</sup> *Id.* at 424 (citing *U.S. v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972); and *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991) (“Congress used broad language in [section 804(c)], and there is no cogent reason to narrow the meaning of that language.”), and rejecting *Michigan Protection & Advocacy Service, Inc. v. Babin*, 799 F.Supp. 695 (E.D.Mich. 1992), *aff’d on other grounds*, 18 F.3d 337 (6th Cir.1994); and *Heights Community Congress v. Hilltop Realty, Inc.*, 629 F.Supp. 1232 (N.D. Ohio 1983), *aff’d in part, rev’d in part*, 774 F.2d 135 (6th Cir. 1985), to the extent that they limit the application of section 804(c) to owners and their agents).

discriminatory statements made in connection with the housing market.<sup>35</sup>

For example, the Second Circuit also recognized a related right “to inquire about the availability of housing without being subjected to racially discriminatory statements.”<sup>36</sup> Both of these protections are offered as explanations for the discrepancy between §3604(c) and the exemptions under §3603(b),<sup>37</sup> and for an independent cause of action under §3604(c).<sup>38</sup>

Other courts have also attempted to identify reasons for this (in one sense) too-broad prohibition. The FHA was originally enacted in 1968 against a background of systematic and widespread racial discrimination in both the sale and rental of housing. Though *Shelley v. Kraemer* was decided in 1948,<sup>39</sup> declaring state enforcement of racially restrictive covenants a violation of the Equal Protection Clause, residential racial segregation remained severe for decades thereafter.<sup>40</sup> Home ownership by people of color was further frustrated by discriminatory lending practices. “Redlining,” narrowly defined as “the practice whereby mortgage lenders figuratively draw a red line around minority neighborhoods and refuse to make mortgage loans available inside the red lined area,”<sup>41</sup> and broadly as “not only the direct refusal to lend in minority neighborhoods, but also procedures that discourage the submission of mortgage loan applications from minority areas, and

<sup>35</sup> *Space Hunters*, 429 F.3d at 424 (2nd Cir. 2005) (citing Robert G. Schwemm, *Discriminatory Housing Statements and § 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 *FORDHAM\_URB. L.J.* 187, 250 (2001)).

<sup>36</sup> *Space Hunters*, 429 F.3d at 424 (citing HUD ex rel. Stover v. Gruzdaitis, No. 02-96-0377-8, 1998 WL 482759, at \*3 (HUD ALJ Aug. 14, 1998)).

<sup>37</sup> *Space Hunters*, 429 F.3d at 425.

<sup>38</sup> *Id.* at 425 (“In fact, we have permitted plaintiffs to recover for discriminatory advertising even when the plaintiffs were not in the market for housing. See *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 903-04 (2d Cir.1993).”).

<sup>39</sup> 334 U.S. 1, 20 (1948).

<sup>40</sup> Robert G. Schwemm, *Why Do Landlords Still Discriminate (And What Can Be Done About It)?*, 40 *J. MARSHALL L. REV.* 455, 456-60 (2007); Jonathan Brown with Charles Bennington, *A Study of Racial Discrimination by Banks and Mortgage Companies in the United States*, pt. 1, <http://www.public-gis.org/reports/red1.html> (last visited April 30, 2008).

Racially restrictive covenants were private agreements between neighboring homeowners, by which each homeowner agreed for himself and his successors to sell his or her own property only to persons of a particular race (and that race was inevitably White). While *Shelley v. Kraemer* did not outlaw such covenants, it barred judicial enforcement of the covenants in favor of White homeowners (like the Kraemers) in the event that one of their neighbors breached and sold the property to a Black family (like the Shelleys). *Shelley*, 334 U.S. at 21-22.

<sup>41</sup> Brown with Bennington, *A Study of Racial Discrimination by Banks and Mortgage Companies in the United States*, pt. 1, <http://www.public-gis.org/reports/red1.html> (last visited April 30, 2008).

marketing policies that exclude such areas,"<sup>42</sup> was common (and still is).<sup>43</sup>

A would-be homeowner of color was thus likely to be forced into the rental residential real estate market, where he or she encountered still further patterns of racial discrimination and "steering."<sup>44</sup> Steering is "not an outright refusal to rent to a person within a class of people protected by the statute; rather it consists of efforts to deprive a protected homeseeker of housing opportunities in certain locations."<sup>45</sup> Unfortunately, housing discrimination is not a relic of a bygone era.<sup>46</sup>

The FHA, as enacted in 1968, reflected a sweeping prohibition on allowing private property owners in the residential housing market to use the selection of tenants to further racial discrimination and residential segregation in the United States. At that time, the protected categories were race, color, religion, and national origin. In 1974, sex was added, and in 1988, familial status and handicap were added, along with provisions protecting renters with handicapped family members. People in these protected groups continue to face discrimination in obtaining housing unrelated to their ability to pay the rent, and antidiscrimination laws are underenforced.<sup>47</sup>

The exemption under § 3603(b) should therefore be understood as a *narrow* exception to the FHA's mandates, in order to balance fair

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 66-67 (2006). Section 905(a) of Pub. L. 102-550 provided that:

The Congress finds that—'in 1991, data collected under the Home Mortgage Disclosure Act disclosed evidence of pervasive discrimination in the Nation's mortgage lending markets; the Housing Discrimination Survey, released by the Department of Housing and Urban Development in 1991, found that Hispanic and African-American homeseekers experience some form of discrimination in at least half of their encounters with sales and rental agents.

Housing and Community Development Act of 1992, Pub. L. No. 102-550, § 905(a), 106 Stat. 3672 (1992). See also Schwemm, 40 J. MARSHALL L. REV. at 459.

<sup>44</sup> Racial steering has also been defined as the intentional behavior of real estate agents to direct clients to specific neighborhoods on the basis of race or ethnicity. Kennedy Smith, *Report by American Planning Association studies racial steering*, DAILY JOURNAL OF COMMERCE, July 11, 2005, available at [http://findarticles.com/p/articles/mi\\_qn4184/is\\_20050711/ai\\_n14719721](http://findarticles.com/p/articles/mi_qn4184/is_20050711/ai_n14719721) (last visited April 30, 2008). See also George Galaster and Erin Godfrey, *By Words and Deeds: Racial Steering by Real Estate Agents in 2000*, 71 J. AM. PLANNING ASS'N 251 (2005).

<sup>45</sup> HUD v. Edelstein, 2 Fair Hous.-Fair. Lend (PH), ¶ 25,018, 25,236, 25,239, 1991 WL 442784 (HUD A.L.J. Dec. 9, 1991).

<sup>46</sup> See, e.g., Michael Schill and Susan Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1329-1333 (1995) (discussing under-enforcement of federal antidiscrimination law and consequences for housing segregation).

<sup>47</sup> *Id.* at 1329-33.

housing goals with recognized rights to freedom of intimate association. While it is one thing to require a person selling a home, or renting out dozens of apartments in a large complex in which he or she does not even live, to apply the most thoroughly non-discriminatory standards in selecting buyers or tenants, it is quite another actually to require someone to live in close quarters—in a home he or she owns, or an apartment he or she rents—with a person with whom he or she does not feel “comfortable,” for almost any reason at all.<sup>48</sup> The relationship between roommates or housemates is one more akin to a personal relationship like friendship or dating. Overly stringent anti-discrimination laws in this area therefore threaten to infringe upon rights of intimate association.<sup>49</sup>

Although the exception is narrow, it covers very nearly the entire clientele of Roommate.com. Moreover, the Internet is such an easy and obvious way to exchange information about available housing, including apartments, house-sharing, and so on, that it has quickly overtaken print media even in local real estate markets. Why bother advertising in (or reading) the classifieds of the local newspaper, when you can instantaneously post information about a property (including pictures) online, and housing seekers can search for an apartment by ZIP code and all sorts of other criteria, with the touch of a button? Because the Internet is such a perfect mechanism (or medium) for putting buyers and sellers of all sorts of things together (think of eBay), it has rapidly supplanted other forms of real estate advertising, particularly in the rental

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<sup>48</sup> Interestingly, we actually force college students to do this all the time – gender is the *only* characteristic used for sorting, though even the purpose of that criterion (presumably, the protection of modesty as well as a reduced risk either of a sexual relationship or of sexual predation) is attenuated in a world with more and more persons who are “out” lesbian, gay, bisexual, or of non-standard gender identification. New York University, for example, offers only “single-sexed” rooms and suites, but, as their housing forms explain, “Room assignments are made by New York University on the basis of the legal sex of the student, which is the sex assigned to the student at birth. First-year students now have the option of requesting a room assignment based on gender identity, which is the gender a student identifies with that may be different from the sex assigned to that student at birth. This option would include gender identity male (GIM) and gender identity female (GIF). If a student selects this option, we will seek to place the student in a room or suite with others of the same gender identity who have requested a room assignment on this basis, however, this placement is not guaranteed. If such housing is not possible, legal sex will be used in determining housing placement.” Informational letter from New York U. Department of Housing e) (on file with author). In other words, a straight genetically-male student may find himself living with another straight male, a gay male, a bisexual male, and maybe, a “gender identity female” male – but under no circumstances, heaven forbid, with a girl (even one who is “gender identified” male).

<sup>49</sup> See discussion in *Evans v. Romer*, 882 P.2d 1335, 1345 (Colo. 1994), *overruled on other grounds by Romer v. Evans*, 517 U.S. 620 (1996). Similar issues are raised by the question of race- or ethnicity-“matching” (or “preference”) in the adoption context. For a critical discussion of this issue, see Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913 (1994), *reprinted in* CRITICAL RACE FEMINISM: A READER 151-58 (Adrien Wing ed., 1997).

market. Roommate.com itself has approximately 150,000 active listings and has about a million page views per day.<sup>50</sup>

This makes the question of whether online publishers of housing information must comply with § 3604(c) of the FHA—the central question of *Fair Housing Council v. Roommate.com* – all the more pressing. Given that the Internet has become *the* primary way people search for (and advertise) housing, especially shared apartments and roommate situations, if § 3604(c) does *not* apply to advertising in this new medium, the provision has nearly been gutted.

Before turning to the interaction between § 3604(c) of the FHA and the immunity provisions of the Communications Decency Act, it is therefore worth pausing to remind ourselves of how anti-discrimination policies and goals are furthered by § 3604(c), as distinct from § 3604(a), (b), and (f). In general, civil rights statutes are to “be read expansively in order to fulfill their purpose,” and this principle has been applied to § 3604(c).<sup>51</sup> In understanding why, we can identify at least four benefits to prohibiting discrimination in advertising, even while supporting § 3603 (b)-type exemptions to § 3604(a), (b), and (f).<sup>52</sup>

#### A. SECTION 3604(C) TURNS PUBLISHERS OF REAL ESTATE ADVERTISING INTO LOW-COST EDUCATORS IN THE BROADER EFFORT TO TEACH AMERICANS ABOUT THE SUBSTANTIVE NON-DISCRIMINATION PROVISIONS OF THE FHA

It is safe to assume that many persons seeking housing do not know very much about the Fair Housing Act (or other civil rights laws that protect them from discrimination in housing). Persons likely to be discriminated against are also likely to be among the least knowledgeable. The advertisements housing-seekers read therefore may provide the only information they get about the permissible bases for selecting tenants. Thus, if many advertisements contain discriminatory qualifications, it would be easy and natural for housing seekers to assume that all landlords are permitted to discriminate on those bases,

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<sup>50</sup> *Fair Housing Council*, No. CV 03-09386PA(RZK), 2004 WL 3799488, at \*1 (C.D. Cal. Sep. 30, 2004).

<sup>51</sup> See *Mayers v. Ridley*, 465 F.2d 630, 635 (D.C. Cir. 1972) (en banc) (Wright, J., concurring) (concluding that the court’s interpretation of § 3604(c) would be broad, consistent with the “well established” practice). In *Mayers*, Section 3604(c) was read broadly enough to prohibit the Washington, D.C. Recorder of Deeds from recording any deeds that contained racially restrictive covenants. *Id.*

<sup>52</sup> See also Strahilevitz’s discussion of “exclusionary vibes” and “exclusionary amenities.” Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1867-8, 1886-1887, 1886-87 (2006).

squandering the opportunity for housing websites to contribute to educating housing-seekers about their rights.<sup>53</sup>

There is no reason to exempt Internet roommate-matching services from having to bear the same costs that are borne by newspapers and other publishers who decide to enter the real estate advertising market, who must then police the contents of their real estate advertisements for illegal content. The Internet permits the website operator to disseminate much more information, at much lower cost, than a traditional publisher.<sup>54</sup> It is not difficult to add a banner advertisement that contains the substantive provisions of the FHA (including the exemptions, if desired), nor is it burdensome to adapt the software questionnaire or drop-down menus to seek only permissible information. In this way, those who enjoy commercial benefits from bringing together housing providers and housing seekers can cooperate to ensure that the anti-discrimination laws are not violated.<sup>55</sup>

#### B. NONDISCRIMINATORY ADVERTISING HELPS COUNTERACT IMPROPER STEERING

According to the FHA, “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>56</sup> One of the things this might mean is that everyone should have access to those neighborhoods that are geographically convenient and desirable, affordable, and so on, without fear of discrimination. But it is also a premise of fair housing policy that more diverse and integrated neighborhoods are not only an effect, but also a *cause*, of a reduction in discrimination and racism (and other objectionable “-isms”) – that as people learn to live together, as neighbors and fellow citizens, this will break down barriers, and people who might have believed they could never get along, will learn to do so. For that to happen, there needs to be maximum openness and access to

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<sup>53</sup> See Jennifer 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, 975-76 (2002), for a similar argument.

<sup>54</sup> To the extent that services like Roommate.com have become “crucial intermediaries” in putting housing providers and seekers together, that only strengthens the claim for applying § 3604(c) to them, as was done with multiple listing services in *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 447 F.Supp. 838, 840 (E.D.N.Y. 1978). See Chang, 55 STAN. L. REV. at 980-81.

<sup>55</sup> Colin Crawford, *Cyberplace: Defining A Right To Internet Access Through Public Accommodation Law*, 76 TEMP. L. REV. 225 (2003), uses public accommodation law to understand the role of the Internet and Internet actors in perpetuating or correcting discrimination, treating the Internet as a “place.”

<sup>56</sup> 42 U.S.C.A. § 3601 (Westlaw 2008).



housing.

In surveying possible neighborhoods, the housing seeker is likely to be sensitive to various cues. Rainbow flags in windows may send a signal that gay people live here; small children playing in yards suggest families; commercial establishments with signs in languages other than English demonstrate the presence of those ethnic or national origin communities; and so on.

By contrast, some property owners exude what Professor Lior Stravilevitz of the University of Chicago calls an “exclusionary vibe.”

An exclusionary vibes approach involves the landowner’s communication to potential entrants about the character of the community’s inhabitants. Such communication tells potential entrants that certain people may not feel welcome if they enter the community in question, because they will not share certain affinities with existing or future residents. Although the landowner invokes no legal right to exclude anyone from the property in question, an exclusionary vibe may still be effective at excluding a targeted population thanks to two mechanisms. First, a prospective entrant may view the exclusionary vibe as an effective tool for creating a focal point around which people can organize their affairs. A variation on this focal points effect arises if the prospective entrant assumes that the exclusionary vibe will create a community population that is likely to embrace bouncer’s exclusion at a later date as a means of removing the entrant from the community. Second, the potential entrant may assume, incorrectly, that the exclusionary vibe is backed by a bouncer’s right to exclude those who are not made to feel welcome by the exclusionary vibe.<sup>57</sup>

The Fourth Circuit recognized this in the early days of the FHA. According to *U.S. v. Hunter*, the Fair Housing Act prohibits discriminatory advertising because:

[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.<sup>58</sup>

In the online environment, it is likely that housing seekers will use particular neighborhoods (or ZIP codes) as search parameters, and if

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<sup>57</sup> Strahilevitz, 104 MICH. L. REV. at 1851 (citations omitted).

<sup>58</sup> *U.S. v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972). See also Chang, 55 STAN. L. REV at 974-75.

many advertisements for housing in that area contain discriminatory language about a group to which the housing seeker belongs, the seeker may be dissuaded from even looking there (even if each ad with such language, on closer inspection, turns out to be for a residence covered by § 3603(b)). Discriminatory advertisements, whose cumulative message is that persons in certain groups do not fit in or would not be welcome in a neighborhood, are contrary to the goals of the FHA.

C. REAL ESTATE ADVERTISING CONTRIBUTES TO THE GENERAL ATMOSPHERE REGARDING THE CIVIL RIGHTS OF PERSONS IN PROTECTED CATEGORIES

As alluded to above, even if only those roommate-seekers who might permissibly discriminate in roommate-selection were allowed to advertise their discriminatory preferences, it would be difficult for housing-seekers and others to determine whether an apparently unlawful ad fell within some exception or other. Instead, such advertisements would create the impression that preferential treatment in housing (whether on the basis of race, religion, gender, sexual orientation, family status, or other categories) is not a form of illegal discrimination, which in turn may undermine civil rights protections in other areas (such as employment). (This is Strahilevitz's second mechanism by which an exclusionary vibe excludes a targeted population.)<sup>59</sup> Some commentators have already drawn the connection between § 3604(c) and, for example, sexual harassment.<sup>60</sup> Without the broad prohibitions of § 3604(c), what entered the law as a narrowly-circumscribed exception (§ 3603(b)) would threaten to create a tacit permission to discriminate more generally. Moreover, because of the efficiency gains implicit in greater specification of possible roommates, a permission to engage in discriminatory advertising amounts to an encouragement of it. If one *has* discriminatory preferences, it would be "irrational" *not* to express them, if one is permitted to do so. There is, therefore, every reason to believe that the total volume of such advertisements would only rise (as the expansion of the Internet roommate market has demonstrated).

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<sup>59</sup> See Strahilevitz, 104 MICH. L. REV. at 1851 (citations omitted).

<sup>60</sup> See Robert G. Schwemm and Rigel C. Oliveri, *A New Look at Sexual Harassment Under the Fair Housing Act: The Forgotten Role of § 3604(c)*, 2002 WIS. L. REV. 771, 786 (2002).

## D. DISCRIMINATORY HOUSING ADVERTISING AND/AS “HATE SPEECH”

The volume of online housing advertisements is most significant because discriminatory online advertising, polluting cyberspace,<sup>61</sup> can be understood as a variety of “hate speech.” Although the phrase “hate speech” is more often associated with extreme actions like cross-burning,<sup>62</sup> or attempts to limit student speech,<sup>63</sup> when the scope of the Internet’s reach is analyzed, and the aims of the FHA considered, a case can be made for characterizing prohibited advertising as a form of hate speech.

“Hate speech” has been variously defined, both by those who support and by those who oppose its suppression. One First Amendment treatise defines hate speech as “the generic term that has come to stand for verbal attacks based on race, ethnicity, religion, and sexual orientation or preference.”<sup>64</sup> More specifically, Frederick Schauer makes the connection between such speech and discrimination by defining hate speech as

Utterances intended to and likely to have the effect of inducing others to commit . . . acts of unlawful discrimination based on the race, religion, gender, or sexual orientation of the victim; and . . . utterances addressed to and intended to harm the listener (or viewer) because of her race, religion, gender, or sexual orientation.<sup>65</sup>

Employing this definition, a discriminatory housing advertisement qualifies as hate speech.<sup>66</sup> If the housing in question is not covered by the exemption, such an ad straightforwardly expresses an intention to commit an act of unlawful discrimination on one or more of the identified bases. But even if the particular space advertised is exempt, the ad is likely to have the effect of inducing others, not aware of the legal niceties of § 3603(b), to commit such acts with respect to non-

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<sup>61</sup> Schwemm makes a similar point: “‘Congress takes very seriously people who publicly announce that they will discriminate on race,’ Schwemm says. ‘We do not want people mucking up the press with such ads.’” Stephanie Francis Ward, *With Roomies—Be Careful How You Ask For Them: 9th Circuit opinion applies fair housing rule on discrimination to Web site*, ABA J. E-REPORT, May 25, 2007.

<sup>62</sup> See *R.A.V. v. St. Paul*, 505 U.S. 377, 377-78, 393, 396 (1992).

<sup>63</sup> See *Harper v. Poway School District*, 455 F.3d 1052 (9th Cir. 2006) (order denying request for rehearing en banc) (Reinhardt, J., concurring).

<sup>64</sup> RODNEY A. SMOLLA & MELVILLE B. NIMMER, *SMOLLA AND NIMMER ON FREEDOM OF SPEECH*, § 12.2, at 12-2 (2007).

<sup>65</sup> Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1349 (1992).

<sup>66</sup> A similar idea is mentioned in Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1893 (2006).

exempt properties. The ads are unquestionably “addressed to” certain viewers, both those who do and those who do not belong to the categories in question, and are intended to exclude and discourage some of those viewers from seeking housing from that provider, which is surely a harm to them.

Robert Post has identified three categories of harm from hate speech relevant to discriminatory housing advertisements:

(1) “Deontic” Harm. . . . is an elemental wrongness to racist expression, regardless of the presence or absence of particular empirical consequences. . . . A society committed to the ideals of social and political equality cannot remain passive, and must issue unequivocal expressions of solidarity with vulnerable minority groups and make positive statements affirming its commitment to those ideals.

(2) Harms to Identifiable Groups. Racist expression harms those groups that are the target of the expression. . . . [S]peech likely to cast contempt or ridicule on identifiable groups ought to be regulated to prevent injury to the status and prospects of the members of those groups. . . .

(3) Harm to Individuals. Racist expression, like defamation, invasion of privacy, and intentional infliction of emotional distress, harms individuals. These injuries include feelings of humiliation, isolation, and self-hatred, as well as dignitary affront. . . .<sup>67</sup>

A number of scholars, particularly critical race theorists such as Mari Matsuda, Patricia Williams, and Richard Delgado, have expanded further on the various psychological and even physical harms of such speech.<sup>68</sup> While discriminatory ads are not generally among the most virulent examples of hate speech (though there is nothing to prevent ads from containing extremely offensive epithets referring to membership in protected categories,<sup>69</sup> and “contempt and ridicule” are commonplace), the statements are made in public, intensifying them. As Delgado notes, “mere words, whether racial or otherwise, can cause mental, emotional,

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<sup>67</sup> Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 271-277 (1991) (quoted in Ronald Turner, *Regulating Hate Speech and the First Amendment: The Attractions of, and Objections To, An Explicit Harms-Based Analysis*, 29 IND. L. REV. 257, 295 (1995) (citations and quotation marks omitted)).

<sup>68</sup> See Turner, 29 IND. L. REV. at 296-98 and sources cited therein.

<sup>69</sup> ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 42 (1992) (discussing “nigger,” as well as “slut,” “fag,” and “cripple”).

or even physical harm to their target, especially if delivered *in front of others* or by a person in a position of authority.”<sup>70</sup> A web-posted housing ad can be seen by millions, and appears with the implicit approval of the website operator. The law recognizes that the target of discriminatory speech suffers harms distinct from the harms of the discriminatory act contemplated or described.<sup>71</sup> A sign saying “\_\_\_ go home” inflicts a dignitary injury on the persons in the group to whom it is directed, quite separable from whatever injury any particular group member suffers by actual exclusion. Every person of color who ever walked by a restaurant, motel, restroom, or water fountain with a sign reading “WHITES ONLY” was damaged by that experience – even if he or she had no occasion to enter the restaurant, motel, or restroom, or drink from the fountain – and hence never discovered if the sign would be enforced or ignored. If most or all of the housing ads in the paper explicitly sought “white” “Christian” tenants or roommates, or said “no gays, blacks, or Jews,” the environment created thereby, of separatism and antagonism, would be inimical to the goals of the Fair Housing Act. The use of discriminatory language, and even images, in advertising, contributes to a broader sense of inclusion or exclusion, of being a valued participant or a marginalized outsider, in the community. Where one may safely live, and raise a family, is at the core of that experience of citizenship.<sup>72</sup>

## II. COMMUNICATIONS DECENCY ACT IMMUNITY: THE PURPOSES AND LIMITATIONS OF § 230

The basic immunity involved is set forth with classic simplicity in 47 U.S.C § 230(c)(1): “No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>73</sup> Under this section, an interactive computer service provider will not be liable when transmitting content it would otherwise be unlawful to “publish.” According to the Ninth Circuit, “The touchstone of section 230(c) is that providers of interactive computer services are immune from liability for

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<sup>70</sup> Richard Delgado, *Words That Wound: A Tort Action For Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143 (1982) (emphasis added).

<sup>71</sup> See generally Turner, 29 IND. L. REV. at 292-302 and sources cited therein.

<sup>72</sup> A perhaps less extreme version of the same argument is that a ban on discriminatory advertising reduces or eliminates the harm of “stigma” associated with encountering such ads. See, e.g., Jennifer 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, 975-76 (2002).

<sup>73</sup> 47 U.S.C.A. § 230(c) (Westlaw 2008).

content created by third parties.”<sup>74</sup> The immunity applies to a defendant who is the “provider . . . of an interactive computer service” and is being sued “as the publisher or speaker of any information provided by” someone else.<sup>75</sup>

Where did this provision come from? *Stratton Oakmont, Inc. v. Prodigy Services Co.*, decided in 1995, was an important impetus for § 230(c).<sup>76</sup> In *Stratton*, a New York state court had held that Prodigy, an interactive service provider, was a “publisher” of allegedly libelous or defamatory statements, not a “distributor,” and hence potentially liable.<sup>77</sup> In reaching this conclusion, the *Stratton* court employed a familiar distinction between publishers and distributors:

[O]ne who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue. A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault.<sup>78</sup>

In *Stratton*, the court determined that Prodigy was a “publisher,” in essence because it exercised editorial control over content:

PRODIGY held itself out to the public and its members as controlling the content of its computer bulletin boards. Second, PRODIGY implemented this control through its automatic software screening program, and the Guidelines which Board Leaders are required to enforce. By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and “bad taste”, [sic] for example, PRODIGY is clearly making decisions as to content, and such decisions constitute editorial control. That such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made, does not minimize or eviscerate the simple fact that PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs’ claims in

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<sup>74</sup> *Roommates.com I*, 489 F.3d 921, 925 (9th Cir. 2005).

<sup>75</sup> 47 U.S.C. § 230(c).

<sup>76</sup> 1995 WL 323710 (N.Y. Sup., May 24, 1995). See also *Roommate.com II*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc). (“Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards”).

<sup>77</sup> *Stratton Oakmont*, 1995 WL 323710, at \*4.

<sup>78</sup> *Id.* at \*3 (internal citations omitted).

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this action, PRODIGY is a publisher rather than a distributor.<sup>79</sup>

As enacted, the federal Communications Decency Act of 1996 (CDA) had two purposes: (1) to protect children from indecency on the Internet, and (2) to foster growth of the Internet.<sup>80</sup> As the Ninth Circuit explained,

Title V of the Telecommunications Act of 1996, is known as the “Communications Decency Act of 1996.” The primary goal of the Act was to control the exposure of minors to indecent material. Parts of the Act have since been struck down as unconstitutional limitations on free speech, but the section at issue here, § 230, remains intact.<sup>81</sup>

Beyond child protection, the secondary purpose of the immunity provisions codified at § 230 is to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations.”<sup>82</sup>

The intent of this section was to prevent computer service provider liability for common law speech-based torts (such as defamation) arising from material disseminated online. These torts frequently provide for both “speaker” and “publisher” liability, and it is the latter that is at issue here.<sup>83</sup> On the one hand, ISPs did not want to run the risk of being held legally responsible for the content of the millions, or even billions, of messages posted and sent online. At the same time, perhaps paradoxically, after *Stratton*, some providers were concerned that by exercising *any* editorial control over content, they might subject themselves to liability for unlawful communications that somehow “got through.” Rather than foregoing all control over content whatsoever, computer service providers were able to get an immunity provision added to the CDA, thereby actually *encouraging* the exercise of editorial control over content (a.k.a. censorship) without fear of liability.<sup>84</sup> As the Ninth Circuit later emphasized, “Congress sought to

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<sup>79</sup> *Id.* at \*4 (citations omitted).

<sup>80</sup> Marsha Cope Huie, et al., *The Right To Privacy in Personal Data: The EU Prods the U.S. and Controversy Continues*, 9 TULSA J. COMP. & INT’L L. 391, 415 (2002).

<sup>81</sup> *Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (internal citations deleted).

<sup>82</sup> 47 U.S.C. § 230(b)(2).

<sup>83</sup> See, e.g., M.C. Dransfield, Annotation, *Liability of Publisher of Defamatory Statement for its Repetition or Republication by Others*, 96 A.L.R.2d 373 (Westlaw 2007).

<sup>84</sup> A detailed legislative history is provided in Jennifer 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, 988-94, 1002-03 (2002), including fair housing-related legislation that was before Congress at the same time the CDA was enacted. Chang argues that this shows that “Had [Congress] desired to immunize [online service providers] from fair housing

immunize the *removal* of user-generated content, not the *creation* of content.”<sup>85</sup>

Hence, the CDA crucially distinguishes between “mere” publishers, who enjoy immunity, and “information content providers,” who (like speakers) do not. An information content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.”<sup>86</sup> Since the first version of the CDA was enacted in 1996,<sup>87</sup> a series of cases have defined the difference between “interactive computer service providers” and “information content providers,” for purposes of evaluating publisher liability in various contexts.

A 1997 Fourth Circuit case, *Zeran v. American Online, Inc.*,<sup>88</sup> articulated how § 230(c) immunity relates to free speech on the Internet.

Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. . . .

. . . Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages.

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liability, it would be reasonable to expect that at least some members would have identified or discussed the issue at some point in the legislative history of § 230.” *Id.* at 1003. One might equally argue, however, that had they intended *not* to provide immunity for discriminatory housing advertisements, it would be reasonable to expect that at least some members would have identified or discussed the issue. Such are the hazards of relying too heavily on silent legislative history to determine the intent of a statute.

<sup>85</sup> *Roommate.com II*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc).

<sup>86</sup> 47 U.S.C. § 230(f)(3). The balance of § 230 is intended to preclude regulation of Internet service providers (“ISPs”), encourage the development of screening technology, and protect ISPs that employ filtering devices to detect and screen child pornography.

<sup>87</sup> The Communications Decency Act was enacted as Title V of The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996).

<sup>88</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997). The case is also analyzed in Jennifer 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, 994-99 (2002).



Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced 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. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.<sup>89</sup>

*Zeran* gave § 230(c) a broad and forceful interpretation, which has been widely followed nationwide ever since.<sup>90</sup>

*Zeran* involved a suit against America Online (“AOL”) for unreasonably delaying the removal of messages defaming the plaintiff repeatedly posted on the website. In finding AOL immune, the *Zeran* court employed the traditional distinction between “publisher” and “distributor” with respect to the tort of defamation.<sup>91</sup> Under *Zeran*, the “plain language” of § 230 intended to exempt an ISP even if it exercised “a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content. . . .”<sup>92</sup> The court held that the “plain language”<sup>93</sup> of the statute “create[d] a federal immunity to any

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<sup>89</sup> *Zeran*, 129 F.3d at 330-331. *Zeran* addressed §230 as it appeared in the Communications Decency Act of 1996. The portions of that statute intended to protect minors from indecent material were declared unconstitutional in *Reno v. A.C.L.U.*, 521 U.S. 844 (1997), but §230 remained unscathed.

<sup>90</sup> As the Ninth Circuit stated (through a panel consisting of Judges Reinhardt and Kozinski, along with the author of the opinion, Judge Milan Smith), “The majority of federal circuits have interpreted the CDA to establish broad ‘federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.’” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (citing *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (quoting *Zeran*, 129 F.3d at 331)). In *Perfect 10*, the Ninth Circuit also referred to *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003), which in turned cited *Batzel v. Smith*, 333 F.3d 1018, 1026-27 (9th Cir. 2003). *Id.* A California Supreme Court defamation case similarly followed *Zeran*. See *Barret v. Rosenthal*, 146 P.3d 510, 514 (Cal. 2006).

<sup>91</sup> *Id.* at 332. See also *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 at \*3 (N.Y. Sup. May 24, 1995), and cases cited therein.

<sup>92</sup> *Zeran*, 129 F.3d at 330. A useful summary of the relevant cases following *Zeran* is found in Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 203-07 (2007).

<sup>93</sup> *Zeran*, 129 F.3d at 330.

cause of action that would make service providers liable for information originating with a third-party user of the service.”<sup>94</sup>

### III. FHA v. CDA; WHEN IS A “PROVIDER OF INTERACTIVE COMPUTER SERVICES” WHO ADVERTISES ROOMS FOR RENT ALSO AN “INFORMATION CONTENT PROVIDER” OF HOUSING INFORMATION?

Those who provide homes to others have a crucial role to play in carrying out the goals of the Fair Housing Act, and its broad prohibition on discriminatory advertising is central to that role. Courts have rightly rejected all attempts to expand the narrow exception to its non-discriminatory mandate, justified by the freedom of intimate association. Thus, § 3604(c) of the Fair Housing Act has been applied to a very wide variety of media, including “newspapers, multiple listing services, telecommunications devices for the deaf, a housing complex’s ‘pool and building rules,’ as well as ‘any other publishing medium.’”<sup>95</sup> The U.S. Department of Housing and Urban Development (“HUD”) “has issued a regulation construing Section 3604(c) as applying to ‘[w]ritten notices and statements includ[ing] any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling.’”<sup>96</sup> But does it apply to those who publish housing advertisements on the Internet, like craigslist, or to an “online roommate-matching website”<sup>97</sup> like Roommate.com? Or does the immunity offered to interactive computer service providers by the Communications Decency Act provide a shield? That is the question presented by two cases decided by federal Circuit Courts of Appeal in the spring of 2008, *Chicago Lawyers’ Committee For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, in the Seventh Circuit, and *Fair Housing Council v. Roommate.com*, in the Ninth Circuit.<sup>98</sup> Their differing

<sup>94</sup> *Id.*

<sup>95</sup> *Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.* (*Chicago Lawyers’ Committee*), 461 F. Supp. 2d 681, 687 (N.D. Ill. 2006) (directing the reader to see *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999-1000 (2d Cir. 1991) (newspapers); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1057-59 (E.D. Va. 1987); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 447 F. Supp. 838, 842 n.3 (E.D.N.Y. 1978) (multiple listing services); *telecommunication devices for the deaf, U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 420 (2d Cir. 2005) (telecommunication devices for the deaf); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1289-91 (C.D. Cal. 1997) (a housing complex’s “pool and building rules”); *U.S. v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) (“as well as ‘any other publishing medium’”).

<sup>96</sup> *Chicago Lawyers’ Committee*, 461 F. Supp. 2d at 687 (citing 24 C.F.R. § 100.75).

<sup>97</sup> *Roommates.com I*, 489 F.3d at 924.

<sup>98</sup> Scholarship has been largely pessimistic. See, e.g., *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 96 n.274 (2006) (“Courts have read the protection against liability for content provided by others to

answers may create a question suitable for decision by the U.S. Supreme Court in the not-too-distant future.

#### A. *CHICAGO LAWYERS' COMMITTEE V. CRAIGSLIST*

In *Chicago Lawyers' Committee For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, a fair housing group attacked craigslist<sup>99</sup> based on the content of housing advertisements posted on the site.<sup>100</sup> The plaintiffs argued that the publication of this information, detailing preferences as to race, sex, religion and familial status, violated the fair housing laws.<sup>101</sup> One commentator characterized this case as raising the issue of "whether online classified ad venues must comply with the Fair Housing Act."<sup>102</sup> An Illinois federal district court held the claim barred by the CDA, stating that, "Near-unanimous case law holds that Section 230(a) affords immunity to ICSs against suits that seek to hold an ICS liable for third-party content."<sup>103</sup> The court cited *Zeran* as "the fountainhead of this uniform authority."<sup>104</sup> After considering arguments based on the "publisher or speaker" language of the statute, the court found the statute's language to govern.<sup>105</sup> While the *Zeran* court held that § 230's "plain language" "created a federal immunity to any cause of

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preempt virtually every other cause of action. E.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) (invasion of privacy; negligence); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118-19 (W.D. Wash. 2004) (Consumer Protection Act, Wash. Rev. Code Ann. § 19.86.010-920 (West 1999), and tortious interference with business relationships); *Fair Housing Council*, No. CV 03-09386 PA(RZX), 2004 WL 3799488, at \*8-9 (C.D. Cal. Sept. 30, 2004) (Federal Fair Housing Act, 42 U.S.C. § 3604(c) (2000); *Noah v. AOL Time Warner Inc.*, 261 F.Supp. 2d 532, 540-41 (E.D. Va. 2003) (Title II of Civil Rights Act of 1964, 42 U.S.C. § 2000a (2000)."); Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 214-18 (2007). *But see* Jennifer 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, 969 (2002).

<sup>99</sup> The entity does not capitalize its name.

<sup>100</sup> 461 F. Supp. 2d 681 (N.D. Ill. 2006).

<sup>101</sup> *Id.* at 682.

<sup>102</sup> Ronald J. Mann, *Emerging Frameworks for Policing Internet Intermediaries*, 10 J. INTERNET L., Dec. 2006, at 3, 8 (December 2006).

<sup>103</sup> *Chicago Lawyer's Committee*, 461 F. Supp. 2d at 688.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 698. The plaintiff's citation of the federal Department of Housing and Urban Development's position that the CDA did not bar claims under the FHA was found to be "unpersuasive," and not entitled to *Chevron* deference. *Id.* at 692 n.9. In reviewing administrative interpretations of statutes, courts look first to the principles set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step under *Chevron* is to determine whether the statutory meaning is unambiguous. *Id.* at 843. No deference to the view of the administrative agency is necessary when "normal principles of statutory construction suffice" to determine the statute's meaning. *See, e.g., Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 786 (9th Cir. 2004) (citations omitted).

action that would make service providers liable for information originating with a third party user of the service,”<sup>106</sup> the *Craigslist* district court took a somewhat different approach, reading § 230 as prohibiting “publisher” treatment of an interactive computer service provider, in turn making it impossible to state any claim that required proving that the interactive computer service “published” any content.<sup>107</sup>

At the district court level, the amici also raised a First Amendment issue, citing *Smith v. California*<sup>108</sup> and using the traditional publisher/distributor distinction to argue,

As a matter of the First Amendment, an entity that serves as an intermediary for large quantities of third-party content – whether it be a bookstore, a library, or the provider of an online forum – cannot be held liable for unlawful content that may be interspersed among the overall body of information being disseminated absent evidence that it knew or should have known of that content.<sup>109</sup>

The case was appealed to the Seventh Circuit, which affirmed, in a relatively brief opinion authored by Chief Judge Frank Easterbrook.<sup>110</sup> (The case was decided just three weeks before the Ninth Circuit filed its *en banc* opinion.) As the Seventh Circuit understood the issue, “[t]he question is not whether Congress gave any thought to the Fair Housing Act [in enacting the Communications Decency Act], but whether it excluded § 3604(c) from the reach of § 230 (c)(1).”<sup>111</sup> According to the Seventh Circuit, “[w]hat § 230(c)(1) says is that an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else,”<sup>112</sup> and thus cannot be liable under § 3604(c).<sup>113</sup> As Easterbrook put it, *craigslist* “is not the author of

<sup>106</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>107</sup> *Chicago Lawyer’s Committee*, 461 F. Supp. 2d at 696. This decision is also discussed in Jeffrey P. Cunard and Jennifer B. Coplan, *Cyberliability 2006: Select Developments*, COMMUNICATIONS LAW 2006 51, 75 (Practicing Law Institute 2006); Evan Brown, *Internet Law in the Courts*, 11 J. INTERNET L., Jan. 2007, at 16, 17; Leslie Paul Machado, *Immunity Under § 230 Of The Communications Decency Act of 1996: A Short Primer*, 10 J. INTERNET L., Sep. 2006, at 8, 9; Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 211-14 (2007).

<sup>108</sup> *Smith v. California*, 361 U.S. 147, 152-153 (1959).

<sup>109</sup> Brief for Amazon.com, Inc., et al. as Amicus Curiae in Support of Craigslist’s Motion for Judgment on the Pleadings, *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06 C 0657), 2006 WL 1794487 at n.4.

<sup>110</sup> *Chicago Lawyers Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc. (Craigslist)*, 519 F.3d 666, 668 (7th Cir. 2008).

<sup>111</sup> *Id.* at 671.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

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the ads and could not be treated as the ‘speaker’ of the posters’ words.”<sup>114</sup> The Seventh Circuit also rejected the argument that craigslist “can be liable as one who ‘cause[d] to be made, printed or published any [discriminatory] notice, statement, or advertisement,’”<sup>115</sup> because Craigslist’s role is too passive to satisfy causation. “An interactive computer service ‘causes’ postings only in the sense of providing a place where people can post. Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination.”<sup>116</sup> The Seventh Circuit concluded that, “given § 230(c)(1) [the Lawyers’ Committee] cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.”<sup>117</sup>

### B. *FAIR HOUSING COUNCIL V. ROOMMATE.COM*

Although *Craigslist* was decided by the Seventh Circuit a few weeks before the Ninth Circuit en banc panel decided *Roommate.com II*, when the California federal district court heard *Fair Housing Council*, it was “the first case to address the relationship between the CDA’s grant of immunity and the FHA’s imposition of liability for the making or publishing of discriminatory real estate listings.”<sup>118</sup> Until that time, although the Ninth Circuit had a reasonably well-developed body of law on § 230(c), no case had yet had to balance the policies behind § 230(c) against the FHA, an important piece of civil rights legislation which expressly and purposefully created publisher liability.<sup>119</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 671-72.

<sup>116</sup> *Craigslist*, 519 F.3d at 671.

<sup>117</sup> *Id.* at 672.

<sup>118</sup> *Fair Housing Council*, No. CV 03-09386PA(RZK), 2004 WL 3799488, at \*3 (C.D. Cal. Sep. 30, 2004). *Chicago Lawyers’ Committee*, 461 F. Supp. 2d 681 (N.D. Ill. 2006), was decided between the district court decision and the Ninth Circuit appeal.

<sup>119</sup> In this way, *Roommate II* is distinguishable from *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532 (E.D.Va. 2003), *aff’d*, 2004 WL 602711 (4th Cir. 2004) (per curiam), which found § 230 immunity for an alleged violation of Title II. Still, the Eastern District of Virginia federal district court, in dicta, remarked, “the exclusion of federal criminal claims, but not federal civil rights claims, clearly indicates, under the canon of *expressio unius est exclusion alterius*, that Congress did not intend to place federal civil rights claims outside the scope of § 230 immunity,” *Id.* at 539, leading at least one commentator to conclude, “This case suggests a bleak outcome in a case where the Fair Housing Act, under Title VIII of the Civil Rights Act of 1968, confronts § 230 immunity.” Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 206 (2007). Student Sussman may have overestimated the degree of deference likely to be shown to such an opinion by the Ninth Circuit.

1. *Background: § 230 In The Ninth Circuit*

Two cases decided by the Ninth Circuit in 2003 form the backdrop for the Ninth Circuit's analysis of § 230(c) immunity. In its en banc opinion in *Roommate.com II*, the Ninth Circuit revisited and clarified its holding in each of them.

a. *Batzel v. Smith*

In *Batzel v. Smith*,<sup>120</sup> the Ninth Circuit considered the applicability of § 230(c) to Ton Cremers, the “moderator of a listserv and operator of a website,” who disseminated an email message he received from Bob Smith, containing allegedly defamatory information about Smith's former employer, Ellen Batzel.<sup>121</sup> Batzel had employed Smith as a handyman. While working at her home, statements Batzel made to Smith, and observations Smith made, led him to believe that some paintings in her home were looted Nazi art.<sup>122</sup> Smith sent an email to Cremers, at an email address Cremers maintained as the sole operator of the nonprofit “Museum Security Network,” communicating this. Cremers, who received many messages relating to stolen art at the Network, posted Smith's message to the listserv he moderated, although Smith had not intended for that to happen, and had not sent his email to the address dedicated to that purpose.<sup>123</sup> Batzel sued.<sup>124</sup>

The district court held that Cremers (and the Museum Security Network) was not an “Internet service provider” entitled to immunity under § 230(c).<sup>125</sup> The Ninth Circuit disagreed, and found Cremers immune from any speech-based tort. As the Court stated,

There is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world. Congress, however, has chosen for policy reasons to immunize from liability for defamatory or obscene speech “providers and users of interactive computer services” when the defamatory or obscene material is “provided” by someone else. This case presents the question whether and, if so, under what circumstances a moderator of a listserv and

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<sup>120</sup> 333 F.3d 1018 (9th Cir. 2003).

<sup>121</sup> *Id.* at 1020-21.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1022.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1026.

operator of a website who posts an allegedly defamatory e-mail authored by a third party can be held liable for doing so.<sup>126</sup>

While the *Batzel* court understood § 230(c) broadly with respect to publishers, it applied the section narrowly with respect to the causes of action to which immunity applied. The Ninth Circuit apparently interpreted § 230(c) to provide immunity for “defamatory or obscene speech,” nothing more. Despite the breadth of its holding, therefore, nothing in *Batzel* even hinted that online publishers should be immune from suit under the Fair Housing Act.

(In *Roommate.com II*, the Ninth Circuit put a somewhat different spin on *Batzel*, to harmonize the earlier case with *Roommate.com II*. This analysis focused on whether the material was sent to Cremers “for posting online,” leaving Cremers “to determine whether or not to prevent its posting,” in which case Cremers would be entitled to immunity under § 230, or whether Cremers “publishe[d] material that he [did] not believe was tendered to him for posting online, [so that] he [was] the one making the affirmative decision to publish,” in which case he would be “properly deemed a developer and not entitled to CDA immunity.”<sup>127</sup>)

b. *Carafano v. Metrosplash.com*

The leading Ninth Circuit case distinguishing “interactive computer service providers” from “information content providers” in relation to § 230(c) is *Carafano v. Metrosplash.com, Inc.*,<sup>128</sup> decided, like *Batzel*, in 2003. *Carafano* addressed Matchmaker.com’s liability for false and defamatory postings on an Internet dating site. The Ninth Circuit held that Matchmaker.com was not an information content provider, and hence was immune under § 230(c).<sup>129</sup> Like *Roommate.com*, the Matchmaker site used both multiple-choice and essay sections.<sup>130</sup> In *Carafano*, “an unidentified prankster placed a fraudulent personal ad,” containing allegedly defamatory content about the sexual interests of a user.<sup>131</sup> Carafano sued Matchmaker.

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<sup>126</sup> *Batzel*, 339 F.3d at 1020.

<sup>127</sup> *Roommate.com II*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc).

<sup>128</sup> 339 F.3d 1119 (9th Cir. 2003).

<sup>129</sup> *Id.* at 1124-25.

<sup>130</sup> *Id.* at 1121.

<sup>131</sup> *Roommates.com I*, 489 F.3d 921, 927 (9th Cir. 2007). That user, Christianne Carafano, is an actress who was a member of the cast of *Star Trek: Deep Space Nine*, under the stage name “Chase Masterson.” *Carafano*, 339 F.3d at 1121.

The *Roommates.com I* Ninth Circuit opinion identified two reasons why the Ninth Circuit found Matchmaker immune: Matchmaker “merely ‘facilitated the expression of information by individual users,’”<sup>132</sup> in other words, “‘no profile ha[d] any content until a user actively create[d] it.’”<sup>133</sup> Neither the multiple-choice questions with pre-set answer choices, nor the essay questions, negated that.<sup>134</sup> But secondly, “even if [Matchmaker] could be considered a content provider for publishing its customers’ profiles, it was exempt from liability because it did not ‘create[ ] or develop[ ] the particular information at issue.’”<sup>135</sup> The information entered by the “prankster” was “transmitted unaltered to profile viewers.”<sup>136</sup> Matchmaker “was not a content provider of the offending information because it did not play a significant role in creating, developing or transforming it.”<sup>137</sup> It was, “with respect to the defamatory content. . . merely a passive conduit and thus could not be liable for failing to detect and remove it.”<sup>138</sup> (The similarity between Matchmaker and craigslist is clear.)

At least two issues remained undecided after both *Batzel* and *Carafano*: first, whether the Ninth Circuit would find that § 230(c) immunity applied in contexts other than the speech torts (libel, defamation); and second, whether Roommate.com’s conduct as a website operator was sufficiently distinguishable from that of Matchmaker.com to take it outside the scope of immunity established by *Carafano*. Whether Roommate.com, unlike Matchmaker, was a “creator” or “developer” of the potentially discriminatory content would prove to be the central issue in the *Roommate.com II* decision.

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<sup>132</sup> *Roommates.com I*, 489 F.3d at 927 (citing *Carafano*, 339 F.3d at 1124-25).

<sup>133</sup> *Roommates.com I*, 489 F.3d at 927 (citing *Carafano*, 339 F.3d at 1124). The Ninth Circuit en banc opinion concedes that the language of *Carafano* “was unduly broad.” *Roommate.com II*, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc). Specifically, the Ninth Circuit retracts the claim that the website is immune for the reason given above. As the Ninth Circuit explains in *Roommate.com II*, “even if the data are supplied by third parties, a website operator may still contribute to the content’s illegality and thus be liable as a developer.” *Id.*

<sup>134</sup> *Roommates.com I*, 489 F.3d at 927 (citing *Carafano*, 339 F.3d at 1124).

<sup>135</sup> *Roommates.com I*, 489 F.3d at 928 (citing *Carafano*, 339 F.3d at 1125).

<sup>136</sup> *Roommates.com I*, 489 F.3d at 928 (citing *Carafano*, 339 F.3d at 1125).

<sup>137</sup> *Roommates.com I*, 489 F.3d at 928 (citing *Carafano*, 339 F.3d at 1125) (quotation marks omitted). In the Ninth Circuit en banc opinion in *Roommate.com II*, the court goes even further, and states that the “allegedly libelous content there – the false implication that Carafano was unchaste – was created and developed *entirely* by the malevolent user, without prompting or help from the website operator.” *Roommate.com II*, 521 F.3d at 1171 (emphasis added). Furthermore, Matchmaker.com “did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier.” *Id.*

<sup>138</sup> *Roommate.com II*, 521 F.3d at 1172.



## 2. *The District Court: Total Immunity*

The district court provided a good overview of how Roommate.com does business before proceeding to its legal analysis. Because details matter, it is quoted here at length.

Roommate owns and operates [www.roommates.com](http://www.roommates.com), an Internet website which provides a roommate locator service for individuals who have residences to share or rent out, and individuals looking for residences to share. The website allows those with residences, and those looking for residences, to post information about themselves and available housing options on a searchable database. Basic membership is free and allows a user to create a personal profile, conduct searches of the database, and send “roommail”—a type of internal e-mail system—to other users. Paid memberships allow users to view the free-form essay “comments” posted by other users, view full-size photos, and receive roommail from other users. Roommates.com [sic] currently receives over 50,000 visits and 1,000,000 page views per day. Approximately 40,000 users are offering rooms for rent, 110,000 users are looking for a residence to share, and 24,000 users have paid for upgraded memberships.

To become a member of Roommate’s service, a person must author a personal profile. The profile includes information, much of which is entered by selecting from among a number of predetermined options provided by Roommate, concerning, among other things, the person’s age, gender, sexual orientation, occupation, and number of children. A user must provide a response for each inquiry. Roommate’s questionnaire makes no inquiries concerning a user’s race or religion. Users create their own nicknames, can attach photographs, and may add a free-form essay to personalize the entry by describing themselves and their roommate preferences. When listing a room for rent, the user responds to prompts which result in the posting of specific details about the area, rent and deposit information, date of availability, and features of the residence. Information may also be posted about the current occupants of the household and roommate preferences for the incoming roommate. In addition to admittedly non-discriminatory information such as cleanliness, smoking habits, and pet ownership, these preferences can, when selected, include the user’s responses to Roommate’s questions about age, gender, sexual orientation, occupation, and familial status.<sup>139</sup>

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<sup>139</sup> *Fair Housing Council*, No. CV 03-09386PA(RZK), 2004 WL 3799488, at \*1 (C.D. Cal. Sep. 30, 2004).

The Ninth Circuit later emphasized that Roommate.com required each subscriber “to disclose his sex, sexual orientation and whether he would bring children to a household” and “also describe his preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household.”<sup>140</sup>

At a glance, it might appear that the publication of some of this content, after its creation by the user, would violate § 3604(c) of the FHA. Thirty-five years ago, the Fourth Circuit held that newspapers may constitutionally be enjoined from publishing discriminatory rental real estate advertisements.<sup>141</sup> Three years ago, in *Space Hunters, Inc.*, the Second Circuit held a housing information vendor liable for violations of the FHA, including § 3604(c), notwithstanding that the rooms in question were covered by the § 3603(b) exemption from the substantive antidiscrimination provisions of § 3604(a) and (b).<sup>142</sup> Like the newspaper, Roommate.com disseminates information provided by housing vendors seeking tenants. The all-important difference, of course, is that Roommate.com provides its services via the Internet, and thus claimed to enjoy immunity as an interactive computer service provider.

Before the federal district court for the Central District of California, Roommate.com, represented by the same counsel that had successfully represented Matchmaker.com in *Carafano*,<sup>143</sup> prevailed in convincing Judge Percy Anderson that the immunity provision covered the business model of Roommate.com. The district court used three overlapping arguments. First, the district court relied on the absence of evidence of any legislative intent to *exempt* the FHA in general from the immunity provision of the CDA. “The CDA clarifies its effect on other laws and specifically exempts federal criminal laws, laws pertaining to intellectual property, and the Electronic Communications Privacy Act of 1986,” but not the Fair Housing Act.<sup>144</sup> Employing the maxim *expressio unius est exclusio alterius*, the district court concluded that the immunity provision applied.<sup>145</sup>

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<sup>140</sup> *Roommate.com II*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc).

<sup>141</sup> A court may constitutionally enjoin a newspaper’s printing of classified advertisements which violate [§ 804(c)]; such subsection does not contravene the due process clause of the Fifth Amendment of the U.S. Constitution either. See *U.S. v. Hunter*, 459 F.2d 205, 213-15 (4th Cir. 1972).

<sup>142</sup> *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005).

<sup>143</sup> Stephanie Francis Ward, *With Roomies—Be Careful How You Ask For Them: 9th Circuit opinion applies fair housing rule on discrimination to Web site*, ABA J. E-REPORT, May 25, 2007.

<sup>144</sup> *Fair Housing Council*, 2004 WL 3799488, at \*3 (citing 47 U.S.C. § 230(e)).

<sup>145</sup> This maxim is embodied in U.S. law in the principle that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in

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Second, the district court followed *Carafano*'s interpretation of the distinction between interactive computer service providers and information content providers, and saw no meaningful distinction between Matchmaker.com's practices and those of Roommate.com.<sup>146</sup> Both websites asked members to answer multiple-choice questions and write free-form essays, and then created profiles consisting of this information. The Ninth Circuit did not hold Matchmaker.com "responsible, even in part," for the content, because it came from users.<sup>147</sup> The same, thought the district court, went for Roommate.com.

Finally, the district court was unmoved by the Fair Housing Council's policy argument: "a concern that application of the CDA might eviscerate the FHA."<sup>148</sup> Notwithstanding its acknowledgement that Roommate.com receives "over 50,000 visits and 1,000,000 page views per day,"<sup>149</sup> the district court conceded only that "the most that can be said is that operators of Internet sites such as Roommate have an advantage over traditional print media because websites, unlike newspapers, are exempt from 42 U.S.C. section 3604(c) and the related state fair housing laws for publishers."<sup>150</sup> This of course effectively grants FHC's argument – the "advantage" offered by Internet publication is so substantial that if it is beyond the FHA's reach, § 3604(c) is a dead letter, primarily (apparently) because Congress did not see fit to exempt it explicitly from § 230(c).<sup>151</sup> Relying on two cases exempting Internet publishers from liability for defamation and obscenity, the district court reiterated that "Congress has chosen to treat cyberspace differently" than "other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for

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the absence of evidence of a contrary legislative intent." *Fair Housing Council*, 2004 WL 3799488, at \*3 (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The district court reasoning here paralleled that of the Eastern District of Virginia in *Noah v. AOL Time Warner Inc.*, 261 F.Supp. 2d 532, 537-39 (E.D. Va. 2003).

<sup>146</sup> *Fair Housing Council*, 2004 WL 3799488, at \*4.

<sup>147</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003).

<sup>148</sup> *Fair Housing Council*, 2004 WL 3799488, at \*4. Chang also used the term "eviscerate." , Jennifer 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, 982 (2002).

<sup>149</sup> *Fair Housing Council*, 2004 WL 3799488, at \*1.

<sup>150</sup> *Id.* at \*4.

<sup>151</sup> The Ninth Circuit turned out to be much more sensitive to this issue than the district court, stating, "we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Roommate.com II*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc).

publishing or distributing obscene or defamatory material written or prepared by others.”<sup>152</sup>

Understanding itself as acting modestly within the precedents, in fact the district court broke new ground in using § 230(c) of the CDA not only as a shield from liability for the common-law speech torts, but as a battering ram to breach the formerly impregnable walls of § 3604(c), eroding a protection for fair housing that appears not even to have been contemplated by the drafters of the CDA.

3. *The Ninth Circuit Reversal: No Immunity For Creating and Distributing Multiple-Choice Questionnaires and Answers, But No Liability For Transmitting User-Created “Additional Comments”*

Reasoning narrowly, the Ninth Circuit reversed solely on the second of the district court’s three bases of decision – whether, to what extent, and with respect to what information, Roommate.com is an “information content provider” under 47 U.S.C. § 203(f)(3). Judges Kozinski, Reinhardt, and Ikuta all agreed that Roommate.com was to some degree an information content provider. However, the three judges disagreed about just how much of Roommate.com’s content exposed them to potential liability on this basis.<sup>153</sup>

The first important difference the Ninth Circuit identified between Matchmaker and Roommate.com was how the website obtained the potentially unlawful information. “The prankster in *Carafano* provided information that was not solicited by the operator of the website.”<sup>154</sup> Matchmaker.com’s website intended obviously only to solicit information from speakers about themselves, not speech about anyone else. In *Carafano*, the defamatory statements were made by one wrongfully impersonating the speaker. In addition, providing some of the information about Ms. Carafano (such as her actual phone number and address) was a violation of Matchmaker.com’s explicit rules.<sup>155</sup>

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<sup>152</sup> *Id.* at \*4. The decision is briefly analyzed in Karen S. Frank and Stephen M. Fronk, *Online Liability 2006*, CABLE TELEVISION LAW 2006: COMPETITION IN VIDEO, INTERNET, AND TELEPHONY 383, 422 (Practicing Law Institute, 2006); Stephen M. Fronk, *Online Liability 2007*, CABLE TELEVISION LAW 2007: COMPETITION IN VIDEO, INTERNET, AND TELEPHONY 851, 892-93 (Practicing Law Institute, 2007); *Real Estate Listings: Internet Roommate Service*, 35-MAR REAL EST. L. REP. 1 (March 2006); Leslie Paul Machado, *Immunity Under § 230 Of The Communications Decency Act of 1996: A Short Primer*, 10 J. INTERNET L., Sep. 2006, at 9; and in more detail by Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 207-11 (2007).

<sup>153</sup> *Roommates.com I*, 489 F.3d 921 (9th Cir. 2007).

<sup>154</sup> *Id.* at 928.

<sup>155</sup> *Id.* (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003)).

Notwithstanding its broader language, the rule of *Carafano*, as read by the *Roommates.com I* court, is that there is only “CDA immunity for information posted by a third party that was not, *in any sense*, created or developed by the website operator—indeed, that was provided *despite* the website’s rules and policies.”<sup>156</sup> The *Roommates.com I* court continued, “we do not read [*Carafano*] as granting CDA immunity to those who actively encourage, solicit and profit from the tortious and unlawful communications of others.”<sup>157</sup>

By contrast, Roommate.com does much more than merely passively publish information sent to it by members (or even solicited from them).

Roommate also channels the information based on members’ answers to various questions, as well as the answers of other members. Thus, Roommate allows members to search only the profiles of members with compatible preferences. . . . Roommate also sends room-seekers email notifications that exclude listings incompatible with their profiles. . . . While Roommate provides a useful service, its search mechanism and email notifications mean that it is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals. By categorizing, channeling and limiting the distribution of users’ profiles, Roommate provides an additional layer of information that it is “responsible” at least “in part” for creating or developing.<sup>158</sup>

It is, therefore, an “information content provider” under 47 U.S.C. § 230(f)(3)<sup>159</sup> as to this information, and not entitled to immunity.

On the other hand, Roommate.com also permits users to post “Additional Comments” about themselves or the roommates they seek, in response to the query, “[w]e strongly recommend taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate.”<sup>160</sup> Although this information frequently expresses discriminatory preferences,<sup>161</sup> the Ninth Circuit concluded that “Roommate’s involvement is insufficient to make it a content provider of these comments”<sup>162</sup> for three reasons:

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<sup>156</sup> *Roommates.com I*, 489 F.3d at 928 (citing *Carafano*, 339 F.3d at 1121) (first emphasis added; second emphasis in original).

<sup>157</sup> *Roommates.com I*, 489 F.3d at 928.

<sup>158</sup> *Id.* at 928-29.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (“ ‘Pref[er] white Male roommates,’ . . . ‘NOT looking for black muslims.’ . . . ‘drugs, kids or animals’ or ‘smokers, kids or druggies,’ . . . ‘psychos or anyone on mental medication’”).

<sup>162</sup> *Id.*

- [1] Roommate's open-ended question suggests no particular information that is to be provided by members;
- [2] Roommate . . . does not prompt, encourage or solicit any of the inflammatory information provided by some of its members.
- [3] . . . Roommate [does not] use the information in the 'Additional Comments' section to limit or channel access to listings.<sup>163</sup>

In this opinion, the Ninth Circuit took a very fine-grained, rather than holistic, approach to determining whether and to what extent Roommate.com is a potentially liable "information content provider."

a. Judge Reinhardt's Holistic Analysis

Judge Steven Reinhardt, concurring in part and dissenting in part, advocated broader potential liability for interactive computer service providers who do more than passively transmit information entirely created by users. He would hold "that *none* of the information that the [FHC] challenge[s] satisfies the test for §230(c) immunity."<sup>164</sup> On his view, Roommate.com is "responsible in part for creating or developing information," hence disqualified from immunity as an "information content provider," if it *either* "categorizes, channels and limits the distribution of information, thereby creating another layer of information," *or* "actively prompts, encourages, or solicits the unlawful information."<sup>165</sup> In Reinhardt's view, Roommate.com does both of those things not only with respect to the questionnaires (and their answers), but also in the "Additional Comments" section, and hence should not be immune for that content either.<sup>166</sup>

With respect to distribution of information expressing unlawful preferences, Reinhardt notes that the material sent to users "aggregates an entire profile [including 'Additional Comments'] and presents it as a whole."<sup>167</sup> In Reinhardt's view, "when Roommate provides an additional layer of information by channeling the completed user profiles, that additional layer of information includes the 'Additional Comments' section with the various responses,"<sup>168</sup> negating any immunity for the content of the "Additional Comments." Because the recipient of "roommail" from Roommates.com receives an integrated profile,

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<sup>163</sup> *Roommates.com I.*, 489 F.3d at 928.

<sup>164</sup> *Id.* at 930 (emphasis in original).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 931.

<sup>168</sup> *Roommates.com I.*, 489 F.3d at 931 (quotation marks and citation omitted).

“[t]here is no justification for slicing and dicing into separate parts the material that Roommate elicits and then channels as an integral part of one package of information to the particular customers to whom it selectively distributes that package.”<sup>169</sup> Reinhardt harmonizes this approach to that taken in *Batzel*, in which the unit of analysis was the entire e-mail message, rather than selected portions of it.<sup>170</sup>

Furthermore, Reinhardt argues, *contra* Kozinski’s opinion for the majority, that Roommate.com *does* “prompt, encourage, or solicit” discriminatory information in the “Additional Comments.” In Reinhardt’s view, because the “Additional Comments” section immediately follows a section that includes multiple-choice questions about gender, sexual orientation, and familial status, “ordinary users would understand the recommendation to constitute a suggestion to expand upon the discriminatory preferences that they have already listed and to list their additional discriminatory preferences in that portion of the profile.”<sup>171</sup> In support of this claim, Reinhardt cites both the testimony of a Roommate.com executive about his intentions for the “Additional Comments” section (for example, that religious preferences be expressed to “avoid the need to contact and interview dozens of incompatible people”<sup>172</sup>), and the actual discriminatory preferences

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 931 (citing *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003)).

<sup>171</sup> *Roommates.com I*, 489 F.3d at 932.

<sup>172</sup> *Id.* Note, however, that there is no requirement that discriminatory intent be shown to find a violation of § 804(c). Rather, the issue is what an “ordinary reader” would infer. *See, e.g.*, *Housing Rights Center v. Sterling*, 404 F. Supp. 2d 1179, 1193 (C.D.Cal. 2004) (“In prohibiting advertisements, statements, or other notices which indicate a discriminatory preference in the context of the selling or renting of a dwelling, § 3604(c) does not require evidence of discriminatory intent.”); *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1290 (C.D.Cal. 1997) (noting that an oral or written statement violates § 3604(c) if it suggests a preference, limitation or discrimination to the “ordinary listener or reader”). *See also Chew v. Hybl*, No. C 96-03459 CW, 1997 WL 33644581, at \*5 (N.D.Cal. Dec. 9, 1997) in which the court noted:

While the Ninth Circuit has not decided whether a plaintiff must show that the defendant acted with discriminatory intent in order to establish a § 804(c) violation, other circuits that have addressed the issue have concluded that such a showing is not necessary. *See Jancik v. Dept. of Housing & Urban Development*, 44 F.3d 553, 556 (7th Cir.1995) (analyzing statutory language and determining that ordinary reader standard applies); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir.1991) (same); *Housing Opportunities Made Equal, Inc. v. Cincinnati Enquirer, Inc.*, 943 F.2d 644, 646 (6th Cir.1991) (acknowledging ordinary reader standard); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 29 (D.C.Cir.1990) (same), *cert. denied*, 498 U.S. 980 (1972); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934, (1972) (applying ordinary reader standard). Those courts that analyzed the statute relied on the plain meaning of the verb “indicates.” “Giving that word its common meaning, we read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question.” *Ragin*, 923

abundantly expressed therein.<sup>173</sup> While this is perhaps of limited persuasive force (it seems likely that most persons filling out such forms simply don't *know* which preferences are lawful to express and which are not), more significant is that the "sample" profiles (and nicknames) posted by Roommate.com, which new users are invited to preview, include such unlawful preferences.<sup>174</sup> Taken together, Reinhardt may overstate things slightly, though not unreasonably, when he concludes that the suggestion to "personalize" one's profile through "Additional Comments" "is in essence an invitation to elaborate on discriminatory preferences already listed and to list others such as race, religion, or national origin."<sup>175</sup>

Reinhardt's approach has the advantage of treating the entire e-mail message transmitted to the user in the same way the courts would view a rental real estate advertisement published in a newspaper. While it might appear that this would impose a significant administrative burden on Roommate.com (must they now read and analyze the content of the "Additional Comments" of every user from the point of view of the FHA?), arguably all Roommate.com would need to do is post an explicit instruction about the sort of information that may *not* lawfully be included in the "Additional Comments" section (and eliminate such content from any "sample" profiles).<sup>176</sup> In this way, they would cease to "prompt, encourage, or solicit" such information, and in fact, would do the contrary. If Roommate.com were to establish such a practice, any

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F.2d at 999; *see also, Jancik*, 44 F.3d at 556. "[T]he statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent." *Ragin*, 923 F.2d at 1000; *see also, Jancik*, 44 F.3d at 556. The Court agrees that the ordinary reader or listener standard applies to the question of whether a statement violates section 804(c).

<sup>173</sup> *Roommates.com I*, 489 F.3d at 932-33.

<sup>174</sup> *Id.* at 933.

<sup>175</sup> *Id.*

<sup>176</sup> Chang, writing before *Carafano*, *Craigslist*, and *Roommate.com II* were decided, addressed some of the practical aspects of regulating online advertisements for violation of the FHA, and concluded,

Requiring OSPs to monitor their own housing listing services for illegal discriminatory preferences thus does not impose a heavy or impossible burden. In contrast, the resourceful application of existing automatic blocking technology can render the burden a minimal one. In the context of fair housing, there is no need to commit personnel resources to conducting extensive factual research to determine the truth or falsity of each statement, and no need to make complicated, expert legal judgments. The burden of fair advertising liability is an eminently reasonable one that does not require a large, ongoing expenditure of OSP capital and would not threaten the continued rapid development of the Internet.

Jennifer 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, 1007 (2002).



information posted by a third party in violation of that rule should bring Roommate.com under the protection of *Carafano*, where there was no liability for information posted in violation of the site's own rules.<sup>177</sup>

b. Judge Ikuta: Immunity For User-Generated Content

In contrast to Judge Reinhardt, who would hold Roommate.com potentially liable not only for the questionnaire and its answers, but for any information selectively distributed along with the questionnaire as part of an integrated profile, Judge Sandra Ikuta would give Roommate.com immunity from publisher liability, under § 230(c), reasoning that unless a website operator directly provides “the essential published content,” it is not an “information content provider” under *Carafano*.<sup>178</sup> She read the prior case authority to have “explicitly held that a website operator does not become an information content provider by soliciting a particular type of information or by selecting, editing, or republishing such information.”<sup>179</sup> She cited, with approval, the broad language of *Carafano*, concluding that “Under §230(c), therefore, 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.”<sup>180</sup> Her opinion did not directly address the issue of selective distribution, or roommate matching (Roommate.com sends profiles only “to the particular members who qualify to receive”<sup>181</sup> them, based in part on discriminatory categories such as familial status). It would therefore appear that she concurred in the judgment only to the extent necessary to determine “whether Roommate violated the FHA by publishing its form questionnaires.”<sup>182</sup>

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<sup>177</sup> Had Roommate.com done so initially, there might have been no lawsuit. Counsel for Fair Housing Council Gary Rhoades said:

his clients sent letters to various sites that run roommate advertisements and advised the businesses that their practices ran afoul of federal and state housing law. According to Rhoades, Roommates.com was the only site that did not change its listing policy. “It’s pretty easy (to screen comments) with software that will seek out discriminatory language,” he says. “The Web site probably already has that feature for strong profanity.”

Stephanie Francis Ward, *With Roomies—Be Careful How You Ask For Them: 9th Circuit opinion applies fair housing rule on discrimination to Web site*, ABA J. E-REPORT, May 25, 2007.

<sup>178</sup> *Roommates.com I*, 489 F.3d at 934 (Ikuta, J., concurring in part) (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

<sup>179</sup> *Roommates.com I*, 489 F.3d at 933 (Ikuta, J., concurring in part).

<sup>180</sup> *Id.* at 934 (Ikuta, J., concurring in part) (citing *Carafano*, 339 F.3d at 1124).

<sup>181</sup> *Roommates.com I*, 489 F.3d at 931.

<sup>182</sup> *Id.* at 927.

#### 4. *The Ninth Circuit En Banc Opinion*

After the result from the three-judge panel, Roommate.com petitioned for and obtained rehearing en banc on October 12, 2007.<sup>183</sup> The *en banc* opinion, also authored by Judge Kozinski, centers upon Roommate.com's activities as a "content provider" "responsible, in whole or in part" for creating or developing" content on the site.<sup>184</sup> The court makes clear that a website like Roommate.com "can be both a service provider and a content provider. . . . immune from liability for some of the content it displays to the public but . . . subject to liability for other content."<sup>185</sup> The court then turned to three potential liability-creating sorts of content: questions and answers; profile pages; and "Additional Comments." The Ninth Circuit concluded that Roommate.com is not immune from liability for the first two, but is not liable for the third (just as the first Ninth Circuit opinion had held).

The first category includes the questions and choice of answers presented to subscribers. The Ninth Circuit deals with these relatively summarily:

Roommate created the questions and choice of answers, and designed its website registration process around them. Therefore, Roommate is undoubtedly the 'information content provider' as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.<sup>186</sup>

The last clause above opens into another form of conduct for which Roommate.com is not immune: "inducing third parties [the subscribers] to express illegal preferences."<sup>187</sup> This novel argument analyzed Roommate.com's required drop-down menus of preferences (for example, as to the sexual orientation of a roommate) as inducing subscribers themselves to violate the FHA by expressing illegal preferences. This "inducement" falls completely outside § 230(c). The court concluded, "Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus § 230 of the CDA does not apply to them. Roommate is entitled to no immunity."<sup>188</sup> Given

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<sup>183</sup> Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 506 F.3d 716 (9th Cir. 2007) (order granting en banc review).

<sup>184</sup> *Roommate.com II*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1164.

<sup>187</sup> *Id.* at 1165.

<sup>188</sup> *Id.*

this language, it is very difficult to see how Roommate.com can possibly avoid liability on remand for the information it sought with its drop-down menus relating to membership in protected categories under the FHA (and California law).

The court then turned to the profile pages, where information about subscribers is displayed. The profile provides information about a subscriber's own membership in protected classes (e.g., "Male"/"Female"), that of others in the residence (e.g., "Straight male(s)"/"Gay male(s)"), and preferences in roommates ("willing to live with 'Straight or gay' males, only with 'Straight' males, only with 'Gay' males or with 'No males'").<sup>189</sup> Similar information is displayed about children (whether a subscriber has them, and/or is willing to live with them).<sup>190</sup> This information is useful to subscribers, obviously, and is also used by Roommate.com "to channel subscribers away from listings where the individual offering housing has expressed preferences that aren't compatible with the subscriber's answers."<sup>191</sup> Because Roommate.com created the questionnaire, and compiles the profiles, the Ninth Circuit majority was unequivocal in finding that Roommate.com is "the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not 'create[e] or develop[.]' the information 'in whole or in part.'"<sup>192</sup> "By any reasonable use of the English language, Roommate is 'responsible' at least 'in part' for each subscriber's profile page, because every such page is a collaborative effort between Roommate and the subscriber."<sup>193</sup> Any other view, said the majority, "strains both credulity and English."<sup>194</sup>

Two important uses of the profile information, for which Roommate.com is also not immune, are "the operation of its search system, which filters listings, [and] of its email notification system, which directs emails to subscribers according to discriminatory criteria."<sup>195</sup> This follows from the lack of immunity for the questions: "If Roommate has no immunity for asking the discriminatory questions, as we concluded above, it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing."<sup>196</sup>

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<sup>189</sup> *Id.* at 1165.

<sup>190</sup> *Roommate.com II*, 521 F.3d at 1165.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 1166.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 1166.

<sup>195</sup> *Id.* at 1167.

<sup>196</sup> *Roommate.com II*, 521 F.3d at 1167.

The Ninth Circuit made clear that it is the interaction with civil rights laws that is significant, not the content of the preferences expressed: “A dating website that requires its users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality.”<sup>197</sup> As (former) Fair Housing Council attorney Gary Rhoades trenchantly pointed out, “there is no ‘Fair Dating Act.’”<sup>198</sup> But even a housing website that *permitted* user-defined discriminatory criteria, but did not require their use or otherwise “contribute[] to the alleged illegality” would be immune.<sup>199</sup> Similarly, the constraints properly imposed on Roommate.com would also apply to employment or educational sites.<sup>200</sup>

The third category of content analyzed by the Ninth Circuit consists of the “Additional Comments” section. Like the first Ninth Circuit opinion, the en banc opinion holds that § 230(c) provides immunity for this material. The treatment is summary:

Roommate publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences. Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate. . . . This is precisely the kind of situation for which section 230 was designed to provide immunity.<sup>201</sup>

The court summarized § 230 immunity this way:

Where it is very clear that the website directly participates in developing the alleged illegality—as it is clear here with respect to Roommate’s questions, answers and the resulting profile pages—immunity will be lost. But in cases of enhancement by implication or development by inference—such as with respect to the “Additional Comments” here—section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and

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<sup>197</sup> *Id.* at 1169.

<sup>198</sup> Panel discussion, University of La Verne College of Law, Ontario, California (February 6, 2007).

<sup>199</sup> *Roommate.com II*, 521 F.3d at 1168.

<sup>200</sup> *Id.* at 1169 n.25.

<sup>201</sup> *Id.* at 1173-74. *Contra* Reinhardt’s concurrence in the earlier opinion, the Ninth Circuit is not persuaded that the presence of other discriminatory material encourages subscribers to express discriminatory preferences in the “Additional Comments,” saying, “the encouragement that bleeds over from one part of the registration process to another is extremely weak, if it exists at all. Such weak encouragement cannot strip a website of its section 230 immunity.” *Id.*

protracted legal battles. . . . The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune.<sup>202</sup>

This distinction limns "the edge of [this] rule of law," although the court acknowledges, "Any immunity provision, including section 230, has its limits and there will always be close cases. . . . [but] there can be little doubt that website operators today know more about how to conform their conduct to the law than they did yesterday."<sup>203</sup>

### 5. *Issues On Remand*

In its initial complaint, FHC alleged three bases on which Roommate.com violated § 3604(c) of the FHA:<sup>204</sup> (1) permitting "nicknames" (or screennames) selected by users and posted by Roommate.com, which are often racially or religiously identifying (e.g., "ChristianGrl, CatholicGirl, Asianpride, Asianmale, Whiteboy, Chinesegirl, Latinpride, and Blackguy"<sup>205</sup>); (2) posting "freeform essays," written by housing providers, which express discriminatory preferences (e.g. "'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.'"<sup>206</sup>); and (3) posing questions that "require[e] the disclosure of information about a user's age, gender, sexual orientation, occupation, and familial status."<sup>207</sup>

The Ninth Circuit en banc opinion made clear that Roommate.com is immune for (2) above, the "Additional Comments,"<sup>208</sup> and it would appear that (1), the nicknames, fall within that rationale. The issues remaining on remand therefore all relate to (3).

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<sup>202</sup> *Id.* at 1174-75.

<sup>203</sup> *Id.* at 1175 n.39.

<sup>204</sup> 42 U.S.C. § 3604(c) (prohibiting "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>205</sup> *Fair Housing Council*, No. CV 03-09386 PA(RZX), 2004 WL 3799488, at \*2 (C.D. Cal. Sept. 30, 2004).

<sup>206</sup> *Id.*, at \*2.

<sup>207</sup> *Id.*, at \*2.

<sup>208</sup> See *supra* notes 201-203 and accompanying text.

The first issue explicitly left for the district court on remand is “whether any of Roommate’s questions actually violate the Fair Housing Act or California law, or whether they are protected by the First Amendment or other constitutional guarantees.”<sup>209</sup> However, the Ninth Circuit reminded the district court “that asking questions certainly *can* violate the Fair Housing Act and analogous laws in the physical world.”<sup>210</sup>

The second “merits” question left open is whether “the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences.”<sup>211</sup> The Ninth Circuit held “that Roommate is sufficiently involved with the design and operation of the search and email systems – which are engineered to limit access to housing on the basis of the protected characteristics elicited by the registration process – so as to forfeit any immunity” under § 230.<sup>212</sup> Put another way, *if* the roommate-matching in which Roommate.com engaged constitutes illegal steering, Roommate.com is not immune under § 230 for that conduct. As Judge Kozinski instructed the district court, “If such screening is prohibited when practiced in person or by telephone, we see no reason why Congress would have wanted to make it lawful to profit from it online.”<sup>213</sup>

With the remand of the case, the state law claims originally pleaded by the Fair Housing Council are also revived.<sup>214</sup> In addition to the FHA claim, the First Amended Complaint also stated causes of action for violations of the California Fair Employment and Housing Act (FEHA) and the Unruh Civil Rights Act, and claims for unfair business practices and negligence,<sup>215</sup> which were dismissed when the District Court declined to exercise supplemental jurisdiction over them.<sup>216</sup> FEHA, which prohibits discrimination based on “race, color, religion,

<sup>209</sup> *Roommate.com II*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1169-70.

<sup>212</sup> *Id.* at 1170.

<sup>213</sup> *Id.* at 1167.

<sup>214</sup> *Id.* at 1175 (“We vacate the dismissal of the state law claims so that the district court may reconsider whether to exercise its supplemental jurisdiction in light of our ruling on the federal claims”).

<sup>215</sup> *Fair Housing Council*, No. CV 03-09386 PA(RZX), 2004 WL 3799488, at \*2 (C.D. Cal. Sept. 30, 2004).

<sup>216</sup> *Id.* at \*6. There is no reason to believe the FHA in any way preempts these other antidiscrimination laws. *See, e.g., Rojo v. Kliger*, 801 P.2d 373, 376-83 (Cal. 1990).

national origin, physical handicap, medical condition, ancestry, marital status, sex and pregnancy,” is significantly broader than the FHA.<sup>217</sup>

#### V. IS THERE A FIRST AMENDMENT ISSUE HERE?

Although no First Amendment issue was before the Ninth Circuit, at the district court level, Roommate.com (and other similarly-situated interactive service providers) have argued and likely will continue to argue that holding Roommate.com liable for discriminatory statements made by persons posting to the websites is an impermissible restraint on free speech.<sup>218</sup>

Timothy Alger, a partner at Los Angeles’ Quinn Emanuel Urquhart Oliver & Hedges, who represents Roommate.com,

maintains his client has First Amendment protection. People have the right to choose whom they live with, Alger says, and he theorizes that Fair Housing Act language about advertising property does not apply to roommate situations. His appeal also argued First Amendment protection, Alger says, but the court chose not to address it. If Roommate.com does not prevail on its Communications Decency Act theory, Alger says, his client will return to the trial court and argue the First Amendment case. “It’s absurd to say that people cannot select a roommate based on criteria that’s important to them,” he says. “You have a right to choose who you live with. The question is, can the government regulate speech on that choice?”<sup>219</sup>

Such arguments are not especially promising when it comes to violations of §3604(c).

Thirty-five years ago, the Supreme Court ruled that a newspaper’s free speech rights were not violated by antidiscrimination laws which prohibited classified “help wanted” ads which specified a particular sex

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<sup>217</sup> CAL. GOV’T CODE §§ 12940(a); 12945(a) (West, Westlaw through Ch.2 of 2008 Reg. Sess. and Ch. 6 of 2007-2008 Third Ex. Sess. urgency legislation). *Hejmadi v. Amfac, Inc.*, 249 Cal. Rptr. 5, 16 (Cal. App. 1988) (“The California Fair Employment and Housing Act (Gov.Code. §§ 12900-12998) prohibits discrimination against employees because of race, color, religion, national origin, physical handicap, medical condition, ancestry, marital status, sex and pregnancy. (Gov.Code. §§ 12940(a); 12945(a))”).

<sup>218</sup> *Fair Housing Council*, 2004 WL 3799488, at \*5. The district court explicitly declined to reach this issue. *Id.* The Ninth Circuit en banc opinion does the same. *Roommate.com II*, 521 F.3d 1157, 1175 n.40 (9th Cir. 2008) (en banc). (“We do not address Roommate’s claim that its activities are protected by the First Amendment. The district court based its decision entirely on the CDA and we refrain from deciding an issue that the district court has not had the opportunity to evaluate”).

<sup>219</sup> Stephanie Francis Ward, *With Roomies—Be Careful How You Ask For Them: 9th Circuit opinion applies fair housing rule on discrimination to Web site*, ABA J. E-REPORT, May 25, 2007. Of course, § 3603(b) ensures that the “absurdity” to which Alger alludes does not in fact occur.

for job seekers.<sup>220</sup> The Court there noted that the speech in question was not only commercial speech, it was illegal commercial speech.<sup>221</sup> It pointed out that the newspaper's argument for exemption from the regulation would apply to advertisements promoting the sale of narcotics, or soliciting prostitutes. "The illegality in this case may be less overt, but we see no difference in principle here."<sup>222</sup> Although the case was decided before the Supreme Court developed its doctrine protecting commercial speech,<sup>223</sup> the principle that the First Amendment does not protect illegal speech remains in force. As a leading casebook states, "The Court has consistently held that advertising of illegality is not protected by the First Amendment."<sup>224</sup>

Specifically, the constitutionality of § 3604(c) arose in *Space Hunters*, and was treated rather summarily by the Second Circuit.

Defendants attempt to evade the sweep of section 804(c) [§ 3604(c)] by invoking the First Amendment. Specifically, defendants claim that "[u]nder the Government's expansive reading of [section 804(c)] anyone who 'make[s]' a statement indicating discrimination in race, religion, family status, etc. would be liable, including private individuals who may state they do not like children living on their block." Defs.' Br. at 42. Defendants are wrong. ¶

While there may indeed be some cases in which the breadth of section 804(c) encroaches upon the First Amendment, this is not one of those cases. This case (unlike defendants' hypothetical) unmistakably involves commercial speech, a subset of speech for which the First Amendment "accords a lesser protection . . . than to other constitutionally guaranteed expression." Courts have consistently found that commercial speech that violates section 804(c) is not protected by the First Amendment.<sup>225</sup>

The Sixth Circuit was equally unsympathetic. In *Campbell v. Robb*, the court stated, citing *Pittsburgh Press*,

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<sup>220</sup> *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

<sup>221</sup> *Id.* at 388.

<sup>222</sup> *Id.*

<sup>223</sup> See *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557 (1980).

<sup>224</sup> ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 1094 (3d ed. 2006).

<sup>225</sup> *U.S. v. Space Hunters, Inc.*, 429 F.3d 416, 425 (2d Cir. 2005) (citations omitted). Other cases are in accord. See *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *U.S. v. Hunter*, 459 F.2d 205, 211-14 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).



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§3604(c) may be constitutionally applied to [a landlord's] discriminatory statement directly to [a prospective tenant], since it is illegal commercial speech, akin to "a want ad proposing a sale of narcotics or soliciting prostitutes," which the government may ban outright without running afoul of the First Amendment.<sup>226</sup>

Although it seems unlikely that any First Amendment argument in relation to § 3604(c) will get much traction,<sup>227</sup> it is worth noting that no less an eminence than Chief Judge Frank Easterbrook of the Seventh Circuit, in the *Craigslist* decision, has suggested that there might be First Amendment problems with § 3604(c) as it applies to advertisements of property covered by the § 3603(b) exemption. As he put it, "Although [§ 3603(b)] does not take single-family homes outside the scope of § 3604(c), any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment."<sup>228</sup> It can be anticipated that Roommate.com will make an argument along these lines before the district court on remand.

## VI. IS THERE NOW A CIRCUIT SPLIT?

Even if the district court follows the implicit direction of the Ninth Circuit and finds FHA (and FEHA) liability, actual implementation of the decision may be considerably postponed. Should certiorari be sought, it might well be granted. In the meanwhile, the opinion may be subject elsewhere in the United States to the suspicion that, like 90% of the Ninth Circuit cases heard by the Supreme Court in 2006-2007, it will be reversed.<sup>229</sup> The Supreme Court Rules provide that a factor the court will consider in determining whether certiorari shall be granted is if "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."<sup>230</sup> Prior to the Ninth Circuit *Roommate.com II* decision, five

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<sup>226</sup> *Campbell v. Robb*, 162 Fed. Appx. 460, 470 n.7 (6th Cir. 2006).

<sup>227</sup> Sussman concludes similarly. See Jeffrey M. Sussman, *Cyberspace: An Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 200 (2007). ("the constitutionality of 3604(c) is so well established that this article will not explore any First Amendment freedom of the press arguments for website immunity").

<sup>228</sup> *Craigslist*, 519 F.3d 666, 668 (7th Cir. 2008).

<sup>229</sup> Brent Kendall, *9th Circuit is The Champion of Reversals*, LOS ANGELES DAILY J. 1 (July 3, 2007).

<sup>230</sup> SUP. CT. R. 10. The Supreme Court has not expressly defined a conflict between circuits; the cases simply recite the rule as a justification for granting certiorari. See, e.g., *U.S. v. O'Malley*, 383 U.S. 627, 629 (1966) ("Because of these conflicting decisions [between the 7th and 1st Circuits] we granted certiorari"); and *Bingler v. Johnson*, 394 U.S. 741, 747-48 (1969) ("The holding of the [Third Circuit] Court of Appeals with respect to [the Regulation] was contrary to the decisions of

Circuits (and many district courts) had interpreted § 230 as imposing a flat ban on the imposition of liability on the basis of information provided by third parties.<sup>231</sup> Judge McKeown, in dissent, stated that the “majority’s decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the internet.”<sup>232</sup> The dissenters clearly suggested that a conflict with other circuits has been created.

*Roommate.com II* is certainly the most significant deviation from the *Zeran* line of cases; but because most of the other cases do not involve the FHA, it is possible to avoid characterizing the holding as a conflict. The majority responded to Judge McKeown’s suggestion, and argued that no conflict is created.<sup>233</sup> Judge Kozinski contended that no other circuit has considered “a case like ours” and that none “even arguably conflicts with our holding today.”<sup>234</sup> He pointed out that the *Craigslist* court also immunized the unprogrammed “Additional comments,” and carefully limited Roommate.com’s potential liability.<sup>235</sup> Nevertheless, *Roommate.com II* is in fact the first case to find a chink in the armor of § 230. The cases from *Zeran*<sup>236</sup> through *Craigslist*<sup>237</sup> all have sustained the statutory immunity.

It is possible to harmonize *Roommate.com II* with *Craigslist* by focusing on the facts: one service has, and the other lacks, the offending drop-down menus, and Kozinski labored to bring out the active role Roommate.com played in the development of the potentially offending content. But there is a larger issue having to do with the interpretation of § 230. Ultimately, the court must decide between the public policies inherent in the CDA and the FHA. In piercing the immunity, the policy against advertising expressing discriminatory preferences was elevated above the immunity policy expressed in § 230. The strong public policy which had been applied uniformly from *Zeran* forward<sup>238</sup> was

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several other circuits—most notably, that of the Fifth Circuit. . . which explicitly sustained the Regulation against attack. . . . Accordingly, upon the District Director’s petition, we granted certiorari to resolve the conflict.”).

<sup>231</sup> *Craigslist*, 519 F.3d 666, 670-72 (7th Cir. 2008); *Universal Communications Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-421 (1st Cir. 2007); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322-24 (11th Cir. 2006); *Ben Ezra, Weinstein and Company, Inc. v. America Online, Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997).

<sup>232</sup> *Roommate.com II*, 521 F.3d 1157, 1177 (9th Cir. 2008) (en banc) (McKeown, J., dissenting).

<sup>233</sup> *Id.* at 1172 n.33.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> See *supra* notes 88-94 and accompanying text.

<sup>237</sup> See *supra* Part III.A.

<sup>238</sup> See *supra* Part III.A., and the cases discussed in Jeffrey M. Sussman, *Cyberspace: An*

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subordinated to a policy overlooked by the drafters of § 230.

The Federal Courts Study Committee Implementation Act of 1990 addressed intercourt conflicts, and requested that the Board of the Federal Judicial Center conduct a study of “the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.”<sup>239</sup> Factors to be considered in the study include whether the conflict:

- (1) imposes economic costs or other harm on persons engaging in interstate commerce;
- (2) encourages forum shopping among circuits;
- (3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
- (4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits, but is unlikely to be resolved by the Supreme Court.<sup>240</sup>

The first three categories are triggered here. If some Circuits grant immunity where the Ninth Circuit does not, the uncertainty may impose economic costs on persons in interstate commerce. Those who believe themselves to have been harmed by particular Internet postings would forum-shop into the Ninth Circuit if they could; Internet service providers would prefer fora with immunity. Most significantly, the “benefit” of the immunity would be enjoyed in Circuits other than the Ninth Circuit.

## VI. CONCLUSION

The consistent holdings prior to *Roommates.com I*, and the strength of the immunity policy, suggest that the Supreme Court may yet take interest in this matter. Should the Supreme Court wish to address the relationship between the CDA (and the Internet in general), and civil rights laws, *Roommate.com II* presents that opportunity. As decided by the en banc panel, however, it represents a legally well-reasoned defense of the FHA and its civil rights imperatives against the unfettered expansion of § 230 immunity. However robust the Internet speech protections contained in § 230(c), the Ninth Circuit has correctly held that the CDA does not relieve housing websites from their obligation

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*Emerging Safe Haven For Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194 (2007).

<sup>239</sup> Pub.L. 101-650, Title III, § 302, 104 Stat. 5104 (1990), as amended by Pub.L. 102-572, Title V, § 502(c), 106 Stat. 4513 (1992).

<sup>240</sup> *Id.*

under the federal Fair Housing Act (and related state civil rights laws) to refrain from facilitating and disseminating discriminatory advertisements. Precisely because the Internet is such a powerful and efficient means for bringing housing providers together with housing seekers, it is imperative that those who benefit commercially from this enterprise participate fully in implementing the goal of “fair housing throughout the United States.” Judge Kozinski’s en banc opinion is a ringing rejection of Internet exceptionalism: if conduct is “unlawful. . . face-to-face or by telephone, [it does not] magically become lawful when [it takes place] electronically online. The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet”<sup>241</sup>— and certainly not one of unregulated housing discrimination.

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<sup>241</sup> *Roommate.com II*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).