

## Washington Journal of Law, Technology & Arts

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Volume 6 | Issue 2

Article 4

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10-1-2010

# Inducement or Solicitation? Competing Interpretation of the "Underlying Illegality" Test in the Wake of *Roommates.com*

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### Recommended Citation

Jeffrey R. Doty, *Inducement or Solicitation? Competing Interpretation of the "Underlying Illegality" Test in the Wake of Roommates.com*, 6 WASH. J. L. TECH. & ARTS 125 (2010).

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WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS  
VOLUME 6, ISSUE 2 AUTUMN 2010

INDUCEMENT OR SOLICITATION? COMPETING  
INTERPRETATIONS OF THE "UNDERLYING ILLEGALITY" TEST  
IN THE WAKE OF ROOMMATES.COM

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CITE AS: 6 WASH J.L. TECH. & ARTS 125 (2010)  
<https://digital.lib.washington.edu/dspace-law/handle/1773.1/478>

ABSTRACT

*In Fair Housing Council of San Fernando Valley v. Roommates.com, the United States Court of Appeals for the Ninth Circuit held that a Web site operator loses the immunity granted by section 230 of the Communications Decency Act by materially contributing to the alleged illegality of its third-party content. Subsequent case law seems to reflect two different standards for determining when this "underlying illegality" test is satisfied. Most courts have adopted a narrow reading of Roommates.com, denying immunity only when a Web site has explicitly requested illegal content. In NPS LLC v. StubHub, Inc., however, a Massachusetts district court appears to adopt a broader inducement-based standard that would impose liability upon a much wider range of conduct. This Article examines the recent case law in order to identify the contours of these differing theories for negating § 230 immunity.*

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## INTRODUCTION

Section 230 of the Communications Decency Act (CDA)<sup>1</sup> protects Web site operators from suits arising out of third-party content as long as the operators are not partly responsible for the development of that content.<sup>2</sup> In *Fair Housing Council of San Fernando Valley v. Roommates.com*,<sup>3</sup> the Ninth Circuit interpreted this to mean that a Web site operator loses § 230 immunity when it materially contributes to the underlying illegality of its third-party content.<sup>4</sup>

Subsequent case law, however, has not been entirely consistent in its application of the “underlying illegality” test. Most cases seem to indicate that the test is satisfied only when a defendant explicitly requests the illegal material, a scenario found in *FTC v. Accusearch Inc.*,<sup>5</sup> but the recent decision in *NPS LLC v. StubHub, Inc.*<sup>6</sup> suggests that a wider range of conduct generates liability. These divergent

<sup>1</sup> 47 U.S.C. § 230 (2006).

<sup>2</sup> See generally 4 RAYMOND T. NIMMER, *THE LAW OF COMPUTER TECHNOLOGY* § 14:11 (4th ed. 2010).

<sup>3</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

<sup>4</sup> *Id.* at 1168.

<sup>5</sup> *Fed. Trade Comm’n v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

<sup>6</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483 (Mass. Dist. Ct. Jan. 26, 2009).

approaches raise the possibility that two distinct standards have emerged in the wake of *Roommates.com*: "solicitation," which requires an actual request by the Web site operator, and "inducement," for which implicit suggestions may be sufficient.<sup>7</sup>

This Article will first provide a brief overview of § 230 and the early cases interpreting the provision. Next, the Article will describe the "underlying illegality" limitation of *Roommates.com* and analyze the recent case law that applies it. The Article will conclude by examining the relationship between the solicitation and inducement approaches and by discussing how they might affect future litigants.

### I. BASIC OPERATION OF SECTION 230

The purpose behind section 230 of the Communications Decency Act (CDA)<sup>8</sup> was to both promote the free exchange of ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.<sup>9</sup> The statute accomplishes these goals by ensuring that those who merely provide an outlet or forum for third-party speech over the Internet will not be held liable for any claims that may arise out of the content of that speech.<sup>10</sup>

In determining whether a defendant is entitled to immunity under § 230(c)(1), courts engage in a three-part analysis.<sup>11</sup> First, to receive immunity, the defendant must be a "provider or user of an interactive computer service,"<sup>12</sup> which includes Web sites.<sup>13</sup> Next, the cause of

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<sup>7</sup> For purposes of this Article, the words "solicitation" and "inducement" are given specific meanings. These are not terms of art however; they are used here merely as conventions. Cases applying *Roommates.com* have not explicitly defined either term, nor have they drawn any clear distinction between the two. Indeed, some courts appear to use the terms interchangeably.

<sup>8</sup> 47 U.S.C. § 230 (2006).

<sup>9</sup> *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

<sup>10</sup> Section 230(c)(1) declares that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

<sup>11</sup> See, e.g. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-22 (1st Cir. 2007).

<sup>12</sup> 47 U.S.C. § 230(c)(1) (2006).

action must be one that treats the defendant as the “publisher” or “speaker” of the content at issue.<sup>14</sup> Claims that would hold the defendant liable in some other capacity are unaffected by § 230.<sup>15</sup> Finally, the defendant will not be entitled to immunity if “responsible, in whole or in part, for the creation or development”<sup>16</sup> of the content because the scope of § 230 extends only to third-party content. The bulk of § 230 litigation concerns this third prong,<sup>17</sup> but it appears that recent cases have adopted differing approaches for determining whether the defendant is a “content provider” under the *Roommates.com* framework.

## II. THE PRE-ROOMMATES.COM UNDERSTANDING OF “CONTENT PROVIDER”

Before *Roommates.com*, a Web site operator could engage in a wide range of actions without being considered a “content provider.” Early precedent established that immunity encompassed all “traditional editorial functions,” including minor editing of spelling, grammar, and length, as well as selecting which content to publish.<sup>18</sup> A Web site operator would only face liability if it were to significantly alter the meaning of the content.<sup>19</sup> Immunity also remained intact when the

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<sup>13</sup> The Internet itself qualifies as an “interactive computer service,” and therefore, a defendant need only be a “user” of the Internet to satisfy the first prong of the test. Because every Web site operator is necessarily an Internet user, this requirement is rarely the subject of litigation. See *Batzel v. Smith*, 333 F.3d 1018, 1030-31 (9th Cir. 2003).

<sup>14</sup> 47 U.S.C. § 230(c)(1) (2006).

<sup>15</sup> For example, in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009), the Ninth Circuit held that § 230 does not insulate a defendant against promissory estoppel claims because liability under such claims is based on the defendant’s act of making a promise, rather than its role as a publisher.

<sup>16</sup> 47 U.S.C. § 230(f)(3) (2006) (defining “information content provider”).

<sup>17</sup> David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 454-55 (2010).

<sup>18</sup> See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). See also *Batzel*, 333 F.3d at 1031.

<sup>19</sup> See *Batzel*, 333 F.3d at 1031.

Web site operator provided neutral tools for third parties to use in creating their own content.<sup>20</sup> Such tools included detailed questionnaires with pre-populated drop-down menus that allowed users to create online profiles.<sup>21</sup> These early developments reflected the notion that § 230 conferred a “broad grant of immunity” on Web site operators.<sup>22</sup>

### III. ROOMMATES.COM AND THE “UNDERLYING ILLEGALITY” TEST

*Fair Housing Council of San Fernando Valley v. Roommates.com* is one of the first decisions to place substantive limits on § 230 immunity.<sup>23</sup> The defendant in *Roommates.com* provided an online community where prospective renters and those with available housing could connect with one another by searching user profiles and sending or receiving email notifications.<sup>24</sup> The profiles required users to disclose their race, gender, sexual orientation, and whether or not they had children, as well as their preferences for these same categories, all of which are protected characteristics under the Fair Housing Act (FHA).<sup>25</sup> The Web site then allowed users to conduct searches based on these illegal criteria.<sup>26</sup> The Ninth Circuit denied § 230 protection because the defendant had “developed” the content on users’ profiles and the discriminatory results of their searches.<sup>27</sup>

In reaching this conclusion, the court adopted what has been

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<sup>20</sup> See, e.g. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

<sup>21</sup> See *Id.* at 1124. In concluding that these questionnaires did not render the defendant a content provider of its users’ profiles, the court explained that “[n]o profile has any content until a user actively creates it.”

<sup>22</sup> See *Curran v. Amazon.com, Inc.*, 2008 WL 472433, at \*14 (S.D. W. Va. Feb. 19, 2008).

<sup>23</sup> *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

<sup>24</sup> *Id.* at 1161-62.

<sup>25</sup> *Id.* at 1161. The Fair Housing Act generally makes it illegal to express any preferences regarding a protected characteristic in the context of the sale or rental of a dwelling. See 42 U.S.C. § 3604(c) (2006).

<sup>26</sup> *Id.* at 1167.

<sup>27</sup> *Id.* at 1166-67.

called the “underlying illegality”<sup>28</sup> test: “[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.”<sup>29</sup> The court explained that a Web site that merely provides the tools used to create content nevertheless “materially contributes” to its illegality if the tools themselves are designed to elicit or encourage its illegal nature.<sup>30</sup> Such tools effectively lose their “neutral” character and the Web site operator is rendered a co-developer of the third-party content resulting from their use. Rather than treating § 230 as a “broad grant of immunity,” the holding in *Roommates.com* reinforces its limits by establishing the boundary between providing “neutral tools” and being actively involved in the development of a third party’s illegal speech.

However, while the underlying illegality test recognizes that a Web site operator can be liable for any content it effectively causes a third party to produce, it is unclear what types of actions will exert this causal force. The uncertainty owes in large part to the vague and varying articulations of the standard found throughout the *Roommates.com* opinion.<sup>31</sup> Some language suggests that a Web site loses immunity by simply encouraging an illegal aspect of its user-generated

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<sup>28</sup> This Article uses the term “underlying illegality” when referring to the standard set forth in *Roommates.com*. See Lynn C. Percival, IV, *The One-Sided Voidability of Contracts Impacted by 47 U.S.C. § 230*, 17 TEX. WESLEYAN L. REV. (forthcoming 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542423](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542423) (adopting this terminology). Other names have been suggested. See, e.g. Bradford J. Sayler, *Amplifying Illegality: Using the Exception to CDA Immunity Carved Out By Fair Housing Council of San Fernando Valley v. Roommates.com to Combat Abusive Editing Tactics*, 16 GEO. MASON L. REV. 203 (2009) (the “amplifying illegality” concept).

<sup>29</sup> *Roommates.com*, 521 F.3d at 1168.

<sup>30</sup> *Id.* at 1172.

<sup>31</sup> See Eric Goldman, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, TECHNOLOGY AND MARKETING BLOG (April 3, 2008, 8:05 PM), [http://blog.ericgoldman.org/archives/2008/04/roommatescom\\_de\\_1.htm](http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm) (discussing potential consequences of the opinion’s “myriad of ambiguities”).

content.<sup>32</sup> In other parts of the opinion, however, the court stresses that the users who registered with Roommates.com were literally given no choice but to express discriminatory preferences.<sup>33</sup> Adding to the confusion is the spectrum of terms the court uses, variously describing content providers as those who “encourage,” “solicit,” “elicit,” “induce,” “urge,” “prompt,” or “promote” unlawful speech. As might be expected, decisions following *Roommates.com* have not applied the underlying illegality test consistently. Instead, the case law seems to reflect two different approaches to defining culpable behavior: one based on “solicitation” and the other on “inducement.”

#### IV. THE SOLICITATION APPROACH

In a number of recent cases, courts appear to adopt what might be termed a “solicitation standard” for evaluating whether a defendant has materially contributed to the illegality of its third-party content.<sup>34</sup>

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<sup>32</sup> See, e.g., *Roommates.com*, 521 F.3d at 1167 (“Roommate’s search function is similarly designed to steer users based on discriminatory criteria.”); *Id.* at 1172 (“The salient fact in *Carafano* was that the website’s classifications of user characteristics did absolutely nothing to enhance the defamatory sting of the messages, to encourage defamation or to make defamation easier.”).

<sup>33</sup> See, e.g., *Id.* at 1166, n.19 (“Roommate, of course, does much more than encourage or solicit; it forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully.”); *Id.* at 1170, n.26 (“But, it is Roommate that *forces* users to express a preference and Roommate that forces users to disclose the information that can form the basis of discrimination by others.”).

<sup>34</sup> The emergence of a solicitation standard is evidenced by the many cases interpreting the *Roommates.com* opinion narrowly and declining to extend its holding to other fact patterns. The most critical factor, according to these cases, is that *Roommates.com* *required* its users to provide discriminatory responses as a condition of using the Web site. See, e.g. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (“Whereas the website in *Roommates.com* required users to input illegal content as a necessary condition of use, Nemet has merely alleged that Consumeraffairs.com structured its website and its business operations to develop information related to class-action lawsuits.”). Many decisions also point out that the questions themselves were discriminatory. See, e.g. *Atl. Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009) (“The Ninth Circuit’s decision was based solely on the fact that the content on the website that



This “solicitation” only occurs when the Web site operator explicitly requests the content directly from the third party. Because the standard is premised on a narrow reading the *Roommates.com* opinion, a defendant whose conduct rises to this level is likely to lose immunity regardless of which standard is used.

#### A. Key Considerations Under a Solicitation Standard

The solicitation approach appears to have three defining characteristics. To be considered a “developer” of the offending content, a Web site operator must make an explicit request for that content, the request must be specific enough to exclude lawful material, and there must be an illegal motive behind the request. A Web site operator that solicits content in this manner is effectively expressing its own ideas by enlisting a third party to supply the necessary material.

First, under a solicitation standard, a defendant’s actions would need to rise to the level of an actual request; a Web site operator will not lose immunity over material submitted in response to an implicit suggestion. In *Best Western International, Inc. v. Furber*,<sup>35</sup> visitors to the defendant’s Web site wrote allegedly defamatory emails which the defendant then posted online. The plaintiff sued, arguing that the Web site “impliedly suggest[ed]” that visitors should make defamatory statements, but the court flatly rejected this as a basis for denying immunity.<sup>36</sup> Instead, the court granted summary judgment in favor of the defendant because the Web site did not “explicitly solicit tortious material.”<sup>37</sup>

In addition to being explicit, a request must exhibit a certain degree of specificity to constitute a material contribution under the solicitation approach. Among courts that have taken this solicitation

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was discriminatory was supplied by Roommates.com itself.”). See also *Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148, 158 (Cal. Ct. App. 2009) (distinguishing *Roommates.com* by pointing out that MySpace’s profile questions were not discriminatory and that MySpace did not require its members to answer them as a condition of using the site).

<sup>35</sup> *Best Western Int’l, Inc. v. Furber*, 2008 WL 4182827 (D. Ariz. Sep. 5, 2008).

<sup>36</sup> *Id.* at \*10

<sup>37</sup> *Id.* at \*10

approach, immunity appears to be forfeited only when compliance with the request almost *necessarily* entails providing unlawful content.<sup>38</sup> The case law suggests two basic scenarios that would satisfy this condition. In the first scenario, a Web site operator offers a range of illegal content options and requires a third party to select from it.<sup>39</sup> The most frequently cited example of this scenario is the questionnaire in *Roommates.com*, which required users to select discriminatory answers from pre-populated drop-down menus. In the second scenario, a Web site operator requests a specific kind of information that is alleged to have illegal attributes. In *Woodhull v. Meinel*,<sup>40</sup> for example, the defendant asked a student-run newspaper for any information it had about the plaintiff that she “disliked.” The plaintiff sued, claiming that the information provided was defamatory. Though the request itself would not seem to require an illegal response, the only content that fit its description had an illegal quality. In such cases, it may be difficult to determine whether the defendant solicited the content for its legal properties or for its illegal properties.

Finally, as courts often conduct an inquiry into the motivation behind the request, liability under a solicitation standard appears to require an illegal intent.<sup>41</sup> This intent might be inferred from the

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<sup>38</sup> See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968 (N.D. Ill. 2009) (“The phrase ‘adult,’ even in conjunction with ‘services,’ is not unlawful it itself nor does it necessarily call for unlawful content.”). See also *Joyner v. Lazzareschi*, 2009 WL 695539, at \*5 (Cal. Ct. App. March 18, 2009) (finding that a defendant who created titles for discussion threads on a message board did not “develop” any defamatory postings because “[p]resumably, positive messages about plaintiff or messages defending him could be and were posted under the foregoing, general thread headings.”).

<sup>39</sup> Examples of cases referencing this type of scenario include *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690 (S.D.N.Y. 2009), *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009), *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), and *Doe II v. MySpace, Inc.*, 96 Cal. Rptr. 3d 148 (Cal. Ct. App. 2009).

<sup>40</sup> *Woodhull v. Meinel*, 202 P.3d 126 (N.M. Ct. App. 2008).

<sup>41</sup> For a discussion of this intentionality requirement in the *FTC v. Accusearch Inc.* trial court opinion, see Recent Cases, *Federal District Court Denies § 230 Immunity to Website that Solicits Illicit Content: FTC v. Accusearch, Inc.*, 121 HARV. L. REV. 2246 (2008). The author proposes a mens rea-based exception to CDA immunity.

nature of the defendant's operations or from the manner in which the defendant uses the content.<sup>42</sup> In *Woodhull*, the court found it relevant that the stated purpose of the defendant's Web site was "to make fun of" the plaintiff, suggesting that the information had been solicited for its defamatory character.<sup>43</sup> Such inferences connect the defendant's actions to the illicit nature of the content, the key element introduced by *Roommates.com*.

B. A Possible Example from the Tenth Circuit: *FTC v. Accusearch*

A recent case out of the Tenth Circuit provides an example of how a defendant might lose immunity under a solicitation-based approach. In *Federal Trade Commission v. Accusearch Inc.*,<sup>44</sup> the defendant sold private telephone records through its Web site, *Abika.com*.<sup>45</sup> After a customer placed an order, Accusearch would hire third-party researchers to locate the information and would post the results to the customer's online account in violation of the Telecommunications Act.<sup>46</sup> Although Accusearch was aware that the records were obtained illegally, it claimed immunity under § 230.<sup>47</sup>

In an opinion that largely mirrors *Roommates.com*, the Tenth Circuit determined that Accusearch was responsible for the "development" of the records that it supplied to customers, rendering it a content provider under § 230(f)(3). The court construed the word "develop" to mean "the act of drawing something out, making it

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<sup>42</sup> In *Roommates.com*, the Ninth Circuit noted that "Roommate both elicits the allegedly illegal content and makes aggressive use of it in conducting its business." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008). For further discussion of how the purposes and uses of the defendant's Web site influenced the Ninth Circuit's decision, see Varty Defterderian, Note, *Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity*, 24 *BERKELEY TECH. L.J.* 563 (2009).

<sup>43</sup> *Woodhull v. Meinel*, 202 P.3d 126, 129 (N.M. Ct. App. 2008).

<sup>44</sup> *Fed. Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009).

<sup>45</sup> *Id.* at 1191-92.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1199.

'visible,' 'active,' or 'useable'"<sup>48</sup> and stated that a service provider is "responsible" for the development of offensive content "only if it in some way specifically encourages development of what is offensive about the content."<sup>49</sup> According to the court, Accusearch did exactly that when it exposed the confidential telephone records to public view on Abika.com.<sup>50</sup> Even though the content itself was provided by third-party researchers, Accusearch could not claim § 230 immunity.

Two aspects of the Tenth Circuit's analysis are particularly significant. First, the court distinguishes its earlier decision in *Ben Ezra, Weinstein, & Co. v. America Online Inc.*,<sup>51</sup> where a publicly traded corporation sued America Online for posting inaccurate information about its stock, information that America Online had purchased from a third-party vendor. The court points out that the offending content in *Ben Ezra* had been "erroneous stock quotations and, unsurprisingly, America Online did not solicit the errors."<sup>52</sup> The critical factor in *Accusearch* thus appears to be the defendant's solicitation of the confidential telephone records. Second, the court asserts that "Accusearch's responsibility is more pronounced than that of Roommates.com. Roommates.com may have encouraged users to post offending content; but the offensive postings were Accusearch's *raison d'etre* and it affirmatively solicited them."<sup>53</sup> Thus, the *Accusearch* court believed it was applying the underlying illegality test more narrowly than the Ninth Circuit did in *Roommates.com*. Its characterization of the *Roommates.com* scenario focused on the fact that the defendant's conduct in that case represents the minimum level of "development" that will remove § 230 immunity.

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<sup>48</sup> *Id.* at 1198.

<sup>49</sup> *Id.* at 1199.

<sup>50</sup> *Id.*

<sup>51</sup> *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000).

<sup>52</sup> *Accusearch*, 570 F.3d at 1199.

<sup>53</sup> *Id.* at 1200.

## V. THE INDUCEMENT APPROACH

Most of the § 230 cases decided since *Roommates.com* seem to fit within the general framework of a solicitation-based standard. At least one case, however, has taken a markedly different approach. In *NPS LLC v. StubHub, Inc.*,<sup>54</sup> a Massachusetts district court applied a much broader interpretation of *Roommates.com* that would deny immunity to those whose actions appear to have “induced” the creation or development of illegal content. This “inducement” does not require an actual request and can occur even when third parties retain unfettered discretion over the nature of the content. Though the exact contours of the theory are far from clear, liability under an inducement standard is based on a vague determination that the defendant’s actions influenced a third party’s decision to post illegal content.<sup>55</sup>

A. Evidence of a Broader Interpretation: *NPS v. StubHub*

In *NPS v. StubHub*, the New England Patriots brought suit against StubHub alleging tortious interference with its contractual relationships with season ticket holders.<sup>56</sup> StubHub operated a Web site that allowed users to buy and sell tickets to sporting, concert, theater, and other live entertainment events.<sup>57</sup> Although Patriots tickets were non-transferrable and the organization prohibited unauthorized exchanges, many ticket holders chose to sell their tickets through the defendant’s Web site, often at prices greatly exceeding face value.<sup>58</sup> StubHub did not buy or sell tickets directly but it did profit from the transactions, charging a 15% commission to the seller and 10% to the buyer.<sup>59</sup>

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<sup>54</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483 (Mass. Dist. Ct. Jan. 26, 2009).

<sup>55</sup> See, e.g. Zac Locke, *Asking for It: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008) (discussing how the *Grokster* inducement test might be applied in § 230 cases).

<sup>56</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483 at \*4.

<sup>57</sup> *Id.* at \*2.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

StubHub also facilitated these ticket sales in a number of ways. For instance, it offered a limited guarantee against voided tickets.<sup>60</sup> It also created a special category of sellers, called "LargeSellers," for those who purchased large quantities of tickets and later resold them at a profit.<sup>61</sup> StubHub allowed these users to purchase tickets without the normal 10% fee and also urged them to "check the website from time to time for underpriced tickets or exclusive listings that may not be seen elsewhere."<sup>62</sup> StubHub even allowed these users to "mask" the ticket location by listing a seat up to five rows away, making it impossible for the Patriots to determine, based solely on the listings, which ticket holders were selling their tickets.<sup>63</sup>

The effect of these measures was to increase the asking price for each ticket, resulting in larger commissions.<sup>64</sup> By taking advantage of these features, however, LargeSellers almost invariably ran afoul of a Massachusetts anti-scalping law, which generally forbade the reselling of tickets at above face value.<sup>65</sup> Hence, listings with inflated ticket prices constituted illegal third-party content, which, according to the Patriots, satisfied the "improper means" element of its tortious interference claim.<sup>66</sup> StubHub countered with a § 230 defense.<sup>67</sup>

Applying the rule from *Roommates.com* without discussion, the court states that "the same evidence of knowing participation . . . sufficient . . . to establish improper means is also sufficient" to deny immunity.<sup>68</sup> As stated earlier in the opinion, improper means could be shown if StubHub either intentionally induced or encouraged others to violate the anti-scalping law, or profited from such violations while declining to stop or limit them,<sup>69</sup> a direct reference to the *Grokster*<sup>70</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at \*3.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at \*11.

<sup>65</sup> MASS. GEN. LAWS ANN. ch. 140, §§185A, 185D (West 2002).

<sup>66</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at \*10 (Mass. Dist. Ct. Jan. 26, 2009).

<sup>67</sup> *Id.* at \*12.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at \*10.

standards for contributory infringement<sup>71</sup> and vicarious infringement, respectively.

According to the court, StubHub “intentionally induced or encouraged” LargeSellers to violate the anti-scalping law when it “strongly urged” them to check the Web site for underpriced tickets and offered to waive the 10% fee.<sup>72</sup> By virtue of its commission system, StubHub also profited when tickets were sold for more than face value, and it declined to stop or limit this activity because it did not require sellers to list the face value of the ticket, making it impossible to know whether the law was being violated.<sup>73</sup>

These actions were enough to take StubHub outside the scope of § 230. Because the opinion itself only purports to decide the immunity issue based on the “same evidence,” and not necessarily the same standard, as the improper means issue, one cannot conclusively say that *Grokster* is responsible for the result. Based on the facts alone, however, the court’s interpretation of the underlying illegality test is a clear departure from the prior narrow interpretations of *Roommates.com*.

While the *StubHub* decision itself may not carry much precedential weight, it could be a preview of how the underlying illegality test will be applied by courts eager to establish limits on § 230 immunity.<sup>74</sup> The

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<sup>70</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>71</sup> “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936-937. For a discussion on the impact such a standard would have on § 230 jurisprudence, see Varty Defterderian, Note, Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity, 24 BERKELEY TECH. L.J. 563 (2009).

<sup>72</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at \*11 (Mass. Dist. Ct. Jan. 26, 2009).

<sup>73</sup> *Id.* at \*11. It is worth noting that StubHub displayed the text of the Massachusetts anti-scalping law on its “Q & A” page. See *Id.* at \*2.

<sup>74</sup> An inducement-based approach appears in another case as well, though not as an interpretation of the *Roommates.com* exception. In *People v. Gourlay*, 2009 WL 529216 (Mich. Ct. App. March 3, 2009), a criminal defendant was convicted for his role in providing Web hosting services as well as “artistic assistance” to a minor who had created a Web site to broadcast pornographic images of himself over the

Seventh Circuit in particular has shown some hostility toward expansive readings of the statute and its decision in *Chicago Lawyers' Committee v. Craigslist*<sup>75</sup> even indicates that *Grokster* would apply in the context of § 230 as well.<sup>76</sup> The inducement standard would represent a natural extension of this theory. Furthermore, the Ninth Circuit itself is gaining a reputation for its willingness to deny § 230 protection. If called upon to clarify its holding in *Roommates.com*, the court may be inclined to follow an inducement-based approach.

### B. Distinguishing Inducement from Solicitation

As is readily apparent from the *StubHub* case, inducement differs from solicitation in at least two important respects: it requires no explicit request and can occur even when users have been given the option of posting legal content.

First, a Web site operator can be liable under an inducement standard without making any explicit statements or requests. *StubHub* never requested that its users increase the price of the tickets they sold; indeed, the Web site's user agreement expressly required sellers to comply with all applicable laws when setting their prices.<sup>77</sup> The second key difference is that, under inducement, a Web site operator can still be considered a "developer" of user-generated content even if users have the option of posting legal content. In *StubHub*, the Web site had

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Internet. The defendant appealed, arguing that 47 U.S.C. § 230 preempted his conviction because he had not created or developed the pornographic content. In dismissing this claim, the court noted that the offense required proof that he had "persuade[d], induce[d], entice[d], coerce[d], cause[d], or knowingly allowe[d]" a child to engage in a sexually abusive activity. *Id.* at \*4. Because of this, the court concluded, a defendant who has committed the offense has necessarily placed himself outside the scope of § 230 immunity. *Id.* at \*5. Though based on a Michigan criminal statute, MICH. COMP. LAWS ANN. § 750.145c(2) (West 2004), the analysis in *Gourlay* would seem to permit a loss of immunity even in cases of "persuasion," a far cry from the rigorous requirements of the solicitation theory.

<sup>75</sup> *Chicago Lawyer's Comm. For Civil Rights Under Law, Inc., v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

<sup>76</sup> *Id.* at 670.

<sup>77</sup> *NPS LLC v. StubHub, Inc.*, 2009 WL 995483, at \*11 (Mass. Dist. Ct. Jan. 26, 2009).



“developed” the illegal ticket prices even though its users remained entirely free to engage in legitimate ticket sales.

These two features demonstrate the relatively tenuous causal relationship capable of triggering liability under an inducement standard. Because of these differences, the inducement standard carves out a much larger exception to the protections available under § 230.

### C. Key Considerations Under an Inducement Standard

When evaluating claims under an inducement standard, a court might focus on the specific actions of a defendant, the intent behind those actions, and the influence they exert on a third-party’s decision to produce illegal content. There must some cognizable act by the defendant to support a denial of immunity, but this act need not be an actual request for unlawful content.<sup>78</sup> A plaintiff would also need to demonstrate that the act was driven by an illegal intent.<sup>79</sup> This intent can be inferred from context, particularly when a Web site’s revenue depends on the particular choices that its users make.<sup>80</sup>

Perhaps most importantly, the defendant’s actions must in some way influence a third party’s decision to develop content that is unlawful. Although the discussion in *StubHub* offers little guidance on this point, the facts of the case help to identify three categories of behavior that may be problematic. The first involves creating financial incentives for others to produce illegal material,<sup>81</sup> such as the special

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<sup>78</sup> See, e.g., *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007) (“Even assuming arguendo that active inducement could negate Section 230 immunity, it is clear that UCS has not alleged any acts by Lycos that come even close to constituting the ‘clear expression or other affirmative steps taken to foster’ unlawful activity that would be necessary to find active inducement.”) (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 914 (2005)).

<sup>79</sup> *People v. Gourlay*, 2009 WL 529216, at \*4 (Mich. Ct. App. March 3, 2009) (“[W]hen a person persuades, induces, entices, or coerces another, the person is actively and intentionally attempting to bring about a particular action or result.”).

<sup>80</sup> Hattie Harman, *Drop-Down Lists and the Communication Decency Act: A Creation Conundrum*, 43 IND. L. REV. 143, 172-173 (2009).

<sup>81</sup> See, e.g., *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009) (“Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; for example, craigslist does not offer a

discount given to LargeSellers in *StubHub*. Another category involves reducing the risk of detection for users who commit illegal acts. Although not specifically mentioned in the court's analysis, the ability of StubHub users to "mask" the location of their seats would fall under this category. Other examples may include guarantees of anonymity offered by "repu-taint" Web sites.<sup>82</sup> A third category covers instances where a Web site operator provides suggestions or examples of illegal content for its users to emulate,<sup>83</sup> although it is unclear whether this alone could sufficiently influence a user's behavior. *StubHub* may offer an example from this category as well, as the court found it significant that the defendant had "strongly urged" LargeSellers to check the listings for underpriced tickets. Beyond these general observations, however, the contours of an inducement standard remain unclear.

#### CONCLUSION

Cases decided in the wake of *Roomates.com* seem to reflect two different standards for determining when the "underlying illegality" test is satisfied. Most courts apply a "solicitation" standard, requiring the Web site operator to explicitly request the offending material. This request must be specific enough that compliance with its terms would almost necessarily entail providing illegal content. An "inducement" standard, on the other hand, could deprive a Web site operator of immunity even when its users retain a significant degree of control over the illicit nature of the posted content. Inducement describes conduct that influences a third party's decision to develop illegal material, either by creating financial incentives, reducing the risk of detection, or perhaps offering examples for third parties to emulate. Liability will not attach under either standard however, unless the

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lower price to people who include discriminatory statements in their postings.") (citing Chicago Lawyer's Comm. For Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 671-72 (7th Cir. 2008)).

<sup>82</sup> See Patricia Sánchez Abril, *Repu-Taint Sites and the Limits of § 230 Immunity*, J. INTERNET L., Jan. 2009, at 3 (explaining that a "repu-taint" Web site is one that encourages users to post sensitive information about others without regard for the disclosure's veracity or consequences.).

<sup>83</sup> *Id.*

defendant harbored an illegal intent, which often must be inferred from context. Despite indications that some courts might be willing to adopt a broader interpretation of *Roommates.com*, the weight of authority continues to support strong protections for Web site operators.

#### PRACTICE POINTERS

- Regardless of how broadly a court may interpret the *Roommates.com* exception, a plaintiff will still need to establish that the Web site operator intended for its users to produce unlawful content and that it took specific action to bring about that result.
- Under a narrower “solicitation” standard, defendants will generally be entitled to § 230 immunity unless their actions amount to an explicit request that is specifically limited to illegal material.
- Under a broader “inducement”-type standard, a plaintiff may be able to overcome a § 230 defense by merely showing that the defendant’s actions in some way influenced a third party’s decision to produce illegal content.
- To reduce exposure, Web site operators should examine their fee structures or pricing policies to ensure that they do not create financial incentives for unlawful behavior. Any sample content or recommendations to users should be removed if they might tend to suggest an illegal course of action.