

University of Michigan Journal of Law Reform

Volume 43

2010

Interactive Computer Service Liability for User-Generated Content After *Roommates.com*

Bradley M. Smyer
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Communications Law Commons](#), [Internet Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Bradley M. Smyer, *Interactive Computer Service Liability for User-Generated Content After Roommates.com*, 43 U. MICH. J. L. REFORM 811 (2010).

Available at: <https://repository.law.umich.edu/mjlr/vol43/iss3/7>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

INTERACTIVE COMPUTER SERVICE LIABILITY FOR USER-GENERATED CONTENT AFTER *ROOMMATES.COM*[†]

Bradley M. Smyer*

This Note explores the future of interactive computer service provider (ICSP) liability for user-generated content under the Communications Decency Act (CDA) after Roommates.com II. Roommates.com II held that a housing website was not entitled to immunity under § 230 of the CDA from federal Fair Housing Act claims, in part because providing preselected answers to a mandatory questionnaire rendered the site an “information content provider” at least partially responsible for creation or development of answers. After examining the historical and legislative origins of ICSP immunity for user-generated content under 47 U.S.C. § 230, this Note argues that courts should generally evaluate ICSP immunity from claims arising out of both entirely and partially user-generated content on the basis of whether the ICSP is the sole information content provider. Section 230’s focus on which party “provides” the essential content and the statutory definition of “information content provider” support this interpretation. This Note further argues, however, that Congress should amend § 230 to limit immunity in circumstances where the ICSP is an “information content provider” with respect to an objectionable housing advertisement and specifically redefine “information content provider” to include the use of ICSP created dropdown answers to ICSP required questions. This proposal is narrowly adapted to better serve the purposes of the Fair Housing Act and § 230 than the current statutory language because it defines the scope of immunity to balance the conflicting goals of the two statutes.

Interactive computer service providers (ICSPs), such as MySpace and Facebook, enjoy immunity from claims arising out of entirely user-generated content under the Communications Decency Act (CDA).¹ The CDA states that “[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”² Thus, because entirely user-generated content is provided by an entity other than the ICSP, the ICSP generally enjoys

[†] The company goes by “Roommate.com” while its web address is pluralized as “Roommates.com.” Note also that the district court case caption is “Roommate.com” while the en banc opinion is “Roommates.com.” For consistency with the cases, this Note refers to the web entity as “Roommate.com,” the district court opinion as “*Roommates.com*,” and the two circuit opinions respectively as “*Roommates.com I*” and “*Roommates.com II*.”

* University of Michigan Law School, J.D. 2009; Brigham Young University, B.A. 2006. Note Editor, *University of Michigan Journal of Law Reform*. Special thanks to Karri Smyer for her inspiration and support.

1. See 47 U.S.C. § 230(c) (2008).
2. *Id.*

immunity from claims related to the content so long as the user-generator qualifies as an “information content provider.”³

Courts have interpreted this immunity broadly.⁴ The CDA defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁵ This generally means that “[u]nder 230(c) . . . 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.”⁶

Although ICSPs enjoy immunity from entirely user-generated content under the CDA, partially user-generated content⁷ poses a more difficult problem. For example, suppose an individual is seeking a roommate and posts a vacancy on an interactive Internet site specially suited to match those seeking rental opportunities with those offering them. Suppose further that the post includes defamatory, discriminatory, or otherwise illicit information. Although the individual may be subject to liability for the post, the ICSP would enjoy immunity from claims arising out of this entirely user-generated content. In contrast, suppose that in completing the post, the individual is required to select among preprepared answers to a series of questions. If the answers selected later become the subject of a lawsuit, the individual will most likely be held liable for the objectionable information, just as in the case of entirely user-generated content. Under current law, however, it is unclear if the ICSP will also share liability for the content.

In April 2008, the Ninth Circuit Court of Appeals arguably broke with other circuits when it held that CDA immunity did not apply to user-selected responses to a required questionnaire with preprepared, dropdown answers.⁸ The court’s analysis, like other courts that have analyzed this issue,⁹ focused on whether the ICSP’s level of involvement made it an “information content provider” of the objectionable information. However, unlike other courts, the

3. *Id.*

4. *See, e.g., Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service.”) (emphasis added).

5. 47 U.S.C. § 230(f)(3) (2008).

6. *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003).

7. I use this phrase to refer to a situation where a third party “provides” information developed in part with the ICSP.

8. *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1175–76 (9th Cir. 2008) (en banc) (*Roommates.com II*).

9. *See Carafano*, 339 F.3d at 1124; *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288 (D.N.H. 2008).

Ninth Circuit found that the ICSP's posing of questions with preselected answers constituted "creation or development" sufficient to qualify the ICSP as an "information content provider" under the statute.¹⁰ In so holding, the court reversed a district court decision that had held that Roommate was immune from Fair Housing Act (FHA) claims via the CDA.¹¹ As commentators have noted:

Prior to the Ninth Circuit *Roommate.com II* decision, five [c]ircuits (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. 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."¹²

This Note explores the parameters of ICSP liability for partially user-generated content under the CDA after *Roommates.com II*, and argues that courts should generally evaluate ICSP immunity from claims arising out of both entirely and partially user-generated content on the basis of whether the ICSP is the *sole* information content provider. This Note further argues, however, that Congress should amend 47 U.S.C. § 230 to limit immunity in circumstances where the ICSP is an "information content provider" with respect to an objectionable housing advertisement and to specify that the definition of "information content provider" includes an ICSP's use of ICSP-created dropdown answers to mandatory questions. Part I discusses common law liability prior to CDA immunity under § 230, recounts the legislative and statutory history of § 230, and illustrates the pre-*Roommates.com II* interpretation of § 230. Part II introduces the reasoning of the *Roommates.com* line of cases. Part III identifies problems partially user-generated content poses for ICSPs who provide preselected answers, argues that *Roommates.com II* reached a desirable result, albeit arguably inconsistent with current law, and proposes an amended version of § 230 to

10. *Roommates.com II*, 521 F.3d at 1175–76 (holding that housing website was not entitled to § 230 immunity from federal Fair Housing Act claims, in part because providing preselected answers to a mandatory questionnaire rendered the site partially responsible for creation or development of its user's answers). *Contra Friendfinder Network*, 540 F. Supp. 2d at 306–07 (holding that social network website enjoyed immunity from state law tort claims because provision of preselected answers to a questionnaire did not amount to creation or development of content).

11. *See Roommates.com II*, 521 F.3d at 1175–76.

12. Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 376–77 (2008).

acknowledge the competing interests underlying the *Roommates.com II* decision. Finally, Part IV concludes by acknowledging the practical limitations of this thesis and argues that, despite such limitations, the proposed change to § 230 is preferable to the current regime.

I. FROM COMMON LAW TO CURRENT LAW: IMMUNITY UNDER 47 U.S.C. § 230

A. Common Law Liability Prior to Immunity Under § 230

A defamatory communication tends “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”¹³ Defamation law developed, in part, as a safety valve to protect against the physical violence that might ensue without available proper legal recourse.¹⁴ The tort of defamation continues in modern American jurisprudence arguably because of the inherent value of human reputation,¹⁵ even as compared to the fundamental freedom of speech.¹⁶ “A defamatory statement is actionable if it is a false and unprivileged statement of fact that is ‘of and concerning’ the plaintiff, and that is published.”¹⁷ Liability for defamatory statements extends to those who contribute to, or distribute, the actionable comment.¹⁸ Courts attach a level of liability for transmission or republication depending on whether the third party acted as a common carrier, distributor, or publisher.¹⁹ Generally, these categories represent different degrees of the third party’s control over the objectionable material.²⁰ For example, primary publishers, like authors and newspaper editors, are strictly liable for defama-

13. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

14. Melissa A. Troiano, Comment, *The New Journalism?: Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1452 (2006) (citing T. BARTON CARTER ET AL., *THE FIRST AMENDMENT AND THE FOURTH ESTATE: THE LAW OF MASS MEDIA* 85 (8th ed. 2001)).

15. *Id.*

16. See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech or freedom of the press.”).

17. Troiano, *supra* note 14, at 1452.

18. *Id.* at 1453 (quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)) (“Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”).

19. *Id.* (citing Jae Hong Lee, *Batzel v. Smith & Barrett v. Rosenthal: Defamation Liability for Third-Party Content on the Internet*, 19 BERKELEY TECH. L.J. 469, 471 (2004)).

20. See *id.*

tory content.²¹ Distributors, such as bookstores, are held “liable only if they knew or had reason to know of the defamatory” content.²² Common carriers, like telephone companies, who simply transmit the information, “are not generally liable for defamatory content.”²³ Courts have applied these traditional categories to various forms of media, including print, radio, and television.²⁴

Common law defamation principles “discouraged online entities from removing offensive Internet” content because exercising editorial control over user-generated content subjected the entity to “publisher” liability.²⁵ In *Stratton Oakmont, Inc. v. Prodigy Services*, an example directly relevant to both the scope and history of § 230, the court found an Internet service provider operating an Internet forum was liable as a “publisher” under traditional defamation categories.²⁶ Stratton Oakmont sued Prodigy after an anonymous user of “Money Talk,” an online investment and banking bulletin board operated by Prodigy, posted defamatory statements about Stratton Oakmont and its president Daniel Porush.²⁷

Stratton Oakmont sought partial summary judgment as to whether Prodigy was a “publisher” of the objectionable statements.²⁸ The court granted the motion, finding that Prodigy’s own claims regarding editorial control over published material²⁹ and use of automated screening software³⁰ constituted a level of control like that of a publisher under traditional defamation law.³¹ The court explicitly recognized that good intentions did not diminish this level of liability:

21. *Id.*

22. *Id.*

23. *Id.*

24. *See id.*; Lee, *supra* note 19, at 486–87 (explaining that although courts initially struggled in applying traditional defamation liability to these media forms, “traditional approaches to defamation eventually were reformulated and adapted for the new radio and television technologies, as had been done with telegrams earlier”).

25. Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 Nw U. L. REV. 1471, 1480 (2008).

26. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *13–18 (N.Y. Sup. Ct. May 26, 1995).

27. *Id.* at *1–2.

28. *Id.*

29. *Id.* at *4 (“We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.”).

30. *Id.* at *5.

31. *Id.* at *13 (“PRODIGY’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability . . .”).

Presumably [Prodigy's] decision to regulate the content of its bulletin boards was in part influenced by its desire to attract a [market] perceived to exist consisting of users seeking a "family-oriented" computer service. This decision simply required that to the extent computer networks provide such services, they must also accept the concomitant legal consequences.³²

Although the *Prodigy* decision represented a principled application of common law principles to Internet entities, discord soon emerged regarding the proliferation of indecent material on the Internet and the disincentives the common law approach created for entities to conduct any self-regulation of content.

B. Legislative History of § 230³³

Dissatisfied with the level of Internet indecency, Senator Exon introduced the initial version of the bill that eventually became the CDA in February 1995.³⁴ He "proposed the CDA as an amendment to the Federal Telecommunications Act of 1934,"³⁵ and maintained that the amendment was an essential tool to help protect the American people, especially families and children, from Internet pornography and indecency.³⁶ He explained, "[t]he information superhighway should not become a red light district Once [this legislation is] passed, our children and families will be better protected from those who would electronically cruise the digital world to engage children in inappropriate communications and introductions."³⁷

The Senate passed Senator Exon's amendment as part of a telecommunications reform bill on June 14, 1995.³⁸ The Exon amendment altered 47 U.S.C. § 223 by applying regulations to in-

32. *Id.* at *13-14.

33. This section is primarily based on the excellent published works of Vikas Arora, Robert Cannon, Jennifer C. Chang and Stephen Collins. See Vikas Arora, Note, *The Communications Decency Act: Congressional Repudiation of the "Right Stuff,"* 34 HARV. J. ON LEGIS. 473, 479-80, 483-86 (1997); Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 64-73 (1996); Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 988-94 (2002); Collins, *supra* note 25, at 1479-83.

34. S. 314, 104th Cong. (1995); 141 CONG. REC. S1920 (daily ed. Feb. 1, 1995); see also Arora, *supra* note 33, at 479-80.

35. See Arora, *supra* note 33, at 479.

36. See 141 CONG. REC. S8087 (daily ed. June 9, 1995).

37. Cannon, *supra* note 33, at 53 (quoting 141 CONG. REC. S1953 (daily ed. Feb. 1, 1995)).

38. See 141 CONG. REC. S8347 (daily ed. June 14, 1995).

teractive computer services analogous to those that had applied to obscene telephone calls.³⁹ The amendment indicated that it was unlawful, *inter alia*, to:

[K]nowingly . . . send to or display to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication.⁴⁰

Also dissatisfied with the proliferation of indecency on the Internet, Representatives Christopher Cox and Ron Wyden introduced the bill that later became § 230 in the House during the summer of 1995.⁴¹ The section was introduced as the “Online Family Empowerment” amendment to the telecommunications bill then pending before the House.⁴² Both Congressmen advocated the Cox-Wyden amendment as a means of reducing the amount of pornographic materials available to children via the Internet.⁴³ Other Representatives expressed similar concerns about the quantity and accessibility of obscene Internet materials.⁴⁴

The Cox-Wyden amendment gained support from persons with numerous rationales, including:

39. Cannon, *supra* note 33, at 57–58; *see also* 47 U.S.C.A. § 223 (West 2008) (imposing liability for “[o]bscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications”).

40. *See* Collins, *supra* note 25, at 1479 (quoting 47 U.S.C. § 223(d)(1)(B) (Supp. II 1997)). Although the Exon Amendment to 47 U.S.C. § 223 eventually became law, the Supreme Court later found this section of the CDA unconstitutional. *See id.* (citing *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (“The CDA [47 U.S.C. § 223] places an unacceptably heavy burden on protected speech, and . . . the defenses do not constitute the sort of ‘narrow tailoring’ that will save an otherwise patently invalid unconstitutional provision.”)). *Compare* 47 U.S.C. § 223(d)(1)(B) (Supp. II 1997), with 47 U.S.C.A. § 223 (West 2008).

41. *See* 141 CONG. REC. H8468 (daily ed. Aug. 4, 1995).

42. *See* Chang, *supra* note 33, at 988.

43. Representative Cox explained, “[a]s the parent of two, I want to make sure that my children have access to this future [represented by the Internet] and that I do not have to worry about what they might be running into on line. I would like to keep that [offensive material] out of my house and off of my computer.” Chang, *supra* note 33, at 988 (2002) (quoting 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)). Representative Wyden opened his remarks on the amendment by saying, “[w]e are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe.” *Id.* (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden)).

44. *See* Chang, *supra* note 33, at 988 & n.81.

[C]oncern about the exposure of children to obscene online material, opposition to the Senate's heavy-handed federal regulatory approach to obscenity on the Internet, and concern that the approach taken in recent common law defamation cases [particularly the *Prodigy* ruling] would discourage [online service providers] from actively screening out indecent material.⁴⁵

Representative Wyden emphatically acknowledged that the Cox-Wyden amendment "stands in sharp contrast to the work of the other body."⁴⁶ Unlike the Exon Amendment, the Cox-Wyden approach eschewed additional regulations and restrictions on interactive computer services by expanding "federal government regulation of the Internet" and broadening "the role of the Federal Communications Commission (FCC)."⁴⁷ Members of the House feared that the Exon Amendment's solution to the Internet indecency problem would be inefficient, ineffective, and detrimental to continued Internet growth.⁴⁸

Representative Wyden explained:

In my view that approach, the approach of the [Senate], will essentially involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected. . . . [N]ot even a Federal Internet censorship army would give our Government the power to keep offensive material out of the hands of children⁴⁹

Representative Cox also emphasized the undesirability of the regulatory approach: "[i]f we regulate the Internet at the FCC, that will freeze or at least slow down technology. It will threaten the future of the Internet. That is why it is so important that we not have

45. *Id.* at 988.

46. 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden).

47. See Chang, *supra* note 33, at 989-91.

48. *Id.* at 989; Cannon, *supra* note 33, at 67 ("The younger House . . . wanted nothing of the [Exon approach] and sought to distance itself from the appearance of a regulatory-hungry federal government ready to trample the prized freedoms found in cyberspace.").

49. See 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden); see also Chang, *supra* note 41, at 989 & n.84 (citing *Cyberporn: Protecting Our Children from the Back Alleys of the Internet: Hearing Before the H. Subcomms. on Basic Research and Technology of the Comm. on Science*, 104th Cong. 82 (1995) [hereinafter *Cyberporn Hearing*] (statement of Stephen M. Heaton, General Counsel, CompuServe, Inc.) ("The cyber community, made up of hundreds of thousands of computers distributed across the globe is truly a world without borders. Directly regulating cyberspace—history's only true functioning anarchy—may prove impossible.")).

a Federal computer commission do that.”⁵⁰ Other Members of Congress, foreshadowing the Supreme Court ruling two years in the future, expressed concern that the Senate’s approach might also unconstitutionally limit free speech.⁵¹

Supporters of the Cox-Wyden amendment believed that encouraging the private sector to employ blocking, filtering, and screening technologies posed a more efficient and less intrusive solution to the Internet obscenity problem.⁵² Witnesses testified that private filtering technology was available, effective, and less intrusive than the Senate alternative.⁵³ Representative Wyden stated his agreement: “[w]e are here to say that we believe that parents and families are better suited to guard the portals of cyberspace and protect our children than our Government bureaucrats.”⁵⁴ Representative Cox also explained: “[w]e want to encourage people like Prodigy, like CompuServe, like America Online . . . to do everything possible for us, the customer, to help us control . . . what comes in and what our children see.”⁵⁵

Proponents of the Cox-Wyden amendment also felt that traditional common law principles, by imposing liability on entities that voluntarily edited Internet content, discouraged the desired type of private action.⁵⁶ Representative Cox explained that “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.”⁵⁷ Representative Cox specifically criticized the approach taken by the *Prodigy* court as unwisely punishing ICSPs for trying to mitigate

50. See Chang, *supra* note 33, at 989 (citing 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

51. See, e.g., *id.* at 989 (citing 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Lofgren) (endorsing the Cox-Wyden amendment and stating that “I would urge its approval so that we preserve the first amendment and open systems on the Net.”)). See also Cannon, *supra* note 33, at 67 (“On June 20, 1995, Speaker Gingrich pronounced that the CDA ‘is clearly a violation of free speech and it’s a violation of the right of adults to communicate with each other.’”).

52. See Chang, *supra* note 33, at 990.

53. *Id.* at 990 (citing *Cyberporn Hearing*, *supra* note 49 (statement of Stephen M. Heaton, General Counsel, CompuServe, Inc.) (testifying that existing laws on indecency “are more than adequate” for the Internet, and that the role of government should be “to encourage the development . . . of new technologies that empower parents in shaping their children’s experiences in cyberspace.”)).

54. Chang, *supra* note 33, at 990 (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden)).

55. *Id.* at 990 (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)); see also *id.* (citing 141 CONG. REC. H8470–71 (statement of Rep. Lofgren) (“Senator Exon’s approach is not the right way. . . . The private sector is out giving parents the tools that they have.”)).

56. See Chang, *supra* note 33, at 990.

57. 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox); see also Chang, *supra* note 33, at 991.

Internet obscenity.⁵⁸ As discussed *supra*, the *Prodigy* court found that sufficient control over an Internet service's bulletin board, even if that control is exercised screening objectionable content, subjected the service to publisher's liability for the defamatory content.⁵⁹ To correct what the Cox-Wyden amendment advocates viewed as a case law principle incompatible with the most favorable solution,⁶⁰ the amendment included a "Good Samaritan" protection:

This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or to enable restriction of access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont [sic] v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.⁶¹

The House passed the Cox-Wyden Amendment on August 4, 1995 with overwhelming support,⁶² and the amendment was eventually codified as 47 U.S.C. § 230. The "Good Samaritan" section, as codified in the statute, specifies 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."⁶³

58. See Chang, *supra* note 33, at 990 (quoting CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) ("The court said . . . 'You . . . are going to face higher, stricter [sic] liability because you tried to exercise some control over offensive material.' Mr. Chairman, that is backward.")).

59. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *13 (N.Y. Sup. Ct. May 26, 1995) ("PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability . . .").

60. See, e.g., Chang, *supra* note 33, at 991 n.95 (citing 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte) ("There is no way that any of those entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin board. . . . [A]nd to have that imposition imposed on them is wrong.")).

61. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.); see also Chang, *supra* note 33, at 992 (quoting *id.* and explaining the rationale behind the "Good Samaritan" exception).

62. See 141 CONG. REC. H8478-79 (daily ed. Aug. 4, 1995) (vote totals of 420-to-4).

63. 47 U.S.C. § 230(c)(1) (2008).

C. Case Law Interpretation of § 230

Shortly after the CDA's enactment in 1996, the Fourth Circuit Court of Appeals interpreted the service provider immunity created by § 230 in *Zeran v. America Online*.⁶⁴ In *Zeran*, an anonymous user posted advertisements for "Naughty Oklahoma T-Shirts," in reference to the 1995 Oklahoma City bombing, and urged parties to telephone "Ken" at Zeran's number.⁶⁵ Plaintiff Zeran received "a high volume" of angry, derogatory, and threatening phone calls from those appalled by the morbid audacity of the advertisement.⁶⁶

Zeran informed America Online (AOL) of the situation and was told that AOL would delete the anonymous user's account and offensive postings.⁶⁷ However, an anonymous user repeatedly posted the offensive advertisements and Zeran received an increased volume of calls.⁶⁸ Reportedly, just five days after the original posting, the calls were so frequent that at times Zeran received "an abusive phone call approximately every two minutes."⁶⁹ Zeran argued that AOL was liable for distributing the "defamatory speech" contained in the subsequent advertisements after learning of its defamatory character.⁷⁰

The Fourth Circuit Court of Appeals rejected arguments that AOL was subject to any publisher liability. The court found that § 230 prevented Zeran's claims: "By its plain language, § 230 creates a federal immunity to *any* cause of action that would make service providers liable for information originating with a third-party user of the service."⁷¹ The court also rejected Zeran's argument that even if the statute did forbid publisher liability, it did not immunize AOL against distributor liability.⁷² The court noted that distributor liability "is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by [the language and purposes of] § 230" and that imposing such liability would chill Internet speech, discourage "self-regulation," and increase the burden on computer service providers.⁷³

64. 129 F.3d 327 (4th Cir. 1997).

65. *Id.* at 329.

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 330.

71. *Id.* (emphasis added).

72. *Id.* at 331-33.

73. *Id.* at 332.

Although *Zeran's* broad application of § 230 has been highly criticized,⁷⁴ most courts have followed *Zeran* “despite the level of involvement an ISP has in the defamatory or otherwise offensive material.”⁷⁵ Courts “have applied *Zeran's* reasoning to bar not only defamation claims, but other tort causes of action asserted against interactive service providers.”⁷⁶ Courts have even found that immunity under § 230 applied when the provider had some participation in creating the content.⁷⁷

In 2003, the Ninth Circuit Court of Appeals held in *Carafano* that § 230 immunized Matchmaker, a “commercial Internet dating service,” from a plaintiff’s claims of identity theft, defamation, negligence, and misappropriation after an anonymous third party created a false profile using the plaintiff’s name and contact information.⁷⁸ The *Carafano* court specifically rejected the theory that Matchmaker’s questionnaire, consisting of multiple choice and essay questions, made the service a content provider under the CDA.⁷⁹ The court noted that “[u]nder 230(c) . . . 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.”⁸⁰ The court continued:

74. See Chang, *supra* note 41, at 995–97 (analyzing the *Zeran* decision and questioning the court’s assumption that distributor liability is inconsistent with the purposes of the statute); see also *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1020 (Fla. 2001) (Lewis, J., dissenting) (“While the initial foray into *Zeran's* analysis is thus promising, its eventual conclusion—and thus, the majority’s corresponding conclusion in this case, patterned on the analyses contained in the two *Zeran* decisions—is, in my view, a startling non sequitur. Contrary to case law which has traditionally recognized an important difference between distributor and publisher liability, the majority opinion rejects any such distinction . . .” (citations omitted)); Christopher Butler, *Plotting the Return of an Ancient Tort to Cyberspace: Towards a New Federal Standard of Responsibility for Defamation for Internet Service Providers*, 6 MICH. TELECOMM. & TECH. L. REV. 247, 253 (2000) (“The [*Zeran*] court circumvented the publisher/distributor dichotomy . . .”); Michael H. Spencer, *Defamatory E-mail and Employer Liability: Why Razing Zeran v. America Online Is a Good Thing*, 6 RICH. J.L. & TECH. 25, ¶ 13 (2000), <http://www.richmond.edu/jolt/v6i5/article4.html> (on file with the University of Michigan Journal of Law Reform) (“This judicial legislating, though noble in its foresight, nevertheless falls outside of the parameters of the judge’s role in society. As a result of the court’s retooling of defamation law, other courts have followed this dangerous, diverging path.”).

75. Sarah Duran, *Hear No Evil, See No Evil, Spread No Evil: Creating a Unified Legislative Approach to Internet Service Provider Immunity*, 12 U. BALT. INTELL. PROP. L.J. 115, 123 (2004).

76. *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 714 (Ct. App. 2002); *Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772, 776–77 (Ct. App. 2001).

77. See *Carafano v. Metroplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that an Internet dating website was not responsible for user profile information “formulated in response to Matchmaker’s questionnaire”).

78. *Id.* at 1121–22.

79. *Id.*

80. *Id.*

The fact that some of the content was formulated in response to Matchmaker's questionnaire does not alter this conclusion. Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile "information" consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an "information content provider" under the statute because no profile has any content until a user actively creates it.⁸¹

In coming to its conclusion, the *Carafano* decision drew heavily on *Gentry v. eBay, Inc.*, a California state case decided the year before.⁸² In that case, plaintiff buyers claimed that eBay violated California's Autographed Sports Memorabilia statute, and was negligent and engaged in unfair business practices based, *inter alia*, on its practice of ranking sellers whose profiles contained faulty information, "permitting other false representations to be placed on its web site, and making its own false or misleading representations."⁸³ The trial court denied plaintiffs' claims based, in part, on the service provider's immunity under § 230.⁸⁴ The California Court of Appeals affirmed the trial court's decision.⁸⁵ Particularly, the court of appeals rejected the plaintiffs' argument that eBay's ranking system based on fallacious comments made it an "information content provider" under the statute.⁸⁶

The *Carafano* court explained that, as in *Gentry*, "the fact that Matchmaker classifies user characteristics into discrete categories and collects responses to specific essay questions does not transform Matchmaker into a 'developer' of the 'underlying misinformation.'" ⁸⁷ The court also dismissed Carafano's contentions that Matchmaker's set of "preprepared responses" meaningfully made the service provider an 'information content provider' under the statute.⁸⁸

81. *Id.*

82. *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703 (Ct. App. 2002).

83. *Id.* at 706.

84. *Id.* at 706-09.

85. *Id.* at 706, 716, 718-19.

86. *Id.* at 718-19.

87. *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003).

88. *Id.* at 1125 ("Carafano responds that Matchmaker contributes much more structure and content than eBay by asking 62 detailed questions and providing a menu of

Courts have also found that § 230 barred claims under the Fair Housing Act (FHA).⁸⁹ In *Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist*, the court held that CDA immunity under § 230 extended to Internet service providers that publish discriminatory housing advertisements.⁹⁰ Plaintiff, a civil rights group, filed suit against Craigslist, a popular Internet forum for posting various types of advertisements, alleging that Craigslist violated § 3604(c) of the FHA by publishing discriminatory housing advertisements.⁹¹

Plaintiff argued that § 230(c)(1)⁹² was merely definitional and did not itself grant immunity for discriminatory housing advertisements.⁹³ Defendant argued that the court should apply the prevailing interpretation first articulated in *Zeran*, and find the defendant immune from suit under § 230.⁹⁴ The court rejected both interpretations, however, before it granted "Craigslist's Rule 12(c) motion for judgment on the pleadings."⁹⁵ Noting that *Zeran* and its progeny interpreted CDA immunity far too expansively than was warranted by the "plain meaning" of § 230(c)(1),⁹⁶ the court explained that the section would merely "prohibit [an ICSP's] treatment as a publisher"⁹⁷ Thus, § 230 "would bar any cause of action that requires . . . a finding that an [ICSP] published third-party content."⁹⁸ In contrast to the holding in *Zeran*, the *Craigslist* court interpreted § 230(c)(1) only to "[bar] any claim that requires 'publishing' as an element."⁹⁹ Nevertheless, because § 3604(c) of the

'pre-prepared responses.' However, this is a distinction of degree rather than of kind, and Matchmaker still lacks responsibility for the 'underlying misinformation.'").

89. See *Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006). The Fair Housing Act makes it unlawful 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." 42 U.S.C. § 3604(c) (2008); see also Collins, *supra* note 25, at 1488-91 (analyzing this case in the context of congressional amendment to § 230).

90. *Craigslist*, 461 F. Supp. 2d at 698.

91. *Id.* at 682-86.

92. 47 U.S.C. § 230(c)(1) (2008) ("No 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.").

93. *Craigslist*, 461 F. Supp. 2d at 692.

94. *Id.*

95. *Id.* at 692, 699.

96. *Id.* at 695.

97. *Id.* at 696.

98. *Id.*

99. *Id.* at 698.

FHA requires that the material be “made, printed, or published,”¹⁰⁰ Craigslist was still immune under § 230(c)(1).¹⁰¹

The Seventh Circuit Court of Appeals affirmed, explaining that, while Congress did not consider potential conflicts between the FHA and the CDA, “§ 230(c)(1) is general . . . [It] covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians’ promises, and everything else that third parties may post on a web site”¹⁰² Thus, even though the court expressed some concern about how broadly § 230 had been interpreted following *Zeran*, it ultimately concluded that § 230 barred claims under the FHA.

II. *Roommates.com II*: A NEW INTERPRETATION OF § 230?

A. *Background: the Website, the District Court, and the Circuit Court*

Most people have preferences when selecting a potential roommate.¹⁰³ However, some preferences are more suspect than others¹⁰⁴ and others are prohibited by the FHA.¹⁰⁵ Suppose a person looking

100. 42 U.S.C. § 3604(c) (2008).

101. *Craigslist*, 461 F. Supp. 2d at 698; see also Collins, *supra* note 25, at 1488–89 (“Liability under § 3604(c) requires that the OSP be a publisher; therefore, Craigslist was immune from liability for discriminatory housing advertisements that originated from third-party users.”).

102. Collins, *supra* note 25, at 1489 (quoting Chi. Lawyers’ Comm. for Civil Rights Under the Law v. Craigslist, Inc., 519 F.3d 666, 666, 671 (7th Cir. 2008)).

103. Klein and Doskow present an illustrative hypothetical regarding a possible Internet housing search scenario. See Klein & Doskow, *supra* note 12, at 331.

104. Examples of some of the suspect preferences expressed by Roommates.com’s users include: “looking for an ASIAN FEMALE OR EURO GIRL”; “I’m looking for a straight Christian male”; “I am not looking for freaks, geeks, prostitutes (male or female), druggies, pet cobras, drama, black muslims or mortgage brokers”; and “Here is free rent for the right woman I would prefer to have a Hispanic female roommate so she can make me fluent in Spanish or an Asian female roommate just because I love Asian females.” Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987, at *5–6 (C.D. Cal. Sept. 30, 2004) (*Roommates.com*).

105. It is important to note that § 3604(a), (b), and (f) of the FHA prohibit “discrimination 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. However, under § 3603(b) persons renting out a room or unit of an owner-occupied building of [four] families or fewer (including persons seeking a ‘roommate,’ typically in an apartment) are exempt from these requirements.” Klein & Doskow, *supra* note 12, at 334–35 (citations omitted). But, even in these otherwise exempted situations, it is still unlawful “[t]o 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.” 42 U.S.C. § 3604(c) (2008); see also Klein & Doskow, *supra* note 12, at 335.

for a roommate decides to advertise via Roommates.com. The website boasts information for more than 80,000 potential roommates, and makes the information available to registered users.¹⁰⁶ Initial registration includes selecting a location and indicating whether a room is available or one is sought, and allows the user to view available rooms or roommates.¹⁰⁷ The user must create an account to “proceed further and contact potential roommates.”¹⁰⁸ Creating an account for a room-seeker begins by indicating room preferences, including desired location, dwelling type, rent, length of lease, and shared room preferences.¹⁰⁹ The user must then indicate roommate preferences from a dropdown menu, including “age, gender, sexual orientation, smoking habits, cleanliness, pets, and familial status (whether or not they have children).”¹¹⁰ The user must also provide this same information regarding himself.¹¹¹ A user must provide information for all questions to create an account.¹¹² Users also create their own nicknames, attach photographs, and add an “Additional Comments” essay “describing themselves and their roommate preferences.”¹¹³

Creating an account for a roommate-seeker similarly begins by indicating location, dwelling type, and rent.¹¹⁴ Specific information about the household is also required, “including the age range, sexual orientation, and occupation of the current household members.”¹¹⁵ The registrant must also indicate the criteria for finding a potential roommate from the same dropdown menu as those seeking rooms, and is also “encouraged to personalize” their account by adding “Additional Comments.”¹¹⁶ Roommate-seekers find roommates in one of three ways: the website automatically generates “My Matches” based on desired roommate characteristics,¹¹⁷ a user may conduct a “Power Search” for roommates by searching

106. Roommate Matching Service Home Page, <http://www.roommates.com> (on file with the University of Michigan Journal of Law Reform).

107. *Id.*; see *Roommates.com*, 2004 U.S. Dist. LEXIS 27987, at *3–4 (describing the Roommates.com registration process); Bradford J. Saylor, *Amplifying Illegality: Using the Exception to the 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, 205–07 (2008) (explaining the registration and account creating process in exhaustive detail).

108. See Saylor, *supra* note 107, at 205.

109. *Id.*

110. *Id.* at 205–06.

111. *Id.* at 206.

112. *Id.*

113. *Fair Hous. Council of San Fernando Valley v. Roommate.com*, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987, at *3 (C.D. Cal. Sept. 30, 2004) (*Roommates.com*).

114. See Saylor, *supra* note 107, at 206.

115. *Id.*

116. *Id.*

117. *Id.*

according to new preferences,¹¹⁸ or a user may also opt for “Email Notification” when a new user with compatible criteria registers.¹¹⁹

In *Roommates.com*, the plaintiffs, two civil rights groups, alleged that “Roommate is liable for making and publishing ‘discriminatory statements that indicate preferences based on race, religion, national origin, general familial status, age, sexual orientation, source of income, and disability, all in violation of fair housing laws.’”¹²⁰ Roommate.com claimed that it was “immune from suit pursuant to section 230 of the [CDA]” because the plaintiffs sought to “make it liable for the publication of content provided by third parties.”¹²¹ Both parties sought summary judgment.¹²² The plaintiffs argued that Roommate.com violated “state and federal housing laws” by allowing users to select potentially-suspect nicknames¹²³ and draft “free form essays . . . which indicate at least potentially discriminatory preferences,”¹²⁴ and by requiring questionnaire answers that disclosed a user’s “age, gender, sexual orientation, occupation, and familial status.”¹²⁵ Roommate.com argued that it was “entitled to the grant of immunity provided by the CDA notwithstanding any potential violations of the fair housing laws.”¹²⁶

After noting that “[t]his is apparently the first case to address the relationship between the CDA’s grant of immunity and the FHA’s imposition of liability for the imposition of liability for the making or publishing of discriminatory real estate listings,” the court granted Roommate.com’s motion for summary judgment.¹²⁷ The court explained that because the “FHA is not among the types of laws which are specifically exempted from the CDA,” it could not unilaterally create an exception for the fair housing laws without evidence of legislative intent.¹²⁸ The court concluded: “In the absence of contrary legislative intent, therefore, the Court finds that the CDA applies to shield Roommate from liability for the FHA violations alleged by Plaintiffs to the extent that Plaintiffs seek to make Roommate liable for the content provided by its users.”¹²⁹

118. *Id.*

119. *Id.* at 206–07.

120. Fair Hous. Council of San Fernando Valley v. Roomate.com, No. CV 03-09386 PA (RZx), 2004 U.S. Dist. LEXIS 27987, at *1–2 (C.D. Cal. Sept. 30, 2004) (*Roommates.com*).

121. *Id.* at *2.

122. *Id.* at *1.

123. *Id.* at *5. (“These nicknames include: ChristianGrl, CatholicGirl, Asianpride, Asianmale, Whiteboy, Chinesegirl, Latinpride, and Blackguy.”).

124. *Id.* at *5. See *supra* note 104.

125. *Id.*

126. *Id.*

127. *Id.* at *7–8, *15.

128. *Id.* at *8.

129. *Id.* at *8–9.

The court then explained that Ninth Circuit precedent “compels the conclusion that Roommate cannot be liable for violating the FHA arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users’ responses to the multiple choice questionnaire.”¹³⁰ After noting that “an ‘interactive computer service’ qualifies for immunity so long as it does not also function as an ‘information content provider’ for the portion of the statement or publication at issue,”¹³¹ the court drew analogy between the questionnaire used by Roommate.com and the one used by Matchmaker in *Carafano*.¹³²

Both questionnaires consisted of both multiple choice and essay questions.¹³³ Then relying on the *Carafano* court’s conclusion that Matchmaker could not be “considered an ‘information content provider’ under the statute because no profile has any content under the statute until a user actively creates it,”¹³⁴ the court concluded that the plaintiffs’ “FHA claim [was] barred by the immunity provision of the CDA.”¹³⁵

The Ninth Circuit Court of Appeals partially reversed and remanded.¹³⁶ The majority agreed with the district court that Roommate.com was not an “information content provider” with regard to information contained in the “Additional Comments” section of a user’s profile.¹³⁷ In this section, Roommate.com advised its users: “[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.”¹³⁸ Although these “free form” essays “produce[d] the most provocative and revealing information in many user’s profiles,”¹³⁹ the open-ended question “suggests no particular information that is to be provided by members” and so Roommate.com did not qualify as an “information content provider.”¹⁴⁰

130. *Id.* at *12.

131. *Id.* at *9 (quoting *Carafano*, 339 F.3d 1119, 1123 (9th Cir. 2003)).

132. *See id.*; *see also supra* discussion of *Carafano*.

133. *Id.*

134. *Id.* at *10 (quoting *Carafano*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

135. *Id.* at *12.

136. *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 489 F.3d 921, 930 (9th Cir. 2007) (*Roommates.com I*).

137. *Id.* at 929.

138. *Id.* at 932. (Reinhardt, J., concurring in part and dissenting in part).

139. *Id.* at 929 (“Some state that they ‘Pref[er] white Male roommates,’ while others declare that they are ‘NOT looking for black muslims.’ Some don’t want to deal with annoyances such as ‘drugs, kids or animals’ or ‘smokers, kids or druggies,’ while others want to stay away from ‘psychos or anyone on mental medication.’”); *see also id.* at 929 n. 10 (“The female we are looking for hopefully wont [sic] mind having a little sexual incounter [sic] with my boyfriend and I [very sic].”); *id.* at 929 n.11 (“We are 3 Christian females who Love our Lord Jesus Christ. . . . We have weekly bible studies and bi-weekly times of fellowship.”).

140. *Id.* at 929.

The court, however, concluded that Roommate.com was an “information content provider” with regard to preferences selected in response to its mandatory questionnaire and its publication and distribution such preferences.¹⁴¹ First, the court explained that because a user must chose among preprepared answers to a number of mandatory questions, and because those questions and answers were prepared by Roommate.com, Roommate.com is “‘responsible’” for these questionnaires because it “creat[ed] or develop[ed]” the forms and answer choices.¹⁴² Second, the court reasoned that the CDA did not exempt Roommate.com “from liability for publishing and distributing its members’ profiles, which it generates from their answers to the form questionnaires.”¹⁴³ In coming to this conclusion, the court distinguished *Carafano*, stating:

The prankster in *Carafano* provided information that was not solicited by the operator of the website *Carafano* did not consider whether the CDA protected such websites, and we do not read that opinion as granting CDA immunity to those who actively encourage, solicit and profit from the tortious and unlawful communications of others.¹⁴⁴

Therefore, by requesting and compiling the potentially unlawful information,¹⁴⁵ “Roommate provides an additional layer of information that it is ‘responsible’ at least ‘in part’ for creating or developing.”¹⁴⁶

141. *Id.* at 926–27.

142. *Id.* at 926 (“Individuals looking for a room must first complete a form about themselves. They must use a drop-down menu to identify themselves as either ‘Male’ or ‘Female’ and to disclose whether ‘Children will be present’ or ‘Children will not be present.’ Individuals looking to rent out a room must complete a similar form. They must use a check-box menu to indicate whether ‘Straight male(s),’ ‘Gay male(s),’ ‘Straight female(s),’ and/or ‘Lesbian(s)’ now live in the household, and a drop-down menu to disclose if there are ‘Children present’ or ‘Children not present.’ If users fail to provide answers to any of these questions, they cannot complete the membership registration process. In addition to completing one of the two forms described above, all prospective members must fill out the ‘My Roommate Preferences’ form. They must use a drop-down menu to indicate whether they are willing to live with ‘Straight or gay’ males, only ‘Straight’ males, only ‘Gay’ males, or ‘No males,’ or may choose to select a blank response. Users must make comparable selections for females. They must also declare ‘I will live with children,’ ‘I will not live with children’ or change the field to a blank.”).

143. *Id.* at 927 (“We are not convinced that *Carafano* would control in a situation where defamatory, private or otherwise tortious or unlawful information was provided by users in direct response to questions and prompts from the operator of the website.”).

144. *Id.* at 928.

145. *See id.* (“Thus, Roommate allows members to search only the profiles of members with compatible preferences.”).

146. *Id.*

B. Roommates.com II: The Ninth Circuit En Banc Opinion

Roommate.com was granted rehearing en banc on October 12, 2007.¹⁴⁷ On rehearing, the majority held that Roommate.com was an “information content provider” as to the prepopulated answers to its mandatory questions and as well as its compilation and use of those answers.¹⁴⁸ With regard to the mandatory questions, the court explained:

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. . . . Roommate’s own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.¹⁴⁹

The court also reasoned that Roommate.com was an “information content provider” with regard to its use of its users’ preferences. As explained above, Roommate.com required its users to select among preprepared answers to mandatory questions.¹⁵⁰ These answers provided potentially discriminatory preferences, as illustrated above.¹⁵¹ Roommate.com then used this “information to channel subscribers away from listing where the individual offering housing has expressed preferences that aren’t compatible with the subscriber’s answers.”¹⁵² The court first explained that Roommate.com was clearly an “information content provider” under the CDA, and hence not eligible for immunity, because it was at least a partial creator or developer of content.¹⁵³ The majority explained:

147. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 506 F.3d 716 (9th Cir. 2007) (*Roommates.com I*).

148. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165, 1169–70 (9th Cir. 2008) (en banc) (*Roommates.com II*).

149. *Id.* at 1164–65.

150. *See, e.g., id.* at 1165.

151. *See id.*

152. *Id.*

153. *Id.* at 1165, 1167 (“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.”).

By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information. And section 230 provides immunity only if the interactive computer service does not “creat[e] or develop[]” the information “in whole or in part.”¹⁵⁴

Similarly, the majority concluded that Roommate.com was not entitled to CDA immunity for the content because its use of filtering and email notification systems, which allowed users to filter and receive notifications according to discriminatory criteria, also made it an developer of the content for purposes of the CDA.¹⁵⁵ The court explained that because Roommates.com “designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose,” it could not enjoy immunity for its use of such information.¹⁵⁶ The court held that such use constituted “development” under § 230.¹⁵⁷

In coming to this conclusion, the majority took the “opportunity to clarify two of [its] previous rulings regarding the scope of section 230 immunity.”¹⁵⁸ The majority explained that its holding in *Batzel v. Smith*,¹⁵⁹ that “an editor’s minor changes to the spelling, grammar and length of third-party content do not strip him of section 230 immunity,” is consistent with this concept of “development” because none of the editor’s “changes contributed to the libelousness of the message”¹⁶⁰ The majority also explained that it “must clarify the reasoning undergirding [its] holding in *Carafano*” because “we used language there that was unduly broad.”¹⁶¹ The majority explained that while it had correctly held that Matchmaker, the website, was immune under § 230, the court “incorrectly suggested that it could never be liable because ‘no [dating] profile has any content until a user actively creates it.’”¹⁶²

154. *Id.* at 1166.

155. *Id.* at 1167.

156. *See id.* (“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.”(citations omitted)).

157. *See id.* at 1168–72.

158. *Id.* at 1170.

159. 333 F.3d 1018 (9th Cir. 2003).

160. *Roommates.com II*, 521 F.3d at 1170.

161. *Id.* at 1171.

162. *Id.*

The majority went on to suggest that “a more plausible rationale for the unquestionably correct result in *Carafano* is this . . . [w]ith respect to the defamatory content, the website operator was merely as passive conduit”¹⁶³ By contrast, the majority explained, “Roommate both elicits the allegedly illegal content and makes aggressive use of it in conducting its business.”¹⁶⁴ The majority, however, for substantially the same reasons as the panel opinion, declined to hold Roommate.com liable for any content provided in the “Additional Essays” section.¹⁶⁵

Three judges dissented to the majority’s reasoning that Roommate.com “creat[ed] or develop[ed]” information by providing preselected answers to mandatory questions and using that information to filter and alert its users.¹⁶⁶ The dissent primarily took issue with the majority’s interpretation of phrase “creation or development” with regard to the preferences.¹⁶⁷ The dissent first explained that adding preselected answer choices to mandatory questions does not “develop” information under the statute.¹⁶⁸ The dissent explained: “Roommate, with its prompts, is merely ‘selecting material for publication,’ which we have stated does not constitute the ‘development’ of information. The profile is created solely by the user, not the provider of the interactive website. Indeed, without user participation, there is no information at all.”¹⁶⁹ Thus, relying on the very language in *Carafano* that the majority distinguished, the dissent declared: “We got it right in *Carafano*, that ‘[u]nder § 230(c) . . . 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.’”¹⁷⁰

The dissent then took issue with the majority’s reasoning that Roommate.com “create[ed] or develop[ed]” information by filtering and using this information.¹⁷¹ The dissent noted that such an application would impose liability on all interactive search engines

163. *Id.* at 1171–72.

164. *Id.* at 1172.

165. *Id.* at 1173–76.

166. *Id.* at 1182 (“A close reading of the statute leads to the conclusion that Roommate is not an information content provider for two reasons: (1) providing a drop-down menu does not constitute ‘creating’ or ‘developing’ information; and (2) the structure and text of the statute make plain that Congress intended to immunize Roommate’s sorting, displaying, and transmitting of third-party information.”).

167. *Id.*

168. *Id.*

169. *Id.* (citations omitted).

170. *Id.* at 1187.

171. *Id.* at 1182.

and effectively obliterate CDA immunity.¹⁷² Furthermore, the dissent explained that Roommate.com could not have “develop[ed]” content by filtering, searching, sorting and transmitting information because “Roommate made no changes to the information provided to it by users.”¹⁷³ The dissent also suggested that other courts have rejected such a theory of “development.”¹⁷⁴ The dissent explained: “Unsurprisingly, these courts reached the same commonsense solution that I reach here: § 230(c)(1) immunizes the interactive service provider.”¹⁷⁵

III. PRESERVING IMMUNITY UNDER § 230

A. *Partially User-Generated Content and ICSP Liability* *After Roommates.com II*

The *Roommates.com II* decision illustrates the practical and philosophical difficulties in evaluating § 230 immunity for ICSPs that provide preselected answers to mandatory questions or develop a business model around the use of such answers. The opinion’s precedential effect, however, contrary to the assertions of the dissent,¹⁷⁶ appears to be quite limited. First, the holding is only binding within the Ninth Circuit. Second, the en banc decision appears to limit Roommate.com’s liability to the use and solicitation of predetermined answers to required questions “inducing third parties to express illegal preferences.”¹⁷⁷ Because merely “asking questions certainly can violate the [FHA],” the complete en banc panel agreed that Roommate.com did not enjoy CDA immunity from liability for asking such questions of its users.¹⁷⁸ The judges disagreed, however, as to whether Roommate.com’s actions in (1) requiring users to select among preprepared answer choices to

172. *Id.* at 1183.

173. *Id.* at 1185.

174. *Id.*

175. *Id.*

176. *See id.* at 1176 (“The majority’s unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned.”).

177. *See id.* at 1165–72.

178. *Id.* at 1164, 1176 (“However, we note that asking questions certainly *can* violate the Fair Housing Act and analogous laws in the physical world. For example, a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don’t magically become lawful when asked electronically online. The Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet.”).

mandatory questions and (2) using those answers to filter and classify its members made it an “information content provider” under the CDA. The majority ultimately held that both actions made Roommate.com an “information content provider”:

Roommate designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose. 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.¹⁷⁹

Thus, for an ICSP to be an “information content provider” with regard to partially user generated content, either for publication of the selected information or the ICSP’s use of the information, it appears that the preprepared answer must *itself* express an illegal preference. This likely limits the applicability of the holding to those few cases, such as under the FHA, where merely expressing a particular preference is illegal.¹⁸⁰

Even assuming *Roommates.com II*’s holding is limited to those cases where preprepared answers themselves express an illegal preference, the case’s competing interpretations of “information content provider” illustrate a larger philosophical inconsistency lurking behind § 230 immunity with regard to partially user-generated content. As noted *supra*, § 230 provides 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.”¹⁸¹ 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 or any other interactive computer service.”¹⁸² Inserting this definition in the place of “information content provider” in the statute illustrates that a service provider can simultaneously act as an “information content provider” while at the same time enjoying immunity under the statute, so long as another party ultimately “provide[s]” the information: no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by any person or

179. *Id.* at 1167.

180. The majority also mentioned race discrimination in educational and employment opportunities. See *Roommates.com II*, 521 F.3d at 1170 n.25.

181. 47 U.S.C. § 230(c)(1) (2008).

182. 47 U.S.C. § 230(f)(3) (2008).

entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.¹⁸³

Assuming that selecting a preprepared answer constitutes at least a partial “creation or development” of the information,¹⁸⁴ and that information is “provided” by selecting an answer that otherwise would not be published,¹⁸⁵ an ICSP should enjoy immunity under § 230 even if it is also considered an “information content provider” with regard to the content. Thus, under the current statutory language, courts should arguably evaluate ICSP immunity from claims arising out of both entirely and partially user-generated content on the basis of whether the ICSP is the *sole* “information content provider” of information it did not ultimately “provide.”¹⁸⁶ This battle is instead fought, however, with competing definitions of “creation or development.”

B. Roommates.com II: A Desirable Result Arguably Inconsistent with Current Law

Many have criticized the Roommates.com II decision as misapplying the CDA immunity.¹⁸⁷ The *Roommates.com II* court’s arguable

183. Note that “another” is absent from this altered statute for grammatical reasons.

184. The *Roommates.com II* majority would not likely contest this assumption because it embraced an expansive view of “development.”

185. See Carafano v. Metrosplash.com, 339 F.3d 1119, 1124 (9th Cir. 2003) (“Under § 230(c) . . . 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.”).

186. The majority opinion recognized the importance of this analysis noting both the reality of multiple “information content providers” for any given information and the importance of focusing on who ultimately “put[] information online.” See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc) (*Roommates.com II*) (“The dissent tilts at windmills when it shows, quite convincingly, that Roommate’s subscribers are information content providers who create the profiles by picking among options and providing their own answers. There is no disagreement on this point. But, the fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping ‘develop’ at least ‘in part’ the information in the profiles. As we explained in *Batzel*, the party responsible for putting information online may be subject to liability, even if the information originated with a user.”).

187. See, e.g., Varty Defterderian, Note, Fair Housing Council v. Roommates.com: A New Path for Section 230 Immunity, 24 BERKELEY TECH. L.J. 563, 592 (2009) (“Despite over a decade of precedent and clear congressional intent, Roommates.com paved a new path to OSP liability. . . . Though perhaps well intentioned, the majority not only created a hazier test for immunity under section 230, but also overstepped its bounds.”); Seth Stern, Note, Fair Housing and Online Free Speech Collide in Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 58 DEPAUL L. REV. 559, 559 (2009) (“[T]he holding directly contradicts precedent from the Ninth Circuit and other courts, as well as the clearly expressed goals of the Communications Decency Act (CDA).”).

misapplication of § 230 notwithstanding, the result has common sense appeal and represents a policy move in the right direction. Applying § 230 as it is currently formulated and interpreted¹⁸⁸ would immunize Roommates.com for information selected by a user regardless of the ICSP's level of meaningful "creation or development" of discriminatory preferences in providing preselected answers to mandatory questions or building a business model on such preferences.¹⁸⁹ Thus, an ICSP could use § 230 immunity to contravene the FHA's clear purpose to hold entities liable that "print, or publish, or cause to be made, printed, or published" information with regard to a preference in renting a room.¹⁹⁰ This level of immunity arguably extends, however, beyond the legislative purposes behind § 230.¹⁹¹ Courts hold print entities liable under the FHA for merely printing such advertisements,¹⁹² and acknowledge that there is "no cogent reason to narrow the meaning of that language [of the FHA]," absent clear intent otherwise.¹⁹³ Congress never explicitly considered § 230's potential conflict with the FHA.¹⁹⁴

188. See *Roommates.com II*, 521 F.3d at 1176–77 (McKeown, J., concurring in part and dissenting in part) ("Now, with the stroke of a pen or, more accurately, a few strokes of the keyboard, the majority upends the settled view that interactive service providers enjoy broad immunity when publishing information provided by third parties. . . . The majority's decision, which sets us apart from five circuits, contravenes congressional intent and violates the spirit and serendipity of the Internet.").

189. One could hypothetically imagine one preprovided answer to a single required question. Under the statutory language as interpreted by the dissent, this service provider would also enjoy immunity. Additionally, applying the statute as written may allow § 230 immunity where an interactive service provider is responsible for 99.99 percent of the actual content development so long as it is "provided," i.e. selected, by a third party.

190. 42 U.S.C. § 3604(c) (2008). See *supra* note 105 and accompanying text.

191. See *supra* Part II.B.

192. See *Chi. Lawyers' Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 687 (N.D. Ill. 2006) ("[C]ourts have held that 42 U.S.C.S. § 3604(c) applies to a variety of media, including newspapers, brochures, multiple listing services, telecommunication devices for the deaf, a housing complex's pool and building rules, as well as any other publishing medium. Along the same lines, the United States Department of Housing and Urban Development ('HUD') has issued a regulation construing Section 3604(c) as applying to written notices and statements including any applications, flyers, brochures, deeds, signs, banners, posters, billboards or any documents used with respect to the sale or rental of a dwelling." (citations and quotations omitted)).

193. *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972).

194. See *Chang*, *supra* note 33, at 1011–12 ("Congress did not articulate any intention that § 230 limit the applicability of the FHA's advertising provisions to OSPs, either in the text of § 230 or at any point in its legislative history. This complete legislative silence suggests not only that its members failed to realize that fair housing interests would be implicated at all in the passage of § 230, but that Congress did not intend for the fair advertising mandates to be abrogated. With the integrity of the federal government's decades-long commitment to equal housing opportunity hanging in the balance, Congress would not have instituted such a far-reaching change without a single word of comment.").

Furthermore, applying § 230 immunity to FHA claims where the ICSP is an “information content provider” of discriminatory preferences, by soliciting those preferences and searching, sorting, and filtering on the basis of those preferences, arguably extends beyond the dual legislative goals of § 230: limiting the accessibility of Internet indecency and encouraging Internet proliferation.¹⁹⁵ It is difficult to imagine how allowing for ICSP immunity of FHA violations furthers the goal of limiting Internet access to indecent and pornographic materials. Although one could argue that disallowing § 230 immunity may stifle Internet growth, this is not an insurmountable objection. The level of Internet communication has increased significantly since the passing of the CDA, inherently weakening the relevancy of this critique.¹⁹⁶ Even so, narrowly limiting § 230 immunity in this way may have little effect on legal speech and future Internet growth.¹⁹⁷

Whereas *Roommates.com II* represents a policy move in the right direction, it also represents a legally inconsistent stance given the broad application of § 230 immunity.¹⁹⁸ Although some scholars have gone as far as suggesting that § 230 immunity does not apply to § 3604(c) claims under the FHA,¹⁹⁹ this is contrary to practice and the plain language of the statute.²⁰⁰ As noted by the Seventh Circuit, although it may not always create the most desirable results, § 230 is a statute “[t]hat covers ads for housing, auctions of paintings that may have been stolen by Nazis, biting comments about steroids in baseball, efforts to verify the truth of politicians’

195. See *supra* Part I.B.

196. See, e.g., Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 818 (2007) (“In 1996, the usage of the Internet was estimated at 40 million users worldwide. In 1999, the estimate had increased to more than 109 million users in over 159 countries. In 2001, a survey announced the number of Internet users worldwide to be 513.41 million.” (citations omitted)).

197. *Contra* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1176–77 (9th Cir. 2008) (en banc) (*Roommates.com II*) (McKeown, J., concurring in part and dissenting in part) (“The majority’s unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned. The majority condemns Roommate’s ‘search system,’ a function that is the heart of interactive service providers. My concern is not an empty Chicken Little ‘sky is falling’ alert. By exposing every interactive service provider to liability for sorting, searching, and utilizing the all too familiar drop-down menus, the majority has dramatically altered the landscape of Internet liability. Instead of the ‘robust’ immunity envisioned by Congress, interactive service providers are left scratching their heads and wondering where immunity ends and liability begins.”).

198. See generally Daniel Rockey, *Could Your Web Site Be Liable for ‘Contributing’ to Unlawful Conduct by Your Users?*, 15 ANDREWS INTELLECTUAL PROP. LITIG. REP. 12 (2008).

199. See Chang, *supra* note 33, at 1012.

200. See Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, 519 F.3d 666, 671 (7th Cir. 2008).

promises, and everything else that third parties may post on a web site”²⁰¹ Thus, under current law, an ICSP’s § 230 immunity likely extends to partially user-created content that would otherwise constitute an FHA violation. Therefore, to hold an ICSP responsible for partially user-generated content that violates the FHA, Congress must amend § 230.

C. A House Divided: Making § 230(c) Compatible with the FHA

Congress should amend § 230 to account for relevant counter interests in fair housing advertisement on the Internet. A number of commentators have called for action.²⁰² Some have proposed limiting § 230 immunity to situations not involving housing.²⁰³ Although such a proposal preserves the relevant interests in fair housing advertisement on the Internet, it does so by completely abolishing § 230 immunity for any housing information posted on the Internet, whether completely or partially user-generated.²⁰⁴ Practically, this means that service providers will be subject to the same liability as print entities. Although there is inherent appeal in uniform liability between print and electronic entities, this solution ignores the purposes behind § 230 immunity in allowing ICSPs freedom to edit obscene postings without incurring traditional publisher liability.²⁰⁵ Any legislative response should be consistent with the underlying goals of the FHA and § 230.

Congress should amend § 230 accordingly: “No 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, *except for content with respect to the sale or rental of a housing unit in which the interactive computer service provider also acts as an information content provider.*” This proposal is more narrowly tailored to serve the purposes of both the FHA and § 230.²⁰⁶ Under

201. *Id.* at 671.

202. *See* Chang, *supra* note 33, at 1012; Collins, *supra* note 25, at 1495; Duran, *supra* note 75.

203. *See* Collins, *supra* note 25, at 1495 (proposing to abolish an ICSP’s § 230 immunity with regard to both completely and partially user-generated content: “No 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, *except for notices, statements, or advertisements with respect to the sale or rental of a dwelling.*”).

204. Although Collins suggests that this proposal would not impose “excessive” burdens on providers who edit content, without § 230 immunity, such editing would in fact subject a provider to common law publisher liability specifically rejected by the language and rationale of § 230. *See id.* at 1496–97; *supra* Part I.A.

205. *See supra* Part I.B.

206. *Id.*

this proposal, an ICSP would enjoy § 230 immunity unless it is “responsible, in whole or in part, for the creation or development” of the objectionable housing advertisement. Consistent with the legislative purposes behind § 230, an ICSP could edit obscene posts with immunity, including housing advertisements, so long as it did not participate in the “creation or development” of the FHA violating post, thus discouraging service providers from facilitating FHA violations via the Internet.²⁰⁷

This proposal would not likely alter the outcome in the *Roommates.com II* case. However, it would provide a cogent reason for that outcome and a clearer standard for evaluating an ICSP’s potential liability for partially user-generated content. Even so, this proposal is not without objection.²⁰⁸ First, his proposal does not create complete uniformity between print and online entities with regard to FHA liability.²⁰⁹ Second, this proposal assumes that, the soundness of its legal reasoning aside, *Roommates.com II* produced a desirable outcome.²¹⁰ Finally, this proposal still requires a court to determine initially whether an ICSP is an “information content provider” with regard to objectionable housing information. This task invariably requires a consistent interpretation of what ICSP actions are sufficient to constitute “creation or development” under the statute. Competing interpretations of this phrase was the real sticking point between the majority and dissent in *Roommates.com II*. Therefore, Congress should also amend the definition of “information content provider” to acknowledge the obvious “creation or development” with respect to ICSP created dropdown answers to mandatory questions.

The prospective burden of the proposed reform on courts appears small, as they make determinations regarding a party’s status as an “information content provider” under the current case law interpretation of the statute.²¹¹ Admittedly, this proposal does preserve immunity with regard to housing information for Internet entities to a larger degree than that available to similarly situated print entities. Although greater uniformity is possible, and may

207. See Chang, *supra* note 33.

208. See Collins, *supra* note 25, at 1495–98 (addressing the most common objections to limiting § 230(c)).

209. Some have suggested a restoration of common law distributor liability regarding Internet providers. See, e.g., Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 698 (N.D. Ill. 2006).

210. See generally Jon Burns, Recent Development, *Doe v. SexSearch.com: Placing Real-Life Liability Back Where It Belongs in a Virtual World*, 9 N.C. J.L. & TECH. 69 (2007); Rockey, *supra* note 198; Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran V. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583 (2008).

211. See, e.g., *supra* notes 64, 89, 99 and accompanying text.

even be desired, this proposal strikes a level of immunity more true to the stated goals of the conflicting statutes.

IV. CONCLUSION

Congress enacted 47 U.S.C. § 230 to encourage Internet service providers to self-regulate Internet indecency and obscenity.²¹² This section explicitly provides ICSPs immunity from traditional publisher liability and courts have interpreted this immunity sweepingly.²¹³ However, difficult issues arise when courts are asked to parse the nuances of exactly which activities rise to the level of “information content provider” and which do not. This analysis is further complicated when § 230 immunity clashes with other strongly held societal values. *Roommates.com II* provides an interesting, and relatively aberrant, illustration of a court rejecting an exceedingly broad application § 230 immunity in applying fair housing regulations.²¹⁴

The result in *Roommates.com II*, although ultimately desirable, is arguably inconsistent with the language and interpretation of § 230. Congress should amend § 230, as proposed *supra*, to limit immunity in circumstances where the ICSP is an “information content provider” with respect to an objectionable housing advertisement.²¹⁵ Congress should also amend the definition of “information content provider” to include an ICSP’s use of ICSP-created dropdown answers to mandatory questions, where such answers “materially contribute to alleged illegality of the conduct.”²¹⁶ This proposal is narrowly tailored to better serve the purposes of the FHA and § 230 than the current statutory language. Although this proposal is not perfect, in that it preserves some inconsistency between print and Internet entities and is based on the assumption that nondiscriminatory Internet housing advertisements should be discouraged at the cost of curtailing some Internet immunity, it achieves a level of immunity more true to the stated goals of the conflicting statutes and is therefore preferable to the current regime.

212. See *supra* Part I.B.

213. See *supra* Part I.C.

214. See *supra* Part II.C.

215. See *supra* Part III.C.

216. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc) (*Roommates.com II*).