

FAIR HOUSING COUNCIL v. ROOMMATES.COM

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, decided on May 15, 2007, the U.S. Court of Appeals for the Ninth Circuit cut back on the safe harbors for interactive computer services provided by the Communications Decency Act (CDA). Under Section 230(c) of the CDA, 47 U.S.C. 230(c), a provider of interactive computer services is not liable for material supplied by an unaffiliated information content provider. Courts have interpreted the CDA broadly to shelter Internet companies from a wide range of claims, including defamation and invasion of privacy, arising from third party content posted on these companies' system. The *Roommates* decision arguably limits the scope of this critical safe harbor.¹

I. FACTS.

Roommate.com provides an online matching service for people looking for housing, tenants, and roommates. Roommate displays an online questionnaire asking people to describe themselves and to express preferences in what they are looking for in a roommate. Some questions concerned age, gender, sexual orientation, and number of children (but not race). The Fair Housing Council sued Roommate for violating the federal Fair Housing Act, which prohibits discrimination in housing. The district court dismissed the suit under the CDA, finding that Roommates was not liable for the potentially discriminatory statements on its site made by the people offering housing and looking for roommates.

II. HOLDING.

The Ninth Circuit reversed on both narrow and broad grounds. In its

¹ By its terms, Section 230 does not apply to claims relating to intellectual property infringement and criminal behavior.

narrow ruling, the Ninth Circuit made clear that the simple act of asking certain questions may itself constitute a violation of the fair housing laws. With respect to the questions, Roommate was an information content provider, not an interactive computer service. After all, it created the questionnaire. Thus, with respect to the questions, the CDA provided Roommate with no protection, and the case was remanded for the district court to determine whether the questions violated the fair housing laws.

The Ninth Circuit's broader rulings concerned Roommate's display of the responses it received to its questionnaires. The Ninth Circuit articulated two possible theories under which Roommates could be liable for this display.

A. Active Solicitation.

The Ninth Circuit found that the CDA immunity does not apply "to those who actively encourage, solicit and profit from the tortious and unlawful communications of others." In making this ruling, the court distinguished the Ninth Circuit's earlier ruling in *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), involving an online dating service. There, a person created a false profile of a star from the Star Trek series, and posted it on the dating service. The court found that the CDA protected the online dating service, even though the subscriber created the false profile in response to a questionnaire supplied by the dating service. The *Roommates* court explained that *Carafano* differs from this case in a significant respect: "The prankster in *Carafano* provided information that was not solicited by the operator of the website.[...] Nothing in the questions the dating service asked suggested, encouraged, or solicited posting the profile of another person...." The *Roommates* court then said, "[w]e are not convinced that *Carafano* would control in a situation where defamatory,

private, or otherwise tortious information was provided by users in direct response to questions and prompts from the operator of the website."

Next, the Ninth Circuit provided the hypothetical example of the website www.harassthem.com, where the visitor "would be encouraged to provide private, sensitive, and/or defamatory information about others -- all to be posted for a fee. To post the information, the individual would be invited to answer questions about the target's name, addresses, phone numbers, social security number, credit card, bank accounts, mother's maiden name, sexual orientation, drinking habits, and the like. In addition, the website would encourage the poster to provide dirt on the victim...." The court concluded, "[b]y providing a forum designed to publish sensitive and defamatory information, and suggesting the type of information that might be disclosed to best harass and endanger the targets, this website might well be held responsible for creating and developing the tortious information."

Obviously, this is an extreme example. But if courts apply this "active inducement" concept too broadly, then many websites that solicit user comments could risk losing their CDA immunity. For example, many websites encourage comments on the practices of specific multinational corporations. Auction sites encourage users to provide feedback on vendors. Retail sites solicit comments about products such as books and films. Users of all these sites, under the veil of anonymity, often provide sharp criticisms that the target entity might want to silence.

The opinion does suggest what might be the outer bounds of its holding. The opinion found that while Roommate could be liable for user statements "in direct response to questions and prompts from the operator," it could not be liable for user statements made in the "Additional Comments" portion of their profile, where users were encouraged to write "a

paragraph or two describing yourself and what you are looking for in a roommate." The court held that "Roommate's involvement is insufficient to make it a content provider of these comments. Roommate's open-ended question suggests no particular information that is to be prompted by members; Roommate certainly does not prompt, encourage, or solicit any of the inflammatory information provided by some of its members."

At the same time, Judge Reinhardt dissented from this holding. He said, "when viewed in the context of the entire sign-on process that conveys the message to prospective users that they should express their preferences for tenants based on race, gender, sexual orientation, national origin, and religion, ordinary users would understand the recommendation to constitute a suggestion to expand upon the discriminatory preferences that they have already listed and to list their additional discriminatory preferences in that portion of the profile."

If even open-ended questions cause a company to lose its CDA safe harbor, companies will begin to limit the circumstances under which they request user views. Freedom of expression on the Internet will become much more constricted. Hopefully courts will limit this holding to its facts – to a situation where the website operator's questions intentionally elicit responses that the operator knows are highly likely to be unlawful. But even if courts properly restrict their application of this "active inducement" test, the test makes it more difficult for defendants to prevail on motions to dismiss on CDA grounds. Instead, cases are more likely to go to trial as plaintiff's attempt to prove that the defendant encouraged or solicited the unlawful statements.

B. Channeling

The Ninth Circuit found another way in which Roommate became an

information content provider with respect to the user generated content. Roommate channels information based on members' answers to questions, as well as the answers of other members. For example, members can only search profiles with compatible answers. Also, Roommate sends email notifications that exclude incompatible listings. The court concluded that the "search mechanism and email notification mean that [Roommate] is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals. By categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information" that renders it an information content provider.

This obviously is an enormous problem for any service that forwards information, *e.g.*, an online news service that forwards information to subscribers based on user defined criteria. For example, if a group of users want news stories concerning Paris Hilton, and the service forwards an article that contains defamatory information, the Ninth Circuit's decision suggests that the news service may be liable for defamation.

The court's discussion of "channeling" is very brief -- just two paragraphs. Perhaps it can be read not as a separate test for losing CDA immunity, but as an added factor when a website actively solicits the unlawful material. However, Judge Reinhardt in his dissent describes these as "two independent tests for determining whether Roommate" is an information content provider. And if other courts view channeling as an independent test, hopefully they will deprive the Internet company of the CDA safe harbor only when the channeling is based on facially unlawful categories. Continuing with the Paris Hilton example, the news service would lose its immunity if it intentionally designed its service to forward information highly likely to defame her or violate her privacy.

In sum, if the standards articulated by the *Roommates* court are interpreted too expansively, the safe harbor provided by the CDA may not provide as much protection for the interactive Internet services to which users have grown accustomed.