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Plumbing the Depths of the Communications Decency Act's Safe Harbor: Recent Decisions in the Seventh and Ninth Circuits

Two websites that allowed users to post listings of available housing, were separately sued for violations of the Fair Housing Act based on allegedly discriminatory postings by their users. Both websites claimed they were protected by the immunity provided under Section 230(c)(1) of the Communications Decency Act (CDA) for content provided by the users of their site. The Ninth Circuit, sitting en banc, disagreed on 3 April 2008 in Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) and found that Roommate.com was not immune under the CDA for users' answers to allegedly discriminatory questions and Roommate's sorting and filtering of the resulting profiles. The Seventh Circuit, however, on 14 March 2008, in* Chicago Lawyer's Committee for Civil Rights Under Law v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), granted Craigslist immunity under the CDA for users' postings on its site. Despite the apparent inconsistency between these decisions, the two cases have key factual differences that explain the divergent results. Additionally, both decisions in similar ways narrow previous understandings of CDA immunity for website operators.*

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I. Introduction

Under Section 230(c)(1) of the Communications Decency Act (CDA), a provider of interactive computer service, such as a website operator, is not liable as the publisher or speaker of material supplied by an unaffiliated information content provider.[1] The statute thus draws a clear distinction between the provider of interactive computer

[1] 47 U.S.C. 230(c)(1). By its terms, Section 230 does not apply to claims relating to intellectual property infringement and federal criminal activity.

service, on the one hand, and the information content provider on the other.[2] Courts have interpreted the category of provider of interactive computer service broadly; website operators that contract for, select, and edit content have all remained providers of interactive computer service, and thus within the CDA's safe harbor.[3]

Two recent appellate decisions, *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC,* 521 F.3d 1157 (9th Cir. 2008)(*Roommate*[4]) and *Chicago Lawyer's Committee for Civil Rights Under Law v. Craigslist, Inc.,* 519 F.3d 666 (7th Cir. 2008)*(Craigslist),* appear to demonstrate the limit of judicial flexibility for the category of provider of interactive computer service. In *Roommate*, the full Ninth Circuit found that the operator of a website for housing services was so intimately involved in the development of the content that it crossed the line from provider of interactive computer service to information content provider. By contrast, the website operator in *Craigslist* participated in the development of the content to a lesser degree, and remained on the interactive computer service side of the line.

The Ninth Circuit defined the phrase "development of information" to include "materially contributing to [the] alleged unlawfulness" of the content.[5] It then discussed neutral actions by service providers that would not meet this test, in an effort to ensure that its ruling not interfere with legitimate Internet services. Nonetheless, the court acknowledged that its interpretation of the CDA was less absolute than in previous decisions, and could lead to uncertainty in "close cases."[6]

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[2] The term interactive computer service includes any "system…that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet…." 47 U.S.C. § 230(f)(2). An information content provider is someone who "is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3).

[3] See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. 1998) (holding that CDA immunity applied even if website had "an active, even aggressive role in making available content prepared by others").

[4] Despite the fact that its website's URL is www.roommates.com, the company is incorporated under the singular name "Roommate.com, LLC" and will be referred to accordingly.

[5] *Roommate*, 521 F.3d at 1168.

[6] Id. at 1174.

At the same time, the facts in *Roommate* were extreme. Roommate asked questions that probably violated the U.S. fair housing laws; it required users to answer these questions in a manner that forced the users to violate the fair housing laws; and it required users to search for information using unlawful criteria. Hence, it is no surprise that the Ninth Circuit refused to extend the CDA's protection to Roommate's activities. So long as future courts deny the safe harbor only in clear-cut cases, and follow the Ninth Circuit's admonition that close cases "must be resolved in favor of immunity,"[7] the Ninth Circuit's decision should not have a negative impact on the growth of the Internet.

This article will first discuss the Ninth Circuit's decision in *Roommate*, then the Seventh Circuit's decision in *Craigslist*. After reviewing the opinions, the article will assess their probable impact on the outer limits of immunity for website operators under the CDA.

II. *Fair Housing Council of San Fernando Valley v. Roommate*

In *Fair Housing Council of San Fernando Valley v. Roommate.com,* the Ninth Circuit sitting *en banc* reached the same general conclusions as the panel a year earlier.[8] In a complex decision, Chief Judge Kozinski, writing for the majority, found that the phrase "development of information" in the definition of an "information content provider" included one who "contributes materially to the alleged illegality" of the information.[9]

1. Facts

Roommate provides a website designed to match people looking for housing with those who have spare rooms. In order to search listings or post vacant housing on the website, users must create profiles which require them to provide both basic information such as their name, location, and email address as well as information about their gender, sexual orientation, and the presence of children. Users are further required to provide

[7] Id.
[8] Federal appellate decisions in the U.S. are rendered by three-judge panels. A disappointed litigant can seek rehearing by the entire circuit court. The court has the discretion whether to grant this en banc hearing.
[9] *Id.* at 1168.

their preferences in a roommate's gender, sexual orientation, and the presence of children based on drop-down choices provided by Roommate. Leaving an option blank during this preference-selection stage automatically selects all of the choices available. Roommate also provides an optional "Additional Comments" section inviting users to describe themselves and their desired roommate in an open-ended essay. Roommate compiles this information into a searchable profile page and sends out emails alerting subscribers to new matches based on the criteria provided during registration. The Fair Housing Council (Council) sued Roommate in the United States District Court, Central District of California, under the Fair Housing Act (FHA). The FHA makes it illegal

> to make, print, 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.[10]

The Council alleged that Roommate violated the FHA in three ways: by posing questions that indicate an intent to discriminate, by developing and displaying users' discriminatory preferences in searchable profile pages, and by publishing the discriminatory comments made by users in the "Additional Comments" section. The District Court dismissed the suit after finding that Roommate was immune under the CDA and therefore not liable under any of the Council's theories for the allegedly discriminatory statements made by Roommate's users.

The Council appealed to the Ninth Circuit, and a three judge panel issued its decision on 15 May 2007. In an opinion written by Judge Kozinski, the panel affirmed the District Court's finding that the CDA protected Roommate with respect to the free text "Additional Comments" posted by users.[11] However, the Ninth Circuit held that the simple act of asking certain questions may itself constitute a violation of the fair housing

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[10] 42 U.S.C. § 3604(c).

[11] *Fair Housing Council of San Fernando Valley v. Roommate.com*, 489 F.3d 921 (9th Cir. 2007), *aff'd en banc*, 521 F.3d 1157 (9th Cir. 2008).

laws. Because Roommate created these potentially discriminatory questions, the court found that with respect to the questions, Roommate was an information content provider, not a provider of an interactive computer service, and therefore was not immune under the CDA. Additionally, the Ninth Circuit found that Roommate could be liable for the display of the responses it received to its questions under two distinct theories. The court held that CDA immunity did not apply "to those who actively encourage, solicit and profit from the tortious and unlawful communications of others,"[12] and that by providing drop-down boxes containing pre-defined criteria, Roommate actively solicited the allegedly unlawful user content. The court also concluded that "by categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information" that renders it an information content provider ineligible for CDA protection.[13]

2. The Ninth Circuit's En Banc Decision

Roommate filed a petition for rehearing en banc, which the Ninth Circuit granted. On 3 April 2008, in another opinion written by Judge Kozinski, the en banc Ninth Circuit came to the same conclusions as the earlier panel decision. The en banc opinion was longer, more complex, and more nuanced than the panel decision, largely because Judge Kozinski devoted so much space to responding to Juge McKeown's forceful dissent.

With respect to the content of Roommate's questions, the en banc opinion was nearly identical to the panel decision. The court found that because "Roommate created the questions and choice of answers," Roommate is "undoubtedly the 'information content provider' and can claim no immunity" under the CDA.[14] This portion of the case was, as in the panel decision, remanded to the District Court to determine if the questions themselves violated the FHA.

Likewise, the en banc decision's grant of immunity to Roommate for publication of the users' responses in the "Additional Comments" section was similar to that of the panel decision. Here, the Ninth Circuit found that because Roommate "publishes these

[12] *Roommate*, 489 F.3d 921 at 928 .
[13] Id. at 929.
[14] *Roommate*, 521 F.3d at 1164.

comments as written" and "does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences," "[t]his is precisely the kind of situation for which section 230 was designed to provide immunity."[15] In the panel decision, Judge Reinhardt had dissented from this holding, arguing that by soliciting discriminatory preferences earlier, Roommate should be held liable for discriminatory responses in the "Additional Comments" section. However, the en banc court decided this issue unanimously, stating "the encouragement that bleeds over from one part of the registration process to another is extremely weak, if it exists at all," and concluded that "[s]uch weak encouragement cannot strip a website of its section 230 immunity."[16]

The en banc decision differed somewhat from the panel decision in its application of the CDA to Roommate's display and search of user profiles based on pre-defined criteria. In the en banc opinion, both of the liability theories advanced in the panel decision – active solicitation and channeling - were absorbed into the broader question of whether the website operator materially contributed to the alleged unlawfulness of the content. If so, the operator "developed" the information, fell within the definition of an information content provider, and lost protection under the CDA. The court found that Roommate materially contributed to the alleged unlawfulness of the content in three ways: by requiring users to answer allegedly discriminatory questions, by actively soliciting allegedly discriminatory answers even if optional, and by designing a search and email system that limited listings based on allegedly discriminatory criteria.

a) Requiring Users to Answer Allegedly Discriminatory Questions

The Ninth Circuit found that by requiring potential users to answer allegedly discriminatory questions about sex, family status, and sexual orientation using pre-populated answers, Roommate became "more than a passive transmitter of information provided by others."[17] Since Roommate created the allegedly unlawful questions, and then *required* the user to answer as a condition of doing business, the court found that

[15] Id. at 1173-74
[16] Id. at 1174.
[17] *Roommate*, 521 F.3d at 1166.

Roommate was responsible for the allegedly unlawful answers. The court analogized Roommate's practices to a "real life" real estate broker who says "tell me whether you're Jewish or you can find yourself another broker," and stated that "when a business enterprise extracts such information from potential customers" as a condition of doing business, it develops such information.[18]

b) Actively Soliciting Allegedly Discriminatory Answers

Judge Kozinski then expanded the "active solicitation" reasoning in the panel decision, finding that even if the answers to the questions were not required as a condition of doing business, by eliciting answers, Roommate contributed to the alleged unlawfulness of the information and thus developed the responses. The court stated unequivocally that "unlawful questions solicit (a.k.a. 'develop') unlawful answers," and found that by providing users with drop down menus with unlawful alternatives, Roommate induced users to express discriminatory preferences.[19]

In making this ruling, the Ninth Circuit expressly narrowed its holding in *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003). In *Carafano*, the court found a dating service automatically immune under the CDA for a fraudulent profile created by an unknown subscriber; the Ninth Circuit held that a website operator could never be liable for user-created profile content because "no [dating] profile has any content until a user actively creates it."[20] Here, the court rejected that broad language, stating "[w]e disavow any suggestion that *Carafano* holds an information content provider *automatically* immune so long as the content originated with another"[21] because, under the clarified definition of development, "a website operator may still contribute to the content's illegality and thus be liable as a developer."[22]

c) Designing a Search and Email System that Limits Listings Based on Allegedly Discriminatory Criteria.

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[18] Id.
[19] Id.
[20] *Carafano*, 339 F.3d at 1124.
[21] *Roommate*, 521 F.3d at 1171.
[22] Id.

Next, the Ninth Circuit found that Roommate was "sufficiently involved with the design and operation of the search and email systems – which are engineered to limit access to housing on the basis of the protected characteristics elicited by the registration process – so as to forfeit any immunity to which it was otherwise entitled under section 230."[23] The court reasoned that if there is no immunity for asking discriminatory questions, Roommate "can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing."[24] Judge Kozinski then analogized Roommate's filtering to the unlawful screening of prospective housing applicants by intermediaries who have been found liable for implementing the landlords' preferences: "if such screening is prohibited when practiced in person or by telephone, we see no reason why Congress would have wanted to make it lawful to profit from it online."[25]

Judge Kozinski acknowledged that reading the court's definition of "develop" too broadly "would defeat the purposes of section 230 by swallowing up every bit of immunity that the section otherwise provides."[26] To clarify the limits of the application of the court's definition, Judge Kozinski emphasized that "providing neutral tools, even if used to perform unlawful or illicit searches, does not amount to 'development' for the purposes of immunity exception."[27] Therefore, the court suggested, "a housing website that allows users to specify whether they will or will not receive emails by means of *user defined* criteria… would be immune."[28]

3. Judge McKeown's Dissent

The en banc decision contained a forceful dissent by Judge McKeown, joined by Judge Rymer and Judge Bea, which required Judge Kozinski to sharpen his reasoning from the panel decision and place clear limitations on the application of the holding to neutral Internet services. At the outset of his dissent, Judge McKeown warned that "the

[23] Id. at 1170.
[24] Id. at 1167.
[25] Id. citing *Jeanty v. McKey & Poague, Inc.*, 496 F.2d 1119, 120-21 (7th Cir. 1974).
[26] Id. at 1167.
[27] Id. at 1169.
[28] Id. (Emphasis in original)

majority's unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned."[29] Although Judge McKeown agreed that the CDA doesn't protect Roommate for the questions themselves, he found the majority's analysis of Roommate's liability for the responses and profiles generated by users flawed for three reasons: (1) it "conflates the questions of liability under the FHA and immunity under the CDA;" (2) it rewrites the CDA by modifying the definition of "information content provider" and (3) it has "far reaching practical consequences in the Internet world."[30]

a) Conflation of Liability With Immunity.

Judge McKeown found the majority's result "driven by the distaste for housing discrimination" rather than a clear application of the CDA and identified six passages in Judge Kozinski's opinion that "highlight that the majority's conclusion rests on the premise that Roommate's questions and matching function violate the FHA."[31] The dissent observed that the "entire opinion links Roommate's ostensibly reprehensible conduct (and that of its users) with an unprecedented interpretation of the CDA's immunity provision."[32]

This distaste, the dissent argued, resulted in an immunity analysis that "is built on substantive liability."[33] Instead, the dissent argued, the "issue of user liability for allegedly discriminatory preferences is a separate question" from Roommate's liability as an 'information content provider' under the CDA, stating "it would be nonsense to claim to be immune only from the innocuous."[34] The dissent found that the majority opinion conflated liability with immunity, an "upside-down approach" which requires a finding of "liability in order to decide whether immunity is available."

Judge Kozinski responded that the dissent scored a "debaters point" by "noting that the same activity might amount to 'development' or not, depending on whether it

[29] 521 F.3d at 1176 (J. McKeown, dissenting).
[30] Id. at 1177-78 (J. McKeown, dissenting).
[31] Examples include "If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online." Id. at 1164.
[32] Id. at 1178 (J. McKeown, dissenting).
[33] Id. at 1182 (J. McKeown, dissenting).
[34] Id. (J. McKeown, dissenting).

contributes materially to the illegality of the content."[35] However, Judge Kozinski stressed that the court's definition of 'develop' "does not depend on finding substantive liability, but merely requires analyzing the context in which a claim is brought."[36]

b) Rewriting the Definition of Information Content Provider.

The dissent next found the majority's interpretation of 'develop' within the definition of information content provider in Section 230(f)(3) to be contrary to principles of statutory interpretation. Claiming the majority "race[d] past the plain language of the statute," the dissent stated "we should give the term ['develop'] its ordinary meaning."[37] Looking to Webster's Dictionary, the dissent defined develop as a "gradual advance or growth through progressive changes"[38] and found that this "keeps intact the settled rule that the CDA immunizes a webhost who exercises a publisher's traditional editorial functions."[39] The majority criticized this definition by pointing out that it predates the Internet (finding the same definition in a 1963 edition of Webster's) and therefore does not apply to the "swift and disorderly changes that are the hallmark of growth on the Internet."[40] Further, the majority suggested alternative definitions from Webster's[41] and Wikipedia[42] which it found more relevant. To the majority, the fact that the definition of information content provider in Section 230(f)(3) includes both the words 'create' and 'develop' "as separate bases for loss of immunity" is important because the dissent's definition of develop "fits just as easily within the definition of 'creation.'"[43] The dissent countered that although "the majority has no problem offering up potentially suitable definitions of 'development' by turning to dictionaries… it fails to explain why, and from where, it plucked its definition."[44]

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[35] Id. at 1171, n.30.
[36] Id.
[37] Id. at 1184 (J. McKeown, dissenting).
[38] Id. (citing *Webster's Third New International Dictionary*, 618 (2002))
[39] Id.
[40] Id. at 1168.
[41] "making usable or available" *Webster's Third*, 618.
[42] "The process of researching, writing, gathering, organizing, and editing information for publication on websites" (Wikipedia definition of "web content development").
[43] *Roommate*, 521 F.3d at 1168.
[44] Id. at 1184, n. 11 (J. McKeown, dissenting).

The dissent then argued that the majority ignored Congressional intent and prior case history in constructing the CDA narrowly. According to the dissent, Congress intended that "third-party content on the Internet should not be burdened with the traditional legal framework."[45] Pointing to the majority's claims that CDA immunity should not "give online businesses an unfair advantage over their real-world counterparts,"[46] the dissent responded that "this is precisely the path Congress took with the CDA."[47] The dissent asserted that whether the FHA trumps the CDA is a policy decision for Congress, and because Congress had made its intentions clear and commented positively on earlier cases granting robust immunity,[48] this broad grant of immunity should be upheld.

Additionally, the dissent found that CDA case law had "adopted a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'"[49] In particular, courts had held that website operators were not liable for information provided by third parties, even if they act as traditional publishers would by editing, selecting, and organizing the content.[50] The majority narrowed this precedent through its definition of 'develop' and by expressly overturning the holding in *Carafano* that a website operator is automatically immune for content created by a third party. The dissent found that the majority's narrowing of *Carafano* was done "without *any* language in the statute supporting the consideration of the webhost's prompting or solicitation."[51] To the dissent, "the CDA does not

[45] Id. at 1176 (J. McKeown, dissenting).
[46] Id. at 1164 (footnote 15).
[47] Id. at1177 (J. McKeown dissenting).
[48] H.R. REP. No. 107-449, 2002 U.S.C.C.A.N. 1741, 1749 (Committee report stated with reference to *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), and its progeny that "[t]he courts have correctly interpreted section 230(c)" and sought to apply the same protection in the "Dot Kids Implementation and Efficiency Act").
[49] *Roommate*, 521 F.3d at 1180 (citing *Carafano*, 339 F.3d at 1123) (J. McKeown dissenting).
[50] *See Batzel*, 333 F.3d at 1026-27.
[51] *Roommate*, 521 F.3d. at 1186 (J. McKeown dissenting).

countenance an exception for the solicitation or encouragement of information provided by users."[52]

Judge Kozinski responded to the dissent's argument that the majority opinion sets the Ninth Circuit apart from other circuits by observing that

> [n]o other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today. No case cited by the dissent involves active participation by the defendant in the creation and development of the allegedly infringing content; in each the interactive computer service provider passively relayed content generated by third parties … and did not design its system around the dissemination of unlawful content.[53]

c) Harm to the Internet.

Lastly, the dissent argued that the majority's decision had severe ramifications for the Internet by creating uncertainty, chilling speech, and impeding development of useful tools and technologies. By finding that Roommate was not eligible for CDA immunity because it actively solicited the unlawful content and used a discriminatory filtering process, the dissent found that the majority unnecessarily narrowed an important protection for website operators. The dissent pointed to "countless websites" that provide structured searches and categorized information, warning that "putting a lid on [these] functions of interactive websites stifles the core of the their services."[54] Removing immunity based on the unlawfulness of the information could place significant filtering burden on operators, putting "the webhost in the role of a policeman for the laws of the fifty states and the federal system."[55] Further, by eliminating immunity based on solicitation or specialization of content, the dissent foresaw a "direct restriction on the

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[52] Id. at 1185. The dissent goes on to cite a number of decisions that found even solicited information immune under the CDA. *See Universal Commc'n*, 478 F.3d at 421. (stating that the CDA, unlike ECPA, does not include secondary liability).
[53] *Roommate*, 521 F.3d at 1172 n. 33.
[54] Id. at 1188.
[55] Id.

free exchange of ideas and information,"[56] pointing to news organizations that solicit third-party information and websites directed to protected categories.[57]

Judge Kozinski agreed that if "any classification of information… could be construed as 'development' under an unduly broad reading of the term," it would "sap section 230 of all meaning."[58] However, Judge Kozinski argued that the majority opinion was sufficiently narrow so as to preclude such a result. His opinion contained a significant amount of limiting language that should restrict its application to only the most blatant acts of inducing unlawful conduct (as in this case).[59] Indeed, Judge

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[56] Id.

[57] Id. (noting that there are "countless" specialized roommate sites such as http://christian-roommates.com and http://prideroommates.com).

[58] Id. at 1172.

[59] Judge Kozinski repeatedly characterized the behavior that materially contributes to alleged illegality in very strong terms: "asks discriminatory questions;" "makes answering discriminatory questions a condition of doing business"; "forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully" (at 1166); "designed to steer users based on discriminatory criteria;" "designed its system to use allegedly unlawful criteria;" "force users to participate in its discriminatory process"; "use unlawful criteria;" "designed to achieve illegal ends" (at 1167); "require the use of discriminatory criteria"; "to transform an innocent message into a libelous one"; "directly involved in the alleged illegality;" "taking affirmative acts that are unlawful;" "connection to the discriminatory filtering process is direct and palpable" (at 1169); "makes discrimination both possible and respectable;" "create a website designed to solicit and enforce housing preferences that are alleged to be illegal;" "contributed to the libelousness of the message" (at 1170) "elicits the allegedly illegal content and makes aggressive use of it"; "developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site;" "directly involved with developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practices;" "forcing subscribers to divulge protected characteristics and discriminatory preferences"; "active participation by the defendant in the creation or development of the allegedly unlawful content;" "designed its system around the dissemination of unlawful content" (at 1172); "encourage or enhance any discriminatory content created;" "substantial affirmative conduct on the part of the website creator promoting the use of such tools for unlawful purposes"; "it is very clear that the website directly participates in developing the alleged illegality" (at 1174); "encourage illegal content, or design your website to require users to input illegal content" (at 1175).

Kozinski included a lengthy paragraph setting forth examples of when liability would and would not attach to a service provider. [60]

Nonetheless, Judge Kozinski acknowledged that majority's opinion could create uncertainty: "there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality." Accordingly, these close cases "must be resolved in favor of immunity lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites."[61]

III. *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.,* the Seventh Circuit found Craigslist immune under the CDA for allegedly discriminatory housing postings made by the site's users. While this result appears inconsistent with *Roommate*, which also involved a housing website, the Craigslist service differed in critical respects from Roommate. In particular, Craigslist passively hosted content provided by users, while Roommate prompted specific user responses and then channeled the responses based on categories it created. Although the opinion lacked the clarity of *Roommate*, the Seventh Circuit hinted that it, too, may exclude from CDA protection website operators that actively solicit allegedly unlawful content.

1. Facts

Craigslist.org is a network of community websites for over 450 cities that provides classified listings in categories ranging from housing to jobs to personal ads. Craigslist receives over 30 million such postings per month. At issue in this case are Craigslist's housing listings that allow users to post advertisements – either landlords with rooms or apartments to rent, or individuals seeking places to live. In order to create a posting advertising available housing, a user is provided with a screen containing a number of blank fields to complete including email address, rental price, location, and a blank text box entitled "Posting Description." The content of these fields is left entirely to the user, and as a result, some of these housing notices display blatant bias against

[60] Id. at 1169.
[61] Id. at 1174.

races, religions, genders, or sexual orientations.[62] Once created, the postings are made available on the website in the order they are received for users to browse. A blank search box is provided that allows users to search all listings based on user-defined criteria.

In response to allegedly discriminatory postings on the website, the Chicago Lawyers Committee sued Craigslist in United States District Court, Northern District of Illinois, for violating the FHA. Craigslist argued that section 230(c)(1) of the CDA sheltered it from liability for content posted by its subscribers. The District Court, in a decision filed on 14 November, 2006, agreed with Craigslist and granted Craigslist's motion to dismiss. The Chicago Lawyers' Committee appealed the decision to the Seventh Circuit.

2**. Holding**

On March 14, 2008, Judge Easterbrook writing for the Seventh Circuit upheld the District Court's finding that Craigslist was immune under a "natural reading" of section 230(c)(1) of the CDA.[63] The court found that under the FHA, the only way that Craigslist could be liable for users' comments would be as a publisher. However, under Section 230(c)(1) of the CDA, a provider of interactive computer services cannot be treated as the "speaker" of the poster's words. Accordingly, to the extent that Craiglist is a provider of interactive computer services, it cannot by found liable for allegedly discriminatory content posted by users.

The court rejected the Lawyers' Committee's arguments that the CDA does not apply to the FHA because Congress did not contemplate discriminatory housing advertisements when it enacted the CDA. Instead, the court observed that although the FHA was in existence at the time the CDA's enactment, Congress did not explicitly exclude it from the reach of 230(c)(1), as it excluded intellectual property and federal criminal laws. Accordingly, the CDA applied to the FHA violations.

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[62] Notable examples include postings proclaiming "NO MINORITIES" and "No children." See *Craigslist*, 519 F.3d at 668.
[63] Id. at 671.

Likewise, the court rejected the Lawyers' Committee's argument that Section 230(c) is restricted to the blocking and screening of sexually explicit information since it is included in the CDA under the heading "Protection for 'Good Samaritan' blocking and screening of offensive material." The court found that Congress could have limited the statute to sexually oriented material, but instead intentionally included the broad term "publisher or speaker of *information*."[64] Judge Easterbrook explained that, in this context, "information" includes "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."[65]

In addition, the Seventh Circuit understood the problems that would ensue from requiring a service such as Craigslist to filter or screen for discriminatory content. Although such filtering might be possible, the court recognized that automated filters that search, for example, for the word "white" would remove both a discriminatory post and one for housing in a "red brick house with white trim."[66] Further, the court acknowledged that filtering the entire Craigslist network of sites by hand would require a staff significantly larger than its current 30 employees, delay postings, make the service less useful, and still be prone to error.

Finally, Judge Easterbrook recognized that the proper remedy here would be to pursue those who post the discriminatory ads, not Craigslist. Immunizing the website operator under Section 230(c)(1) did not free the individual making a discriminatory post from liability. The court pointed out that a service like Craigslist can be used to identify targets to investigate, but that the Lawyers' Committee "cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."[67]

IV. Analysis

1) Consistency Between *Roommate* and *Craigslist.*

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[64] Id. (emphasis added).
[65] Id.
[66] Id. at 668.
[67] Id. at 672.

Although both Craigslist and Roommate provide users the opportunity to post notices of available housing and search those notices, the fact that the Ninth Circuit denied CDA protection to Roommate, while the Seventh Circuit granted it to Craigslist, is not as inconsistent as it may seem. Unlike Craigslist, which provided blank text boxes for users to describe their available housing, Roommate created drop-down menus of pre-determined answers to allow users to identify their race, gender, and sexual orientation. Roommate then allowed users to search its database of available housing and create targeted emails based on these same criteria. Craigslist's search function, in contrast, was based on user-defined search terms entered into a generic search prompt. In contrast to Roommate, Craigslist did not "induce anyone to post any particular listing or express a preference for discrimination."[68] In other words, the Craigslist service lacked precisely those features that the Ninth Circuit found so problematic in *Roommates*. Craigslist operated like Roommate's "Additional Comments" section, which the Ninth Circuit found protected by the CDA.

Craigslist also is consistent with *Roommates* in that it appears to take a step back from the more absolutist view of CDA immunity articulated by earlier courts. After reviewing Craigslist's advocacy of "broad immunity for liability for unlawful third-party content," and the plaintiff's counter-interpretation that Section 230 is limited to efforts to block or screen content, the Seventh Circuit concluded that "neither side's argument finds much support in the statutory text." [69] Quoting at length from his own rambling dicta in *Doe v. GTE Corp.,* 347 F.3d 655, 659-60 (7th Cir. 2003), Judge Easterbrook concluded that "section 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts."[70]

Immediately after quoting this dicta, the Seventh Circuit asserted that the Supreme Court's holding in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005), is incompatible with treating Section 230(c)(1) as providing general immunity with respect to third-party content. This is a complete non-sequitur. To be sure, the Supreme Court in *Grokster* held that a service provider incurred secondary

[68] Id. at 671.
[69] Id. at 669.
[70] Id. at 670.

copyright liability for actively inducing infringing conduct. But Section 230(e)(1) of the CDA has an express exception for intellectual property infringement: "Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property." Thus, regardless of how broadly a court interprets the CDA's safe harbor, it cannot apply to copyright liability. Accordingly, *Grokster* is irrelevant to the statute's interpretation.

While the Seventh Circuit rejected the notion that the CDA provides absolute immunity to service providers, it did not attempt to define the limits of the safe harbor, as the Ninth Circuit did in *Roommate*. However, in one passage the Seventh Circuit suggests limits similar to those found by the Ninth Circuit in *Roommate*. In rejecting the Lawyers' Committee's contention that Craigslist "caused" the publication of the discriminatory statements, the Seventh Circuit stated:

> Causation in a statute such as [the FHA] must refer to causing a particular statement to be made, or perhaps the discriminatory content of a statement. […] Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination...[71]

This passage implies that if Craigslist had induced the expression of a discriminatory preference, it would have "caused" the publication of the statement. This, in turn, indicates that the Seventh Circuit might agree with the Ninth Circuit that the CDA does not apply to website operators that actively encourage submission of unlawful content. Significantly, the *Roommate* court pointed to this passage as evidence that "the Seventh Circuit's opinion is actually in line with own."[72]

2) Consistency With CDA Jurisprudence.

While *Roommate* and *Craigslist* appear consistent with one another, are they also consistent with the body of existing CDA jurisprudence? Judge Kozinski certainly is correct that "[n]o other circuit has considered a case like" *Roommate*; no other CDA case has "involve[d] active participation by the defendant in the creation and development of the allegedly infringing content;" and no other interactive computer service provider has

[71] *Craigslist,* 519 F.3d at 671.
[72] *Roommate*, 521 F.3d at 1172 n. 33.

"design[ed] its system around the dissemination of unlawful content."[73] While other cases have involved Internet companies soliciting content that turns out to be unlawful, "Roommate … does more than encourage or solicit; it forces users to answer certain questions and thereby provide information that other clients can use to discriminate unlawfully."[74] As the Ninth Circuit explains, "Roommate's work in developing the discriminatory questions, discriminatory answers, and discriminatory search mechanism is directly related to the illegality of the site.[…] [H]ere, Roommate is directly involved with developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practices."[75]

Because no other CDA case involved facts as extreme as *Roommate*, the result in *Roommates* is not inconsistent with other CDA cases. Likewise, the test articulated by the Ninth Circuit – "a website helps to develop unlawful content … if it contributes materially to the alleged illegality of the conduct" – is not inconsistent with previous interpretations of "information content provider," because that term has never been applied to a similar set of facts.

Moreover, the *Craigslist* decision in passing provided a hint of how *Craigslist* and *Roommate* can be reconciled with the architecture of the existing CDA jurisprudence. The Seventh Circuit stated that "[i]f craigslist 'causes' discriminatory notices, then so do phone companies and courier services…."[76] The Seventh Circuit probably was alluding to the principle that common carriers generally have no liability for their dissemination of defamatory statements made by others. However, several courts have indicated that this privilege is qualified; common carriers are exempt from liability so long as they do not act in bad faith.[77] Both the Seventh and Ninth Circuits seem to be applying a similar bad

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[73] Id.
[74] Id. at 1166 n. 19.
[75] Id. at 1172.
[76] *Craigslist*, 519 F.3d at 672.
[77] *See, e.g.*, *Peterson v. Western Union Tel. Co.*, 67 NW 646, 647 (Minn. Sup. Ct. 1896)("But where the message, on its face, is clearly susceptible of a libelous meaning, is not signed by any responsible person, and there is no reason to believe that it is a cipher message, and it is forwarded under such circumstances as to warrant the jury in finding that the operator, in sending the message, was negligent or *wanting in good faith in the premises*, the company may be held to have maliciously published the libel. A publication under such circumstances is not privileged.)(Emphasis supplied.).

faith standard to website operators that materially contribute to the development of the unlawful content.

This parallel to defamation follows courts' longstanding practice of interpreting the CDA through the prism of defamation law.[78] Defamation law establishes three standards of liability for three classes of actors with varying degrees of control over the unlawful content. Publishers are strictly liable; distributors have notice liability, *e.g.*, they are liable only if they know the content they distribute is defamatory; and common carriers have no liability, subject to the bad faith exception recognized by some courts. Section 230(c)(1) provides that a website operator should not be treated as the "publisher" of the third party content it hosts. Thus website operators are not subject to the strict liability standard that applies to publishers in defamation cases. *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), ruled that "publishers" under Section 230(c)(1) included "distributors," which meant that Section 230(c)(1) also protected website operators from notice liability. Accordingly, *Zeran* and its progeny treated website operators as common carriers under defamation law.[79] Prior to *Roommate*, no website operator had acted with the degree of bad faith that could subject a common carrier to defamation liability. But Roommate did act with this degree of bad faith. The Ninth Circuit's imposition of liability on Roommate, therefore, parallels the defamation principles followed by the CDA jurisprudence.

Significantly, *Roommate* and *Craigslist* do not undermine *Zeran*; they do not challenge *Zeran*'s holding that websites are not subject to notice liability. Rather, as Judge Kozinski makes abundantly clear, they address the unusual circumstance of operators that directly induce illegal content.

Nonetheless, as Judge Kozinski notes, "there will always be close cases where a clever lawyer could argue that something the website operator did encouraged the illegality."[80] Notwithstanding Judge Kozinski's admonition that these close cases "must

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[78] Congress enacted Section 230 in response to a defamation case, *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[79] See, e.g., *Universal Comm'cn Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007), *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003), *Ben Ezra, Weinstein, and Co., Inc. v. Am Online Inc.,* 206 F.3d 980 (10th Cir. 2000).
[80] *Roommates,* 521 F.3d at 1174.

be resolved in favor of immunity,"[81] that fact remains that this ruling could make it harder for defendants to prevail on motions to dismiss under the CDA. Instead, cases are more likely to go to trial as plaintiffs attempt to prove that the defendant encouraged or solicited the unlawful content.

V. Conclusion

Without question, *Roommate* and *Craigslist* appear to take the CDA a step back from more absolute descriptions of the safe harbor in earlier cases. But it is at most a small step. Pushed by Judge McKeown's dissent, Judge Kozinski repeatedly stressed that the majority holding did not apply to neutral services, but only to operators with a direct and palpable connection to the illegal content. CDA immunity for website operators remains robust. As Judge Kozinski stated: "The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[82]

[81] Id.
[82] Id. at 1175.