NOTES

Picking Roommates on the Internet: Matching Roommates Online and Losing Communications Decency Act Immunity in the Process

I. INTRODUCTION

Roommates.com, LLC (Roommates) is in the business of matching would be cohabitants with one another—and does so on a massive scale.[1] Roommates' Web site requires that users disclose their sex, sexual orientation, and whether children will be brought to the household through a drop-down menu with prepopulated answers; users must also disclose their preference in roommates according to the same criteria.[2] Additionally, users are encouraged, but not required, to write an open-ended essay that further describes them in a section entitled "Additional Comments."[3] Information from both sources is in turn displayed on the users' individualized pages and used by Roommates to match users.[4] The Fair Housing Councils of San Fernando Valley and San Diego (Councils) filed suit against Roommates in federal court, claiming that Roommates had run afoul of the Fair Housing Act (FHA) and California state laws.[5]

The district court did not consider the FHA or related claims, and instead found that Roommates was immune under section 230 of the Communications Decency Act (CDA).[6] On appeal, Councils took issue with three features of Roommates' Web site that are designed to allow

1. At the time of the district court's disposition in this case, Roommates' Web site included over 150,000 active listings and received a million page views daily. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161 (9th Cir. 2007).

2. *Id.* This information is requested in addition to mundane information such as name and location.

3. *Id.* at 1161, 1173. Specifically, the section invites users to "tak[e] a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate."

4. *Id.* at 1162.

5. *Id.*

6. *Id.* at 1161, 1173. *See generally* Communications Decency Act, 47 U.S.C. § 230 (2000).

users to find a more-perfect match.[7] First, Councils alleged that by requiring users to disclose their sex, sexual preference, and children, Roommates was indicating intent to discriminate based on these criteria.[8] Second, Councils alleged that Roommates developed and displayed on its Web site the discriminatory preferences of its users, based off of these three inquiries.[9] Third, Councils charged that Roommates was liable for discriminatory comments posted in the "Additional Comments" section of users' profile pages.[10] The Court of Appeals for the Ninth Circuit held that where a Web site directly participates in developing the alleged illegality, as Roommates did by mandating selection from a list of prepopulated answers, they may not avail themselves of section 230 immunity. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2007).

II. BACKGROUND

Recognizing the idiosyncratic and important role of the Internet in modern society, Congress chose to treat it differently from the traditional modes of communication by granting Internet operators significant immunity in passing section 230 of the CDA.[11] Section 230 seeks to encourage the continued growth of the Internet "unfettered by Federal or State regulation" and to encourage user control over information received over the Internet.[12] Section 230(c)(1) provides, in its entirety, that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider."[13] Congress defined 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."[14]

Congress passed section 230 on the heels of a court decision which held that a company that took affirmative steps to edit and censor its message boards crossed the line from distributor to publisher and therefore was liable for the content of its message boards.[15] In *Stratton*

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7. *Roommates.com*, 521 F.3d at 1164.
8. *Id.*
9. *Id.* at 1165.
10. *Id.* at 1173.
11. *See* 47 U.S.C. § 230.
12. *Id.* § 230(b).
13. *Id.* § 230(c)(1).
14. *Id.* § 230(f)(3).
15. Stratton Oakmont, Inc. v. Prodigy Servs., 1995 WL 323710, at *5 (N.Y.S.2d May 24, 1995). The CDA was passed the following year, in 1996.

Oakmont, Inc. v. Prodigy Services Co., the court dismissed concerns that such a holding would encourage the abdication of censorship and monitoring of undesirable content because, in the court's opinion, the market would compensate those that did provide increased control over Web site content in proportion to the increase in lawsuit exposure.[16] One of the purposes of section 230 was to overturn the decision in *Stratton*.[17]

Cases following the enactment of section 230 interpreted the immunity created by the statute broadly—to the benefit of defendants.[18] An early example involved a Web site operator that allegedly delayed in removing third parties' defamatory messages, of which the operator had knowledge.[19] In *Zeran v. AOL*, the plaintiff argued that section 230 did not immunize Web site operators from distributor liability, which may attach when a distributor has actual knowledge of defamatory material.[20] The Fourth Circuit Court of Appeals held that, although section 230 speaks to publisher liability, that distributor liability was "merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230."[21] This decision was later hailed by the Congress as a proper interpretation of section 230(c), "which was aimed at protecting against liability for such claims as negligence . . . and defamation."[22]

In another case, a concerned citizen sent an e-mail to the proprietor of an online newsletter that dealt with matters of stolen artwork alleging that an acquaintance possessed stolen art.[23] The e-mail, which was not intended by its author to be distributed, was included in a newsletter and widely circulated.[24] Holding that the acquaintance's lawsuit against the newsletter's proprietor, the Ninth Circuit reasoned that because the concerned citizen had not intended for his e-mail be published, he cannot be said to have "provided" it as required under section 230(c).[25]

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16. *Id.*

17. *See id.* (noting that Congress could address any issues herein with adoption of the CDA, which was pending at the time of the decision); *see also* Ken S. Myers, Wikimmunity: Fitting the Communications Decency Act to Wikipedia, 20 H.J.L.& TECH. 163, 177-78 (2006) (citing the H.R. CONF. REP. 109-458 (1996), which discussed Congress's goal of overruling Stratton).

18. *See Wikimmunity*, 20 H.J.L. & TECH. at 205-08.

19. Zeran v. Am. Online, Inc., 129 F.3d 327, 328-29 (4th Cir. 1997).

20. *Id.* at 331.

21. *Id.* at 332.

22. H.R. REP. NO. 107-449, 107th Cong. (2000).

23. Batzel v. Smith, 333 F.3d 1018, 1020-21 (9th Cir. 2003).

24. *Id.* at 1022.

25. *Id.* at 1034. Although this case can be seen as a narrowing of the immunity provided by section 230, the court reasoned that its decision served Congress's goal of promoting free speech and the development of the internet because the opposite holding would have

The Ninth Circuit had another opportunity to interpret section 230(c) when an unknown third party created a profile pretending to be a famous actress on an Internet dating Web site.[26] The actress sued the Internet dating site, arguing that because the Web site facilitated the creation of the scandalous account by asking numerous questions with prepopulated answers, the Web site was not eligible for section 230 immunity.[27] The court disagreed and stated that, "no profile has any content until a user actively creates it."[28] Even though the Web site facilitated the creation of the account, the third party was still ultimately responsible for the underlying misinformation.[29] Furthermore, under the court's reading of section 230, the Web site would have been immune even if it had been considered an information content provider because the misinformation was still created or developed by *another* content provider.[30]

The United States Court of Appeals for the Seventh Circuit dealt directly with the interplay of section 230 and the FHA. The proprietor of an Internet message board was sued because some of its users posted ads that were allegedly repugnant of the FHA.[31] The court found that the message board did not induce its users to post discriminatory messages.[32] In holding that section 230 barred FHA lawsuits against the operator of the message board, the court reasoned that while the message board might be causally linked to the creation of discriminatory ads, it could no more be held liable for what users do with its service than the manufacturer of the computer on which the messages were written could.[33]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit found that Roommates was not immune under section 230 because Roommates developed discriminatory questions, which it used to evoke discriminatory answers which, in

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"discouraged [users of the internet] from sending e-mails for the fear that their e-mails may be published on the web without their permission."

26. *See* Carafano v. Metrosplash.Com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003).

27. *Id.* at 1121, 1125.

28. *Id.* at 1124.

29. *See id.* at 1124.

30. *See id.* at 1125 (citing Gentry v. eBay, Inc., 121 Cal. Rptr.2d 703, 717 (2002) ("It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the information [at issue].")).

31. *Id.* at 669.

32. *Id.*

33. *Id.* at 671-72.

turn, fueled a discriminatory search and matching mechanism that is directly related to the alleged FHA violation.[34] The court assessed each of Councils' three allegations of FHA violation in turn.[35] While Roommates was found liable based upon the prepopulated questions it required its users to answer, the court upheld the district court's finding of immunity for claims stemming from the "Additional Comments" portion its Web site.[36] In coming to these conclusions, the court relied on the statutory text of the CDA and on prior case law.[37] The court did find it necessary, however, to accord its decision with some of its previous holdings regarding the threshold for establishing immunity under section 230.[38]

As an initial matter, the court noted that the issue before it was not whether Roommates actually violated the FHA or germane California law, but whether asking certain questions, even in an online questionnaire, can be a violation.[39] First, the court found that section 230 immunity did not apply to alleged FHA violations arising from Roommates' requirement that users disclose their sex, sexual preference, and incumbent children.[40] The court stated that section 230 does not grant immunity when the content developer induces third parties to express illegal preferences.[41] This decision comports to dicta in the Seventh Circuit case mentioned above indicating that, had Craigslist induced users to disclose a discriminatory preference, the result in that case might have been different.[42]

Second, the court found that section 230 immunity did not apply to Roommates for its allegedly discriminatory display and use of the answers supplied to questions regarding sex, sexual preference, or incumbent children because Roommates was a developer of such information.[43] The majority's opinion (as well as the dissent's) hinged

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34. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1170 (9th Cir. 2007).

35. *Id.* at 1163-1175.

36. *Id.* at 1174-75.

37. *Id.* at 1171-73.

38. *Id.* at 1170-71.

39. *Id.* at 1164-65.

40. *Id.* at 1164.

41. *Id.*

42. *See* Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671-72 (7th Cir. 2008) ("Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination; craigslist does not offer a lower price for people who include discriminatory statements in their postings.").

43. *Roommates.com*, 521 F.3d at 1164-65.

largely on the definition of "development" for purposes of the exception to immunity that applies to co-developers.[44]

> We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.[45]

Because Roommates mandates users to answer discriminatory questions, which are displayed and used in Roommates' search and matching mechanisms, the court found that Roommates developed the allegedly unlawful content.[46] Supporting its decision, the majority noted that section 230 speaks of both creation and development when defining an information content provider and that courts are to avoid statutory interpretations that make words in statutes superfluous or redundant.[47] The majority prevented such a redundancy by interpreting "development" as meaning "making usable or available."[48] The majority also found support for its interpretation of development in Wikipedia, which defines Web content development as "the process of researching, writing, gathering, organizing and editing information for publication on websites."[49]

The court stated that its decision in *Batzel v. Smith* foreshadowed its decision in the noted case, and that the two cases are entirely consistent.[50] Under both cases' interpretations of section 230 immunity, an internet service provider that edits an e-mail provided for publishing, but does not add to the libelousness of the message, is eligible for section 230 immunity; however, publication of an e-mail not intended for publishing would be contributing to the development of whatever illegality was contained therein and would lose immunity.[51] The court maintains that its

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44. *See id.* at 1161, 1181-82.
45. *Id.* at 1167-68.
46. *See id.*
47. *See id.* at 1168-69.
48. *See id.* at 1168. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 618 (2002)).
49. *Id.* (citing Wikipedia, Content Development, http://en.wikipedia.org/w/index.php?title=Content-development—web &oldid=188219503 (last visited Apr. 18, 2008). *See generally* Ken S. Meyers, Wikimmunity: Fitting the Communications Decency Act to *Wikipedia*, 20 H.J.L. & TECH. 163 (2006) (providing a description of Wikipedia and an in-depth analysis of section 230's application to it).
50. *See Roommates.com*, 521 F.3d at 1170.
51. *See id.* at 1170-71.

holding in *Carafano v. Metrosplash.com, Inc.*, which found the Web site operator was immune, was correct but noted some of the language used in that case was overbroad.[52] Specifically, the court took issue with its own suggestion in *Metrosplash* that "no profile has any content whatsoever until a user creates it."[53] Nevertheless, the court reasoned that the defendant in *Metrosplash* would still be immune under its new standard because the libelous content in that case was entirely created–and developed–by the user "without prompting or help from the website operator."[54] The key distinction between the *Metrosplash* and the noted case is that the defendant in *Metrosplash* provided "neutral tools" for its matching users whereas Roommates forced its users to divulge "protected characteristics and discriminatory preferences."[55]

Lastly, the court held that Roommates was not liable for the content of its "Additional Comments" section.[56] Text entered into the "Additional Comments" part by users was meant for publication, and Roommates did not contribute to or induce any illegal statements in regard to the "Additional Comments" part, but merely acted as a passive conduit of the user-provided information.[57] Consequently, the "Additional Comments" section and Roommates' use of the information provided there was "precisely the kind of situation for which section 230 was designed to provide immunity."[58] The court remanded the case to the district court to determine if the alleged actions of Roommates, not immune under section 230, violate the FHA or other laws.[59]

IV. ANALYSIS

Although acting with the best intentions, the Ninth Circuit complicates an already complex area of the law with its decision in the noted case. By incorporating the determination of substantive liability into what should be a threshold question of immunity, the court will burden interactive service providers significantly.[60] The new standard announced in this case takes into account whether the interactive service

52. *See id.* at 1171.
53. *Id.*
54. *Id.*
55. *See id.* at 1171-72.
56. *Id.* at 1174.
57. *Id.* at 1173-74.
58. *Id.* at 1174.
59. *Id.* at 1175-76.
60. *Id.* at 1188 (McKeown, J., dissenting). Preventing online discrimination that violates the FHA on the internet is certainly a laudable goal, especially as the internet becomes ever more the preferred medium for many services, such as locating a place to live. The proper issue before the court though, was strictly whether Roommates was immune under section 230.

provider provides neutral or discriminatory choices to its users in determining whether the service provider is entitled to immunity.[61] The narrowing in this case will, in effect, force interactive service providers to consider not only whether content provided to them by third parties was meant for publication, but in what ways their own actions may have influenced the user's submissions—significantly complicating their analysis.[62]

The dissent foresees that the decision in the noted case will chill speech on the Internet and force many popular Web sites to limit severely their services or face massive lawsuit exposure.[63] The dissent likely goes too far in its estimation of the direness of the consequences of this decision, and the colossus that is the Internet will likely not be significantly slowed by the holding; after all, such subjective standards are not new to section 230 interpretive jurisprudence, and the Internet's growth has continued unabated.[64] Indeed, the decision, and the ensuing split in the districts, might have a silver lining: Congress may be induced to develop law that replaces the outmoded CDA immunity provision—with one that is better suited for the interactive nature of Web 2.0.

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61. *See id.* at 1166.

62. *Id.* at 1187 (McKeown, J., dissenting).

63. *See id.* at 1188 (McKeown, J., dissenting).]

64. *See id.*; *see also* Batzel v. Smith, 333 F.3d 1018, 1034 (9th Cir. 2003) (holding that section 230 immunity did not exist when the internet service provider could not have reasonably believed that the communication from a third party was intended for publication, and the internet service provider nevertheless published the communication).

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