

***Fair Housing Council v. Roommates.com*: Ninth Circuit Creates Dangerous New Standard For Website Content Liability (2008)**

In a case with far-reaching implications for interactive websites and other online service providers, the U.S. Court of Appeals for the Ninth Circuit, in *Fair Housing Council v. Roommates.com*, (No. 04-57173, 9th Cir. 2008), recently stripped the defendant website's conduit immunity under the Communications Decency Act of 1996 [CDA], concluding that the site had materially contributed to its allegedly illegal information and rental matching process. Even though the subscribers actually provided their housing preferences, created their online profiles, and initiated search functions, the court concluded that the site had created or developed the information. Significantly, neither the district court nor the Ninth Circuit ever actually reached the merits of the underlying discrimination claims.

The Ninth Circuit's decision is troubling for a number of reasons, beyond just the opaqueness of the standard and the odd logic of linking creation or development with the ultimate illegality of the resulting information.

Background

Secondary liability is rapidly becoming the new legal battleground for Web 2.0, as websites and other online service providers increasingly utilize user-generated and other third-party content, and risk the consequences of hosting others' materials.

To encourage the broad online distribution of information, Congress passed the CDA to immunize sites functioning as conduits from liability for publishing otherwise actionable content. The immunity is lost, however, once a site creates or develops its own information, or collaborates with a third party to do so. Historically, to ensure the broad dissemination of information contemplated by the CDA, the provision of service has been broadly construed, while the concept of information provision has correspondingly been narrowed.

Along with the difference between service and content provider liability, there is also a distinction between bricks-and-mortar and online publishing. In the "real" world, for example, content creators warrant that their facts are accurate and typically indemnify publishers for distributing the creators' works, since the publisher would be liable for the re-publication of a defamatory statement. On the Internet, by contrast, a website is not generally treated as the publisher or speaker of third-party content, unless it creates or develops the information.

The Roommates.com website [the "Site"], which serves as an online matchmaker between persons seeking and those renting properties, was sued in the district court by the Fair Housing Councils of San Fernando Valley and San Diego, alleging violations of the federal Fair Housing Act ["FHA"] and several state anti-discrimination laws. The plaintiffs argued that the questions the Site posed to subscribers (regarding sex, family status and orientation) violated federal and state law; that conditioning access to the

service on answering the questions unlawfully required subscribers to make illegal statements; and that the Site's development and display of subscribers' discriminatory preferences was unlawful.

The lower court held the site immune from liability under the CDA and dismissed the federal claim without addressing FHA liability. The court also declined to exercise supplemental jurisdiction over the state law claims.

The Roommates Website

In broad strokes, the Site matches people seeking a place to live with available rental properties. A subscriber creates a profile by selecting answers from drop-down menus or checking on-screen boxes. For persons renting properties, the profile contains location information, details about the residence, rental details, and a household description (number of occupants, age range, gender, jobs, level of cleanliness, whether inhabitants are smokers, and the presence or absence of children or pets). The remaining sections of the registration are optional.

In addition to basic information (name, location, and e-mail address), the Site also requires subscribers to provide gender, sexual orientation, and whether they would be housing children. Subscribers seeking rental properties are also required to describe a desired roommate, using the same three criteria. Finally, subscribers can fill out an "Additional Comments" section that is an open-ended essay. The Site takes the completed application and programmatically assembles the answers into a profile page. The posted profile displays the subscriber's pseudonym, description, and preferences, as shaped by the Site's questions.

The Communications Decency Act of 1996

It was clearly the contractual agreement of the parties that the Site's users were deemed to have created the content. Under the Terms of Service, subscribers were informed of and agreed that: "You understand that we do not provide the information on the site and that all publicly posted or privately transmitted information, data, text, photographs, graphics, messages, or other materials ('Content') are the sole responsibility of the person from which such content originated." So the Site's owners reasonably assumed that they were shielded by section 230 of the CDA, which protects sites using others' unedited materials. The CDA defines an "interactive computer service" as any "information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." Such services include "access software providers," that, like the Site, supply enabling tools to filter, screen, pick, choose, analyze, digest, search, forward, organize, and reorganize content.

But the CDA protects a site only to the extent that it is not also an "information content provider." A 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” (emphasis added).

The distinction here between providing service and content is crucial. The CDA is predicated on encouraging broad distribution of information by protecting service providers that passively display third-party content. Immunity is not lost, for example, by removing some information or performing minor editing of user-generated materials. But once a provider affirmatively crosses over into developing or creating content, it becomes at some point more like a real-world publisher and is liable for its publications.

This is a difficult line to draw, but there is statutory direction, albeit imprecise. One becomes a content provider by being responsible, *in whole* or *in part*, for the creation or development of a site’s information. Because every interactive website facilitates third-party content creation and development, and aids the dissemination of the materials, this language cannot be read literally since the qualification would swallow the immunity. So there has to be a common-sense context for defining website creation and development, and this is where the appellate court lost its way.

Using a concrete hypothetical: If a user writes a letter about a third party containing defamatory statements and submits it to a website for publication, and the site republishes the letter verbatim or with minor edits, the CDA probably protects the site from defamation liability. As a practical matter, this is an important function that the CDA serves. Given the volume of submitted content and the unreasonableness of imputing personal knowledge in all circumstances to the monitoring site, the CDA does not require service providers to review all third-party materials.

It is probably equally clear that if that letter were a neutral, benign statement, and the site rewrote it to make defamatory references to that third party, the site would become an information content provider and lose its CDA immunity. Thus, the real question is not whether the statements are defamatory, but who created or developed the information. In the first example, presumably the creator/developer is the third party; in the second one, it is probably the site.

The Site’s User Is the Content Creator/ Developer

Like most interactive sites and search engines, the Site is a tool to provide an online function. Here, as a substitute for people actually meeting, the Site provides the means for users to exchange information related to finding and renting appropriate housing, and a mechanism to match those with like interests. Site subscribers input their own information and choose what they want to share with other users, and the site provides a programmatic matching function.

The Site, as a blank form with options for standardized answers, provides simple mechanisms (the drop-down menus and on-screen boxes) to assist the user in creating a profile. The user volunteers the protected characteristics and preferences, and the Site, through user prompts, selects material for publication. Since the profile is created solely

by the user, and there is no information without user input, it does not make sense to impute creation or development of the user's information to the Site. In any event, providing drop-down menus is not creating or developing information, and the CDA immunizes the sorting, displaying, and transmitting of third-party information.

Nor should displaying prompts and offering lists of choices constitute the developing of information. The user self-identifies and provides information to the Site to publish, so the user is the sole creator of the Site's information. Similarly, presenting the user with a universe of preferences and drop-down menus of options does not "develop" the user's preferences. Moreover, the sorting and transmission of unedited user information is more like the conduit function that qualifies for CDA immunity.

Finally, the court distinguishes the legitimacy of a dating site from the illegitimacy of the Roommates site, which, because both sites perform the same function, is illogical. Like the court's standard for stripping the Site's immunity, the analysis conflates the two issues of liability and immunity and creates an artificial link between the question whether a site creates or develops information, and the question of the ultimate legality of the written product. The analysis is backwards, since the CDA is intended to protect sites against their use of otherwise actionable content based on the site providing a service rather than creating or developing the information. So if a service provider publishes a defamatory statement, for example, the relevant liability inquiry is still whether the provider created or developed the statement, and not whether the statement is actionable. Here, the Site provides a matchmaking function, pairing people of like housing instead of romantic interests. Since the court acknowledges that a dating site asking similar questions and having similar search functions would not be a creator/developer, it is difficult to see how sites performing the same actions can be treated differently.

Search Engines as Neutral Tools

Since the court concluded that the Site's search functions also contributed to the elimination of CDA immunity, it is necessary to distinguish what the court characterizes as "legitimate" search engines. Starting with the premise that providing neutral tools to carry out an unlawful search is not development, the court differentiated the Site, which it said was designed to steer users based on discriminatory criteria, from legitimate search engines, which are not designed to achieve illegal ends.

But beyond the fact that the Site does not develop or create any information, the purported search function difference is probably not even technologically accurate. The Site provides a software function that captures the key elements of the real-world rental process. The users input their choices, then the Site searches, using a straight matching function virtually identical to that of a traditional search engine. If, for example, a prospective renter wants a nonsmoking house and inputs that choice, and a property renter wants a nonsmoking roommate and types that in, then the search function matches the two parties. Even if the Site precategorizes choices to assist the parties, how is this any different than a search engine that assists the user by providing key words in

anticipation of the user's search? And, in fact, modern search engines provide more than a straight match function. Google, for example, ranks search results, provides prompts beyond what the user enters, and answers questions. In fact, using the court's definition of development, it can be convincingly argued that Google "encourages" or "contributes" to the resulting unlawfulness by offering search tools that permit users to perform allegedly illicit matches. For example, if a user is seeking a gay, Jewish, male roommate, and Google provides responsive ads, Google is, within the court's definition, materially contributing to the purported unlawfulness of the information created by the initial user.

Conclusion

By incorporating the ultimate illegality of a site's information, a factor that appears nowhere in the CDA, the court's reasoning becomes circular and makes it impossible for service providers to anticipate liability.

First, assuming for the sake of argument that the Site's information is illegal, the real issue here is the identity of the bad actor. Since the users create/develop the Site's information, it is more logical that they are the creators/developers of the information. By conflating the issues of liability and immunity, it makes it easier for the court to blame the Site for the ills of housing discrimination, but those ills notwithstanding, the court does not adequately demonstrate that the Site is more than a tool that subscribers use in potentially illegal housing transactions.

Second, as a matter of statutory construction, an interactive computer service is immune under the CDA until it affirmatively becomes a content provider. Access software providers like the Site are a subgroup within the definition of interactive computer services, so it is clear Congress contemplated that the activities of the former would fall under the immunity umbrella. The permitted activities are exactly what the Site does -- it receives, filters, digests, and analyzes information provided by users in response to the Site's registration prompts, then transmits, organizes, and forwards the information to users in the form of standardized profiles.

Third, since content creation is prospective, while a determination of illegality is after the fact, many sites will err on the side of caution and avoid potential liability by not publishing, restricting the free flow of online information in derogation of Congress's CDA instructions. Further, since the court's liability standard is so imprecise, the unfortunate corollary will undoubtedly be the chilling of free speech.

Finally, within the universe of facts in the Site's drop-down menus, most of these facts are neutral and nonactionable – e.g., the location of housing; its size, configuration, and physical particulars; the level of cleanliness; the mood of the inhabitants; and the presence or absence of pets. So the drop-down menus and on-screen boxes mimic the particulars and analysis that renters and rental owners use. Even assuming that a small number of the inquiries and search functions are illicit, most of them are legitimate, and in any event it is the users who would be discriminating in the worst-case scenarios, and not the Site. Following the court's standard will force online service providers to

anticipate all uses that third parties can make of a site's functionality to create actionable content, turning the intent of the statute on its head.