Litigation Alert: *Roommate.com en banc*

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The Ninth Circuit has issued a long-awaited decision affecting the scope of the safe haven under the Communications Decency Act ("CDA") for internet service providers against liability for information created and provided by third parties. In *Fair Housing Council of San Fernando Valley v. Roommate.com, LLC*, an *en banc* panel of the Ninth Circuit affirmed its earlier decision, holding that Roommate.com is not entitled to immunity for some of its activities in operating a roommate matching website. This decision represents a departure from the broad reading of CDA immunity previously given by this Court and other circuits, and sets new limits on the availability of immunity provided by CDA Section 230(c).

Background Facts and Claims

Roommate.com operates a roommate matching website that allows individuals to post housing opportunities and search for roommates based on information they provide about themselves and their roommate preferences. The site requires users to answer a series of online questions by selecting from drop-down and select-a-box menus before the user is allowed to post or search listings. Many of these questions pertain to factors such as desired housing location and rent, but some require disclosure of information such as age, gender, sexual orientation, and family status. Roommate.com also allows users the option of providing "Additional Comments." Roommate.com then generates member profiles based on the users' responses, which can be searched using Roommate.com's website and are emailed to members according to similar listed preferences.

The Fair Housing Councils of San Fernando Valley and San Diego ("FHC") filed suit in federal district court claiming Roommate.com violated the Fair Housing Act and various state laws due to the member profiles generated and published on its website. FHC claimed that Roommate.com violated the Fair Housing Act in three ways: (1) it posted its questionnaires based in part on discriminatory categories and preferences on its website and required individuals to complete them as a condition to use its service; (2) it posted and distributed its member profiles generated from the questionnaires based in part on discriminatory categories and preferences; and (3) it posted the "Additional Comments" provided by users, some of which contained discriminatory preferences.

The District Court held that the CDA barred the FHC's Fair Housing Act claim and therefore granted in part summary judgment for Roommate.com. On appeal, a three-judge panel of the Ninth Circuit, in a split decision, reversed in part the District Court and held that Roommate.com was not entitled to CDA immunity for either the posting of its questionnaires or the subsequent sorting and distribution of user profiles based on the answers to those questionnaires. A majority of the panel held, however, that Roommate.com was entitled to CDA immunity for the posting of the "Additional Comments," for which Roommate had offered no pre-set answer choices.

The panel's original ruling gave rise to a groundswell of concern in the Internet community and beyond. After the *en banc* hearing was announced, the Court was presented with *amicus curiae* briefs from CNN, NBC, CBS, Time, the Los Angeles Times, the New York Times, the Newspaper Association of America, Amazon, America Online, Google, eBay, Facebook, Yahoo and others warning of the potentially dire impact on the vitality of online media should Section 230 immunity be scaled back.

Section 230 of the CDA and the Fair Housing Act

Section 804(c) of the Fair Housing Act makes it illegal "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin..." Intersecting with this statute is Section 230(c) of the CDA , which states that "[n]o provider...of an interactive computer service shall be treated as the publisher or speaker of any information provided by another

information content provider." Thus, Roommate.com's immunity for any potential Fair Housing Act violation turns on whether it is considered an "information content provider" with respect to the information distributed via its website. Under Section 230(f)(3), an entity is an "information content provider" if it "is responsible, in whole or in part, for the creation or development of [the] information provided."

The Ninth Circuit's En Banc Opinion

From a thematic perspective, the majority opinion, penned by Judge Kozinski, rejects the notion pervading earlier case law that the CDA confers a unique, legally unfettered status on the Internet. The opinion here suggests that times have changed, and now online service providers should be subject to similar liability standards as apply to their offline peers: "the Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick and mortar businesses…questions [that] are unlawful when posed face-to-face don't magically become lawful when asked electronically online." Guided by this view, the majority concluded that Roommate.com was not entitled to CDA immunity for the online questionnaire, the sorting and channeling of information based on the questionnaire, or the resulting user profiles. The only category of activity for which Roommate.com was found to retain Section 230 protection was the "Additional Comments" field of its site.

Central to the Court's analysis was the question of whether Roommate.com could be considered an "information content provider" under Section 230(f)(3) such that CDA immunity would be lost. The Court concluded that "by requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate [became] much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information." As such, the Court found that Roommate could not claim immunity for the postings on its website or for its subsequent sorting and channeling activity.

However, the Court was evidently sensitive to the "slippery slope" concerns articulated by Roommate and those arguing on its behalf, and went to considerable lengths to clarify the original panel's ruling. The majority insists that simply providing drop-down menus or search and sorting capabilities is not enough to trigger the loss of immunity for an online service provider. It was not merely the provision of pre-set answer choices or search capability that caused Roommate to lose its Section 230 immunity, but rather that the pre-set choices and categorization scheme here were inherently unlawful. Roommate.com's search engine, the Court writes, was materially different from Google or Yahoo! because Roommate.com "designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process." The Court offered the following examples of what types of activity would not amount to "development" under CDA Section 230:

- An ordinary search engine providing *neutral* tools to carry out what may be unlawful or illicit searches would not amount to "development, and would thus retain its CDA immunity;"
- A dating website that required users to answer questions regarding sex, race, religion and family status through drop-down menus, and provided a search mechanism based on those answers, would retain its CDA immunity, because it is "perfectly legal to discriminate along those lines in dating;"
- A housing website that allowed users to specify whether or not to receive emails through *user-defined* criteria would retain its CDA immunity, so long as it did not *require* the use of discriminatory criteria;
- A website operator who merely edited user-created data (for instance, by correcting spelling or editing length) would retain CDA immunity for any illegality in the user-created content, so long as the edits were unrelated to the illegality.

Unlike the above examples, the majority found that Roommate.com "designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children," all protected characteristics elicited by the registration process, and, as a result, "forfeit[ed] any immunity to which it was otherwise entitled under Section 230."

The Dissent

The dissent, authored by Judge McKeown, challenged the core theme of the majority opinion – that "if something is prohibited in the physical world, Congress could not have intended it to be legal in cyberspace." The dissent argues that, on the contrary, this is precisely what Congress intended when it enacted Section 230; if it had intended brick and mortar rules to apply to the Internet, it could have left ordinary publisher liability as the default rule in cyberspace.

The dissent finds the majority view regarding Roommate's status as a content "developer" to be flawed because it conflates the questions of liability under the FHA and immunity under the CDA: Roomate.com lost its CDA immunity because it violated the FHA. This conflation is criticized on several grounds. First, the majority wrongly presumed that Roommate's questions to users were unlawful under the FHA. The sole issue before the Court was CDA immunity; the merits of the FHA claim had yet to be addressed even by the District Court, and were certainly not before the Ninth Circuit. Second, the CDA itself says nothing about immunity being stripped when the information being solicited or processed is "unlawful." Indeed it would render Section 230 meaningless if online publishers were "to be immune only from the innocuous," an immunity they would have enjoyed under traditional publisher liability law. Third, the dissent warns of the "far-reaching practical consequences in the Internet world," and notes that this ruling puts the Ninth Circuit at odds with its earlier rulings and rulings of other circuits. Notwithstanding the majority's insistence that "neutral" tools will retain CDA protection, the dissent fears that the majority's definition of "development" puts every site at risk that uses prompts or drop-down menus. To the extent that immunity may now be lost because information sought may be illegal under some statute or federal law, the burden on webhosts could prove "unfathomable."

Time and evolving case law will tell whether the dissent's concerns are warranted or whether the majority has successfully limited and defined the circumstances under which CDA immunity is lost. As the dissent noted, Section 230 immunity had previously been treated as "quite robust," a reading which has since been embraced by five other circuits, including the Seventh Circuit in the recent decision, *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.* It is now more difficult for website providers to know whether their activities will be considered immune under the CDA. *Roommate.com* blurs the distinction between the passive solicitation of information by an interactive service provider that will retain CDA immunity and the active solicitation of information by an information content provider that eviscerates CDA immunity, and opens the door to potentially broad exposure for internet service providers based on third-party postings. While the lines will undoubtedly grow clearer as more cases are resolved, for now, online service providers must be more careful when soliciting or distributing particular information, or run the risk of being found responsible for "creat[ing] or develop[ing]" that information, thus precluding immunity from liability under CDA Section 230.

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