

Ninth Circuit Limits CDA Immunity for Internet Service Providers:

Soliciting, Categorizing, and Sorting of Third Party-Provided Information Can Eviscerate Protection

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On May 15, 2007, the Ninth Circuit issued an important 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*, the Court’s majority held that Roommate.com was not entitled to immunity for the member information it published on its online roommate matching website to the extent that Roommate.com either “created or developed” answer choices for their members to select from, or “categorize[ed], channel[ed] and limit[ed]” the distribution of member profiles based on the information provided. This split-decision thus sets new limitations on the availability of immunity provided by CDA Section 230(c).

Background Facts and Claims

Roommate.com operates an online roommate matching website that allows individuals to search for roommates based on information they provide about themselves and their roommate preferences. Roommate.com asks a series of online questions that users must answer by selecting from drop-down and select-a-box menus. These questions and answers require disclosure of information such as age, gender, and sexual orientation, both in terms of the user and the user’s roommate preferences. Roommate.com also allows users the option of providing “Additional Comments.” Member profiles generated from these questionnaires can then be searched using Roommate.com’s website and are emailed to members according to their 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 answers generated and published on its website. FHC claimed that Roommate.com violated the Fair Housing Act in three ways: (1) it posted its questionnaires on its website and required individuals to complete them in order to use its services; (2) it posted and distributed its member profiles generated from the

questionnaires; and (3) it posted the “Additional Comments” provided by some members. 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.

The Key Issue Under Section 230

Section 230(c) of the CDA states that “No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” To the extent a provider “passively publishes information provided by others,” immunity will protect that provider from liability for the content others create. However, under Section 230, a question arises as to the extent to which the service provider’s selection or manipulation of information supplied by another can eliminate such immunity. 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.” Relying on this definition, the majority of the Ninth Circuit concluded that, if the service provider itself qualified as an “information content provider” by selecting or editing information, even though it received the underlying content from another “information content provider,” then the service provider should lose its immunity. It thus concluded that, for each category of activity that FHC alleged violated the Fair Housing Act, the central question in determining CDA immunity was whether Roommate.com was “responsible, in whole or in part, for the creation or development of [the] information.”

Judge Ikuta, in dissent, disagreed with this key conclusion. She noted that the Ninth Circuit had previously rejected such a broad limitation on immunity, holding that “so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.” Nonetheless, the majority’s view carried the day and determined the outcome.

Application to Roommate.com’s Conduct

As to the first category of activity, the publication of the questionnaires that users are required to complete, the Court found that Roommate.com “‘creat[ed] or develop[ed]’ the forms and answer choices.” Specifically, Roommate.com chose what questions had to be answered and what answer choices were available to the users. As such, Roommate.com was “responsible” for the content and was not entitled to immunity for the publication of the questionnaires. This conclusion was unanimous.

As to the second category of activity, the publication and distribution of member profiles generated from the questionnaires, the Court noted that Roommate.com did more than merely publish the information its members provided – it also “channel[ed] the information based on members’ answers to various questions, as well as the answers of other members.” As a result, members could only search the profiles of those individuals with compatible preferences. The Court saw these email and search functions as involving more than a “passive pass-through of information.” Instead, “by categorizing, channeling and limiting the distribution of users’ profiles, Roommate.com provide[d] an additional layer of information.” To that extent, Roommate.com was responsible in part for creating and developing the information and was thus not entitled to CDA immunity. Judge Ikuta dissented from this holding.

Conversely, as to the third category of activity, the posting of “Additional Comments,” the Court found that Roommate.com was entitled to CDA immunity. As part of the member profile, Roommate.com provided a blank text box for individuals to fill in. Next to the box was a statement advising members to personalize their profile by providing additional information about themselves or their desired roommate. The Court found that Roommate.com was not “responsible” for the content provided by members in this space because it “suggest[ed] no particular information that is to be provided.” Nor did it either “prompt, encourage or solicit” any of the information provided or use the information to “limit or channel access to the listing.” Judge Reinhardt dissented from this holding, asserting that Roommate.com should also be liable for the Additional Comments it generally solicits and channels to users.

Section 230(c) immunity had been treated by courts to date as “quite robust.” It now has become less clear where the final delineation lies between an internet service provider’s neutral solicitation of user information that does not

eviscerate CDA immunity and the suggestive solicitation of information that risks loss of such immunity. The Ninth Circuit’s holding in *Roommate.com* opens the door to potentially broad exposure for internet service providers based on third-party postings. If not amended on rehearing, an internet service provider who either “categorizes, channels and limits” the distribution of information or “actively prompts, encourages, or solicits” particular information risks being found responsible for the “creation and development” of that information, thus precluding immunity from liability under CDA Section 230.

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