

Seventh Circuit Upholds CDA Immunity for Craigslist—But What Is The Impact, If Any, On *Roommate.com*?

BY LAURENCE F. PULGRAM, ILANA S. RUBEL AND JULIE NOKLEBERG

Fenwick
FENWICK & WEST LLP

On March 14, 2007, the Seventh Circuit issued an important decision regarding 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 *Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, the Court unanimously held that Craigslist was entitled to CDA immunity for discriminatory third-party housing notices that were posted on its online classified website because Craigslist was not a “publisher or speaker” of the postings, nor did it “cause” the postings to be made. This decision represents an important win for internet service providers who provide a forum for third-party online postings. Moreover, it could influence the Ninth Circuit as it considers the pending, much-publicized case of *Fair Housing Council of San Fernando Valley v. Roommate.com* – a case that could significantly impact the extent to which online service providers can claim immunity for information created and provided by web site users.

Background Facts and Claims

Craigslist operates an online classified website that allows individuals to post and obtain notices for a variety of goods and services, including housing. Users of the site had allegedly posted housing advertisements and notices that included a preference with respect to a protected class, including race, religion, sex or family status. The Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. (“CLC”) filed suit in federal district court claiming Craigslist violated the Fair Housing Act by featuring such third-party postings on its website. Advertisements for housing that include such a preference are prohibited under Section 804(c) of the Fair Housing Act.

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....” The Court noted that this statute was regularly enforced against newspapers and other publishers, but not against common carriers such as telephone services or courier services such as FedEx or UPS because the latter do not make or publish the information that passes through them.

Section 230(c)(1) 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.” Thus, to the extent an online service provider passively publishes information provided by others, immunity will protect that provider from liability for the content others create. However, 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.” Thus, to enjoy CDA immunity, a web site owner must establish that its activities in providing a forum for user postings did not rise to the level of creating or developing the information posted.

The Seventh Circuit’s Opinion

The Court followed the district court’s reasoning that the plain language of Section 230(c)(1) foreclosed the CLC’s claims under the Fair Housing Act. Under Section 230(c)(1), “an online information system must

not ‘be treated as the publisher or speaker of any information provided by’ someone else.” Because the discriminatory housing postings were provided by its users, Craigslist, an online information system, could not be treated as the publisher of those postings and could not be sued by the CLC on account of the postings: “given § 230(c)(1) [one] cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.”

In reaching its holding, the Court noted the burdens that online service providers such as Craigslist would face if required to actively filter content provided by its users. The hiring of personnel to filter the content “would be expensive and may well be futile.” Filtering could result in delays, making the services provided less useful, and errors would likely be frequent – “[a]utomated filters and human reviewers may be equally poor at sifting good from bad postings unless the discrimination is blatant; both false positives and false negatives are inevitable.”

The Court also rejected several attempts by the CLC to narrow the scope of Section 230 immunity. First, the Court rejected the notion that Section 230(c)(1) immunity was limited to online service providers who undertake some form of filtering or screening. While Section 230(c)(2) protects online service providers for activities taken in censoring user content, Section 230(c)(1) is a separate subsection dealing with a different topic – that being the “liability of speakers or publishers” – which did not pertain to, or require, acts of censorship for it to apply.

Next, the Court rejected the CLC’s argument that Congress did not intend Section 230 to immunize an online service provider from liability under the Fair Housing Act. Because Section 230(c)(1) is a general statute, it applies to all forms of liability, regardless of whether such liability was specifically identified. Congress did not expressly state that Fair Housing Act liability was to be excepted from the general immunity provided by Section 230, thus no such exception exists.

Finally, the Court rejected the CLC’s argument that Craigslist “caused” the discriminatory housing postings because no one could post a discriminatory posting if Craigslist did not provide a forum. The Court noted that under this definition of cause, “one might as well say that people who save money ‘cause’ bank robbery, because if there were no banks there could be no bank robberies.” Because “nothing in the service Craigslist offered induced anyone to post any particular listing or express a preference for discrimination,” Craigslist did not “cause” the postings as required for Fair Housing Act liability.

Comparing and Contrasting Craigslist with Roommate.com

This decision joins the majority of other cases in treating immunity under Section 230(c) of the CDA as “quite robust.” However, it is unclear what impact, if any, it will have on the Ninth Circuit as it ponders the potentially pivotal and factually similar case of *Fair Housing Counsel of San Fernando Valley v. Roommate.com*. (See discussion of *Roommate.com* at http://www.fenwick.com/docstore/Publications/Litigation/Litigation_Alert_05-17-07.pdf)

Roommate.com, an online roommate matching website, would ask a series of questions regarding age, gender and sexual orientation that its users had to answer by selecting from drop-down menus, and then would create user profiles and provide searching and matching functionality based on users’ answers. In addition, Roommate.com offered an “Additional Comments” field in which users could write whatever they wished, and as in the case of Craigslist, many users allegedly used this space to express roommate preferences related to race and other protected classifications. Like Craigslist, Roommate.com was haled into federal court on the claim that its web site and related roommate matching services violated the Fair Housing Act.

In a fractured decision, the Ninth Circuit panel initially held that Roommate.com was entitled to CDA immunity for the Additional Comments posted by users because Roommate did not suggest any particular information for this area, hence was not responsible for user-generated content. The panel found, however, that Roommate was not entitled to CDA immunity for the information provided in response to its other questions because Roommate.com “created or developed” answer choices for their members to select from and “categorized, channeled and limited” the distribution of member profiles based on the information provided. To this extent, Roommate.com was an “information content provider” who was “responsible” for the creation of the information, and was therefore not entitled to immunity under Section 230(c)(1).

The final outcome of *Roommate.com* is unknown – the Ninth Circuit granted rehearing *en banc*, and numerous heavy-hitters in the news and internet communities (including CNN, NBC, CBS, Time, the L.A. Times, Amazon, AOL, Google, Ebay, Facebook, Yahoo and the NY Times Co.) joined in submitting amicus briefs urging the Ninth Circuit to find in favor of full immunity for Roommate.com. Oral argument was heard on December 12, 2007, and no decision has been issued.

The Ninth Circuit may view the Seventh Circuit’s *Craigslist* ruling as not only corroboration of the robust scope of CDA immunity in general, but more specifically as support for the proposition that Section 230 of the CDA protects online housing matching services from liability for statements and actions by web site users that may run afoul of the Fair Housing Act. On the other hand, there is certainly room for the Ninth Circuit to distinguish *Craigslist*. The pivotal facts in *Roommate.com* that informed the Ninth’s Circuit’s analysis – that Roommate.com’s member profiles were created off of pre-set answer and menu

choices determined by Roommate.com and were then categorized, channeled and filtered based on those answers – did not exist in *Craigslist*. While Craigslist presented questions, the answers were entirely created and determined by its users (much like the Roommate.com’s “Additional Comments” field). Further, Craigslist did not limit access to the postings based on a user’s particular answers, but allowed all users to access all postings. The *Roommate* case raises the harder questions of whether an online service provider becomes responsible for content when it provides pre-set answer choices, or when it sorts and categorizes based on users’ input information – issues not addressed by the Seventh Circuit.

If *Roommate.com* is not amended on rehearing, it may be viewed as precedent for finding liability against other online service providers that structure user-generated information through drop-down menus or other pre-set choices. However, whatever the result of *Roommate.com*’s *en banc* hearing, *Craigslist* does represent an important win for online service providers in solidifying Section 230 immunity in suits regarding user-provided content.

For further information, please contact:

Laurence F. Pulgram, Litigation Partner
lpulgram@fenwick.com, 415-875-2390

Ilana S. Rubel, Litigation Partner
irubel@fenwick.com, 650-335-7208

Julie Nokleberg, Litigation Associate
jnokleberg@fenwick.com, 650-335-7664

©2008 Fenwick & West LLP. All Rights Reserved.

THIS UPDATE IS INTENDED BY FENWICK & WEST LLP TO SUMMARIZE RECENT DEVELOPMENTS IN THE LAW. IT IS NOT INTENDED, AND SHOULD NOT BE REGARDED, AS LEGAL ADVICE. READERS WHO HAVE PARTICULAR QUESTIONS ABOUT THESE ISSUES SHOULD SEEK ADVICE OF COUNSEL.