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CRS Report for Congress

Liability of Interactive Computer Service for Violating the Fair Housing Act

Henry Cohen
Legislative Attorney
American Law Division

Summary

In *Fair Housing Council of San Fernando Valley v. Roommate.com*, No. 04-56916 (9th Cir., May 15, 2007), the U.S. Court of Appeals for the Ninth Circuit held that an interactive computer service may be held liable for violating the Fair Housing Act, notwithstanding a federal statute that provides immunity from all civil liability to interactive computer services in some circumstances. An interactive computer service is defined by 47 U.S.C. § 230(f)(2) as a service that "enables computer access by multiple users to a computer server"; it may include an Internet service provider, such as AOL, or a website that allows others to post messages.[1]

On May 15, 2007, the U.S. Court of Appeals for the Ninth Circuit held that 47 U.S.C. § 230(c) does not provide immunity from liability for alleged violations of the Fair Housing Act to a website that posts information provided by people seeking roommates. Although 47 U.S.C. § 230(c) provides immunity to interactive computer services that publish information provided by others, in this case, the Ninth Circuit found, the website had provided questionnaires on which the information provided by people seeking roommates was based. This meant, the court held, that the website was itself an information content provider and had not merely published information provided by others.

The federal statute that provides immunity to interactive computer services is 47 U.S.C. § 230(c), which was enacted as part of Title V of the Communications Decency Act of 1996 (CDA), P.L. 104-104. It provides that "[n]o provider ... of an interactive

[1] The full definition reads, "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."

computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[2]

The defendant in this case, Roommate, is a website that enables people to "find roommates based on their descriptions of themselves and their roommate preferences." It furnishes such members with online questionnaires through which the members "disclose information about themselves and their roommate preferences based on such characteristics as age, sex and whether children will live in the household. They can then provide 'Additional Comments' through an open-ended essay prompt."

The plaintiff in this case charged that Roommate had violated the Fair Housing Act, which prohibits, among other things, publishing or causing to be published any statement, such as an advertisement, with respect to the sale or rental of a dwelling that indicates any preference "based on race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3604(c).[3] The plaintiff alleged that Roommate had violated this provision in three ways: (1) by posting its questionnaires, (2) by posting and distributing by e-mail profiles based on the questionnaires, and (3) by posting the "Additional Comments" that members provide. Roommate claimed that it was immune from liability under 47 U.S.C. § 230(c), and a three-judge panel of the Ninth Circuit ruled as follows with respect to the three charges against Roommate:

Judge Kozinski: Roommate was immune only with respect to charge (3).
Judge Reinhardt: Roommate was immune with respect to none of the charges.
Judge Ikuta: Roommate was immune only with respect to charges (2) and (3).

Thus, there were no votes for immunity with respect to charge (1), one vote for immunity with respect to charge (2), and two votes for immunity with respect to charge (3). Roommate thus received a majority in its favor only with respect to charge (3). This coincided with Judge Kozinski's vote, so Judge Kozinski's opinion became the opinion of the court.

Kozinski Opinion

In his opinion for the court, Judge Alex Kozinski acknowledged that "Roommate is immune so long as it merely publishes information provided by its members.... However, Roommate is not immune for providing materials as to which it is an 'information content provider.' A content provider is 'any person or entity that is responsible, *in whole or in*

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[2] "One of Congress's goals in adopting this provision was to encourage 'the unfettered and unregulated development of free speech on the Internet.'" *Roommate.com*, quoting *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

[3] Even though the Fair Housing Act prohibits publishing statements that discriminate on the basis of race, color, religion, sex, handicap, familial status, or national origin, it does not prohibit discrimination on these bases in the sale or rental itself in some cases that may include roommate situations. Specifically, the Fair Housing Act does not apply to sales or rentals in some cases in which a single family home is sold or rented without the services of a real estate agent, and it does not apply to the sale or rental of rooms or units in dwellings occupied by no more than four families if the owner occupies one of the rooms or units. 42 U.S.C. § 3603(b).

part, for the creation or development of information provided through the Internet.' 47 U.S.C. § 230(f)(3) (emphasis added [by Judge Kozinski])."

With respect to the three alleged violations of the Fair Housing Act with which Roommate was charged, Judge Kozinski found that (1) "Roommate is 'responsible' for these questionnaires because it 'creat[ed] or develop[ed]' the forms and answer choices. As a result, Roommate is a content provider of these questionnaires and does not qualify for CDA immunity for their publication"; (2) Roommate does not merely passively pass on information it has received from members when it publishes and distributes members' profiles, but, "[b]y categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information that it is 'responsible' at least 'in part' for creating or developing"; and (3) Roommate is "not 'responsible, in whole or in part, for the creation or development of 'its users' answers to the open-ended 'Additional Comments' form, and is immune from liability for publishing these responses." Roommate, however, is not immune for (1) posting its questionnaires or (2) posting and distributing members' profiles. This does not necessarily mean that Roommate violated the Fair Housing Act, but only that, if it did, it is not immune under 47 U.S.C. § 230(c).

In reaching his conclusion with respect to the second charge against Roommate — posting and distributing profiles based on the questionnaires — Judge Kozinski distinguished the Ninth Circuit case of *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). In *Carafano*, as Kozinski wrote in *Roommate.com*, "an unidentified prankster placed a fraudulent personal ad on a date matching website.... We held that the CDA exempted the service from liability for two reasons. First, the dating service was not an 'information content provider' for the profiles on its website. Although the website required users to complete detailed questionnaires ..., 'no profile ha[d] any content until a user actively create[d] it.' ... Second, even if the dating service could be considered a content provider for publishing its customers' profiles, it was exempt from liability because it did not 'create[ ] or develop[ ] the particular information at issue.'"[4] After providing this summary of *Carafano*, Judge Kozinski explained:

> *Carafano* differs from our case in at least one significant respect: The prankster in *Carafano* provided information that was not solicited by the operator of the website. The website sought information about the individual posting the information, not about unwitting third parties . . . . While *Carafano* is written in broad terms, it must be read in light of its facts. *Carafano* provided CDA immunity for information posted by a third party that was not, in any sense, created or developed by the website operator — indeed, that was provided *despite* the website's rules and policies.

Reinhardt Opinion

In the second opinion in *Roommate.com*, Judge Stephen Reinhardt joined Judge Kozinski's opinion for the court, but dissented with respect to Kozinski's finding that

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[4] The distinction between these two reasons for exempting the dating service is subtle. As *Carafano* itself put it, "even assuming Matchmaker could be considered an information content provider, the statute precludes treatment as a publisher or speaker for '*any* information provided by *another* information content provider.' 47 U.S.C. § 230(c)(1) (emphasis added [by the court])." 339 F.3d at 1125. In other words, even if "[t]he fact that some of the content was formulated in response to Matchmaker's questionnaire" (*id*. at 1124) is considered sufficient to make Matchmaker an information content provider, the information that it provided was furnished by others.

Roommate was immune from liability for the third charge against it — posting members' "Additional Comments." Judge Reinhardt's difference of opinion stemmed from his different interpretation of the facts of the case, as he found "objective and subjective evidence that Roommate solicits users to set forth discriminatory requirements in the 'Additional Comments.'"

Ikuta Opinion

In the third opinion in *Roommate.com*, Judge Sandra S. Ikuta concurred with Judge Kozinski's opinion for the court that Roommate was not immune from liability for the first charge against it, and was immune from liability for the third charge against it, but, unlike Judges Kozinski and Reinhardt, Judge Ikuta believed that Roommate was also immune from liability for the second charge against it, which, again, was posting and distributing members' profiles. She reached this conclusion because she disagreed with Judge Kozinski that *Carafano* was distinguishable from *Roommate.com. Carafano* controlled this case, she wrote, because it "held that a website operator does not become an information content provider by soliciting a particular type of information or by selecting, editing, or republishing that information." As *Carafano* held that 47 U.S.C. § 230(c) protects information that is solicited, it was immaterial that, as Judge Kozinski noted, the customer in *Carafano* but not in *Roommate.com* had provided information that the website had not solicited. Judge Ikuta concluded:

> In sum, our binding precedent has already addressed the question when a website operator has jointly created and developed content so as to become an "information content provider." Unless a website operator directly provides "the essential published content," *Carafano*, 339 F.3d at 1124, it is not an "information content provider." The result is robust immunity under section 230(c).[5]

Commentary On the Decision

As the fact that the three-judge panel in *Roommates.com* issued three separate opinions appears to indicate, this case raises complex and important questions concerning freedom of speech on the Internet. Legal scholars have weighed in on the decision, and this report will quote from the comments of three of them. Law professor Eric Goldman found *Roommates.com* troubling:

> With 3 largely inconsistent opinions from a 3-judge panel, and a lead opinion that significantly narrows a fairly clear and relatively on-point Ninth Circuit precedent (Carafano), this case seems ripe for an en banc rehearing [a rehearing by all the judges of the Ninth Circuit]. I could even see this case going before the Supreme Court (especially because it conflicts with so many other precedents . . . . Meanwhile, if the Ninth Circuit doesn't correct this opinion, and fast, I predict the following:
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> 1) Websites will shy away from gathering structured data [such as data derived from questionnaires supplied by websites] from users. This is silly, of course, because structured data can be more useful for users, but this ruling makes structured data much more risky.

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[5] Judge Ikuta's final sentence alludes to a comment in *Carafano* (that Judge Kozinski quoted in *Roommates.com*) that "reviewing courts have treated § 230(c) immunity as quite robust." *Carafano*, 339 F.3d at 1123.

> 2) Craigslist will lose its very similar case in the Seventh Circuit.[6] The Seventh Circuit already has some bad 230 dicta in Doe v. GTE, and this opinion will give the Seventh Circuit judges all the ammo they need to hold Craigslist liable.

Professor Goldman added that the decision can even be read to mean "that any time a website reconstructs user data through its search engine, it loses [section] 230 [protection]" and, therefore, "that Google and other search engines have no 230 protection for their search results."[7]

Attorney Laura Quilter also disagreed with the decision, but she was not as alarmed by it as Professor Goldman was, because she believed that it would merely require Internet service providers to inform their customers of relevant law, such as the anti-discrimination provisions of the Fair Housing Act:

> [T]he decision's major point of distinction between *Carafano* and this case was that the ISP established policies. So establishing policies that reiterate the law will be key for ISPs in the wake of this decision. Kozinski stressed that the service in Carafano did not solicit the problematic information and in fact expressly forbade some aspects of it. So, under this decision, establishing policies that reiterate the law will go some way toward protecting an ISP. While this isn't the worst outcome for a speech-related law, it seems (to me) to be a waste of time, and I'd point out that it burdens ISPs with educating their users about the law. This sort of burden is, to my mind, inconsistent with notions of ISPs as "utilities", and also inconsistent with the broad, unfettered access to communications that the First Amendment contemplates.[8]

Finally, law professor Eugene Volokh took essentially the same view as Ms. Quilter, but he apparently did not believe that ISPs would have to educate their users about the law, but believed rather that ISPs would merely have to refrain from asking for information whose publication would violate the law. This is, presumably, because, if an ISP did not ask for such information, but a user provided it on his or her own, then, even under Judge Kozinski's reading of *Carafano*, the ISP would be immune from liability for posting it. Professor Volokh wrote:

> If other sites (for instance, Craigslist, which is the subject of a similar lawsuit) simply ask people to post their ads, and let others search the ads in full text, but without expressly asking for sex/familial status/etc. preferences and specifically providing searches for such preferences, the Ninth Circuit opinion suggests they will be immune. . . . This is not a substantial retrenchment of the preexisting law under 47 U.S.C. § 230, which offers a great deal of immunity to those Internet outlets that merely pass along others' speech. But it does suggest that when the outlets try to channel the speech in likely illegal directions, they may be liable for the result of that channeling.[9]

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[6] The Craigslist lawsuit was dismissed by the district court and is on appeal in the Seventh Circuit. See [http://volokh.com/archives/archive_2006_02_05-2006_02_11.shtml#1139541183].

[7] [http://blog.ericgoldman.org/archives/2007/05/ninth_circuit_s.htm].

[8] [http://lquilter.net/blog/archives/2007/05/15/roommatecom-reversed].

[9] [http://volokh.com/archives/archive_2007_05_13-2007_05_19.shtml#1179255772].