Liability of Interactive Computer Service for Violating the Fair Housing Act

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Summary

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, 489 F.3d 921 (9th Cir. 2007), a three-judge panel of 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. On April 3, 2008, the en banc Ninth Circuit (i.e., 11 judges) affirmed the panel's decision.

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On May 15, 2007, a three-judge panel of 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 (FHA) 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 court 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. On April 3, 2008, the en banc Ninth Circuit affirmed the panel's decision.

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 computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[1]

The defendant in this case, Roommate, is a website that "helps individuals 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."[2]

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).

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[1] "One of Congress's goals in adopting this provision was to encourage 'the unfettered and unregulated development of free speech on the Internet.'" *Roommates.com*, 489 F.3d at 925, quoting *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

[2] 489 F.3d at 924.

[3] Even though the FHA 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 can include roommate situations. Specifically, the FHA 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). The FHA's prohibition of advertising for legal conduct arguably violates the First Amendment, but the three-judge panel did not consider the question, and, for that reason, the en banc court also did not consider it. See footnote 40 of the en banc opinion.

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. Judge Kozinski's opinion concluded:

> Having determined that the CDA does not immunize Roommate for all of the content on its website . . . , we remand for a determination of whether its non-immune publication and distribution of information violates the FHA, 42 U.S.C. § 3404(c).[4]

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 part*, for the creation or development of information provided through the Internet.' 47 U.S.C. § 230(f)(3) (emphasis added [by Judge Kozinski])."[5]

With respect to the three alleged violations of the FHA 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";[6] (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";[7] 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."[8] 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 FHA, 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 *Roommates.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.'[9] . . . Second, even if the dating service could

[4] 489 F.3d at 929-930.

[5] 489 F.3d at 925.

[6] *Id.* at 926.

[7] *Id.* at 929.

[8] *Id.*

[9] The en banc decision, discussed below, stated that, in *Carafano*, "[w]e correctly held that the website was immune, but incorrectly suggested that it could never be liable because 'no [dating] profile has any content until a user actively (continued...)

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.'"[10] 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.[11]

Reinhardt Opinion

In the second opinion in *Roommates.com*, Judge Stephen Reinhardt joined Judge Kozinski's opinion for the court, but dissented with respect to Kozinski's finding that Roommate was immune from liability for the third charge against it—posting members' "Additional Comments." Judge Reinhardt's difference of opinion stemmed from his differing 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.'"[12]

Ikuta Opinion

In the third opinion in *Roommates.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 *Roommates.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."[13] 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 *Roommates.com* had provided information that the website had not solicited.

(...continued)

creates it.' As we explain above, even if the data are supplied by third parties, a website operator may still contribute to the content's illegality and thus be liable as a developer." Slip op. at 3468 (citations omitted).

[10] 489 F.3d at 927-928. 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.

[11] 489 F.3d at 928.

[12] *Id.* at 933.

[13] *Id.*

The En Banc Decision

The en banc Ninth Circuit opinion was written by Judge Kozinski and ruled in the same way that the panel decision had with respect to Roommate's three alleged violations of the FHA, finding that it was immune only with respect to the third. The en banc decision was 8 to 3, with the three dissenters joining in an opinion by Judge McKeown. With respect to Roommate's first and second alleged violations of the FHA (as listed on page 2 in the PDF and print versions of this report), Judge Kozinski wrote for the majority:

> The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity.[14]

With respect to Roommate's third alleged violation of the FHA, Judge Kozinski wrote:

> Roommate publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences. Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate. Without reviewing every essay, Roommate would have no way to distinguish unlawful discriminatory preferences from perfectly legitimate statements. . . . This is precisely the kind of situation for which section 230 was designed to provide immunity.[15]

As he had done in his decision for the three-judge panel, Judge Kozinski remanded the case to the district court "to determine . . . whether the alleged actions for which Roommate is not immune violate the Fair Housing Act, 42 U.S.C. § 3604(c)."[16]

Effect of the Decision

A debate has arisen over how far-reaching the decision in *Roommates.com* will be—specifically, whether it will preclude § 230(c) immunity to search engines such as Google. The dissent in the en banc decision wrote:

> The consequences of the majority's interpretation are far-reaching. Its position will chill speech on the Internet and impede "the continued development of the Internet and other interactive computer services and other interactive media." § 230(b)(1). To the extent the majority strips immunity because of sorting, channeling, and categorizing functions, it guts the heart of § 230(c)(1) immunity.[17]

The majority opinion in the en banc decision stated:

> Roommate's search function is . . . designed to steer users based on discriminatory criteria. Roommate's search engine thus differs materially from generic search engines such as

[14] Slip. op. at 3457.

[15] *Id.* at 3472.

[16] *Id.* at 3475.

[17] *Id.* at 3499.

> Google, Yahoo! and MSN Live Search. . . . [O]rdinary search engines do not use unlawful criteria to limit the scope of searches conducted on them. . . .[18]

The dissent, however, warned that Google might be in danger because "it ranks search results, provides prompts beyond what the user enters, and answers questions."[19] One commentator wrote, "The opinion suggests that 'neutral tools' won't be liable, but all search engines tweak their results to some extent—there is no such thing as a neutral search engine.[20] She added, "Roommate needs to be limited to its facts."

Another commentator who was concerned by the decision wrote:

> If the Supreme Court lets the decision stand, I predict that it will significantly increase litigation and chill Internet activity (e.g., sites like Roommates will be much less efficient as prompts become bulletin boards). The reason I'm skeptical is that litigation if often done in bad faith. As any real litigator will tell you, the point of litigation isn't necessarily to vindicate a right, but to harass an opponent with discovery, document productions, and other expensive tactics. So long as a claim is *plausible*, you can inflict real damage (and maybe get a favorable settlement) even if you think you will ultimately lose. The beauty of broad, bright-line immunity under Section 230 is that it allows parties to end this type of litigation quickly. If Google or Craigslist gets sued for content its *users* create, then the companies can immediately file a summary judgment motion (or a motion to dismiss) and end the case before discovery begins. If that line becomes less bright, then it's harder to shut down frivolous (or at least losing) litigation early.[21]

Finally, another commentator was less concerned:

> If other sites . . . 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 for those Internet outlets that merely pass along others' speech.[22]

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[18] *Id.* at 3461.

[19] *Id.* at 3490.

[20] http://scrawford.net/blog/more-on-section-230/1144/. The majority opinion's "neutral tools" comment appears at 3464 and the dissent's response appears at 3490.

[21] http://obsidianwings.blogs.com/obsidian_wings/2008/04/cert-the-9th-ci.html#more.

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