

FAIR HOUSING COUNCIL V. ROOMMATES.COM: A NEW PATH FOR SECTION 230 IMMUNITY

By Varty Defterderian

Over the years, there have been various terms for the notion that the Internet was something fundamentally different than any communications system or environment that came before it, and thus deserving of a different set of rules.¹ Whether called *digital* or *cyberlibertarianism*,² *cyberspace*³ or *internet exceptionalism*,⁴ the underlying concept was the same: “the online environment should . . . be permitted to develop its own discrete system of legal rules and regulatory processes” without “the imposition of existing offline legal systems grounded in territorially-based sovereignty.”⁵ Internet exceptionalism posits that cyberspace should be free from legal oversight because the fluid and constantly-evolving nature of the Internet and its technologies would independently develop more effective rules of conduct.⁶

Many have deemed section 230 of the Communications Decency Act (CDA), which grants immunity to online service providers for content provided by third parties, as “a flagship example of such exceptionalism.”⁷ Section 230’s safe harbor grants online service providers (OSPs)⁸ a

© 2009 Varty Defterderian. The author hereby permits the reproduction of this Note subject to the Creative Commons Attribution 3.0 License, the full terms of which can be accessed at <http://creativecommons.org/licenses/by/3.0/legalcode>, and provided that the following notice be preserved: “Originally published in the Berkeley Technology Law Journal 24:1 (2009).

1. See Lawrence Lessig, Commentaries, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 505, 513 (1999).

2. H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 377 (2008) (describing a vision of “freedom, liberty, and self-regulation” for online environments).

3. Posting of Eric Goldman to Technology & Marketing Law Blog, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm (April 3, 2008, 20:05:00 PST) (a belief that “the Internet was unique/special/different and therefore should be regulated differently”).

4. Holland, *supra* note 2, at 376 (Internet exceptionalism “presumes that cyberspace cannot be confined by physical borders or controlled by traditional sovereign governments.”).

5. *Id.* at 378.

6. *Id.* at 377.

7. 47 U.S.C. § 230 (2006); *Posting of Eric Goldman, supra* note 3. See Holland, *supra* note 2, at 388 (“Section 230 as a Form of CyberLibertarian Exceptionalism”); Post-

unique status; they receive immunity for behavior that would otherwise create liability in their brick-and-mortar counterparts. As one commentator noted,

[t]his expansion has created an environment in which many of the norms and regulatory mechanisms present in the offline world are effectively inapplicable. This is so not because the very nature of cyberspace makes such application impossible, or because sovereign law is necessarily ineffective or invalid, but rather because sovereign law has affirmatively created that condition.⁹

In enacting section 230, the legislature effectively created a shield from liability to OSPs unavailable to their offline counterparts.¹⁰

Yet, a recent 2008 Ninth Circuit opinion, *Fair Housing Councils v. Roommates.com* (*Roommates.com*), seems to call for the end for such cyber exceptionalism.¹¹ This Note explores this attempt at curtailing the scope of section 230 immunity. Part I provides an overview of the safe harbor, including prior judicial interpretations of contributory liability under the statute. Part II discusses the *Roommates.com* decision and its new and somewhat controversial rubric for liability. Part III attempts to make sense of the opinion's new direction. This Note then addresses the shortcomings of such a liability scheme and the ironically minimal practical effect such an unprecedented interpretation creates. The Note concludes by advocating that such massive doctrinal and policy changes are best left to the Legislature.¹²

ing of Adam Thierer to The Technology Liberation Front, Web 2.0, Section 230, and Nozick's "Utopia of Utopias", <http://techliberation.com/2009/01/13/web-20-section-230-and-nozicks-utopia-of-utopias>, (Jan. 13, 2009) ("In many ways, section 230 is the cornerstone of 'Internet freedom' in its truest and best sense of the term.").

8. In this Note, the term "online service provider" or "OSP" is used interchangeably with "interactive computer service" to denote "any entity providing access by users to information contained in a networked computer server." See Keith Silver, *Good Samaritans in Cyberspace*, 23 RUTGERS COMPUTER & TECH. L.J. 1, 1 n.1 (1997). OSPs include not only Internet service providers (typically known as ISPs), but also the operators of bulletin board services, websites, web portals, and other information services.

9. Holland, *supra* note 2, at 388.

10. 141 Congressional Record H8470 (daily ed., Aug. 4, 1995) (statement of Rep. Cox) ("it will establish as the policy of the United States that we do not wish to have content regulation by the Federal government of what is on the Internet . . .").

11. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

12. Though *Roommates.com* dramatically departs from section 230 jurisprudence, the practical effect will be minimal.

I. SECTION 230: THE STATUTORY LANDSCAPE

In 1996, Congress enacted section 230, which mandates that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹³ This Part first examines the liability landscape for online service providers prior to section 230, specifically looking to the case that inspired the passage of the statute. Section I.B provides an overview of Section 230, including congressional intent behind enacting the statute. Finally, Section I.C discusses subsequent judicial interpretation exempting OSPs from contributory liability for third party content.

A. The Catalyst That Brought About the Communications Decency Act Safe Harbor: *Stratton Oakmont, Inc. v. Prodigy Services, Co.*

Prior to section 230, common law governed liability for publication of materials among online service providers by analogy to their brick and mortar equivalents. Specifically, liability hinged on whether the service providers exercised any editorial control. If so, they were relegated to the status of publishers of the content and exposed to liability. *Stratton Oakmont, Inc. v. Prodigy Services Co.* illustrates this distinction and exemplifies the resulting problematic conclusions.¹⁴

In 1995, Stratton Oakmont, a securities investment banking firm, brought a defamation suit against Prodigy, owner and operator of a computer network whose members communicated with each other via Prodigy’s bulletin boards.¹⁵ Stratton Oakmont was concerned about several libelous posts on Prodigy’s boards characterizing them as unethical and criminal.¹⁶ Under common law defamation principles, publishers are subject to contributory liability for third-party content, whereas mere distributors are not.¹⁷ Because it considered Prodigy a publisher, the court granted Stratton’s motion for partial summary judgment.¹⁸ The court based its decision on several factors, all of which stemmed from Prodigy’s “exer-

13. 47 U.S.C. § 230(c)(1).

14. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

15. *Id.* at *1.

16. *Id.*

17. *See, e.g.,* *Cubby, Inc. v. Compuserve Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (“With respect to entities such as news vendors, book stores, and libraries, however, ‘New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation.’”).

18. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *1.

cis[ing] editorial control” over the content of posts on their message boards.¹⁹ This editorial control included the circulation of guidelines for acceptable content, the use of screening software, and Prodigy’s implied self-analogy to a “responsible newspaper.”²⁰

Though the court maintained that online message boards should generally be treated like bookstores, libraries, or other distributors, rather than like publishers of content, it found Prodigy to be an exception.²¹ The court emphasized the differences between passive and active service providers. Because distributors were “passive receptacle[s] or conduit[s],” they would escape liability.²² In contrast, “exercise of editorial control and judgment” placed service providers, like newspapers, squarely within the bounds of publisher liability.²³ Therefore, any attempt to filter, edit or even sort the content would be an act of editorial control, burdening proactive service providers with greater liability than those that left all data posted to their servers untouched. The *Stratton Oakmont* ruling thus severely limited incentives to self-police one’s website for illegal third-party content.²⁴

B. The Communications Decency Act and Section 230

Congress moved swiftly to counteract the *Stratton Oakmont* outcome.²⁵ The Communications Decency Act of 1996 (CDA) established a safe harbor for interactive computer services from liability arising from

19. *Id.* at *2.

20. *Id.* at *1-2.

21. *Id.* at *4.

22. *Id.* at *3 (emphasis added).

23. *Id.* at *3.

24. The court considered the implications of this decision, though it summarily disregarded any serious disincentives, reasoning that the market would produce sites willing to police content. “[T]he fear that this Court’s finding of publisher status for PRODIGY will compel all computer networks to abdicate control of their bulletin boards, incorrectly presumes that the market will refuse to compensate network for its increased control and the resulting increased exposure.” *Id.* at *5.

25. The legislative history specifically criticized the *Stratton Oakmont* and similar decisions that had relegated OSPs to publisher status because they took steps to restrict access to objectionable third-party content that they played no role in creating. S. REP. NO. 104-230, 194 (1996); see also 141 CONG. REC. H8469-H8470 (daily ed., Aug. 4, 1995) (statement of Rep. Cox, referring to disincentives created by *Stratton Oakmont* decision, “We want to encourage people like Prodigy. . . to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.”); see H.R. REP. NO. 104-458, 194 (1996) (“The conferees believe that [decisions like *Stratton Oakmont*] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.”).

content generated by third-parties.²⁶ This section discusses the requirements for section 230 immunity and then explores the legislative intent and general judicial interpretation surrounding the statute.

Section 230 immunizes defendants who meet the following three requirements, explicated by the Fourth Circuit in *Zeran v. America Online, Inc.*: (1) the defendant must be a provider or user of the interactive computer service, (2) holding the defendant liable would treat it as a publisher or speaker of third-party content, and (3) the defendant must not have developed or created, in whole or in part, the content at issue.²⁷ Entitled “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” this section prohibits OSPs from being regarded as either the speaker or publisher of content provided by a third party.²⁸

The third prong of the *Zeran* test bars immunity for online entities that are also “information content provider[s],” defined as those who create or develop, either completely or in part, information available on the Internet that is at issue in the suit.²⁹ Thus, OSPs that are actually generating the disputed content are excluded from immunity.

In enacting section 230, Congress explicitly relied on five premises, two of which are pertinent: first, that there is an inherent benefit in the increased user control offered by such online services;³⁰ second, that both the Internet and OSPs have thrived under minimal government oversight, to the advantage of the general public.³¹ Accordingly, the Legislature intended section 230 to play a role in a larger policy scheme of “preserv[ing] the vibrant and competitive free market that presently exists,” and encour-

26. The Communications Decency Act was passed as an amendment to the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

27. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), see discussion *infra* Section I.C; Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 586 (2008) (discussing *Zeran*, “[t]hough it did not characterize it exactly as such, the *Zeran* court laid out what in effect functions as a three-part test for § 230(c)(1) immunity”). Section 230 further removes civil liability for restricting access or enabling such restriction of obscene or otherwise objectionable content, regardless of whether it is afforded constitutional protection. 47 U.S.C. § 230(c)(2) (2006). The goal is to remove liability for OSPs that vigorously police their networks, and in the process inadvertently end up removing constitutionally protected speech.

28. 47 U.S.C. § 230(c)(1) (2006).

29. 47 U.S.C. § 230(f)(3) (2006). Interactive computer services are “entit[ies] providing access by users to information contained in a networked computer server.” Silver, *supra* note 8, at 1 n.1.

30. 47 U.S.C. § 230(a)(2) (2006).

31. 47 U.S.C. § 230(a)(4) (2006).

aging development of both the Internet and technologies aimed at enhancing user control.³²

Guided by such legislative intent, the majority of federal courts have construed section 230 broadly, granting immunity for all causes of actions seeking to hold OSPs liable for content created or developed by their third-party users.³³ In accord with the express congressional finding that OSPs “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,”³⁴ courts have read into the statute a Congressional intent to protect and encourage the development of the freedom of internet speech.³⁵ In granting OSPs a special carve-out in the law and thereby keeping online government interference to a minimum, Congress attempted to ensure a robust marketplace of ideas and information in the realm of internet communication.³⁶ Thus, the statute immunizes an OSP defendant from suits that deem it as either the publisher or speaker of content that originates from someone else.³⁷ Under the safe harbor provision of section 230, an injured party “cannot sue the messenger.”³⁸

Though there is room for flexibility in the statute to limit this broad reading, most courts continue to interpret the immunity broadly to include both distributor and publisher liability.³⁹ And in the eleven years since the first broad judicial interpretation of section 230 in *Zeran*⁴⁰ Congress could

32. 47 U.S.C. § 230(b)(1)-(3) (2006).

33. *See, e.g.*, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998). The court held that: there simply is no evidence here that AOL had any role in creating or developing any of the information in the Drudge Report. . . . AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and . . . shall not be treated as a “publisher or speaker” and therefore may not be held liable in tort. *Id.*

34. 47 U.S.C. § 230(a)(3) (2006).

35. *See, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”); *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (“[C]ongress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.”).

36. *See Zeran*, 129 F.3d at 330; *Batzel*, 333 F.3d at 1033.

37. 47 U.S.C. § 230(c) (2006).

38. *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

39. *See infra* Section II.C.

40. *Zeran*, 129 F.3d at 330.

have amended the statute but has not yet seen fit to.⁴¹ This legislative acquiescence suggests that the courts got it right.⁴²

C. Liability for Third-Party Content Under Section 230

Courts have broadly interpreted the OSP immunity provision of Section 230.

In 1997, in *Zeran v. American Online, Inc.*, the Fourth Circuit became the first appellate court to interpret the scope of the safe harbor.⁴³ The plaintiff, Zeran, sought to hold AOL liable for defamatory messages posted on AOL bulletin boards by an unidentified third party.⁴⁴ In the complaint, Zeran highlighted AOL's delay in removing the posted messages, refusal to post a retraction, and failure to screen for essentially identical postings.⁴⁵ Zeran argued that, although section 230 eliminated publisher liability, it left distributor liability intact.⁴⁶ The court was unconvinced; relying on the plain language of the statute, it held that distributors were a subset of the more expansive category of publishers. Therefore, immunity must necessarily extend to distributors as well as to publishers.⁴⁷ The court barred suits against service providers for their exercise of what the court deemed "a publisher's traditional editorial functions" such as discretion over publication, removal, and modification of content.⁴⁸

The court focused on the legislative intent regarding internet exceptionalism and maintained that the Legislature explicitly chose not to use

41. See Lisa Guernsey, EBay Not Liable for Goods That Are Illegal, Judge Says, N.Y. TIMES, Nov. 13, 2000, at C2; Susan Estrich, Should Internet protect against defamation?, USA TODAY, Aug. 29, 2001, at 13; Marc S. Reisler, Internet Issues: Differing Statutes, 231 N.Y. L.J. 5 (2004); Adam Liptak, Ideas & Trends: The Ads Discriminate, but Does the Web?, N.Y. TIMES, March 5, 2006, § 4, at 16; Protection for Web Publishers, N.Y. TIMES, Nov. 21, 2006, at C6. Even courts have noted that [t]he fact that . . . [Congress] has not amended section 230 to add a similar provision in the 10 years since it was enacted, or in the eight years since the example of the DMCA has been in existence, strongly supports the conclusion that Congress did not intend to permit notice liability under the CDA.

Barrett v. Rosenthal, 146 P.3d 510, 520 (Cal. 2006).

42. See 73 AM. JUR. 2D STATUTES § 84 (2008); *United States v. Elgin, J. & E. Ry.*, 298 U.S. 492, 500 (1936) ("Notwithstanding the intent imputed to Congress . . . no amendment has been made to the commodities clause. We must therefore conclude that the interpretation of the act then accepted has legislative approval.").

43. 129 F.3d 327 (4th Cir. 1997).

44. *Id.* at 328-29.

45. *Id.* at 328.

46. *Id.* at 332 ("[D]istributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability.").

47. *Id.*

48. *Id.* at 330.

tort liability against OSPs to deter objectionable internet speech when those OSPs are simply a means of access and dissemination for the potentially harmful speech of others.⁴⁹ In the eyes of the court, Congress regarded any court decision to the contrary as “simply another form of intrusive government regulation of speech.”⁵⁰

In 2006, the California Supreme Court revisited the issue of distributor liability in *Barrett v. Rosenthal*.⁵¹ The plaintiff alleged that a user of an interactive service provider posted a copy of a libelous letter to an online newsgroup.⁵² The trial court ruled that such republication was immune under the statute.⁵³ The Court of Appeal, however, reversed, stating that section 230 did not extend to distributor liability.⁵⁴ The California Supreme Court then reversed and chastised the Court of Appeal for breaking from the majority of federal and state courts in refusing to extend immunity to distributors.⁵⁵ Reiterating *Zeran*'s reasoning and policy considerations, the *Barrett* court held that section 230 barred distributor liability for online publications.⁵⁶ It noted that plaintiffs were still free under section 230 to bring suit against the creators of the defamatory online content, but that the court was not free to further expand liability.⁵⁷ Any such change must await congressional action.⁵⁸

Zeran remains the preeminent case on section 230 immunity.⁵⁹ As reaffirmed in *Barrett*, *Zeran* firmly cemented a blanket policy exempting online service providers for publishing content created by third parties—a protection not afforded to their brick and mortar counterparts.

49. *Id.* at 330-31.

50. *Id.* at 330.

51. *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

52. *Id.* at 514.

53. *Id.*

54. *Id.*

55. *Id.* at 518 (citing *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998); *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Morrison v. Am. Online, Inc.*, 153 F. Supp.2d 930, 933-34 (N.D. Ind. 2001); *PatentWizard, Inc. v. Kinko's Inc.*, 164 F. Supp. 3d 1069, 1071 (D.S.D. 2001); *Green v. Am. Online*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003); *Doe One v. Oliver*, 755 A.2d 1000, 1003-04 (Conn. Super. Ct. 2000); *Doe v. Am. Online, Inc.*, 783 So. 2d 1010, 1013-17 (Fla. 2001)).

56. *Barrett*, 146 P.3d. at 529.

57. *Id.*

58. *Id.*

59. *Id.* at 514.

II. *FAIR HOUSING COUNCIL V. ROOMMATES.COM, LLC*

In an April 2008 opinion, the Ninth Circuit addressed OSP immunity under section 230. In *Fair Housing Council v. Roommates.com, LLC*, the en banc court faced two conflicting federal statutes: the Fair Housing Act (FHA) and the CDA safe harbor.⁶⁰ The 8-3 majority relied not on whether the FHA or section 230 controlled, but rather on the meaning of information content providers.⁶¹ In doing so, it attempted to more clearly demarcate liability for interactive service providers.⁶²

A. The Fair Housing Act

To understand the *Roommates.com* decision, a quick word regarding the Fair Housing Act is necessary. Enacted in 1968, the FHA set up a legislative scheme of anti-discrimination provisions to protect individuals from discrimination by housing sellers or landlords. The FHA prohibits discrimination on the basis of “race, color, religion, sex, familial status, or national origin” in the sale or rental of a dwelling.⁶³ The law, however, contains an express “Mrs. Murphy” exception⁶⁴ excluding from liability persons renting out a room or unit in owner-occupied buildings of four or fewer families, including persons seeking roommates.⁶⁵

Though the FHA permits discrimination in some situations, it also contains a universal anti-discrimination provision regarding the advertising of available housing, including advertising of housing within the Mrs. Murphy exemption. It makes unlawful:

mak[ing], print[ing], or publish[ing], or caus[ing] 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, or an in-

60. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008).

61. *Id.* at 1162-63.

62. *Id.* at 1175.

63. 42 U.S.C. § 3604(a) (2006).

64. 42 U.S.C. § 3603(b)(2) (2006).

65. The exemption is an affirmative defense. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 426 (2d Cir. 2005). The moniker arose from a hypothetical regarding a fictitious Mrs. Murphy who refused to rent rooms to African Americans in the infamous “Mrs. Murphy’s boardinghouse.” Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out The Welcome Mat For Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329, 334 n.17 (2008).

tention to make any such preference, limitation, or discrimination.⁶⁶

This provision not only attributes liability to the advertiser who actively discriminates but also holds the publisher equally accountable. Thus, the owner of an exempt building and the offline publisher through which the owner advertises, such as a newspaper or magazine, would be liable regardless of an owner's ability to lawfully hold such preferences.

B. *Roommates.com*: Factual and Procedural Background

Defendant, Roommates.com (Roommates), runs a website intended to match people looking for roommates or housemates.⁶⁷ Before a user can search or post listings, he must create a profile that consists of answers to a series of questions.⁶⁸ Some of the questions require a response (information about location, residence, rental details and household description), while others are optional (preferences and additional comments).⁶⁹ If a user declines to respond to a question, all the options are automatically selected. Among the mandatory questions, Roommates requires users to disclose sex, sexual orientation, and whether children will be in the household.⁷⁰ The profiles then allow users to search within the Roommates network under one or more of the criterion. In addition, Roommates uses these preferences to send periodic emails indicating availability of housing that match the selected criteria.

The Fair Housing Councils of San Fernando Valley and San Diego (Councils) sued Roommates in federal court, alleging that the site's business practices violated the FHA and California housing discrimination laws.⁷¹ The district court refused to exercise supplemental jurisdiction over the state issues, and without considering the merits of the FHA claims, dismissed the action as barred by section 230.⁷² The Councils ap-

66. 42 U.S.C. § 3604(c) (2006).

67. *Roommates.com*, 521 F.3d at 1161.

68. *Id.*

69. *Id.* at 1181 (McKeown, J., dissenting).

70. *Id.* at 1161. The mandatory disclosure of sex and information with regards to children could potentially implicate discriminatory housing policies under the FHA which bars all distinctions on the basis of both sex and familial status. The disclosure regarding sexual orientation could potentially implicate similar discrimination under the California fair housing law, though the court refused to exercise supplemental jurisdiction. *Id.* at 1162.

71. *Id.*

72. *Id.*

pealed.⁷³ Both the Ninth Circuit panel and the en banc panel refused to extend section 230 immunity to Roommates.⁷⁴

C. *Roommate.com*'s Framework for Immunity

The Ninth Circuit en banc panel found Roommates only partially immune. The court did not afford safe harbor protection to the drop down menus, search engine, or email notifications.⁷⁵ It did, however, find the "Additional Comments" section of profile pages to be eligible for section 230 immunity.⁷⁶ The court held that a website (or user) would be an information content provider, and thus denied section 230 immunity, "if it contribut[ed] materially to the alleged illegality of the conduct."⁷⁷ Specifically, section 230 "does not grant immunity for inducing third parties to express illegal preferences."⁷⁸ Liability is premised not necessarily on the level of control a defendant had over the content at issue, but whether the defendant's actions somehow created or lent itself to the illegality. The Ninth Circuit thus clarified, or at most altered, the third prong of the *Zeran* test for immunity.⁷⁹

D. Passive vs. Active: Muddling Through Liability

Prior to *Roommates.com*, courts did not differentiate between whether an OSP was active or passive; so long as it did not create or develop the content in question, the OSP was immune.⁸⁰ The majority broke with section 230 case law in attempting to define creation or development of content by differentiating passive and active providers or users. The court uses the terms "neutral," "generic" and "passive" almost interchangeably to demarcate the line of immunity under section 230.⁸¹ The majority takes

73. *Id.*

74. *Fair Hous. Council v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007), *rev'd en banc*, 521 F.3d 1157 (9th Cir. 2008).

75. *Roommates.com*, 521 F.3d at 1170, 1172. The drop down menus were filled with options specifically delineated by Roommates, such as sex and sexual preference. *Id.* at 1165.

76. The "Additional Comments" field was a blank text field that allowed Roommate's users to type in their own specific preferences. *Id.* at 1173-74.

77. *Id.* at 1168.

78. *Id.* at 1165.

79. *See supra* Section II.B.

80. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997); *see* 141 CONG. REC. H8469-H8470 (daily ed., Aug. 4, 1995) (statement of Rep. Cox, referring to disincentives created by *Stratton Oakmont* decision, "We want to encourage people like Prodigy. . . to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see.").

81. *Roommates.com*, 521 F.3d at 1161-76.

great pains to distinguish between providers of interactive computer services who “passively display[] content that is created entirely by third parties” and those that create content themselves or are “‘responsible, in whole or in part’ for creating or developing the website.”⁸² The former are exempt from liability, the latter are not. However the court noted that a single website may be immune for some content but be liable for other content.⁸³

This distinction rested on the differences between willfully malicious or illegal services and more “generic” or “neutral” ones, such as Google or Yahoo!.⁸⁴ Roommates’s flaw was actively “inducing” third parties to break the law in certain sections of its website.⁸⁵ By creating categories and allowing users to seek and filter the information based on protective statuses,⁸⁶ Roommates was liable whereas a site that simply solicits free-form comments would not be.⁸⁷ Yet the court overlooks the fact that Roommates is essentially a more user-friendly and technologically advanced version of websites that are used to find roommates, such as Craigslist.⁸⁸ These sorting tools were the tipping point of liability, signifying a more active editorial role that Roommates chose to take.

Although the court notes section 230’s express purpose of overruling the *Stratton Oakmont* decision, the Ninth Circuit still reverts to the same terminology used by the *Stratton Oakmont* court. It also adopts the *Stratton Oakmont* rationales in construing liability. The repeated use of the

82. *Id.* at 1162.

83. *Id.* at 1162-63.

84. *Id.* at 1167.

85. *Id.* at 1165 (“[Section 230] 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.”).

86. *Id.* at 1164 (“Roommate is undoubtedly the ‘information content provider’ as to the questions and can claim no immunity for posting them on its website, or for forcing subscribers to answer them as a condition of using its services.”). “The FHA makes it unlawful to ask certain discriminatory questions for a very good reason: Unlawful questions solicit (a.k.a. ‘develop’) unlawful answers. Not only does Roommate ask these questions, Roommate makes answering the discriminatory questions a condition of doing business.” *Id.* at 1166.

87. Craigslist is one example of a site that simply solicits free-form comments. *See Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008) (“Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination . . .”). *See also Roommates.com*, 521 F.3d at 1172 n.33 (“Craigslist’s service works very much like the ‘Additional Comments’ section of Roommate’s website . . .”).

88. Note that Craigslist has a drop down menu for pets, but not for other categories.

word passive in phrases such as “passive transmitter,”⁸⁹ “passively relayed,”⁹⁰ and “passively displayed”⁹¹ echo the “passive conduit”⁹² of *Stratton Oakmont*. The *Stratton Oakmont* court held that even trivial editorial control pushed a defendant out of the passive circle.⁹³ In *Roommates.com*, however, the court introduces the concept of “materially contributing” to the illegality at issue as a way of differentiating between passive and active conduct.⁹⁴ Thus, Roommates has no immunity for its drop down menus, search engine, or email notification systems because it is deemed to be more than a passive conduit of third-party information.⁹⁵

In an attempt to clarify its standard, the court offers several examples of passivity and one additional example of active illegal conduct. At the passive end of the spectrum are the activities that *Zeran* permitted in 1997: traditional editorial duties including editing typographical errors, censoring obscenity or paring down lengthy posts.⁹⁶ On the active end: “[a] dating website that requires users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines. . . .”⁹⁷ The latter category is somewhat puzzling, since it is essentially a description akin to Roommates’s operations. Yet the Ninth Circuit’s characterization of section 230 would grant it immunity. Thus the *Roommates.com* notion of “passive” is far more nebulous than that of *Stratton Oakmont*.⁹⁸ The phrase “passive transmitter” is stripped of all but form in such a rendering of what falls outside the scope of “information content provider.” Such a dating website would have designed its system to use similar criteria as Roommates in both forcing us-

89. *Roommates.com*, 521 F.3d at 1166.

90. *Id.* at 1172 n.33.

91. *Id.* at 1174.

92. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, *3 (N.Y. Sup. Ct. May 24, 1995); see also discussion *supra* Section I.A.

93. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3, *5.

94. *Roommates.com*, 521 F.3d at 1167-68 (“[T]he immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term ‘development’ as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”). The court does not use the term active conduct; it instead characterizes any such conduct as “development” as per the statute. *Id.* For purposes of this Note and consistency within the nomenclature, I will refer to such development as active conduct.

95. *Id.* at 1166.

96. *Id.* at 1169.

97. *Id.* Here the court appears to be alluding to *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003). For more on this, see discussion *infra* Section V.A.

98. See *Stratton Oakmont, Inc.*, 1995 WL 323710, at *3, *5.

ers to participate and narrowly tailoring search results.⁹⁹ Similarly, any such system must equally be said to induce the actions of its third party users and content providers.¹⁰⁰

Instead of clarifying the meaning of “creation or development,”¹⁰¹ the court muddied the waters. This third prong of the *Zeran* test no longer holds ground on its own; something more than a passive conduit but something less than a content creator is required to trigger immunity.¹⁰² This something more appears to be a tie to the illegal or unlawful nature of the allegation beyond acting as a mere channel for the illegal conduct to occur; it requires that a defendant “materially contribut[e] to [the content’s] alleged unlawfulness.”¹⁰³

In an effort to illustrate the precise scope of “materially contribute,” the court employs the analogy of search engines. Key to drawing a distinction between Roommates and search engines like Google and Yahoo! is *neutrality*.¹⁰⁴ Unlike Roommates, the court noted that “ordinary search engines” allow users to search for almost anything, without biasing their activities towards unlawful or discriminatory behaviors by employing illegal criteria in executing searches.¹⁰⁵ The difference between the ordinary search engine and the Roommates search system is the use of “*neutral tools*”:

If an individual uses an ordinary search engine to query for a “white roommate,” the search engine has not contributed to any alleged unlawfulness in the individual’s conduct; providing *neutral tools* to carry out what may be unlawful or illicit searches does not amount to ‘development’ for purposes of the immunity exception.¹⁰⁶

However, for all its reliance on the neutrality of ordinary search engines, the court failed to articulate a clear rule as to what constitutes neutrality. In this age of near absolute control of information dissemination, it

99. *See Roommates.com*, 521 F.3d at 1167.

100. *See id.* at 1165.

101. 47 U.S.C. § 230(f)(3) (2006).

102. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *supra* Section I.B.

103. *Roommates.com*, 521 F.3d at 1168. Note that the court, despite cautioning that it was not ruling as to the illegality of the Roommate’s actions, appeared to be basing much of its ruling on what it evidently presumed to be the illegal nature of the action. In comparing “ordinary search engines” to Roommates, Judge Kozinski notes that “nor are they designed to achieve illegal ends.” *Id.* at 1167.

104. *Id.* at 1167, 1169.

105. *Id.* at 1167.

106. *Id.* at 1169.

is difficult to argue that Google fits the mold of a neutral search engine.¹⁰⁷ The closest the majority gets is to contrast the search mechanisms of the major search engines of the world to actions inducing illegal behavior.¹⁰⁸ Thus, the test of neutrality is not a matter of the degree of involvement or manipulation of content, but rather an association with, and inducement of, something presumed to be unlawful.

III. MAKING SENSE OUT OF *ROOMMATES.COM*

In order to understand the reasoning behind the somewhat odd and precedent-breaking opinion, one must first look at *Carafano v. Metroplash.com, Inc.*¹⁰⁹ The five-year-old Ninth Circuit opinion stood as the premier obstacle between precedent and the liability the court sought to impose on Roommates. In maneuvering around the *Carafano* analysis, *Roommates.com* appears to emulate, though without recognizing it, the contributory liability scheme for copyright infringement.

A. Paving Over *Carafano*

Operating under an essentially indistinguishable factual background regarding OSP input and control, Matchmaker, an online dating service, was granted full immunity under section 230 by the Ninth Circuit in 2003.¹¹⁰ Like Roommates, users of Matchmaker created profiles that were then matched according to their answers to a detailed questionnaire that included both drop-down menus and text boxes for open-ended questions.¹¹¹ Like Roommates, one of Matchmaker's users used the website in an illegal manner and against the express service terms of the OSP.¹¹² In *Carafano*, the user created a fake, sexually-charged profile for a famous actress and divulged her home address and phone number without her consent, encouraging other users to contact her for sexual purposes.¹¹³

107. See Mike Gudgell, *Google Takes Aim at Online Term Paper Peddlers*, ABC NEWS, May 24, 2007, <http://abcnews.go.com/Technology/story?id=3207084> (discussing how Google will start blocking ads of companies selling term papers); David LaGeese, *The World According to Google*, U.S. NEWS, May 2, 2004.

108. *Roommates.com*, 521 F.3d at 1167.

109. 339 F.3d 1119 (9th Cir. 2003).

110. *Id.* at 1121.

111. *Id.*

112. See *id.* at 1121; Roommates.com Terms of Service, <http://www.roommates.com/terms.rs> (last visited on Dec. 19, 2008) (“You agree to NOT use the Service for any illegal or inappropriate purpose . . .”).

113. *Carafano*, 339 F.3d at 1121.

The Ninth Circuit went to great lengths to maintain that Matchmaker's actions in creating questionnaires in no way made them an information content provider:

Under § 230(c), therefore, 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. The fact that some of the content was formulated in response to Matchmaker's questionnaire does not alter this conclusion.¹¹⁴

Even though Matchmaker created the questions, propagated the list of answers, and put them in a drop-down menu format, the site was still immune from liability under the section 230 safe harbor; this active behavior was insufficient to remove CDA protection. The court further remarked that the matching services and email notifications offered by Matchmaker did not push it into the realm of information content providers.¹¹⁵ Instead, these services were, arguably, precisely the type of continued Internet development that Congress had in mind when drafting section 230.¹¹⁶

The en banc court in *Roommates.com* sought to distinguish *Carafano*. Though the *Roommates.com* court maintained that *Carafano* was correctly decided, the court noted that it had "incorrectly suggested that it could never be liable because 'no [dating] profile has any content until a user actively creates it.'"¹¹⁷ In its stead, the court offered what it deemed a more "plausible rationale" for the holding in *Carafano*: neutrality.¹¹⁸ Under the *Roommates.com* definition of neutrality, it was not the degree of control that Matchmaker exerted in creating the website or soliciting information in general, but rather it was its degree of control of the purportedly illegal activity.¹¹⁹ This was a necessary step in the analysis to remove

114. *Id.* at 1124.

115. *Id.* at 1125.

116. *Id.*

117. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1171 (9th Cir. 2008).

118. *Id.*

119. Though Matchmaker provided the technology to create and publish the fake profile, it neither prompted nor solicited the illegal content. In comparison, Roommates used drop down lists to prompt its users to engage in illegal conduct—to use sex as a criterion for choosing a roommate. The court noted that:

The allegedly libelous content there—the false implication that Carafano was unchaste—was created and developed entirely by the malevolent user, without prompting or help from the website operator. To be sure, the website provided neutral tools, which the anonymous dastard used to publish the libel, but the website did absolutely nothing to encourage the posting of defamatory content—indeed, the defamatory posting was contrary to the website's express policies.

immunity for Roommates because the layout and operations of Matchmaker and Roommates are virtually indistinguishable. Had liability been premised merely on the degree of general control and content manipulation, as was the case in *Carafano*, Roommates could not be held liable.

Interestingly enough, not only does the opinion recast *Carafano*, but in doing so it minimizes the realities of the case. In 2003, the Ninth Circuit referred to *Carafano* as a case of “cruel and sadistic identity theft.”¹²⁰ However, in 2008, the *Roommates.com* opinion refers to it as the work of an “unknown prankster” and “dastard.”¹²¹ In comparison, Roommates’s activity was characterized as illegal and unlawful numerous times throughout the opinion.¹²² This distinction in the seriousness of the behavior highlights both the policy goals and supposed moral culpability levels between the two scenarios. By characterizing such awful harassment and identity theft as a mere prank, the court minimizes the social stigma around the action involving Matchmaker while simultaneously exaggerating the social harm caused by Roommate’s website. It is unclear why a site that enables a woman to express a desire to live only with other women is deemed reprehensible and undeserving of statutory immunity, while a site that enables a random stranger to usurp the identity of an individual and subject her to incessant harassment is merely facilitating pranks.¹²³ Yet such characterization is essential to erode the protections of section 230. The *Roommates.com* court justified its deviation from the clearly stated goals of a statute and the accompanying consistent judicial interpretation by proclaiming strong policy grounds. While eliminating sex and racial discrimination are worthy policy goals, it is not clear that *Roommates.com* actually serves to further those goals.

In distinguishing the two cases, the opinion goes to great lengths to minimize and clarify the holding of *Carafano* in order to pave the way for *Roommates.com*’s new theory of contributory liability.

B. The *Roommates.com* Court Moves Towards Copyright Theories of Contributory Liability

While the Ninth Circuit deviated from prior section 230 jurisprudence, it steered toward other theories of contributory liability, specifically those embodied by *Sony* and *Grokster* in copyright infringement jurispru-

Id. See discussion *supra* Section II.D.

120. *Carafano*, 339 F.3d at 1120.

121. *Roommates.com*, 521 F.3d at 1171.

122. *E.g., id.* at 1164, 1165, 1174.

123. *See id.* at 1171.

dence.¹²⁴ These two cases are the preeminent opinions establishing contributory copyright liability under the doctrine of inducement. Without so much as even referencing either of the two cases that interestingly wound their way up from the same Ninth Circuit to the Supreme Court, the en banc panel in *Roommates.com* arrived at an analogous conclusion, merely swapping *legal* for *noninfringing* and *materially contributes* for *affirmative steps*.

The well known Sony Betamax case of 1984 marked a new era for contributory liability in copyright law and has continued to play a significant role in the internet age. The Supreme Court ruled that the making of individual copies of television shows for personal use did not constitute copyright infringement; instead it was fair use.¹²⁵ The Court also ruled that the manufacturers of home video recording devices, such as the Betamax, cannot be liable for infringement.¹²⁶ Importing the “staple article of commerce” notion from patent law, the Supreme Court held that the test for contributory liability was whether a product “is capable of commercially significant noninfringing uses.”¹²⁷ In other words, regardless of the product’s actual capacity for copyright infringement, so long as “the product is widely used for legitimate, unobjectionable purposes,” it is safe from liability for contributory infringement.¹²⁸

Though the doctrines of liability are essentially identical, the rationale behind each is different. Where the *Sony* Court, twenty-four years prior, was concerned in not “block[ing] the wheels of commerce,”¹²⁹ the *Roommates.com* court was instead concerned about a far-reaching and powerful Internet going unchecked.¹³⁰

124. See *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 421 (1984); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

125. *Sony Corp.*, 464 U.S. at 421.

126. *Id.* at 456.

127. *Id.* at 442.

128. *Id.*

129. *Id.* at 441 (citing *Henry v. A.B. Dick Co.*, 224 U.S. 1, 48 (1912)).

130. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008). The Ninth Circuit observed that:

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. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.

Id.

Twenty-one years after *Sony*, the Supreme Court again addressed contributory liability in copyright infringement—though this time within the realm of the Internet. In *Grokster*, the Court held that peer-to-peer file sharing companies, such as Grokster, could face contributory liability for inducing copyright infringement through acts taken in the course of marketing the software.¹³¹

The *Grokster* ruling narrowed *Sony*'s rule, allowing contributory liability to run in the presence of “clear expression or other affirmative steps taken to foster infringement,” regardless of the substantial noninfringing uses.¹³² In doing so, the Court drew a distinction between passive conduits and active inducement.¹³³ Not only was it Grokster's explicit objective was for the software to be used to download copyrighted works, but Grokster also actively targeted former Napster users, a program explicitly shut down because of its role in making copyright infringement readily accessible.¹³⁴ Grokster's demise was its affirmative actions in creating and fostering a product that would mainly and knowingly be used for infringement, regardless of its potential for lawful activity. Culpable inducement, as opposed to legitimate enterprise, was key to establishing liability.¹³⁵

Roommates.com similarly focused on the purposes and uses of a website. In drawing a distinction between Roommates, arguably a specialized search engine, and more general-use search engines like Google, the court notes that “ordinary search engines” neither use illegal criteria to execute searches, nor are devised to effectuate unlawful outcomes.¹³⁶ The difference between a neutral search tool like Google and Roommates is a matter of legitimate purpose.

Roommates's drop-down menus allow the user to easily sort and choose between potential roommates on the basis of specific characteristics, such as the sex of the potential roommate. Such discrimination on the basis of sex is illegal under the FHA, online or offline. Basically, “[i]f such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online.”¹³⁷ Roommates's drop down menus, according to the majority, have abso-

131. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

132. *Id.*

133. *Id.* at 923.

134. *Id.* at 924.

135. *Id.* at 937 (stating that “[t]he inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise”).

136. *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1167 (9th Cir. 2008).

137. *Id.* at 1164.

lutely no “legitimate, unobjectionable purposes.”¹³⁸ In contrast, “neutral” search engines such as Google and Yahoo! can be used for both lawful and unlawful searches. Thus, “neutral” search engines, or those “capable of commercially significant [legal] uses,” are afforded the section 230 safe harbor, whereas the drop down menus of a site like Roommates.com fails the analogous test as a “staple article of commerce.”¹³⁹

Under *Roommates.com*, such a direct role in the illegal nature of the conduct places an OSP outside the scope of the CDA harbor, much like “affirmative steps” expose a company to contributory liability.¹⁴⁰

IV. SHORTCOMINGS OF THE LIABILITY SCHEME

Roommates.com leaves much to be desired. It chipped away at both the judicial efficiency of a safe harbor and the underlying need and reasoning for immunity.

Post-*Roommates.com*, a court’s analysis of OSP conduct to determine if they qualify for the safe harbor is a more nuanced and claim specific investigation. Conduct is no longer the determinant for establishing whether an OSP is an “information content provider” and thereby exempt from immunity.¹⁴¹ Though the physical and technical methods of control, formatting, filtering, etc., may be indistinguishable, two different OSPs may face diverging liabilities. In effect, the status of *content provider* is based on the underlying claim rather than on the particular degree of content development. A dating website and a roommate matching website with indistinguishable functionality and preferences—employing identical questionnaires, profile sorting, matching and email notification technologies, that enforce the same level of minimal content management, that both include service terms that explicitly prohibit the use of their site to violate federal or state regulation—fall on opposites sides of section 230 immunity. In a statute that creates and exempts from immunity depending

138. *Grokster*, 545 U.S. at 943.

139. *See Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984). Despite the fact that a Google search for “white female roommate” results in a hit for an available room advertisement, complete with a short preview that republishes the potentially illegal content, Google would not be liable under the *Roommates.com* test. *See Roommates.com*, 521 F.3d at 1167. Google neither prompts such searches nor makes it easier for them, as opposed to lawful searches, to occur.

140. Section 230 specifically exempts intellectual property claims from immunity. 47 U.S.C. 230(e)(2) (2006). Although section 230 can neither limit nor expand copyright law, the similarity between *Roommates.com* and copyright inducement liability are too similar to ignore.

141. *See* 47 U.S.C. § 230(c) (2006).

on general conduct, a nuanced definition that instead looks to the underlying claim, irrespective of such conduct, supplants the Congressional definitions of *content provider*.

Such a manner of determining liability has the potential to erode both predictability and reliability of the law. Though the Ninth Circuit firmly believes that *Roommates.com* “extensively clarifies where the edge lies, and gives far more guidance than . . . previous cases,” it in fact muddies the lines of liability.¹⁴² Underlying determinations of legality, rather than OSP control and development, shape the scope of liability. Courts are able to exercise broader discretion. Preliminary determinations of guilt, with no clear standard of proof, become part of the immunity analysis, and the resulting test for immunity is blurrier rather than clearer.

Furthermore, increased judicial discretion resulting from *Roommates.com*, and the necessity for the court to determine legality of the underlying conduct, are taxing to judicial economy. The additional layers of analysis and OSP uncertainty of liability may lead to increased litigation.

Assessing guilt within a safe harbor is further troublesome because it undermines the entire purpose of immunity. In this “upside-down approach,” the court must first determine guilt before determining immunity.¹⁴³ As the dissent noted, “[i]mmunity has meaning only when there is something to be immune *from*, whether a disease or the violation of a law. It would be nonsense to claim to be immune only from the innocuous.”¹⁴⁴ Yet *Roommates.com* does precisely that. If an OSP’s actions aid legal conduct, immunity is available, if not, they fall outside the safe harbor.

These changes to section 230 case law are a direct consequence of the Ninth Circuit’s view on the Internet and the Internet age. The *Roommates.com* majority no longer sees fit to extend the notion of *cyber exceptionalism*.¹⁴⁵ Instead it considers the Internet as just another medium of communication, no more special than any other, despite the fact section 230 uses the term “unique”¹⁴⁶ in describing the opportunities that the Internet creates. Specifically, it notes that special catering and “coddl[ing]”¹⁴⁷ of internet entities is no longer necessary because, far from “fragile,” they have become the “dominant—perhaps the preeminent—means through which commerce is conducted.”¹⁴⁸ The majority therefore

142. *Roommates.com*, 521 F.3d at 1175.

143. *Id.* at 1183 (McKeown, J., dissenting).

144. *Id.* at 1182 (McKeown, J., dissenting).

145. See 141 Congressional Record H8470, *supra* note 10; discussion *supra* Part I.

146. 47 U.S.C. § 230(a)(3) (2006).

147. *Roommates.com*, 521 F.3d at 1175 n.39.

148. *Id.* at 1164 n.15.

believes that section 230 has the potential of giving online organizations “an unfair advantage” over their offline counterparts.¹⁴⁹

Though there may be truth to this sentiment, the majority ignores clear and specific congressional intent. Unlike most statutes, section 230 includes a list of congressional findings and official United States policy goals.¹⁵⁰ In fact, the statute spends more time articulating congressional findings and policy than in laying out the immunity provision.¹⁵¹ This ex-

149. *Id.*

150. 47 U.S.C. § 230(a), (b) (2006). Congressional findings are found in subsection (a) and include the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

Id. United States policy according to section 230 is found in subsection (b) and includes:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id.

151. *See* 47 U.S.C. § 230 (2006). In fact, The Communications Decency Act may never have passed were it not for the policy iterated in section 230. *See* Vikas Arora, Note, *The Communications Decency Act: Congressional Repudiation of the “Right Stuff”*, 34 HARV. J. ON LEGIS. 473, 478 (1997) (“Ultimately, Congress passed the CDA as a legislative compromise designed to remedy the alleged abundance of pornography on the Internet without stifling the growth and use of interactive computer technology.”); Jeff Magenau, *Setting Rules in Cyberspace: Congress’s Lost Opportunities to Avoid the Vagueness and Overbreadth of the Communications Decency Act*, 34 SAN DIEGO L. REV. 1111, 1114 (1997) (“The problems with the language of the CDA are the result of care-

plicitly stated congressional intent should not be taken lightly, nor should it be ignored or ruled obsolete by the judicial branch, as in *Roommates.com*. Three of the five stated policy goals are aimed at encouraging the continued growth and development of the Internet and internet technologies “unfettered by Federal or State regulation. . . .”¹⁵² In passing section 230, the Legislature was specific in its intent and goals. It is not the role of the judiciary to overwrite such express purpose; rather, any revision to the express goals of the statute should be left up to the Legislature.

Furthermore, section 230 purposefully creates a dissonance between online enterprises and their offline counterparts; they are immunized from conduct that the offline enterprises are liable for. Thus, it is entirely incorrect when the majority notes that “[i]f [an act] is prohibited when practiced in person or by telephone, [there is] no reason why Congress would have wanted to make it lawful to profit from it online.”¹⁵³ On the contrary, that is precisely what Congress legislated; OSPs were lawfully allowed to profit from such third-party action, whether via advertisements or subscriber fees.¹⁵⁴ In fact, co-author of section 230 Senator Ron Wyden, was weary of governmental regulation of the Internet. In discussing section 230, he noted that “the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise.”¹⁵⁵

Yet the majority feels that the policy scheme articulated by Congress has reached its expiration date and must therefore be altered. The *Roommates.com* decision contradicts Congress’s clearly stated intent to immunize OSPs, which was affirmed not only during the enactment of the statute but also after courts had an opportunity to interpret section 230. In 2002, the House Committee on Energy and Commerce explicitly endorsed *Zeran* and the decisions that followed it:

The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So. 2d 1010 (Fla. 2001)) and defamation ([citations omitted]; *Zeran v. America*

less drafting and reflect an awkward and hurried attempt at compromise among congresspersons”).

152. 47 U.S.C. § 230(b)(2) (2006).

153. *Roommates.com*, 521 F.3d at 1167.

154. See *Universal Commc’ns Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003); *Ben Ezra v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000).

155. 141 CONG. REC. H8470 (daily ed., Aug. 4, 1995) (statement of Rep. Cox).

Online, 129 F.3d 327 (4th Cir., 1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by H.R. 3833.¹⁵⁶

However, six years later, *Roommates.com* attempts to change the course of OSP immunity.

Such drastic policy and direction change of a statute, even if there is valid reasoning behind the majority's notions, should be left to the Legislature, particularly when congressional intent is so clear.

V. LIFE AFTER *ROOMMATES.COM*

A. *Roommates.com* as Precedent

In the short time since *Roommates.com* was decided, five cases have cited the en banc opinion, none of them published.¹⁵⁷ Of these, most do not provide any in-depth discussion as to the basis of granting or withholding immunity from defendants. However, one of these cases uses similar terminology ("merely a search engine")¹⁵⁸ and the other delves into, if only superficially, the differences between active and passive behavior.¹⁵⁹

Though in dicta, the district court in *Perfect 10, Inc. v. Google, Inc.*, on a remand motion for leave to amend, touches on the necessary characteristics of search engines to qualify for section 230 immunity.¹⁶⁰ Google created and displayed thumbnails of copyrighted images owned by Perfect 10 to its users via its search engine. Along with numerous intellectual property claims, Perfect 10 sued, claiming unfair competition.¹⁶¹ Though terse, the opinion uses parallel terminology to *Roommates.com*, delineating liability depending on whether one is "merely a search engine or an information content provider."¹⁶² The court considers this determination to be

156. H.R. REP. NO. 107-449, 13 (2002).

157. *Doe v. Friendfinder Network, Inc.*, No. 07-cv-286-JL, 2008 WL 2001745 (D.N.H. May 8, 2008); *Nat'l Numismatic Certification, LLC v. eBay, Inc.*, No. 6:08-cv-42-Orl-19GJK, 2008 WL 2704404 (M.D. Fla. July 08, 2008); *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx), 2008 WL 4217837 (C.D. Cal. July 16, 2008); *Capital Corp. Merch. Banking, Inc. v. Corp. Colocation, Inc.*, No. 6:07-cv-1626-Orl-19KRS, 2008 WL 4058014 (M.D. Fla. Aug. 27, 2008); *Best W. Int'l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 WL 4182827 (D. Ariz. Sep. 5, 2008).

158. *Perfect 10*, 2008 WL 4217837, at *8.

159. *Best W. Int'l*, 2008 WL 4182827, at *10.

160. *Perfect 10*, 2008 WL 4217837. The court dismisses Google's 12(b)(6) motion, citing section 230 immunity as an affirmative defense and not appropriate for summary judgment. Thus, there is no actual ruling as to Google's immunity. *Id.* at *8.

161. *Id.* at *1.

162. *Id.* at *8.

highly fact intensive, though it notes that Google's enterprise reaches beyond the search engine business (citing the fact that Google owns Blogger).¹⁶³

Like in *Roommates.com*, the court in *Perfect 10* is concerned with whether Google creates or develops any of the unlawful content. Though the court's use of the phrase "merely a search engine" suggests an adoption of the passive or active distinction of *Roommates.com*, it cites to *Roommates.com* only for the proposition that information content providers are exempt from immunity.¹⁶⁴ However, it bears no mention of the concept of illegality or legitimate purposes. The wording, though brief, suggests that it is instead relying on the distinction between creating content and simply providing a general means to access both the infringing and other noninfringing content. Though citing to *Roommates.com*, *Perfect 10* could equally have cited to any number of prior section 230 opinions for the same notion.

A couple of months later, an Arizona district court, in *Best Western International, Inc. v. Furber*, addressed what OSP actions qualify as passive under *Roommates.com*.¹⁶⁵ The court specifically rejected implied suggestions and general solicitations as actions *active* enough to bar section 230 immunity.¹⁶⁶ Best Western International (BWI) brought suit against Furber and Unruh for inducing users of their website, Freewriters.net, to make defamatory statements against BWI.¹⁶⁷ BWI claimed that Furber, via the homepage, implicitly advocated users to make defamatory statements against BWI.¹⁶⁸ The court not only disagreed with BWI, but also noted that the act of implicitly advocating users to make defamatory statements would be insufficient in eliminating section 230 immunity under *Roommates.com*.¹⁶⁹ As to Unruh, the court held that he was entitled to immunity even though he solicited content from others, as long as the solicitation was not for specifically defamatory material.¹⁷⁰

163. *Id.*

164. *Id.*

165. *Best W. Int'l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 WL 4182827 (D. Ariz. Sep. 5, 2008).

166. *Id.* at *10.

167. *Id.* at *4. There were other named defendants, one that sought CDA immunity for typing and posting on the website on behalf of her husband. The court considered whether the content was a product of a collaborative effort to be a matter for the jury and not appropriately dismissed under summary judgment. *Id.* at *10.

168. *Id.*

169. *Id.*

170. *Id.*

Best Western International, like *Roommates.com*, asserted a relatively wide notion of what is considered passive conduct, though *Roommates.com*'s formulation is potentially much broader.¹⁷¹ So long as its actions are not calculated to induce or create the unlawful act, OSP immunity is left intact under *Best Western International*. Arguably, in a pre-*Roommates.com* world, Unruh would have been allowed immunity for soliciting defamatory material so long as they merely republished the solicited data.¹⁷²

B. The Fate of Section 230 Post-*Roommates.com*

The dissent may be hailing the end as we know it,¹⁷³ yet in reality the narrowing of the safe harbor will not affect most internet operations. Although immunity has been sought for protection from a variety of claims, including cyber-stalking, employment torts, breach of contract, and now housing discrimination, a vast majority of suits employing the safe harbor involve libel and defamation claims. While illegal behavior occurs online, one is hard-pressed to find internet entities that operate explicitly illegal instrumentalities that would come under the *Roommates.com* decision. Sites replete with questionable content, such as *Juicy Campus*, *AutoAdmit*, and *Don't Date Him Girl*, would still fall squarely under the safe harbor specifically allowed by *Roommates.com* because they "passively display[] content that is created entirely by third parties."¹⁷⁴

The majority in *Roommates.com* even struggles to point to similar situations that might warrant OSP liability, barring FHA noncompliance.

171. See *Fair Hous. Council v. Roommates.com*, 521 F.3d 1157, 1169 (9th Cir. 2008) (allowing, in dicta, immunity for a hypothetical internet dating site that required disclosure of sex and sexual orientation, and sorted and emailed users according to those categories and preferences).

172. Immunity determinations pre-*Roommates.com* would not consider inducement liability; instead immunity would hinge on whether the information was created or produced by the OSP instead of being merely republished. See discussion *supra* Section II.D.

173. *Id.* at 1176 (McKeown, J., dissenting) ("The majority's unprecedented expansion of liability for Internet service providers threatens to chill the robust development of the Internet that Congress envisioned.").

174. *Juicy Campus*, <http://www.juicycampus.com/> (last visited Feb. 3, 2009) (A website focusing on gossip, rumors, and rants related to colleges and universities in the United States. It is no longer in existence, having gone offline due to financial trouble during the publication of this Note); *AutoAdmit*, <http://www.autoadmit.com/> (last visited Feb. 3, 2009) (A network of websites for prospective and current college, graduate, law students, best known for its message board that has gained notoriety and drawn criticism for its lack of moderation of offensive and defamatory content); *Don't Date Him Girl*, <http://dontdatehimgirl.com/home/> (last visited Feb. 3, 2009) (a website where women can anonymously discuss their dating experiences). See *Roommates.com*, 521 F.3d at 1162.

Though the majority details several scenarios where OSPs remain in the safe harbor, it lists only one instance where immunity would be stripped:

a website operator who edits in a manner that contributes to the alleged illegality—such as by removing the word “not” from a user’s message reading “[Name] did *not* steal the artwork” in order to transform an innocent message into a libelous one—is directly involved in the alleged illegality and thus not immune.¹⁷⁵

Even the staunchest critics of *Roommates.com* would be hard pressed to find fault with this reasoning. However, even this example would not have qualified for immunity pre-*Roommates.com*. If a message were altered in this way, it would be difficult to argue that this message was still purely third party content for which a website should receive immunity.

The majority’s list of operations that still retain immunity include: a dating web-site set up substantially similarly to *Roommates*, complete with drop-down menus that sort based on sex and a housing website that sorts that on user-defined criteria, even if such criteria includes sex, so long as the user is not required to make a choice. Thus, an OSP can still retain substantial control over its content and structure, implement highly specialized search functions, and still retain immunity. It is not so much the amount of control exerted by an OSP, but rather how that control is exerted. If that control is employed to require or cause the user to engage in illegal behavior, the OSP will lose immunity. Otherwise, the OSP falls within the safe harbor as they did before the *Roommates.com* decision.

Even the implicit solicitors are safe. Juicy Campus, the self-proclaimed “place to spill the juice about all the crazy stuff going on at your campus,” whose slogan reads “C’mon. Give us the juice,” can operate with virtually unchecked safeguards under section 230.¹⁷⁶ Juicy Campus is not liable for inflammatory and potentially defamatory posts that list students by name and describe them as “super slutty girls,”¹⁷⁷ or even the most discussed post, “where da hoes?”¹⁷⁸ Juicy Campus remains a mes-

175. *Roommates.com*, 521 F.3d at 1169.

176. Juicy Campus Gossip, <http://www.juicycampus.com/posts/gossips/all-campuses/> (last visited Feb. 3, 2009).

177. Posting of anonymous to Juicy Campus, *Super Slutty Girls*, <http://www.juicycampus.com/posts/permalink/UT%20Austin/204087> (Nov. 22, 2008).

178. Posting of anonymous to Juicy Campus, *Where da hoes?*, <http://www.juicycampus.com/posts/permalink/Hampton%20University/86616> (Oct. 1, 2008). This would be true even assuming that these statements were false and defamatory.

sage board that is as capable of legitimate use and content as it is capable of the illegitimate.¹⁷⁹

It is quite difficult to imagine a scenario where an OSP would be found liable for defamatory or libelous content provided by third parties. The website operator would have to actively solicit and induce such defamatory content; mere implications in solicitation and knowledge of the content would be insufficient. A far-fetched scenario, where the website employed a drop-down menu that required users to categorize or tag their posts before posting might fall outside the confines of the safe harbor. Such a structural tool would only lead to liability if these tags: (1) were created by the website operator and not user defined, and (2) included options such as “defamation,” “libel,” or “false content.”

Websites aimed at soliciting information for illegal purposes, such as allowing users to stalk or harass other people, might find themselves outside of section 230 protection. A hypothetical loosely based on *Best Western International* is one example of such a website.¹⁸⁰ Soliciting third party content that is specifically defamatory, like soliciting copyright infringement, bears a strong element of fault. Such actions bear more resemblance to actions to which we would attribute direct liability, rather than contributory liability. Defamation, even in light of an almost unchecked freedom of speech under the First Amendment, is illegal. It seems contrary, both to common sense and societal good, that the ringleader escapes liability while those under his control are clearly liable.

Judge Kozinski articulated a second example of a website soliciting information for an illegal purpose in the *Roommates.com* panel decision:

Imagine, for example, www.harrassthem.com with the slogan “Don’t Get Mad, Get Even.” A visitor to this website would be encouraged to provide private, sensitive and/or defamatory information about others—all to be posted online for a fee. To post the information, the individual would be invited to answer questions about the target’s name, addresses, phone numbers, social security number, credit cards, bank accounts, mother’s maiden name, sexual orientation, drinking habits and the like. In addition, the website would encourage the poster to provide dirt on the victim, with instructions that the information need not be

179. Juicy Campus About Us, <http://www.juicycampus.com/posts/about-us> (last visited Nov. 21, 2008) (Juicy Campus is a “forum where college students discuss the topics that interest them most, and in the manner that they deem most appropriate.”).

180. BWI claimed that Furber implicitly advocated users to make defamatory statements against BWI. *Best W. Int’l, Inc. v. Furber*, No. CV-06-1537-PHX-DGC, 2008 WL 4182827, *10 (D. Ariz. Sep. 5, 2008). *Infra* Section V.A.

confirmed, but could be based on rumor, conjecture or fabrication.¹⁸¹

Such an OSP could not claim section 230 immunity post-*Roommates.com*.¹⁸² It is not only difficult to imagine a legitimate and unobjectionable use of such a website, but the OSP would also be eliciting this illegal conduct and making “aggressive use of it in conducting its business.”¹⁸³

However, this is neither surprising, nor an unforeseen or unprecedented effect of *Roommates.com*. First, the safe harbor protections could have been waived simply because federal criminal laws were at issue.¹⁸⁴ And second, at least one court has refused to extend immunity to websites that provide such private and sensitive information. In *F.T.C. v. Accusearch, Inc.*, a district court in Wyoming declined to allow shelter under the safe harbor provision for a website that “offered for sale to its customers a variety of information products, including records of telephone call details, GPS traces (which disclose the exact location of a cell phone at any given time), Social Security Number verification, utility records, DMV records, and reverse email look-ups.”¹⁸⁵ However, though it arrived at the same conclusion, the court did not use the same rationale as *Roommates.com*. It instead held that the claims did not “treat” defendants as “publishers” as required by section 230.¹⁸⁶

As long as future courts read *Roommates.com* narrowly, few websites will lose the protections otherwise afforded by the section 230 safe harbor. Along with the immunity available for the text in comment boxes like that of *Roommates*, there is still room for a wide-reaching net of immunity.

181. *Fair Hous. Council v. Roommates.com, LLC*, 489 F.3d 921, 928 (9th Cir. 2007), *rev'd en banc*, 521 F.3d 1157 (9th Cir. 2008).

182. Although it is somewhat unclear whether such a site would not receive section 230 immunity. Though in the panel opinion and quite important, it strikingly does not reappear in Kozinski's opinion for the en banc majority. One wonders if Judge Kozinski had to give this up in order to gain a majority. And if so, then even such sites may be immune post-*Roommates.com*.

183. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008).

184. 47 U.S.C. § 230(e)(1) (2005) (“Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.”).

185. *F.T.C. v. Accusearch, Inc.*, No. 06-CV-105-D, 2007 WL 4356786, *1 (D. Wyo. Sept. 28, 2007).

186. *Id.* at *4-5 (the statutory meaning of publisher is ambiguous, at least as applied to this case; thus, the court turns to section 230's legislative history to conclude that Congress did not mean to protect such claims).

The only real change would be in cases dealing with FHA violations. However, if the notion of solicitation takes on a broader meaning in the future, the *Roommates.com* decision might have more serious consequences that erode the protections and liability scheme afforded by section 230.

VI. CONCLUSION

Despite over a decade of precedent and clear congressional intent, *Roommates.com* paved a new path to OSP liability. The bright line test demarcating information content providers from online service providers is gone. Though perhaps well intentioned, the majority not only created a hazier test for immunity under section 230, but also overstepped its bounds. Congress had affirmed the judicial approach of the *Zeran* court and its progeny, but still the Ninth Circuit, in *Roommates.com*, sought to alter the course of these rulings. Though a potential narrow reading of the opinion could confine its consequences to suits involving the FHA, the opinion ultimately sets the stage for greater judicial discretion. This, in turn, creates uncertainty for future defendants. For better or worse, the Ninth Circuit's reinterpretation of section 230 was an attempt to limit the reaches of internet exceptionalism, a task best left to the Legislature.