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LITIGATION

Roommate issues: Section 230 immunity in the 9th Circuit

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Under traditional libel law, a publisher of defamatory material authored by a third-party can be subject to tort liability for repeating the libel. Motivated by a desire to nurture the fledgling World Wide Web, Congress in 1996 prescribed different rules for the Internet when it enacted Section 230 of the Communications Decency Act (CDA). Section 230 provides websites and other online service providers with immunity for publication-based tort claims based on actionable content provided by another party.

Content Matters

This is a monthly column devoted to matters of interest to those who create content of all kinds (entertainment, news, software, advertising, etc.) and bring that content to market. Our hope is to shed light on key issues facing the creative content community. If you have questions, comments or topic ideas, let us know at ContentMatters@jenner.com. Because content matters.

The statute provides 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." 47 U.S.C. Section 230(c)(1). Section 230 immunity has three elements. First, the defendant asserting immunity must be a "provider or user of an interactive computer service" — which includes ISPs, search engines, social networks, and websites. Second, the claim must be based on "information provided by another information content provider" — i.e. any third party submitting content for publication on the Web. Third, the claim must treat the defendant as the "publisher or speaker" of the content — a rule that encompasses defamation and privacy torts, but also civil claims for fraud, negligence, and statutory violations. The statute specifically excludes claims based on intellectual property law or federal criminal law.

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In the first decade of its life, courts across the country almost uniformly read Section 230 to confer broad immunity to online service providers. They rejected arguments that CDA immunity should not apply where the defendant had knowledge of the tortious nature of the third-party content, or where the defendant went beyond acting as a passive "bulletin board" by selecting material for publication, editing it, or removing material it deemed offensive.

CDA immunity in the 9th U.S. Circuit Court of Appeals reached its broadest point in *Carafano v. Metrosplash.com.* In that 2003 decision, the court held that Section 230 shielded a dating website from libel and privacy claims brought by an actress whose name was used in a fake user profile that described her in suggestive terms. The site compiled profile information through pre-prepared multiple-choice questionnaires, and structured the data to make it searchable by other users. Although these features "facilitated the expression of information" by users, the court held that utilizing these "neutral tools" did not make the website itself an information content provider — and thus outside the CDA immunity — because all of the profile information originated with the users. After *Carafano*, Section 230 immunity appeared to be governed by a bright-line general rule: a website crossed the line and became an information content provider only to the extent it actually authored the content at issue.

Just five years later, the 9th Circuit scrambled that seeming clarity in its 8-3 en banc decision in *Fair Housing Council of San Fernando Valley v. Roommates.com LLC* (2008). The website in question matched potential roommates based on profile information that it required users to submit. The court ruled the website was not entitled to CDA immunity because it used questionnaires and drop-down menus that forced users to provide information — such as the sex and sexual orientation they preferred in a roommate — that allegedly violated state and federal fair housing laws.

Writing for the majority, Chief Judge Alex Kozinski explained that the website developed the allegedly illegal content by requiring subscribers, as a condition of use, to voice illegal housing preferences: "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 [S]ection 230 of the CDA does not apply to them." The court also held that the website's use of open-ended questions with blank text boxes — inviting users to "describ[e] yourself and what you are looking for in a roommate" — did *not* forfeit CDA immunity because, with those queries, the site did not "directly participate" in developing the "alleged illegality."

The *Roommates.com* majority collapsed the question of substantive liability with the issue of CDA immunity — *assuming* that the site's multiple-choice questions amounted to housing discrimination. The majority then deployed a raft of different formulations to describe the actions by a website operator that could jeopardize its CDA immunity — "materially contributing" to the unlawfulness of the content; "encouraging" the posting of unlawful content; and "soliciting" and "helping to develop" such content.

Following *Roommates.com*, website operators and content lawyers were left to

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scratch their heads as to how much "encouragement" or "inducement" might cross the line and cause a website to be treated as a co-developer of tortious content — and thus ineligible for CDA immunity. Judge Margaret McKeown's three-judge dissenting opinion in *Roommates.com* predicted that stripping away immunity "because a site solicits or actively encourages content" would result in "a direct restriction on the free exchange of ideas and information on the Internet."

For the most part, courts have responded to *Roommates.com* by declining its invitation to broaden the types of situations in which a website operator could be found to have so "encouraged" or "contributed materially" to the posting of tortious content that the site would be deemed a "co-developer" of the content. Instead, courts in the 9th Circuit and elsewhere have tended to read *Roommates.com* narrowly, limiting its holding to situations where a website operator "forces" users to submit content that is "necessarily actionable."

In *Goddard v. Google Inc.* (2009), for example, the plaintiff claimed Google aided advertisers in posting misleading content because its keyword tool suggested the phrase "free ringtone" to advertisers, even though Google allegedly was aware of the issue of unapproved charges by mobile content providers. The Northern District of California reasoned that *Roommates.com* had "carved out only a narrow exception" to the "neutral tools" analysis in *Carafano*. The court held that Google had not "required" users to post unlawful content — the mere fact that Google "suggested" that users provide content that might be actionable did not vitiate its CDA immunity.

In May of this year, the Central District of California endorsed a broad reading of Section 230 immunity in *Asia Econ. Inst. v. Xcentric Ventures LLC*. Judge Stephen Wilson held that RipoffReport.com was entitled to CDA immunity despite the fact that it added metatags to the HTML of user-generated posts, which caused them to appear more prominently among search engine results. The court explained that "[i]ncreasing the visibility of a statement is not tantamount to altering its message," and concluded that the coding was merely "enhancement by implication" that did not make RipoffReport.com a co-developer of the content.

The 4th U.S. Circuit Court of Appeals addressed more pointed allegations in *Nemet Chevrolet v. Consumeraffairs.com* (2009). In that case, a business owner alleged the defendant website solicited negative consumer complaints, asked follow-up questions, and helped users revise their complaints — all to develop information for class actions. The court nonetheless distinguished *Roommates.com* explaining that the roommate-matching site "required" users to input "illegal content" as a "necessary condition of use," while there was "nothing unlawful" about developing material for class actions.

Even courts that have declined to afford defendants CDA immunity have read *Roommates.com* narrowly. In *FTC v. Accusearch*, the 10th U.S. Circuit Court of Appeals considered a case where the defendant advertised that it could obtain confidential phone records for individual phone numbers, and then paid researchers to unlawfully obtain the records and deliver them to customers through its website. In denying CDA immunity, the court relied on *Roommates.com* to find the website was a co-developer of the content because it actively solicited and paid for material that it knew was "inherently unlawful."

Most recently, the New York Court of Appeals joined what it termed the "national consensus" by embracing a broad reading of Section 230 immunity in *Shiamili v. Real Estate Group of N.Y.* (2011). The high court rejected defamation claims filed by a rental property company against a competitor for statements made on the competitor's blog. The defendant had taken a lengthy third-party comment in a discussion thread and republished it as a prominent stand-alone post, accompanied by a derogatory doctored photograph of the plaintiff. In holding, on these allegations, that Section 230 nevertheless bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content" — the *Shiamili* court provided further confirmation that *Roommates.com*was not the sea change in CDA immunity that many had feared.