

Fair Housing Council of San Fernando Valley v. Roommates.com: The Ninth Circuit Court of Appeals Announces a New Legal Test for Mixed-Content Websites

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The Ninth Circuit Court of Appeals, sitting *en banc*, issued its widely anticipated decision in *Fair Housing Council of San Fernando Valley v. Roommates.com* on April 3, 2008, concerning the scope of immunity afforded by Section 230 of the Communications Decency Act (“CDA”) of 1996.¹ Although the court affirmed the outcome reached by a previous panel, the majority decision introduced a new test for determining whether a website is the “developer” of mixed content, and thereby outside the scope of the Section 230 immunity.² The court did so while reaffirming prior rulings that interpreted Section 230 as broadly immunizing website owners from liability based on content posted by third parties.³

The decision marks the first time that a full federal circuit court has interpreted Section 230 since Congress enacted the federal immunity in 1996. Website owners should take careful note of this decision, since under the Ninth Circuit’s test, if a website “materially contributes” to the allegedly illegal content, as opposed to providing “neutral” tools for communicating information, it may forfeit its immunity under Section 230.⁴ Applying this test, the court found that a housing website was not immune from claims under the federal Fair Housing Act and similar state laws that prohibit discriminatory housing practices.⁵

Defendant Roommates.com operated a website designed to match individuals who were seeking housing. The website required users to state their own sex and sexual orientation, as well as whether they lived with children, and also required users to describe their housing preferences in these three categories. The site allowed users to post their own content in an “additional comments” section. Profiles of users were then posted, based on the responses. Users of the service could search profiles of potential roommates, and would receive periodic e-mails informing them of available housing opportunities that matched their preferences.⁶ The Fair Housing Councils of San Fernando Valley and San Diego sued, claiming that Roommates.com was acting as a housing broker, and that its website violated federal and state fair housing laws by soliciting and distributing information based on protected categories—sex, sexual orientation, and family status.⁷

Roommate.com: A Service Provider or Content Provider?

The district court held that Roommates.com was immune from liability under Section 230 of the CDA,⁸ which states 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.”⁹ The immunity provided by the federal law thereby distinguishes “service providers” from “information content providers,” who are defined as those “responsible, in whole or in part, for the *creation or development* of [content].”¹⁰

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As the 9th Circuit noted, however:

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.¹¹

On this point, the *en banc* court focused on the statutory language defining “development,” reasoning that the term “refer[s] not merely to augmenting the content generally, but to *materially contributing* to its alleged unlawfulness. . . . [A] website helps to develop unlawful content, and thus falls within the exception to Section 230,

if it contributes *materially* to the alleged illegality of the conduct.”¹² The court contrasted this kind of “development” to circumstances where a website merely provides purely “neutral” tools for users (e.g., an individual using a search engine to search for “white roommate”).¹³ The court also made clear that immunity is not lost simply by asking questions, unless the questions are themselves illegal, or inevitably result in illegal responses.¹⁴ Finally, website operators who make minor edits to content, such as by correcting spelling or removing obscenity, clearly remain immune, whereas those who alter content to contribute to its illegality (e.g., removing words to create a defamatory impression), lose their immunity.¹⁵

Using its new test, the court found that the Roommates.com website was a content provider of both its questionnaire and filtered search results.¹⁶ It could “claim no immunity for posting them on its website.”¹⁷ However, the court found the website immune from content posted in the “additional comments” section of user profiles, and explicitly agreed with the Seventh Circuit decision in *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,¹⁸ which found immune an online classified website despite user-submitted discriminatory housing advertisements.¹⁹ The Ninth Circuit reasoned that nothing in either case “induces anyone to post any particular listing or express a preference for discrimination.”²⁰

Erring on the Side of Immunity

Notably, the court emphasized that in close cases, courts should err on the side of finding Section 230 immunity, “lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties.”²¹ In finding Roommates.com immune for content posted in the “additional comments” section, and in stating the policies behind Section 230 generally, the court made clear that website operators remain free to edit third-party content, so long as they do not do so in a way that makes it unlawful. Thus, as the *en banc* decision states, the message behind the decision “is clear: If you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”²²

Batzel and Carafano Reaffirmed

Finally, the majority reconciled its holding with two prior Ninth Circuit decisions finding broad Section 230 immunity. In *Batzel v. Smith*,²³ the court had found that where a third party intended his allegedly defamatory e-mail to be posted on a listserv, the listserv’s editor was immune even though he made the decision to post the

e-mail on the site.²⁴ In *Fair Housing*, the *en banc* court reaffirmed *Batzel*, noting that there is “no meaningful difference between an editor starting with a default rule of publishing all submissions and then manually selecting material to be removed” and one of “publishing no submissions and manually selecting material to be published.”²⁵

Similarly, in discussing *Carafano v. Metrosplash.com, Inc.*,²⁶ where the court previously had found a matchmaking service immune from the activities of a third party in falsifying a profile, the *en banc* court found the language it had used was “unduly broad.”²⁷ Instead, the *Fair Housing* court held that *Carafano* was correctly decided because “[t]he allegedly libelous content there . . . was created and developed entirely by the malevolent user, without prompting or help from the website operator.” The court thus specifically “disavow[ed] any suggestion that *Carafano* holds an information content provider automatically immune so long as the content originated with another information content provider.”²⁸

In its decision, the court also signaled its growing skepticism of the need to protect the burgeoning Internet, something Congress sought to do in enacting Section 230 in 1996. While the court found the Internet important, it also found the medium 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 realworld counterparts, which must comply with laws of general applicability.²⁹

Conclusion

The Ninth Circuit’s new emphasis on discerning whether a website “materially contributes” to allegedly illegal content adds a new, but not unexpected, wrinkle to whether Section 230 immunity is available to content on a website. Increasingly, websites reflect a mix of content authored by the website and content prepared by third parties. For this reason, the potential implications of the *en banc* court’s ruling will be explored for many years to come.

Endnotes

1. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).
2. *Id.* at 1168.
3. *See generally id.*
4. *Id.* at 1168.
5. *Id.* at 1169–70.
6. *Id.* at 1161–62.
7. *Id.* at 1162.
8. *Id.*
9. 47 U.S.C. § 230(c)(7).
10. *Id.* § 230(f)(3) (emphasis added).
11. 521 F.3d at 1162–63.
12. *Id.* at 1167–68.
13. *Id.* at 1169.
14. *Id.*
15. *Id.*
16. *Id.* at 1164, 1169.
17. *Id.* at 1164.
18. No. 07-1101 (7th Cir. Mar. 14, 2008).
19. 521 F.3d at 1172–73.
20. *Id.* at 1172.
21. *Id.* at 1174.
22. *Id.* at 1175.
23. 333 F.3d 1018 (9th Cir. 2003).
24. *See generally id.*
25. 521 F.3d at 1170 n. 29.
26. 338 F.3d 1119 (9th Cir. 2003).
27. 521 F.3d at 1171.
28. *Id.* at 1171 n. 31.
29. *Id.* at 1164 n. 15.

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