AMPLIFYING ILLEGALITY: USING THE EXCEPTION TO CDA IMMUNITY CARVED OUT BY *FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY V. ROOMMATES.COM* TO COMBAT ABUSIVE EDITING TACTICS

Bradford J. Sayler[*]

INTRODUCTION

The Internet age has introduced a variety of new ways for private citizens to express themselves. Historically, Average Joe has sat on the sidelines of the world and passively absorbed the word as spread by the few active players. Today, Joe can spread his own message across the globe at the click of a mouse. With nothing more than a computer and an Internet connection, he can create a blog to share his political opinions, post a critique of his recently purchased cell phone, auction off his prized butterfly collection, or vote for the week's hottest celebrity. Add a camera, and Average Joe is able to post his family album or circulate his latest homemade music video. After all, Joe was *Time* magazine's 2006 Person of the Year.[1]

In an age when computer users have great power to reach out to the world around them, there is an increased need for websites that provide users with the ability to post their thoughts. As these users have better access to more people, their opportunity to harm others, such as by posting defamatory comments, becomes much greater. In the past, this has imposed a burden on web hosts to choose whether to censor user postings or face backlash from aggrieved third parties. To alleviate this burden and preserve the Web's vibrant exchange of ideas, Congress enacted 47 U.S.C. § 230 as an amendment to the Communications Decency Act ("CDA") in 1996.[2] Section 230(c) immunizes certain websites from legal action predicated on

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[*] George Mason University School of Law, Juris Doctor Candidate, May 2009; Associate Editor, GEORGE MASON LAW REVIEW, 2008-2009. University of Delaware, B.S., Accounting, cum laude, 2004. I credit Samantha Mortlock for providing the seed from which this Casenote grew. Her guidance, along with the sage advice of Rebecca Ham Ormsbee, greatly improved the clarity of my writing and reasoning. I thank my family for their support and guidance, without which I would not have had the fortitude to stare at my laptop for hours on end. I would also like to thank Amy and Elvis for being so patient with me while I neglected them in favor of this laptop.

[1] *Person of the Year: You*, TIME, Dec. 25, 2006 (featuring on the cover a computer screen that is a mirror reflecting the reader, with the subtitle, "Yes, you. You control the Information Age. Welcome to your world.").

[2] 47 U.S.C. §§ 230(a)-(b) (2000).

their users' postings.[3] Basically, the law grants web hosts the option to actively monitor their websites and promotes free speech on the Internet.[4]

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the United States Court of Appeals for the Ninth Circuit recently held that Roommates.com ("Roommates" or "Roommate") did not fall within the historically broad segment of websites protected by § 230.[5] Roommates facilitated the search for roommates by matching individuals with similar characteristics and preferences.[6] Because of its participation in the matching process, the Ninth Circuit declared that Roommates was not immune from the San Fernando Fair Housing Council's suit alleging violations of the Fair Housing Act.[7] Specifically, Roommates required users[8] to select their preferred roommate characteristics from pre-populated menus, encouraged users to distinguish one another based on these characteristics, and facilitated user searches.[9] Thus, Roommates did not merely host the website, but also amplified the potentially illegal conduct of its users, sufficient to hold it liable as a "content provider."[10]

This Casenote analyzes the impact of the exception to CDA immunity carved out by the *Roommates* holding and concludes that the "amplifying illegality" concept may be an effective way to pursue those websites that facilitate the posting of defamatory remarks. Part I provides an overview of the Roommates website, and background on the Fair Housing Act[11] and § 230. Part II discusses the trend of cases that initially revealed a broad § 230 immunity, of which the *Roommates* holding highlighted a potentially significant exception. Part III explores how the *Roommates* exception, an emphasis on websites' own actions in amplifying the illegal conduct of their users, may also be effective in limiting immunity in the context of a defamation suit.

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[3] 47 U.S.C. § 230(c) (describing the protections afforded providers and users of "interactive computer service[s]").

[4] Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

[5] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

[6] *Id.* at 1161-62.

[7] *Id.* at 1174-75.

[8] This Casenote also uses the terms "subscribers" or "members" to refer to Roommates' users.

[9] *Id.* at 1165.

[10] *Id.* at 1164; *see also id.* at 1167 ("Roommate designed its search system so it would steer users based on the preferences and personal characteristics that Roommate itself forces subscribers to disclose.").

[11] 42 U.S.C. § 3604 (2000).

I. BACKGROUND

A. *The Ins and Outs of Roommates.com*

On a typical day, Roommates.com hosts over 120,000 active profiles of individuals looking for a roommate.[12] The website boasts that Roommates is the "most popular roommate matching service, receiving over 50,000 visits and 1,000,000 page views per day."[13] To take advantage of the website, new Roommates users must select their location and choose whether they are looking for a room or have a room to offer.[14] This allows them to view all available rooms, or those seeking rooms, in their area.[15] To proceed further and contact potential roommates, users must create an account.[16] There are two types of accounts: one for users looking for rooms and one for users with rooms to offer.[17] All users must create a screen name and provide an e-mail address.[18]

When creating an account to search for available rooms, users must designate certain location and room preferences, such as the specific areas of town in which they'd like a room,[19] type of dwelling, maximum rent, lease term, and whether they will share a bedroom or bathroom.[20] Next, users are asked to specify their roommate preferences based on age, gender, sexual orientation, smoking habits, cleanliness, pets, and familial status (whether or not they have children).[21] Although the drop-down menu for each preference is set to the most inclusive specifications,[22] the website

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12 Roommate Matching Service Home Page, http://www.roommates.com (last visited Sept. 21, 2008).

13 *Id.*

14 *Id.*

15 *Id.*

16 All further hyperlinks to Roommates.com in this Casenote require the user to create a basic, free account at http://www.roommates.com/get_started.rs (last visited Sept. 21, 2008) (complete "Account Details" form and follow "Submit" hyperlink; then complete each information request page and follow "Next" hyperlink). The links related to the account set-up process are only accessible by initiating the process and sequentially completing each information request page. *E.g.*, *infra* notes 19-21, 23, 24, 26-31, 153. The links related to member functions require the user to complete the account set-up process. *E.g.*, *infra* notes 32-34.

17 Roommate Matching Service Home Page, http://www.roommates.com (last visited Sept. 21, 2008).

18 *Id.*

19 Roommate Matching Service Membership, http://www.roommates.com/get_started.rs (last visited Sept. 21, 2008). See *supra* note 16 for instructions on setting up a user account at Roommates.com. To view this web page, users must sequentially follow the account set-up process.

20 *Id.*

21 *Id.*

22 *See id.* For example, the default age range is 18-99 and the default female sexuality criterion is "straight or lesbian."

prompts users to "select the criteria by which [Roommates] should match [a user's] potential roommate."[23] Next, users must use drop-down menus to provide all of the same criteria as pertain to themselves.[24] Roommates does not allow users to proceed unless they provide answers to all of the website's information requests. Finally, users have the option of choosing an emoticon,[25] uploading pictures to their account, or providing additional comments.[26] For the "Additional Comments" section, Roommates "strongly recommend[s] taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate."[27]

When creating an account to offer a room, users enter the relevant information for their available room, such as location, type of dwelling, and monthly rent.[28] Then users must enter certain details about the household, including the age range, sexual orientation, and occupation of the current household members.[29] Similar to those seeking a room, these personal details must be entered before users may proceed. After the option of choosing an emoticon and uploading pictures, the website then prompts users to specify the criteria the website should use to match their potential roommate.[30] These criteria are the same as those of users seeking rooms. Finally, users offering rooms are also encouraged to personalize their profile in the Additional Comments section.[31]

Once users create an account they may go to "My Matches" to view accounts that correspond to their roommate specifications.[32] Additionally, they may do a "Power Search" and reselect the criteria by which they would like the website to filter potential roommates.[33] Finally, users may locate roommates by activating the "Email Notification" function, and the

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[23] Roommate Matching Service Membership, http://www.roommates.com/get_started.rs (last visited Sept. 21, 2008). See *supra* note 16 for instructions.

[24] *Id.*

[25] An "emoticon" is a cartoon facial expression to describe the user's mood. For example, a "smiley face" would signify a happy user.

[26] Roommate Matching Service Membership, http://www.roommates.com/get_started.rs (last visited Sept. 21, 2008). See *supra* note 16 for instructions.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Roommate Matching Service Home Page, http://www.roommates.com (last visited Sept. 21, 2008) (enter "Nickname" and "Password" and follow "Go" hyperlink). See *supra* note 16 for instructions.

[33] *Id.* (enter "Nickname" and "Password" and follow "Go" hyperlink; then follow "Power Search" hyperlink). See *supra* note 16 for instructions.

website will send them an e-mail when a compatible user creates a new account.[34]

B. *Statutory Background*

1. The Fair Housing Act

The Fair Housing Act ("FHA") was enacted as Title VIII of the Civil Rights Act of 1968.[35] The FHA was primarily intended to prevent discrimination in the sale or rental of private housing.[36] Particularly, Congress's goal was to promote integrated residential housing and eliminate the segregation of racial groups.[37] Section 3604(c) of the FHA makes it unlawful to

> make, print, or publish, or cause 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 intention to make any such preference, limitation, or discrimination.[38]

Examples of § 3604(c) violations include a newspaper's classified advertisement for renting an apartment in a "white home";[39] newspaper advertisements which indicated a preference for nationalities such as Germans, Spaniards, and Americans;[40] and a landlord's promulgation of a "no children" rule in an apartment complex.[41] Although the San Fernando Fair Housing Council based their suit on § 3604(c) violations, this Casenote does not analyze whether Roommates violated § 3604(c), but instead focuses on the § 230 immunity defense offered by Roommates.

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34 *Id.* (enter "Nickname" and "Password" and follow "Go" hyperlink; then follow "Email Notification" hyperlink). See *supra* note 16 for instructions.

35 42 U.S.C. § 3601 (2000).

36 Otero v. New York City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973).

37 *Id.* at 1133-34.

38 42 U.S.C. § 3604(c) (2000).

39 United States v. Hunter, 459 F.2d 205, 215 (4th Cir. 1972).

40 Holmgren v. Little Vill. Cmty. Reporter, 342 F. Supp. 512, 513 n.1 (N.D. Ill. 1971). This case also mentions the exception to § 3604(c) found in § 3603(b) which permits certain rentals to discriminate, but not to publish their discriminatory intention. *Id.* at 513-14.

41 Blomgren v. Ogle, 850 F. Supp. 1427, 1440 (E.D. Wash. 1993).

2. Section 230 of the Communications Decency Act

In 1995, a New York Superior Court case, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[42] set the stage for Congress's discussion on the "rapidly developing array of Internet and other interactive computer services."[43] The *Stratton* court held the Internet service provider Prodigy liable for its bulletin board users' defamatory remarks on the ground that Prodigy's editorial actions made it a publisher rather than a mere distributor of the remarks.[44] In effect, the *Stratton* court punished Prodigy for attempting to monitor its users' postings, whereas it would have been protected from liability if it merely distributed the information and did not provide any oversight.[45] A year after *Stratton*, Congress passed § 230 primarily to prevent litigants from subjecting Internet providers to heightened liability for monitoring, or failing to monitor, their users' content.[46]

The relevant portion of § 230 that protects interactive computer services ("ICSs")[47] from suits predicated on their users' activity reads:

> § 230. Protection for private blocking and screening of offensive material
>
> c. Protection for "Good Samaritan" blocking and screening of offensive material
>
> 1. Treatment of publisher or speaker. 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.
>
> 2. Civil Liability. No provider or user of an interactive computer service shall be held liable on account of—

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[42] No. 31063-94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, 47 U.S.C. § 230 (2000).

[43] 47 U.S.C. § 230(a)(1). *See* H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (citing *Stratton*, 1995 N.Y. Misc. LEXIS 229).

[44] *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *3-4, *10-11. A bulletin board is "[a] system that enables users to send or read electronic messages, files, and other data that are of general interest and addressed to no particular person." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[45] *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *3-4, *10-11. Regarding print publishers, the republication of a tortious statement carries the same liability as the original publication. Dixson v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977). Alternatively, print distributors, such as bookstores, are liable only if they know or have reason to know of the tortious statements. Smith v. California, 361 U.S. 147, 152-53 (1959).

[46] H.R. REP. NO. 104-458, at 194. The Supreme Court has deemed certain sections of the Communications Decency Act unconstitutional. Reno v. ACLU, 521 U.S. 844, 885 (1997). The sections relevant to *Roommates* are still good law. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 n.5 (9th Cir. 2008) (citing *ACLU*, 521 U.S. at 844).

[47] This Casenote also uses the terms "publisher," "editor," and "operator" to refer to an interactive computer service ("ICS").

A. any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

B. any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1) [subparagraph (A)].[48]

Section 230(f) then defines two key terms used in (c)(1):

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

3. Information content provider. The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.[49]

As the title of subsection (c) indicates, Congress mainly sought to protect the efforts of websites and individuals to block offensive material. In a nutshell, § 230(c)(1) attempts to combat decisions like *Stratton* by immunizing ICSs from the heightened liability they might incur as publishers that monitor for objectionable content.[50]

When passing § 230, Congress emphasized free speech.[51] Congress recognized that 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 activities" and they "have flourished, to the benefit of all Americans, with a minimum of government regulation."[52] Accordingly, § 230 furthered Congress's stated policy to "preserve the vibrant and competitive free market" for the Internet and encourage technology to allow users to control what information they and their families receive.[53]

Website operators, such as Roommates, fall within the definition of an ICS and garner the same § 230 protection as an ICS such as Prodigy, which

48 47 U.S.C. § 230(c).

49 *Id.* § 230(f).

50 H.R. REP. NO. 104-458, at 194.

51 47 U.S.C. §§ 230(a)-(b). *See also* Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) (noting that "imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech").

52 47 U.S.C. § 230(a).

53 *Id.* § 230(b).

provides access to the Internet as a whole, along with a host of services.[54] An information content provider ("content provider"), on the other hand, is typically the third-party user who logs onto an ICS and adds their own content. For example, a Prodigy user who posts a message on a bulletin board is a content provider. This Casenote explores how the *Roommates* court capitalized on Congress's inclusion of those who are *partially* responsible for the creation of content and created a range of ICSs that might also be deemed content providers.

II. A TREND TOWARDS UNFETTERED IMMUNITY, RECENTLY QUESTIONED

Although one of Congress's stated goals in enacting § 230 was to overrule *Stratton*,[55] the broadly worded § 230(c)(1) has presented courts with some flexibility in statutory interpretation. Generally, courts have erred on the side of granting publishers protection.[56] This trend of nearly unfettered immunity[57] was recently qualified by the Ninth Circuit in *Roommates*[58] and questioned by the United States Court of Appeals for the Seventh Circuit in similar cases.[59]

A. Zeran v. AOL *Sets the Trend*

The United States Court of Appeals for the Fourth Circuit established a trend of broad § 230 ICS immunity in *Zeran v. America Online*, a case decided about a year after § 230 became law.[60] In *Zeran*, the plaintiff sued America Online ("AOL") for an allegedly defamatory third-party posting on an AOL bulletin board.[61] An unidentified person posted a description of

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54 Schneider v. Amazon.com, Inc., 31 P.3d 37, 40-41 (Wash. Ct. App. 2001). Note that § 230(c)(1) includes both users and providers of ICSs. 47 U.S.C. § 230(c)(1). As they are treated the same, this Casenote refers to both a user and a provider of an ICS as an "ICS." Also note that this type of "user" is different than a third-party user who posts content to an ICS. *See infra* text accompanying note 94 (discussing an ICS user considered an ICS under § 230).

55 H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

56 Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

57 *See Craigslist*, 461 F. Supp. 2d at 688-90 (providing a list of cases to show that "[n]ear-unanimous case law" supports immunity for ICSs sued for third-party content).

58 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1164-65 (9th Cir. 2008).

59 Doe v. GTE Corp., 347 F.3d 655, 659-60 (7th Cir. 2003); Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008).

60 *Craigslist*, 461 F. Supp. 2d at 688 (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997)).

61 *Zeran*, 129 F.3d at 329.

a t-shirt featuring offensive slogans related to the 1995 Oklahoma City bombing, which had occurred a few days earlier.[62] The description instructed readers to call "Ken" at Zeran's phone number for additional information.[63] As a result, Zeran received an onslaught of angry calls.[64] Zeran claimed he immediately contacted AOL, but it delayed in deleting the defamatory postings, refused to print a retraction, and failed to screen for similar messages.[65] After additional defamatory messages and death threats against Zeran, AOL finally agreed to close the unidentified poster's account.[66] Zeran then filed a defamation claim against AOL and AOL responded by invoking ICS immunity under § 230.[67]

As the first circuit court to interpret the scope of § 230, the *Zeran* court championed the policies behind the statute and granted broad immunity to AOL.[68] The Fourth Circuit barred Zeran's claim against the ICS as precisely the type of suit § 230 was meant to thwart[69] and said § 230 plainly "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."[70]

A year after *Zeran*'s publication, AOL again found itself the target of a defamation suit, this time in the U.S. District Court for the District of Columbia. In *Blumenthal v. Drudge*,[71] AOL was a co-defendant along with gossip columnist Matt Drudge.[72] AOL had contracted with Drudge to write a weekly column for AOL's website.[73] Under the contract, AOL had the right to monitor the column and remove offensive content.[74] It also "affirmatively promoted Drudge as a new source of unverified instant gossip on AOL."[75] The plaintiff, a White House staffer, took issue with a Drudge

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62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.* at 330.

66 *Id.* at 328-29.

67 *Zeran*, 129 F.3d at 328.

68 *Id.* at 328-31.

> The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted.

Id. at 331.

69 *Id.* at 332 ("AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity.").

70 *Id.* at 330.

71 992 F. Supp. 44 (D.D.C. 1998).

72 *Id.*

73 *Id.* at 47.

74 *Id.* at 51.

75 *Id.*

article alleging the staffer had a history of spousal abuse.[76] The *Drudge* court admitted that it would have held for the plaintiff if writing on a "clean slate," but concluded it was bound by § 230.[77] It said that the *Zeran* holding completely precluded the success of the plaintiff's allegation.[78] The court held for AOL because AOL did not rise to the level of a content provider, especially considering Congress's grant of immunity where an ICS had an "active, even aggressive role in making available content prepared by others."[79] *Blumenthal v. Drudge* further solidified the trend of broad judicial interpretation of § 230 immunity for ICSs and the corresponding narrow definition of "content providers."[80]

B. *The Ninth Circuit Initially Follows the Trend*

The Ninth Circuit's initial interpretations of § 230 revealed a tendency to side with courts that have granted a "broad" and "robust" immunity to ICSs.[81] This section's overview of these initial cases provides a framework for determining whether *Roommates* diverged from precedent.[82]

1. *Batzel v. Smith*

The first occasion for the Ninth Circuit to consider the scope of immunity under § 230 was *Batzel v. Smith*,[83] which involved an allegedly defamatory posting on a listserv.[84] While Mr. Smith engaged in remodeling work for Ms. Batzel, he claimed she hinted that a valuable painting in her home had been looted by her Nazi grandfather during World War II.[85] Smith sent a notice to Tom Cremers, operator of the Museum Security Network ("Network"), in the interest of finding the painting's rightful

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76 *Id.* at 46.

77 *Drudge*, 992 F. Supp. at 51-53.

78 *Id.* at 52.

79 *Id.* at 51-53.

80 *See* Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 688-90 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

81 *See Craigslist*, 461 F. Supp. 2d at 690 & n.7 (including Ninth Circuit cases as ones which have not simply followed *Zeran* but have independently concluded that § 230 offers a "'broad,' 'robust' immunity").

82 *See infra* Part II.D.

83 333 F.3d 1018 (9th Cir. 2003).

84 *Id.* at 1020. "A listserv is an automatic mailing list service that amounts to an e-mail discussion group." *Id.* at 1021 n.2 (quoting Ian C. Ballon, 4 E-COMMERCE AND INTERNET LAW: TREATISE WITH FORMS, GLOSSARY OF TERMS 30 (2001)).

85 *Id.* at 1020-21.

owner.[86] As was standard when Cremers received such a notice, he made minor edits and posted Smith's notice on the Network's website and listserv, which forwarded it to all listserv subscribers (mainly security personnel and insurance investigators).[87] When sending his notice, Smith was not aware that his message would end up on an international message board, and later claimed that he would not have sent it had he known.[88] Upon discovering the posting, Batzel filed a defamation suit against Smith and Cremers, claiming the comments were untrue, spiteful, and damaging to her social and professional reputation.[89] Cremers, the Network's listserv operator, filed a motion to dismiss, which the district court denied without addressing § 230.[90] On appeal, the Ninth Circuit vacated and remanded, recognizing Cremers's § 230 immunity.[91]

In reviewing the district court's ruling, the Ninth Circuit provided a detailed background of § 230's legislative history and spoke favorably of Congress's policy goals of promoting website monitoring and free speech.[92] The court then interpreted § 230's definition of an ICS to include "any . . . service or system [that] allows 'multiple users' to access 'a computer server.'"[93] The court granted potential § 230 protection to Cremers as an ICS "user" because his Network service gave other users access to a certain section of the Internet.[94]

Next, the *Batzel* court considered whether Cremers's role in creating or developing the e-mail and listserv posting was significant enough to make him a "content provider."[95] The court stated that a central purpose of § 230 was to immunize an ICS's editing efforts, such that Cremers's minor alterations to the e-mail could not be considered "development."[96] Next, the court focused on Cremers's decision to publish Smith's e-mail.[97] Significantly, it said Cremers's actions in selecting among proffered material was a "usual prerogative of publishers" and did not rise to the level of a content

86 *Id.* at 1021. The Network "maintains both a website and an electronic e-mailed newsletter about museum security and stolen art." *Id.*

87 *Batzel*, 333 F.3d at 1021-22.

88 *Id.* at 1022.

89 *Id.* at 1021-22.

90 Batzel v. Smith, No. 00-9590, 2001 U.S. Dist. LEXIS 11921, at *7 (C.D. Cal. July 25, 2001) (allowing the case to proceed because Batzel produced admissible evidence on all elements of her claim).

91 *Batzel*, 333 F.3d at 1035.

92 *Id.* at 1026-28. "[C]ritics [of § 230 and *Zeran*'s apparent First Amendment emphasis] fail to recognize that laws often have more than one goal in mind, and that it is not uncommon for these purposes to look in opposite directions." *Id.* at 1028.

93 *Id.* at 1030.

94 *Id.* at 1030-31.

95 *Id.* at 1031.

96 *Batzel*, 333 F.3d at 1031.

97 *Id.* at 1031-32.

provider.[98] In support of its holding, the court cited various other courts that "have agreed that the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content' do not transform an individual into a 'content provider' within the meaning of § 230."[99] The court went on to criticize the dissent's belief that "1) a defendant who takes an active role in selecting information for publication is not immune; and 2) [ICSs] who screen the material submitted and remove offensive content are immune."[100] The majority said these two beliefs "cannot logically coexist."[101] This Casenote proposes in Part II.D that a middle ground between the two views can be achieved with the proposition from *Roommates* that an ICS becomes a content provider and loses § 230 immunity when its editorial actions independently develop web content by amplifying the illegal conduct of its users.[102]

Lastly, the Ninth Circuit questioned whether Smith could be considered the "content provider" because he did not knowingly *provide* the message for distribution purposes.[103] The court said if Smith were not a content provider, then Cremers could not be immune because Cremers did not post content *provided* by another user.[104] The court expressed concern for limiting the free speech of users afraid to send an e-mail because it might be posted on a website.[105] On the other hand, the court did not want to overly burden ICSs by requiring them to verify users' intent for every e-mail they considered posting.[106] The court struck a balance by granting immunity under § 230 to only those publishers who *reasonably believe* the content provider intended his communication to be made public.[107] The case was remanded for the district court's consideration of whether Cremers rea-

98 *Id.* at 1031. This Casenote challenges whether this is always the case. *See infra* Part III.B.

99 *Id.* at 1031 n.18 (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); Ben Ezra, Weinstein & Co. v. Am. Online, Inc., 206 F.3d 980, 985-86 (10th Cir. 2000); Blumenthal v. Drudge, 992 F. Supp. 44, 49-53 (D.D.C. 1998); Schneider v. Amazon.com, Inc., 31 P.3d 37, 39-43 (Wash. Ct. App. 2001)).

100 *Batzel*, 333 F.3d at 1032. Basically, the *Batzel* dissent believed that an ICS's decision to post a certain message should remove them from § 230 protection because their implicit endorsement is sufficient to make them a content provider. *Id.* at 1037-39 (Gould, J., concurring in part and dissenting in part). Judge Gould agreed with the majority's interpretation that CDA immunity requires that (1) the defendant provide or use an ICS; and (2) the "asserted claims must treat the defendant as a publisher or speaker of information," but rejected its analysis of what constitutes "information provided by another." *Id.* at 1037.

101 *Id.* at 1032 (majority opinion).

102 *See infra* Part II.D.

103 *Batzel*, 333 F.3d at 1032-35.

104 *Id.* at 1032.

105 *Id.* at 1033-34.

106 *Id.* at 1034.

107 *Id.*

sonably believed Smith meant for his e-mail to be posted on the website and listserv.[108]

2. *Carafano v. Metrosplash*

A month and a half after deciding *Batzel*, the Ninth Circuit filed another opinion affirming its broad view of § 230 immunity, *Carafano v. Metrosplash.com, Inc.*[109] *Carafano* involved defamatory allegations, among other claims, brought by actress Christianne Carafano, a.k.a. Chase Masterson, against the operators of the Matchmaker.com ("Matchmaker") website, Metrosplash.com.[110] Matchmaker operates much like Roommates by pairing compatible singles through a series of online questionnaires.[111] In *Carafano*, an unknown user created a false Matchmaker profile for Carafano that said she was "looking for a one-night stand" and for a "hard and dominant" man.[112] The profile also included Carafano's home address and a fake e-mail address.[113] When users e-mailed the fake address, it automatically replied with Carafano's telephone number and home address.[114] After Carafano received sexually explicit phone calls and threatening faxes, her representative contacted Matchmaker, which removed the posting.[115] The district court considered Matchmaker a partial content provider and denied § 230 immunity.[116] Nevertheless, the district court rejected all of Carafano's claims on other grounds.[117] On appeal, the Ninth Circuit came to the opposite conclusion regarding the issue of § 230 immunity.[118]

In *Carafano*, the Ninth Circuit again considered the extent of ICS participation necessary for an ICS to become a partial developer of the information and, thus, a "content provider."[119] Carafano claimed Matchmaker was partially responsible for the false profile because of the website's required questionnaires, which provided a menu of "pre-prepared responses."[120] Carafano also pointed to Matchmaker's participation in classifying user characteristics into discrete categories as evidence of its respon-

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108 *Id.* at 1035.
109 339 F.3d 1119 (9th Cir. 2003).
110 *Id.* at 1121-22.
111 *Id.* at 1121.
112 *Id.*
113 *Id.*
114 *Id.* at 1121-22.
115 *Carafano*, 339 F.3d at 1122-23.
116 Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055, 1068 (C.D. Cal. 2002), *aff'd on other grounds*, 339 F.3d 1119 (9th Cir. 2003).
117 *Id.* at 1077.
118 *Carafano*, 339 F.3d at 1125.
119 *Id.* at 1123-25.
120 *Id.* at 1125.

sibility and involvement.[121] The court rebuffed Carafano's claims and focused on the fact that Matchmaker was not responsible for the "underlying misinformation."[122] The court limited its analysis to the information at issue—Carafano's false profile.[123] The *Carafano* court also reiterated their *Batzel* position that "so long as a third party willingly provides the essential published content, the [ICS] receives full immunity regardless of the specific editing or selection process."[124]

Understanding the facts and reasoning of *Batzel*, and particularly *Carafano*, is critical to recognizing that the *Roommates* court did not part with precedent.[125] Instead, the court accurately distinguished Roommates as a website that partially developed content by amplifying its users' FHA violations.[126]

C. *Roommates.com Exemplifies an ICS That Has Risen to the Level of a Content Provider*

In *Roommates*, the Ninth Circuit faced the question of whether Roommates garnered § 230 immunity for alleged FHA violations.[127] The Fair Housing Councils of San Diego and San Fernando Valley ("Fair Housing Council") filed an amended complaint on April 21, 2004 that alleged Roommates violated the FHA and various state laws.[128] The complaint set forth three main aspects of the Roommates website that violated the FHA by encouraging and facilitating discriminatory conduct: (1) nicknames chosen by the users, such as "ChristianGrl" and "Blackguy;" (2) the free-form Additional Comments; and (3) Roommates' questionnaires, which required users to disclose their age, gender, sexual orientation, occupation, and familial status.[129] The Fair Housing Council sought to hold Roommates "li-

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121 *Id.* at 1124.

122 *Id.* at 1124-25.

123 *Id.*

124 *Carafano*, 339 F.3d at 1124.

125 *See infra* Part II.D.2.

126 *See infra* Part II.D.2.

127 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161 (9th Cir. 2008). *See supra* Part I.B (describing the Fair Housing Act and § 230). *See generally* Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 Stan. L. Rev. 969, 1001-12 (2002) (advocating, prior to any cases involving both the FHA and § 230, that FHA violations must be enforced against ICSs even in light of § 230 protection).

128 Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488, at *2 (C.D. Cal. Sept. 30, 2004), *rev'd*, 489 F.3d 921 (9th Cir. 2007), *and reh'g en banc granted*, 506 F.3d 716 (9th Cir. 2007), *and aff'd in part, vacated in part, rev'd in part sub nom.* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

129 *Id.* at *2.

able for making and publishing 'discriminatory statements . . . in violation of fair housing laws.'"[130] Roommates sought immunity under § 230 and argued the complaint was barred by the First Amendment.[131] Both parties moved for summary judgment. On September 30, 2004, the district court granted Roommates its motion for summary judgment on the ground that it was immune under § 230.[132] The court cited the Ninth Circuit's traditionally limited definition of content provider and its robust protection of publishers from liability.[133] The Fair Housing Council appealed the district court's determination that Roommates was not an information content provider and that it deserved protection under § 230.[134] On May 15, 2007, after reviewing the parties' briefs and an amicus brief submitted by a group of ICSs, a three-judge panel of the Ninth Circuit reversed the district court's grant of summary judgment and held Roommates was not immune from liability for alleged FHA violations under § 230.[135] On October 12, 2007, the Ninth Circuit voted to have the case reheard by the en banc court.[136]

1. Majority Opinion

The Ninth Circuit affirmed their previous denial of § 230 immunity in the en banc opinion, issued on April 3, 2008.[137] The court again considered Roommates a partial content provider because of its required questionnaires, search capabilities, and e-mail notifications.[138] In Part One of the majority opinion, written by Chief Judge Kozinski, the court held that Roommates was a content provider of its mandatory questionnaires because it created, or developed, the forms and answer choices.[139] The court agreed with the Fair Housing Council that requiring users to disclose certain personal characteristics perhaps "'indicates' an intent to discriminate against

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130 *Id.* at *1.

131 *Id.*

132 *Id.* at *6. Because the FHA claim was settled by § 230, the district court declined to address Roommates' First Amendment defense and declined supplemental jurisdiction of the Fair Housing Council's state claims. *Id.* at *5.

133 *Roommate.com*, 2004 WL 3799488, at *3.

134 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007).

135 *Id.* at 929-30. *See generally* Brief for Amazon.com et al. as Amici Curiae Supporting Defendant, Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007) (No. CV-03-09386-PA(RZX)), 2005 WL 2106305.

136 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 506 F.3d 716 (9th Cir. 2007).

137 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008).

138 *Id.* at 1164.

139 *Id.*

them, and thus runs afoul of both the FHA and state law."[140] Additionally, the court agreed that the mandatory questionnaires enabled other users to discriminate, thus potentially violating the FHA by "'caus[ing]' subscribers to make a 'statement . . . with respect to the sale or rental of a dwelling that indicates [a] preference, limitation, or discrimination.'"[141] The court noted it was not opining on whether Roommates violated the FHA, but was deciding that the district court could consider whether actions by Roommates in developing the questionnaires did indeed violate that law.[142] The court's Part One finding is important, as it distinguishes Roommates from a website being sued only for the information provided by its users, which would be immune from judicial review under § 230.[143] Here, Roommates was held liable as an information content provider for the information *it* provided (required questionnaires and limited answer choices), not the answers its *users* provided.

In Part Two of the opinion, the court held Roommates also qualified as an information content provider by "requiring subscribers to provide the information as a condition of accessing its service."[144] The court equated this to a real-life situation of a real estate broker "saying, 'Tell me whether you're Jewish or you can find yourself another broker.'"[145] The court then went on to deny Roommates § 230 protection for its search functions and e-mail notification system, as the website became a partial developer of the information it required.[146] In contrast to a passive website that merely posts users' information, Roommates took a participatory role in improving users' ability to take advantage of the posted information.[147] For example, the "Power Search" and "My Matches" functions allowed users to narrow their focus to others with compatible preferences. The court differentiated the website's search functions from ordinary search engines in that ordinary search engines do not use unlawful search criteria and are not designed to achieve illegal ends.[148] The court held Roommates materially contributed to, or amplified, its users' potential violations of the FHA.[149]

Finally, in Part Three of the opinion, the court held § 230 protected Roommates from liability for publishing the information users supplied in the "Additional Comments" section of their profiles.[150] Although some of

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140 *Id.*

141 *Id.* at 1165 (quoting 42 U.S.C. § 3604(c)).

142 *Id.* at 1164.

143 *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 330-32 (4th Cir. 1997).

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

145 *Id.*

146 *Id.* at 1167-68.

147 *Id.* at 1167 ("Councils allege that Roommate's search is designed to make it more difficult or impossible for individuals with certain protected characteristics to find housing . . . .").

148 *Id.* at 1167; *see infra* Part II.D.2.

149 *Roommates.com*, 521 F.3d at 1167-68.

150 *Id.* at 1174.

the more controversial and blatant indications of discriminatory preferences were found in these Additional Comments,[151] the court held Roommates' passive involvement in that section was not sufficiently participatory to make it a content provider.[152] And although Roommates "strongly recommend[ed] taking a moment to personalize your profile by writing a paragraph or two describing yourself and what you are looking for in a roommate,"[153] in contrast to the questionnaires, Roommates did not provide a drop-down menu of discriminatory choices, nor did it "encourage or enhance any discriminatory content created by users."[154] The court concluded that publishing the Additional Comments was "precisely the kind of situation for which section 230 was designed to provide immunity."[155]

The *Roommates* court did not address whether the user names, which sometimes indicated characteristics of the users, were immune under § 230. It is likely that Roommates would be protected by § 230 for the user names, because they were similar to the Additional Comments in that Roommates did not direct users toward information they should enter and did not allow them as a search criteria.[156]

2. Partial Dissent

Judges McKeown, Rymer, and Bea dissented from the Part Two holding that Roommates' user information requirement and search functions were sufficient to make it a content provider.[157] The dissent took issue with the majority's expansive interpretation of "information content provider."[158] They believed the court should follow its rule set forth in *Carafano*, which held a website does not become a content provider unless it provides the "essential published content."[159] The dissent also disagreed with the majority's characterization of Roommates' participatory role in the dissemination of user information, instead analogizing Roommates' role to that of a pub-

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151 The court cites examples of Additional Comments, such as "[t]he person applying for the room MUST be a BLACK GAY MALE" and "NOT looking for black muslims [sic]." *Id.* at 1173.

152 *Id.* at 1174-75.

153 Roommate Matching Service Membership, http://www.roommates.com/get_started.rs (last visited Sept. 21, 2008). See *supra* note 16 for instructions.

154 *Roommates.com*, 521 F.3d at 1174.

155 *Id.*

156 *See* 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, 372 (2008) (discussing the *Roommates* court's reasoning and concluding that the nicknames likely fall under the same rationale as the Additional Comments).

157 *Roommates.com*, 521 F.3d at 1176-77 (McKeown, J., concurring in part and dissenting in part) (concurring with Parts One and Three of the majority opinion).

158 *Id.* at 1182.

159 *Id.* at 1186. *See supra* Part II.B.2.

lisher who performed the "traditional editorial functions" protected by § 230.[160] The crucial disagreement between the majority and dissent was the definition of "development" of web content.[161] Their opposing views are analyzed in Section D below.[162]

D. *The* Roommates *Majority Came to the Correct Conclusion, Even in Light of* Carafano

The Ninth Circuit came to the correct conclusion in both *Roommates* and *Carafano*, and the majority's definition of "develop" in *Roommates* is more appropriate than the dissent's definition. To reconcile the *Roommates* opinion with *Carafano* and understand the opposing definitions of "develop," it is necessary to first understand the similarities and differences between Part One and Part Two of the *Roommates* decision.

1. Distinguishing Part One and Part Two of the *Roommates* Decision

The majority's denial of § 230 immunity in Part One of the *Roommates* decision rested solely on Roommates' *own* actions in creating required questionnaires that asked users to make statements that potentially violated the FHA.[163] The statements of Roommates' users, and Roommates' corresponding role as a publisher of these statements, were not critical to the court's holding.[164] In fact, Roommates would have lost § 230 immunity in Part One of the opinion even if the website never had a user. Part One simply held that Roommates was a content provider of its questionnaires, forms, and answer choices, which potentially violated the FHA in and of themselves.[165]

Upon determining Roommates was a content provider with regard to its questionnaires, the court then addressed the more complicated question of whether Roommates garnered § 230 immunity for publishing and distributing users' profiles.[166] In contrast to Part One, where Roommates lost immunity as the *sole* developer of its required questionnaires, Part Two withdrew immunity for the user information that Roommates *partially* de-

160 *Id.* at 1184-85 (quoting Batzel v. Smith, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003)).

161 *Id.* at 1182. *See* Klein & Doskow, *supra* note 156, at 359 ("Whether Roommate.com, unlike Matchmaker, was a 'creator' or 'developer' of the potentially discriminatory content would prove to be the central issue in the [*Roommates*] decision.").

162 *See infra* Part II.D.2.

163 *Roommates.com*, 521 F.3d at 1165.

164 *Id.* at 1164-65.

165 *Id.* at 1164.

166 *Id.* at 1165-72.

veloped by requiring its submission and boosting its usefulness with search functions. The critical language in Part Two was the holding that Roommates' requirement that users provide certain information as a condition to using the website made it "more than a passive transmitter of information provided by others"—it was a "developer, at least in part, of that information."[167] Accordingly, the court also denied Roommates § 230 immunity for its search functions because they were "similarly designed to steer users based on [required] discriminatory criteria."[168]

Thus, Roommates' culpable act in Part One—soliciting user information—translated in Part Two into a participatory role in the development of that information once submitted by the user. In the court's words, "[u]nlawful questions solicit (a.k.a. 'develop') unlawful answers."[169] If Roommates never solicited information from a user, it might have gained § 230 immunity based on the reasoning in Part Two. For example, consider a website that allowed users to enter any information they wanted to provide about themselves or their desired roommates, and then allowed them to filter potential candidates according to set categories such as age, gender, etc.[170] According to the majority, this website would gain § 230 immunity because it merely provided a way to search based on *user-defined* criteria.[171] In contrast, *Roommates* further developed the required *website-defined* information by enhancing its value with filtering and search functions.

2. Reconciling *Roommates* and *Carafano* by Defining "Develop"

The Ninth Circuit's holding in *Carafano* does not affect the *Roommates* court's Part One opinion. In contrast to the FHA claims before the court in *Roommates* Part One, which were not dependent on user-provided information,[172] Carafano's claims were predicated on the information posted to the Matchmaker website.[173] If no user had completed a false profile, Carafano would have had no claim. Unfortunately, the apparently blanket statement made in *Carafano* that immunity is not lost unless the website provides the "essential published content"[174] leads a reader to believe a website could never be responsible for merely posing a question. In comparison to the *Roommates* court, the *Carafano* court placed great em-

167 *Id.* at 1166.

168 *Id.* at 1167.

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

170 *See, e.g.*, Chicago Lawyers' Comm. for Civil Rights Under the Law v. Craigslist, Inc., 461 F. Supp. 2d 681, 684-85 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008). *See also infra* Part II.E.

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

172 *See supra* Part II.D.1.

173 *See supra* Part II.B.2.

174 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

phasis on the user's role in populating the questionnaires.[175] After Part One of *Roommates*, it is apparent that an ICS *can* be liable for simply posing a question, but *Carafano* makes it clear that an ICS cannot be liable solely for the user-provided answer to a question. Accordingly, suits against ICSs must allege that the ICS committed some culpable act, not simply a culpable user response to a neutral ICS question.

Once the *Roommates* court moved on to address the user-provided information and the search/e-mail functions in Part Two of its opinion,[176] the Roommates and Matchmaker websites appeared to share much more in common. Accordingly, the *Roommates* court did not begin to distinguish *Carafano* until Part Two of its opinion.[177] The *Roommates* court began its analysis by admitting that some *Carafano* language was "unduly broad."[178] In particular, it questioned *Carafano*'s suggestion that a website could never be liable for a claim related to user-provided information because "no [dating] profile has any content until a user actively creates it."[179] The *Roommates* court then qualified this proposition by reiterating that Roommates' initial culpability in requiring users to submit potentially FHA-violating information made the website a partial developer of that information.[180] It noted that if a website cannot be susceptible to a suit related to user-provided information, then § 230's exception for "develop[ing]" content "in part" is essentially eviscerated.[181]

The *Roommates* court reaffirmed its *Carafano* holding and distinguished the two cases by defining "develop" based on whether a website "materially contribut[es] to [the] alleged unlawfulness" of its users.[182] Roommates partially developed the user-provided content on its website because its "work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism [was] directly related to the alleged" FHA violations.[183] On the other hand, Matchmaker was more akin to an ordinary search engine, such as Google, as it only "provided neu-

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175 *Id.* (conceding that "the questionnaire facilitated the expression of information by individual users," but that "Matchmaker cannot be considered an 'information content provider' under the statute because no profile has any content until a user actively creates it").

176 Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165-72 (9th Cir. 2008).

177 *Id.* at 1171-72.

178 *Id.* at 1171.

179 *Id.* (citing Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003)).

180 *Id.*

181 *Id.* at 1171 (citing 47 U.S.C. § 230(f)(3) (2000)). The statute reads: "The term 'information content provider' means any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3) (2000) (emphasis added).

182 *Roommates.com*, 521 F.3d at 1167-68.

183 *Id.* at 1172. *See* Klein & Doskow, *supra* note 156, at 371 ("The Ninth Circuit made clear that it is the interaction with civil rights laws that is significant, not the content of the preferences expressed . . . .").

tral tools" and "did absolutely nothing to encourage the posting of defamatory content . . . ."[184]

The *Roommates* dissent disagreed that a finding of partial development should turn on the website's actions in relation to the underlying claim.[185] Instead, the dissent said the opinion should be confined to the issue at hand, § 230 immunity, and accused the majority of prematurely concluding that Roommates had in fact violated the FHA.[186] Under the dissent's approach, the Matchmaker and Roommates websites were indistinguishable from a § 230 standpoint because their information collection and search mechanisms were essentially the same.[187] The fact that Roommates' prompts and search functions related to FHA violations was of no consideration to the dissent. Thus, the dissent believed *Roommates* was wrongly decided in the face of *Carafano* precedent.[188]

Given the intent and language of § 230, the *Roommates* majority's interpretation of what it means to develop web content is more appropriate than the dissent's interpretation. Section 230 does not protect websites from their own actions, so it is critical to differentiate a website's actions from that of its users. The proper way to achieve this distinction is to analyze a website's actions as they pertain to the underlying claim. Granted, this is similar to a determination of whether a website did violate the underlying claim, but this is appropriate because § 230 does not protect websites from their own illegal acts.[189] As long as the court does not punish a website solely for its users' content, then § 230 has been respected.

The dissent argued that it is senseless for the same activity to be "development" for a FHA violation claim but not development for a harassment claim. It is true, in both cases, that courts are analyzing the actions of the website, but § 230 immunity is irrelevant unless these actions are analyzed as they pertain to the underlying claim.[190] This analysis is essential in

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184 *Id.* at 1171. A dating website might achieve "development" by calling attention to certain users who are particularly vulnerable defamation targets (celebrities), or by allowing older men to enable a function that notified them when underage girls in their area created an account. These extreme examples exemplify the extent to which a dating website would need to go to add an unlawful layer of information. Conversely, FHA language makes it fairly clear how a housing website may add an unlawful layer of information: by "caus[ing a discriminatory statement] to be made." 42 U.S.C. § 3604(c) (2000). Fortunately for Matchmaker, there is no "Fair Dating Act." Klein & Doskow, *supra* note 156, at 371 (quoting (former) Fair Housing Council attorney Gary Rhoades).

185 *Roommates.com*, 521 F.3d at 1178, 1182-86 (McKeown, J., concurring and dissenting).

186 *Id.* at 1178. "The majority's definition of 'development' epitomizes its consistent collapse of substantive liability with the issue of immunity." *Id.* at 1182.

187 *Id.* at 1186.

188 *Id.*

189 On remand, Roommates may argue that their actions did not violate the FHA. *Id.* at 1171 n.30.

190 The dissent claims "[w]hether Roommate is entitled to immunity for publishing and sorting profiles is wholly distinct from whether Roommate may be liable for violations of the FHA." *Roommates.com*, 521 F.3d at 1182. Then the dissent apparently contradicts itself in the next sentence by saying, "[i]mmunity has meaning only when there is something to be immune *from*, whether a disease or

distinguishing websites such as Matchmaker, which is intended to assist users in differentiating among suitors based on personal preference,[191] from websites such as Roommates, which is intended to assist users in differentiating among housing candidates based on criteria required by the website. Looking to the underlying harassment claim in *Carafano*, the court accurately decided that Matchmaker did nothing to encourage or facilitate its user's false profile, without which Carafano would have had no basis for a harassment claim. Matchmaker was just a passive forum. Roommates, however, *required* users to choose from pre-set criteria (content that the website provided) and that in turn encouraged users to violate the underlying FHA claims.[192] If the underlying claim in *Roommates* was defamation, the court would have held that the content provided by Roommates, similar to Matchmaker, did not further its users' defamatory conduct and was protected under § 230. As such, it was essential that the court considered how Roommates' required questionnaires particularly related to the underlying claim—alleged FHA violations.

Without considering § 230, all websites may be regarded as amplifying their users' behavior by providing a global forum and adding a stamp of legitimacy. Instead, § 230 established blanket immunity for such characteristics that are common to all websites. So, it is necessary to analyze a website's actions in relation to the underlying claim in order to distinguish websites that amplify their users' behavior toward such unlawfulness from websites that neutrally amplify their users' behavior in ways that were common to websites at the time of § 230's enactment. For example, even if Matchmaker partially developed the false profile by presenting it on a global stage and enhancing its users' ability to differentiate one another, § 230 protected this content development because it was developed toward a lawful end of allowing users to search profiles that the website trusted to be accurate.[193] Certainly, there is added complexity due to the fact that a website's developed content may be meaningless without its users' information, and vice versa. Nevertheless, courts should be able to distinguish the culpability of the website from the culpability of its users by employing a test similar to the *Roommates* court's "material contribution" or "amplifying illegality" test. The possibility that a website amplifies its users' torts, particularly defamation, is explored in Part III.

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the violation of a law." *Id.* If immunity only has meaning in relation to something else, then how can the immunity inquiry be "wholly distinct" from the violation of law inquiry?

191 *See supra* note 184.

192 This is a similar analysis used in determining whether a website or its user is responsible for the underlying information. *See supra* text accompanying notes 120-23.

193 On the other hand, a dating site that asked users to create false, crude profiles for celebrities could lose § 230 protection for content it knowingly developed toward the unlawful end of harassing celebrities. *See also supra* note 184.

E. *The Seventh Circuit's Distaste for* Zeran*'s Broad Interpretation Lends Credence to the* Roommates *Opinion*

The facts of *Roommates* allowed the Ninth Circuit to carve out an exception to § 230 immunity without expressly parting ways with the historically broad interpretation of § 230 immunity.[194] The *Roommates* analysis of § 230 is a better-reasoned approach than that taken by courts blindly following *Zeran*, which gave AOL broad immunity for offensive material posted on a bulletin board by a third-party user. This section discusses two earlier cases where the Seventh Circuit advocated such a scrutinizing approach to § 230 immunity.

The Seventh Circuit initially analyzed the *Zeran* court's broad interpretation of § 230 in *Doe v. GTE*.[195] Male athletes at several universities initiated the *GTE* suit after they discovered secret videotapes of their locker room being distributed online.[196] GTE provided web-hosting services (a web address and storage space on a server) to customers who were selling the pornographic videos through websites such as "youngstuds.com."[197] Although GTE had a contractual right to monitor their customers' websites, it allegedly declined to do so.[198] Nevertheless, the plaintiffs failed to advance a theory that imposed a monitoring duty upon GTE, so the Seventh Circuit affirmed the district court's dismissal based on § 230 immunity.[199]

The *GTE* district court dismissed the suit based on an affirmative defense of § 230 immunity, so the Seventh Circuit reviewed the applicable precedent.[200] The appeals court questioned why a section of federal legislation entitled "[p]rotection for 'Good Samaritan' blocking and screening of offensive material" would grant a similar protection to ICSs who did no editing at all and allowed users to post whatever they wanted.[201] As the intent of § 230 was to encourage ICSs to block offensive material, the *GTE*

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194 This broad interpretation of § 230 was first promulgated by the *Zeran* court. Zeran v. Am. Online, Inc., 129 F.3d 327, 328-31 (4th Cir. 1997) (examining a suit against AOL for its user's defamatory postings about the plaintiff). *See supra* Part II.A. *See also* Klein & Doskow, *supra* note 156, at 377-78 (concluding that, despite the factual differences in the *Roommates* case, it was "the first case to find a chink in the armor of § 230" and reviewing the potential that a recognized circuit split will develop).

195 347 F.3d 655, 659-60 (7th Cir. 2003).

196 *Id.* at 656.

197 *Id.* at 657. The video sellers were included as defendants in the initial suit, but all were either insolvent or could not be located or served. *Id.* at 656.

198 *Id.* at 657-58.

199 *Id.* at 661-62.

200 *GTE*, 347 F.3d at 658-60.

201 *Id.* at 660; *see also* David R. Sheridan, Zeran v. AOL *and the Effect of Section 230 of the Communications Decency Act Upon Liability for Defamation on the Internet*, 61 ALB. L. REV. 147, 172-79 (1997) (questioning the public policy behind a law that promotes decency on the Internet but protects publishers or distributors who fail to remove an obscene post once they become aware of the post).

court was troubled as to why the *Zeran* court read the statute to preclude state laws which require ICSs to perform some level of monitoring.[202]

In *Chicago Lawyers' Committee for Civil Rights Under the Law v. Craigslist, Inc.*,[203] the Northern District of Illinois went even further by pronouncing that it found *Zeran*, and the "essentially uniform body of case law on point," unpersuasive.[204] *Craigslist* presented very similar facts to the *Roommates* case.[205] Chicago Lawyers sued Craigslist.com ("Craigslist"), a website devoted to free classified advertisements, for discriminatory postings in the website's housing section.[206] The primary difference between the two websites is that Craigslist only solicited general housing information such as location and price,[207] while Roommates required users to provide certain personal characteristics such as gender and age.[208] Thus, Craigslist was immune under § 230 because the plaintiff's suit was predicated solely on Craigslist's role as a publisher of user postings, not as a content provider.[209]

In affirming the district court's *Craigslist* decision, the Seventh Circuit questioned those circuits that have followed *Zeran* and granted "broad immunity,"[210] and cited *GTE* for their explanation of why they believed § 230 was not a "general prohibition of civil liability for web-site operators and other online content hosts."[211] The *Craigslist* district court first expressed a similar concern that the *Zeran* holding would immunize publishers who actually became content providers due to their participation in the editing

[202] *GTE*, 347 F.3d at 659-60. The *Zeran* court interpreted § 230(e)(3), which prohibits state laws that conflict with the statute, as barring any action based on a state law requiring ICSs to perform some level of monitoring. Zeran v. Am. Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997). Although the *GTE* court disagreed with this, it was ultimately dicta, as no state law required such monitoring. *GTE*, 347 F.3d at 660.

[203] 461 F. Supp. 2d 681 (N.D. Ill. 2006).

[204] Chicago Lawyers' Comm. for Civil Rights Under the Law v. Craigslist, Inc., 461 F. Supp. 2d 681, 695 (N.D. Ill. 2006) ("Given the above-described overbreadth, internal inconsistency, and problematic applications, the Court respectfully declines to follow *Zeran*'s lead."), *aff'd*, 519 F.3d 666 (7th Cir. 2008).

[205] *Id.* at 683-84.

[206] *Id.* at 683.

[207] *Id.* at 684-85.

[208] *See supra* Part II.D.

[209] *Craigslist*, 461 F. Supp. 2d at 698-99. Chicago Lawyers' Committee apparently did not advance the theory that Craigslist was a content developer, not because of its role as publisher, but because of its actions in facilitating searches based on protected criteria (age, gender, etc.). This Casenote assumes that the plaintiffs would have failed with such a claim, as Craigslist's search function is no different than that of a "neutral" search engine. *See supra* notes 169-71 and accompanying text.

[210] *Craigslist*, 519 F.3d at 666 (collecting decisions in other circuits where § 230 was broadly granted).

[211] *Id.* at 669-70.

process.[212] The *Roommates* court did not fall into this *Zeran* trap, as they accurately identified Roommates' own activities towards violating the FHA. Comparing *Craigslist* and *Roommates* is instructive in understanding how Roommates rose beyond a mere publisher and became a content provider. In other cases, it is not always clear what a publisher is being sued for—the acts of their users or their own acts as a publisher.[213] Part III explores this issue further by presenting a defamation case where the court missed this distinction, and shows that the *Roommates* amplifying illegality test may help courts to accurately take on a similar issue in the future.

III. *ROOMMATES*' "AMPLIFYING ILLEGALITY" CONCEPT MAY BE EFFECTIVE IN RESTRICTING IMMUNITY FOR PUBLISHERS THAT USE DEFAMATORY EDITING TACTICS

The same technological "vibrant market" Congress praised when it passed § 230[214] continues to introduce ways for Internet users to harm one another.[215] Although the Ninth Circuit has historically espoused § 230's emphasis on free speech,[216] *Roommates* indicates a departure from unfettered § 230 publisher protection. The Ninth Circuit has adopted a stance more aligned with the *GTE* and *Craigslist* courts, and is now open to protecting the victims of abusive Internet practices. This Part synthesizes the Ninth Circuit's opinions in *Batzel*, *Carafano*, and *Roommates* to predict how the court might deny § 230 immunity for a publisher who actively manages the content of his website to harm others.

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[212] *Craigslist*, 461 F. Supp. 2d at 695 ("Courts have applied *Zeran*'s language to hold that Section 230(c)(1) immunizes ICSs *because* they alter third-party content, rather than analyzing whether it is the third-party content (which would fall within Section 230(c)(1)'s protection) or the ICS's alteration (which would not) that caused the alleged injury." (discussing *DiMeo v. Max*, 433 F. Supp. 2d 523, 530 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007))). *See infra* Part III.

[213] *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123-25 (9th Cir. 2003).

[214] 47 U.S.C. § 230(b)(2).

[215] *See* DANIEL J. SOLOVE, THE FUTURE OF REPUTATION (2007). Some people have used Craigslist.com to play pranks on others. For example, one woman returned home to find almost thirty people ransacking her house after another user posted an advertisement offering the woman's belongings for free. *House Stripped in Craigslist Hoax*, CBS News, Apr. 5, 2007, http://www.cbsnews.com/stories/2007/04/05/national/main2653699.shtml?source=mostpop_story. For other examples of websites that provide a forum for users to harm others, see Rotten Neighbor, http://www.rottenneighbor.com (last visited Sept. 25, 2008) (providing a forum for users to post stories about bad neighbors); Don't Date Him Girl, http://dontdatehimgirl.com (last visited Sept. 25, 2008) (providing a forum for women to share stories about specific men); and I Saw Your Nanny, http://isawyournanny.blogspot.com (last visited Sept. 25, 2008) (providing a forum for users to post descriptions of negligent nannies, sometimes including pictures, in the hope that parents will see the descriptions and reprimand the nannies).

[216] *See Carafano*, 339 F.3d at 1124 (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)) (echoing the concern over the possible chilling effect on free speech in the absence of § 230).

A. *A Troubling Blanket Application of § 230 in the Spirit of* Zeran

The Eastern District of Pennsylvania's decision in *DiMeo v. Max* epitomizes a situation where a court granted § 230 immunity without ample consideration for whether a publisher could become a content provider through its editing practices.[217] The *DiMeo* case arose from allegedly defamatory remarks posted about Anthony DiMeo III on Tucker Max's website, www.tuckermax.com.[218] DiMeo's publicity firm, Renamity, hosted a New Year's Eve party in 2005 at a Philadelphia restaurant.[219] Twice as many people as were expected attended and devoured all the food and booze well before midnight.[220] Angry party-goers began rioting, prompting the police to come and eventually disperse the crowd.[221] Reporters picked up the story and published summaries in various Philadelphia publications.[222]

Tucker Max's website is essentially a blog dedicated to sharing Max's "adventures" with the public.[223] On his home page, he claims, "I get excessively drunk at inappropriate times, disregard social norms . . . mock idiots and posers . . . and just generally act like a raging dickhead."[224] Max's website hosts a number of message boards and Max does not deny that he "selects, removes, and alters posts" on them.[225] Several of these message board postings focused on DiMeo's New Year's Eve party.[226] After a few particularly inflammatory messages appeared on the board,[227] DiMeo brought a defamation suit against Max for his role as publisher, editor, and information developer.[228]

The district court dismissed DiMeo's claims and granted Max immunity under § 230.[229] DiMeo argued Max's ability to select which messages

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217 DiMeo v. Max, 433 F. Supp. 2d 523 (E.D. Pa. 2006), *aff'd*, 248 F. App'x 280 (3d Cir. 2007). *See Craigslist*, 461 F. Supp. 2d at 695.

218 *DiMeo*, 433 F. Supp. 2d at 524.

219 *Id.* at 525.

220 *Id.*

221 *Id.*

222 *Id.* (citing various news stories).

223 *Id.* at 526. *See* Tucker Max's Home Page, http://www.tuckermax.com (last visited Sept. 25, 2008).

224 Tucker Max's Home Page, http://www.tuckermax.com (last visited Sept. 25, 2008).

225 *DiMeo*, 433 F. Supp. 2d at 526-27.

226 *Id.* at 526.

227 DiMeo claimed that six certain postings typify those concerning him on the message board. These include: "I just wanted to let you know that I think that you are the biggest piece of shit I have ever heard of and I hope that you die soon"; "He's got a neat, nice little [Web] page there from which we can harass him"; and "You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud." *Id.* at 526-27.

228 *Id.* at 527-30. Apparently the complaint didn't refer to Max as an "information content provider." *See infra* note 230 and accompanying text.

229 *Id.* at 529-31.

to post granted him a level of participation which possibly rose to "development of information."[230] The court responded, without even reviewing Max's editing practices, that § 230 was enacted to encourage the exact behavior in which Max had engaged.[231] The court then cited *Batzel* for the proposition that "development of information must mean something more substantial than . . . selecting material for publication."[232] The *DiMeo* court failed to consider that the act of selecting material for publication could itself amount to partial content development, as discussed in the following section.

B. *How the* DiMeo *Court Should Have Ruled*

DiMeo presented a situation, posed by the *Craigslist* district court, where the publisher's editorial actions potentially rose to the level of content development, and the court failed to explore this issue fully.[233] Rather than simply granting § 230 protection to Max for *any* editing, the court should have determined whether Max's selection of material amplified the sting of Max's users' defamatory postings. In tort suits, a proper standard would be to determine if an ICS's editorial activities materially contributed to the alleged wrong.[234] For example, publishers who limit publication to only the most damaging or unlawful material rise to the level of partial content providers and, thus, would be denied § 230 immunity.[235]

Due to the nature of Max's website and his own claim that he is a "raging dickhead" who "mock[s] idiots and posers," it is possible that his editing practices were geared toward creating controversy.[236] Hypothetically, he may have decided to exclude any postings that supported DiMeo to create the impression that Max's users unanimously despised the pro-

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230 *Id.* at 530. When affirming the district court's dismissal, the Third Circuit focused on the fact that the complaint failed to specifically allege that Max was an "information content provider." DiMeo v. Max, 248 F. App'x 280, 282 (3d Cir. 2007).

231 *DiMeo*, 433 F. Supp. 2d at 530.

232 *Id.* at 530 (citing Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003)).

233 Chicago Lawyers' Comm. for Civil Rights Under the Law v. Craigslist, Inc., 461 F. Supp. 2d 681, 695 (N.D. Ill. 2006), *aff'd*, 519 F.3d 666 (7th Cir. 2008); *see supra* text accompanying note 212.

234 *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

235 An "information content provider" is "any person or entity that is responsible, in whole or *in part*, for the creation or development of information . . . ." 47 U.S.C. § 230(f)(3) (emphasis added). This Casenote does not go to the same extreme as the partial dissent in *Batzel*, which would remove any material deemed appropriate by the publisher from § 230 immunity. *Batzel*, 333 F.3d at 1038-39 (Gould, J., dissenting). Such a rule is in direct conflict with Congress's goal of maintaining the Internet's vibrant marketplace of ideas. It may also encourage publishers to forego any editing efforts, a result thwarted by Congress in overruling the *Stratton* decision. H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

236 Tucker Max's Home Page, http://www.tuckermax.com (last visited Sept. 25, 2008).

moter.[237] Such a practice would run contrary to the "diversity of political discourse" Congress envisioned for the Web or the free speech benefits lauded by courts.[238] Max also could have used his editorial power to weed out any light or boring postings, posting only the most obscene for public viewing.[239] This exercise of editorial power clashes with Congress's primary intent in passing § 230, which was to control indecency by promoting "Good Samaritan blocking and screening of *offensive material*."[240] By significantly shaping the tone of the website, both of the above editing practices would clearly amplify the defamatory sting of Max's users' postings, materially contributing to DiMeo's damages. Despite this, the *DiMeo* court failed to explore whether Max engaged in such editing practices.

Imagine the possibilities for abuse if a publisher's editing tactics were taken to the extreme. For example: a publisher of a product review website who removes all positive reviews of a certain product;[241] an operator of a gossip website who deletes inaccurate user-posted rumors for all celebrities except one;[242] or a film-review website which only allows users to critique a particular actor's lower quality works.[243] Surely, these abusive editing practices transcend the mere "traditional publishing functions" courts typically protect.[244] They are much more intrusive and controlling, rising to the level of partial content development.[245] As such, these publishers should not garner the same protection as the intended beneficiaries of the § 230 immunity provision, those who edit to achieve a more civil tone.

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237 It is also possible that Max did not remove any of the postings related to DiMeo or otherwise engage in abusive editing. For the hypothetical arguments in this Casenote, it is only necessary that he might have.

238 47 U.S.C. § 230(a)(3). *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (citing Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997)).

239 Again, there was no evidence presented that Max engaged in such practices. For this hypothetical, it is only necessary that he might have.

240 47 U.S.C. § 230(c) (emphasis added).

241 *See, e.g.*, Whitney Info. Network, Inc. v. Xcentric Venture, LLC, 199 F. App'x 738, 740 (11th Cir. 2006).

242 This unlucky celebrity would suffer from the credibility of the website's other postings.

243 Consider the Internet Movie Database ("IMDB"), visited by over "57 million movie and TV lovers each month." http://www.imdb.com (last visited Sept. 25, 2008). If Sylvester Stallone publicly ridiculed IMDB, then IMDB could retort by allowing users to post comments on STOP! OR MY MOM WILL SHOOT (Universal Pictures 1992) but not ROCKY (United Artists 1976). An unknowing reader might be misled to believe that a critique on the former film accurately sums up Stallone's career.

244 For a discussion of traditional publishing functions, see *supra* text accompanying note 99.

245 It is not surprising that website publisher domination can easily rise beyond "traditional publishing functions." First, compared to print publishers, websites have a much larger base of users who actively contribute, so they have more content to choose from and thus more power to shape the tone of the website. Second, by definition, courts' reference to "traditional publishing functions" is misplaced, as print publishers have traditionally been restricted by relatively stricter regulations than Internet publishers. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003). Thus, Internet publishers often engage in non-traditional functions simply because § 230 affords more leeway.

One of Congress's stated goals in enacting § 230 was to override *Stratton* and remove disincentives for editing out improper web content.[246] Imposing liability on publishers who engage in culpable editing practices would not frustrate these goals.[247] Max's potentially crude editing activities were the opposite of Prodigy's attempt to remove offensive content in *Stratton*.[248] While Prodigy screened out offensive content, Max potentially screened *in* offensive content to strike a more controversial blow to DiMeo. Even if Prodigy failed to screen out some offensive content, it would still be immune from liability under § 230 because its editorial actions as a whole furthered Congress's policy objectives of reducing obscenity and did not further damage the victim.[249] On the other hand, Max's editing practices should not be protected under § 230 if they amplified his users' defamation of DiMeo. This would mean that Max would be sued based on the fact that he became a content provider *through* his role as a publisher, not simply based on his role as publisher alone.[250]

C. *A Possible Ninth Circuit Approach to Paring an Abusive Publisher's § 230 Shield*

Considering the Ninth Circuit's evolving view of § 230, a district court following *Roommates* might come to the conclusion suggested in the prior section if faced with facts similar to *DiMeo*. Rather than summarily concluding § 230 immunizes all editorial activities, the court's opinion in *Roommates* indicates that the Ninth Circuit is open to a broader definition of "content provider."[251]

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246 H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

247 Some commentators go so far as to advocate amending § 230 to deny immunity to ICSs who fail to remove defamatory posts of which they have been made aware. *See* Cara J. Ottenweller, Note, *Cyberbullying: The Interactive Playground Cries for a Clarification of the Communications Decency Act*, 41 VAL. U. L. REV. 1285, 1326-34 (2007). The burden of timely satisfying all such requests and subjectively determining whether posts are truly defamatory would force ICSs to greatly limit users' posting ability, which would thwart Congress's goal of a vibrant exchange of ideas on the Web.

248 *See supra* Part I.B.2.

249 The added layer of defamation would need to be evaluated against a passive editing system with no censorship. Otherwise, a victim may claim that the publisher added to his damages by allowing the post—a result in direct contradiction to Congress's § 230 policy goal of promoting monitoring. *See supra* Part I.B.2 and note 235.

250 The *Roommates* court was concerned that a clever lawyer would often argue inventive ways a website had encouraged illegality. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1174 (9th Cir. 2008). To prevent websites from "having to fight costly and protracted legal battles" to gain § 230 protection, the court recommended that close cases be "resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites." *Id.* at 1174-75.

251 *See supra* Part II.D.

Roommates demonstrated the Ninth Circuit's willingness to add qualifications to previously announced § 230 standards.[252] In *Carafano*, the Ninth Circuit held that Matchmaker's classification of required user characteristics and its search mechanism did not cause it to be a content developer, while in *Roommates* the court deemed Roommates a partial content developer for its similar operating platform.[253] As described above, these apparently contradictory conclusions are reconcilable because Matchmaker provided a neutral search engine which did not encourage the posting of defamatory content, while Roommates' required questionnaires and its search function amplified its users' ability to violate the FHA.[254] The Ninth Circuit worked around its seemingly broad *Carafano* language in reaching its *Roommates* decision.[255]

Because of its past flexibility, the Ninth Circuit might continue to buck the *Zeran* trend by holding certain publishers liable as partial content providers for their editing activities. In regards to publisher protection, *Carafano* held that as long as another party provides the "essential published content," the ICS "receives full immunity regardless of the specific editing or selection process."[256] Similarly, *Batzel* held a content provider is one who goes beyond "the usual prerogative of publishers to choose among proffered material."[257] Although this past treatment of § 230's protection of editing activities sounds conclusive, it could be qualified just as the *Roommates* court qualified the *Carafano* language.[258] To this end, a Ninth Circuit district court could incorporate *Carafano* reasoning by including editorial activities that significantly affect the tone of the website within the definition of "essential published content." Further, it might speak to *Batzel* by holding that a publisher who edits to achieve a harmful goal is going outside of the "usual prerogative" or "traditional editorial functions" of publishers.

Finally, the Ninth Circuit's reading of § 230 in *Batzel* shows a willingness to clarify vague statutory language.[259] Because § 230 did not define "provide," the *Batzel* court read a reasonableness standard into the statute.[260] As such, an ICS in the Ninth Circuit must reasonably believe a third party meant for his information to be published before the information can be deemed to be "provided" to the ICS. As outlined above, a similar ap-

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[252] *See supra* Part II.D.2.

[253] *See supra* Part II.D.2.

[254] *See supra* Part II.D.2.

[255] *See supra* Part II.D.2.

[256] Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003).

[257] Batzel v. Smith, 333 F.3d 1018, 1031 (9th Cir. 2003). The *Batzel* court also stated that "'development of information' therefore means something more substantial than . . . selecting material for publication," but in the context of "publisher's traditional editorial functions." *Id.*

[258] *See supra* Part II.D.2.

[259] *See supra* text accompanying note 107.

[260] *Batzel*, 333 F.3d at 1034-35. *See also supra* Part II.B.1.

proach could be used to expand publisher liability by clarifying what it means to be a *partial* "content provider" under § 230. In sum, a Ninth Circuit district court may avoid restrictive applications of both *Carafano* and *Batzel* by expanding *Roommates*' idea of "amplifying illegality" to include manipulative editing practices.

D. *The Possible Ninth Circuit Approach Applied to* DiMeo v. Max

Rather than broadly applying § 230 immunity to publishers in the spirit of *Zeran* and its progeny,[261] a court employing the *Roommates* test must look to the specific allegations of the complaint, or the evidence presented for summary judgment, to determine whether § 230 immunity applies. For example, the *Roommates* court looked beyond Roommates' role as a publisher to determine whether the website could have violated the FHA by its own actions. Similarly, if confronted with a defamation claim against Max for manipulative editing tactics, a Ninth Circuit district court would need to review the allegations or evidence of the particular harm incurred from Max's own activities, not just that of his users.[262]

In the context of *DiMeo*, the approach in the Ninth Circuit might be as follows. The court could hold that Max's editorial actions in potentially choosing only the most obscene postings went beyond that of a traditional editor,[263] who historically has edited out objectionable postings as required by law.[264] This would distinguish Max from Cremers, the *Batzel* publisher who engaged in "traditional editorial functions." Next, the court could analogize this case to Part One of *Roommates* by holding Max's selection of only the most obscene user postings created an aura of defamation that amounted to solicitation of similar postings.[265] More likely, a Ninth Circuit district court would draw comparisons to Part Two of *Roommates* and dis-

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261 *See supra* text accompanying note 60.

262 The potential for abusing such a pleading requirement would not likely pose a danger to most websites. As they generally have no incentive to damage a person's reputation, and they want to retain as wide a range of users as possible, their editing is towards a civil environment. Accordingly, plaintiffs would face a high hurdle in pleading facts sufficient to show a website went against the overwhelming trend. *See also supra* note 250.

263 Remember that the court failed to explore the specifics of Max's editing practices, so these defamatory tactics are merely hypothetical.

264 *See supra* note 245 (discussing why "traditional publishing functions" are easily surpassed by today's powerful ICSs).

265 Although, in determining that the "Additional Comments" were protected under § 230, the *Roommates* court eschewed a theory of "development by inference." Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008). This underscores the importance of a website's defamatory actions being distinguishable from that of its users. Nevertheless, consider a movie-posting website, such as YouTube, that creates a Disney category for users to post movies into. Might this be an inference that users should violate copyright laws by posting Disney movies to the website?

cuss Max's potential manipulation of his users' postings. In particular, Max might have channeled and limited his users' posts based on their defamatory value, similar to how Roommates channeled and limited user profiles based on statutorily protected user characteristics (i.e., gender and familial status). In distinguishing Roommates from Matchmaker, the *Roommates* court provided language that would be particularly useful in pursuing Max. The court said that Matchmaker's actions were protected under § 230 because they "did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier."[266] Max's editorial activities might have achieved each of these offenses, amplifying the illegality of his users and making him a partial content provider ineligible for § 230 immunity. Max would not lose § 230 immunity for every editorial selection made on his website, but only for those selections that amplified his users' defamation of DiMeo.

The above approach would preserve the immunity afforded to websites that remove obscene posts and engage in the editing style promoted by Congress in § 230. Distinguishing publishers who edit towards obscenity would satisfy the *Batzel* court by presenting a workable standard which would not result in *Stratton*-like effects.[267] This standard would also not offend the broad *Carafano* language that the *Roommates* court simply qualified.[268] If the court found Max's editorial activities potentially amplified his users' defamation of DiMeo, the court could deem him a content provider, deny § 230 immunity, and then determine whether Max's own actions satisfied the elements of defamation.

CONCLUSION

In *Fair Housing Council of San Fernando Valley v. Roommates.com*, the Ninth Circuit revealed a propensity to side with courts of the Seventh Circuit and eschewed the trend towards unfettered publisher immunity under § 230 of the CDA. The court introduced the concept that a publisher's editorial actions can, in fact, make it a partial content provider. This might occur by soliciting particular user information or manipulating user-provided information toward potentially unlawful ends. This "amplifying illegality" concept can be helpful in limiting § 230 immunity for editors who wield their power to achieve unsavory goals. In particular, *DiMeo v. Max* exemplifies a case where the district court should have reviewed whether the website operator's editing tactics amplified the defamatory sting of his users' postings. As the Average Joes increasingly use websites to voice their opinions, the *Roommates* "amplifying illegality" concept is

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

267 *See supra* Part II.B.1.

268 *See supra* Part II.D.2.

particularly useful in restraining website publishers' growing capabilities to manipulate user information to harm helpless third parties.