

Murky “Development”: How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry [*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008)]

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I. INTRODUCTION

In January 2008, an anonymous message posted on the website JuicyCampus.com asked other users of the site to name the “sluttiest girl” in the University of California-Irvine sorority system.¹ The posting generated a swift and steady stream of feedback.² Many posts included the full names of female students and provided detailed descriptions of each nominee’s alleged promiscuous exploits.³

This online discussion, while notable for the number of responses it received, is just one of many similar postings popping up every day at JuicyCampus.com, which claims the mission of “enabling online anonymous free speech on college campuses.”⁴ Another popular discussion thread from February 2008 discussed whether a specific male student at the University of San Diego was gay and included users’ assertions that the named student had various sexually transmitted diseases.⁵ The website’s main page urges users: “C’mon. Give us the juice. Posts are totally, 100% anonymous.”⁶

For a person who becomes the subject of a libelous posting⁷ on a

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1. Posting of anonymous user to <http://www.juicycampus.com/posts/permalink/uc%20irvine/32019> (Jan. 29, 2008) [hereinafter “Sluttiest Girl Thread”].

2. *See id.*

3. *Id.* Specific replies to the posting can be viewed by clicking on the title of the thread and then clicking “View Replies.”

4. JuicyCampus.com, *About Us*, <http://www.juicycampus.com/posts/about-us> (last visited Sept. 21, 2008).

5. Postings of anonymous users to <http://www.juicycampus.com/posts/permalink/university%20of%20san%20diego/7677> (Feb. 24, 2008).

6. JuicyCampus.com, <http://www.juicycampus.com> (last visited Sept. 21, 2008).

7. Publication of false allegations that a person has engaged in “any kind of lascivious or grossly immodest conduct” is generally considered libel per se. RESTATEMENT (SECOND) OF TORTS § 569 cmt. f (1977).

website such as JuicyCampus.com, the legal remedy may be frustratingly limited. Suing an individual poster would be difficult because the site does not require registration and does not collect any personally identifiable information from its users.⁸ The website itself would be an easier target for a lawsuit if not for one statute: 47 U.S.C. § 230, ironically known as the Communications Decency Act.⁹ Under § 230, websites have enjoyed a broad immunity from lawsuits based on content posted by third-party users, as long as the websites themselves were not responsible, in whole or in part, for the “creation or development” of the objectionable content.¹⁰ For years, courts have construed the terms “creation” and “development” narrowly.¹¹ As a result, websites have been allowed to solicit, encourage, edit, and aggressively promote information supplied by third parties without being potentially liable for its contents.¹²

Fortunately for the subjects of scurrilous, anonymous online comments, a recent case demonstrated that immunity for online publishers of third-party information is limited. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,¹³ the United States Court of Appeals for the Ninth Circuit became the first circuit to assign significant meaning to “development” of content as a basis for removing a site’s immunity under § 230.¹⁴ The Ninth Circuit held that the roommate-matching site Roommates.com had “developed,” within the meaning of § 230, the contents of its users’ profiles and its roommate-search database, and therefore could be sued for any content within the database that potentially violated housing-discrimination laws.¹⁵ Writing for the majority, Chief Judge Alex Kozinski adopted a stern tone at times,

8. JuicyCampus.com, *Privacy & Tracking Policy*, <http://www.juicycampus.com/posts/privacy-policy> (last visited Sept. 21, 2008). One of the more revealing pieces of information the site collects from users is the unique Internet Protocol (IP) address of the computer from which the person entered his or her comment. *Id.* However, the site assures users that such information is not personally identifying and suggests the use of IP-cloaking software for users who are concerned about being identified. *Id.*; see also Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 117 (2007) (noting uncertainty of jurisdiction in “Doe” lawsuits against unknown users).

9. 47 U.S.C. § 230 (2000).

10. See *id.* § 230(c)(1), (f)(3). Subsection (c)(1) states that no user or provider of an interactive computer service shall be deemed the speaker of any content provided by another information content provider. *Id.* § 230(c)(1). Subsection (f)(3) defines an “information content provider” as “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.” *Id.* § 230(f)(3). The statute does not define the terms “creation” or “development.” See *id.* § 230(f).

11. See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 834 (2002) (holding that online auction site did not “create or develop” user-submitted information contained in the site’s system for giving feedback and ranking buyers and sellers).

12. See, e.g., *Blumenthal v. Drudge*, 992 F. Supp. 44, 51-53 (D.D.C. 1998) (holding an Internet provider immune for alleged defamation by a gossip columnist even though a company had promoted the columnist as a source of gossip and exercised editorial control over his writings).

13. 521 F.3d 1157 (9th Cir. 2008) [hereinafter *Roommates III*].

14. *Id.* at 1168.

15. *Id.* at 1166-68.

noting at one point that Congress did not intend for the Internet to be a “lawless no-man’s-land.”¹⁶

Unfortunately, the decision in *Roommates.com* exploited ambiguity within the language of § 230 to provide a malleable standard for content “development” that could be extended to remove immunity from virtually any kind of interactive website.¹⁷ Therefore, even though another court potentially could use *Roommates.com* as a roadmap to strip immunity from an interactive website such as JuicyCampus.com, it should not.

This Comment will provide a detailed description of *Roommates.com*,¹⁸ explore the background of § 230 immunity,¹⁹ and explain why the decision in *Roommates.com* is more a symptom of the problems related to broad immunity for sites such as JuicyCampus.com than it is a solution to those problems.²⁰ The true solution lies with Congress, which must clarify what it means to create and develop content on the Internet so that courts do not foster uncertainty about the limits of online immunity by conducting a case-by-case inquiry into whether a site crossed the line into “development” of content. Until that happens, however, courts should refrain from using a website’s role as a “developer” of content as a basis to strip the site’s immunity under § 230. Finally, Congress should consider reining in the broad immunity that allows sites such as JuicyCampus.com to profit from libel with impunity and that leaves people whose names appear on the virtual bathroom wall with little recourse except to hope that people do not believe what they read.

II. CASE DESCRIPTION

Roommates.com is an Internet-based service that matches people seeking a place to live with people seeking a roommate.²¹ The site touts itself as “The Web’s Most Popular Roommate Matching Service.”²² As a condition of registration, users must provide information about themselves including their gender, sexual orientation, and whether they live with children.²³ The site sorts and screens users’ profiles based on these criteria so that, for example, the site will not alert a person seeking a

16. *Id.* at 1164.

17. See discussion *infra* Part V.

18. See discussion *infra* Parts II, IV.

19. See discussion *infra* Part III.

20. See *infra* Part V.

21. Roommates.com, *Terms of Service*, <http://www.roommates.com/terms.rs> (last visited Sept. 21, 2008).

22. Roommates.com Home Page, <http://www.roommates.com> (last visited Sept. 21, 2008). As of 2004, the website garnered approximately one million page views per day and contained approximately 150,000 active listings. *Roommates III*, 521 F.3d 1157, 1161 (9th Cir. 2008).

23. *Roommates III*, 521 F.3d at 1161.

childless roommate to listings submitted by users who live with children.²⁴

A. United States District Court

Plaintiffs Fair Housing Council of San Fernando Valley and the Fair Housing Council of San Diego filed suit against Roommates.com on December 22, 2003, in the United States District Court for the Central District of California.²⁵ The plaintiffs focused on three categories of web content that they alleged violated state or federal fair-housing laws: (1) the nicknames the site allowed users to choose for themselves, which occasionally identified posters by their religion or race;²⁶ (2) the “additional comments” the site allowed paying users to post with their profiles, which often expressed preferences related to race, religion, or sexual orientation;²⁷ and (3) a questionnaire the site required users to complete as a condition of registration, which contained mandatory questions about users’ gender, familial status, and sexual orientation.²⁸

On cross-motions for summary judgment, the court held that § 230 shielded Roommates.com from the lawsuit, and that to rule otherwise would create an unintended exemption for fair-housing laws.²⁹ The court relied on the Ninth Circuit’s decision in *Carafano v. Metroplash.com, Inc.*³⁰ to establish that Roommates.com had not “created” or “developed” the potentially discriminatory content in users’ profiles, even though the profiles resulted from the website’s own questionnaire about users’ gender, family status, and other personal traits.³¹ The court acknowledged the plaintiffs’ argument that broad immunity for Internet publishers could eviscerate the Fair Housing Act, but dismissed it, explaining that the Fair Housing Act is not the only statute to which such a

24. *Id.* at 1165 (noting that the site uses demographic information “to channel subscribers away from listings where the individual offering housing has expressed preferences that aren’t compatible with the subscriber’s answers”).

25. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC (*Roommates I*), No. CV 03-09386PA (RZX), 2004 WL 3799488, at *2 (C.D. Cal. Sept. 30, 2004), *rev’d*, 521 F.3d 1157. The name of the company that owns the site, Roommate.com, LLC, differs slightly from the name of the site. *Roommates III*, 521 F.3d at 1161 n.2. This Comment will use “Roommates.com” throughout for the sake of consistency.

26. *Roommates I*, 2004 WL 3799488, at *2 (citing specific user names including “ChristianGirl,” “Whiteboy,” and “Blackguy”).

27. *Id.*; *Roommates III*, 521 F.3d at 1173 (citing comments including “MUST be a BLACK GAY MALE” and “I am NOT looking for black muslims [sic]”).

28. *Roommates I*, 2004 WL 3799488, at *2.

29. *Id.* at *3 (citing *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) for the proposition that “a court may not create an exemption for the fair housing laws without violating the maxim *expressio unius est exclusio alterius*”).

30. 339 F.3d 1119 (9th Cir. 2003). *Carafano* involved a user of a website who created a false and potentially defamatory profile of another person. *Id.* at 1124. The court held that no online profile has content until a user supplies it. *Id.*

31. *Roommates I*, 2004 WL 3799488, at *4 (holding that precedent “compels the conclusion that Roommate[s.com] cannot be liable for violating the [Fair Housing Act] arising out of the nicknames chosen by its users, the free-form comments provided by the users, or the users’ responses to the multiple choice questionnaire”).

concern applies.³² The court granted Roommates.com summary judgment and declined to exercise supplemental jurisdiction over a parallel state-law housing-discrimination claim.³³

B. United States Court of Appeals for the Ninth Circuit (panel decision)

On appeal, the plaintiffs succeeded on two of their three arguments.³⁴ They did so by tailoring their claims more closely to the issue of Roommates.com's potential liability as an information content provider, not as a mere publisher of third-party content.³⁵ Plaintiffs argued that the formatting of the site amounted to "creation" and/or "development" of content, for which an online publisher is not immune.³⁶ The plaintiffs elected not to appeal the trial court's decision on the issue of liability for the users' self-chosen screen names, but instead argued that the website violated fair-housing laws in three ways: first, by inquiring in its questionnaires about users' protected personal characteristics as a condition of using the site; second, by sorting and filtering results based on users' compiled preferences of gender, sexual orientation, and family status; and third, by displaying the potentially discriminatory "additional comments" that some of the site's paying users typed into their profiles.³⁷

The plaintiffs argued that Roommates.com was the sole creator of the content in its questionnaires, and that potentially discriminatory information within completed user profiles was a mutual creation of both Roommates.com and its users to which immunity did not extend.³⁸ The plaintiffs reasoned that the overall structure of the website, which required users to enter their gender, sexual orientation, and family status when creating a profile, revealed that Roommates.com played a significant role in creating or developing any potentially discriminatory infor-

32. *Id.* (noting that courts already had deemed Internet immunity to override traditional causes of action for defamation). The court also noted that nothing prevented plaintiffs from filing suit against individual users and members of Roommates.com. *Id.*

33. *Id.* at *5-*6.

34. Fair Housing Council of San Fernando Valley v. Roommates.com, LLC (*Roommates II*), 489 F.3d 921, 926-29 (9th Cir. 2007), *vacated*, 521 F.3d 1157.

35. Appellants' Opening Brief at 18, *Roommates III*, 521 F.3d 1157 (9th Cir. 2008) (No. 04-56916). The argument put forth by the plaintiffs shifted between their first appellate brief and second brief. In the first, plaintiffs did not argue that the information within the completed user profiles was content created or developed in part by Roommates.com. *See id.* at 19-30. Rather, plaintiffs argued only that the site was an information content provider of its inquiries and of the "additional comments" posted by users. *Id.* Not until the second brief did plaintiffs argue that Roommates.com had partly "created or developed" the completed user profiles. *See* Appellants' Reply Brief and Answering Brief to the Cross Appeal at 17-18, *Roommates III*, 521 F.3d 1157 (No. 04-56916).

36. Appellants' Reply Brief, *supra* note 35, at 18.

37. *Roommates II*, 489 F.3d at 926.

38. Appellants' Reply Brief, *supra* note 35, at 17 (stating that questionnaires are Roommates.com's product alone and characterizing the content of users' completed profiles as "Combined Roommate-User Information").

mation within the resulting profiles.³⁹

Roommates.com reiterated the argument that had prevailed in the district court: the plaintiffs' claims treated the website as a "publisher" of discriminatory information, but liability as a "publisher" is precisely what is exempted under § 230.⁴⁰ Roommates.com argued that the district court correctly applied *Carafano* to support the proposition that a website does not become the "provider" of objectionable content merely because it provides a template and multiple-choice questionnaire that users must complete before joining the site.⁴¹ Further, Roommates.com pointed out that Congress could have specifically exempted fair-housing statutes from the immunity provisions of § 230 but did not do so.⁴²

Writing for a fragmented three-member panel, Judge Kozinski held first that Roommates.com was a "content provider" with regard to the questionnaires it required users to complete, and therefore was not entitled to immunity from a lawsuit based solely on the content of the questions.⁴³ The second issue the majority addressed was more complex: whether Roommates.com could be considered a "content provider" of the information within the completed user profiles.⁴⁴ Despite *Carafano*, which appeared to preclude a website from being deemed the content provider of information submitted by users via an online questionnaire, the majority held that Roommates.com was not entitled to immunity regarding its users' profiles because it actively solicited and processed them.⁴⁵ Notably, the majority reached this holding without attempting to define "development" of information.⁴⁶

In dicta, the majority envisioned a hypothetical website called "harrasstem.com," designed to help users get even with and "provide

39. Appellants' Reply Brief, *supra* note 35, at 18-19.

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

41. Roommate.com, LLC's Answering Brief as to the Judgment & Opening Brief as to Attorneys' Fees & Costs, at 29-31, *Roommates III*, 521 F.3d 1157 (9th Cir. 2008) (No. 04-56916) ("The website's questionnaire is simply a method of collecting standardized information for a convenient, searchable database.").

42. *Id.* at 32. This argument echoed the district court's holding that the listing of statutes not subject to § 230 implied the exclusion of statutes not listed, including fair-housing laws. See *Roommates I*, No. CV 03-09386PA (RZX), 2004 WL 3799488, at *3 (C.D. Cal. Sept. 30, 2004), *rev'd*, 521 F.3d 1157.

43. *Roommates II*, 489 F.3d 921, 926 (9th Cir. 2007). Even inquiring about a person's gender or family status, the court noted, could conceivably run afoul of fair-housing laws regardless of any answers provided by users. *Id.* at 927.

44. *Id.*

45. *Id.* at 928-29 ("By categorizing, channeling and limiting the distribution of users' profiles, Roommate[s.com] provides an additional layer of information that it is 'responsible' at least 'in part' for creating or developing.").

46. *Id.* The omission is notable, given that the later en banc decision would explore the meaning of the term "develop" and furnish a new definition. See *Roommates III*, 521 F.3d at 1168. In addition, it is notable that the key issue in the en banc decision was the supposedly unlawful nature of the inquiry, see *id.* at 1169-70, whereas the opinion in the panel decision rested not upon the unlawful nature of the inquiry but upon the additional "layer" of information created by a search and e-mail notification system. *Roommates II*, 489 F.3d at 929.

dirt” on other people.⁴⁷ The dicta suggested that such a site likely would not be protected by the logic of the *Carafano* decision and stated that *Carafano* did not grant immunity “to those who actively encourage, solicit and profit from the tortious and unlawful communications of others.”⁴⁸ The majority stated that determining whether § 230 protected such activity by a website would involve mapping the “outer limits” of immunity but that such a task was not necessary to resolve the case of *Roommates.com* because the website’s profile-searching and e-mail-notification systems clearly made it an information content provider.⁴⁹

By contrast, the majority held that Roommates.com retained immunity for any discriminatory content in the “additional comments” the site allowed users to add to their profiles.⁵⁰ The difference, the court held, was that Roommates.com did not specifically encourage or prompt discriminatory information in the comments section and did not use it to “limit or channel access” to listings.⁵¹ The court remanded for a determination of whether the site’s non-immune content violated fair-housing law.⁵²

One judge on the panel would have stripped the website’s immunity even further.⁵³ In a concurrence, Judge Steven Reinhardt wrote that the website should not have been entitled to immunity for content in the “additional comments” because the comments were integral parts of discriminatory user profiles and because the site solicited and prompted users in a way that encouraged them to express their discriminatory preferences.⁵⁴

The third judge on the panel concurred in part, but stated that he believed the majority had gone too far.⁵⁵ Judge Sandra Ikuta agreed that Roommates.com was not entitled to immunity for the content it created as part of its questionnaire and agreed that the site enjoyed immunity for the “additional comments” contributed by users.⁵⁶ However, the judge disagreed with the majority’s holding that Roommates.com was responsible for creation or development of the content of user profiles.⁵⁷ Judge Ikuta noted that the Ninth Circuit had previously rejected

47. *Roommates II*, 489 F.3d at 928.

48. *Id.*

49. *Id.* at 928-29 (stating that Roommates.com’s profile-searching and e-mail notification systems “mean that it is neither a passive pass-through of information provided by others nor merely a facilitator of expression by individuals,” but an information content provider).

50. *Id.* at 929.

51. *Id.*

52. *Id.* at 929-30. The court also vacated the district court’s dismissal of the state law claim so that the court could reconsider the issue of supplemental jurisdiction. *Id.* at 930.

53. *Id.* at 930 (Reinhardt, J., concurring in part and dissenting in part).

54. *Id.* at 931-32. Dissenting in part, Judge Reinhardt stated that the site’s format “suggests that it is desirable, as well as permissible, to use the profiles to achieve discriminatory goals.” *Id.* at 933.

55. *Id.* at 933 (Ikuta, J., concurring in part).

56. *Id.*

57. *Id.*

the idea that a website becomes a “developer” of third-party content merely because it specializes in a certain type of publication and performs traditional editorial functions with regard to content submitted by users.⁵⁸

Five months after the panel’s decision, the Ninth Circuit agreed to re-hear the case en banc.⁵⁹ The court’s en banc decision, and its implications for interactive websites such as JuicyCampus.com, will be discussed in detail following a review of the background of Internet immunity under § 230.

III. BACKGROUND

The far-ranging immunity that exists today for Internet publishers originated with a statute expressly aimed at fighting pornography and encouraging websites to self-regulate.⁶⁰ Congress did not state that its purpose in passing the law was to place websites beyond the reach of longstanding tort-law principles, but courts interpreted the plain language of the statute to do just that.⁶¹ In recent years, however, this broad interpretation of Internet immunity has come under attack by those who believe it involves a misreading of the statute and rewards irresponsible behavior.⁶²

A. Communications Decency Act

In the summer of 1995, United States Senator Jim Exon was concerned about what he deemed “vile” pornography on the Internet and, more specifically, the fact that such content would be easily accessible to children with a few mouse clicks.⁶³ To illustrate his concerns, he assembled a blue notebook full of examples of the kinds of pornography available online and shared it with his Senate colleagues.⁶⁴

At the same time, a related concern was on lawmakers’ minds. In *Stratton Oakmont, Inc. v. Prodigy Services, Co.*,⁶⁵ a New York state

58. *Id.* at 934-35 (noting the Ninth Circuit’s rejection of the argument that a website becomes the “developer” of content by selecting it for publication and thus transforming it). Judge Ikuta also reasoned that, under *Carafano*, a website is not an information content provider for purposes of § 230 unless it “directly provides ‘the essential published content.’” *Id.* at 935 (quoting *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003)). In addition, the judge stated that the majority’s dicta about the outer limits of § 230 immunity were unnecessary because “the present case does not require us to determine what types of conduct would make a website operator a joint information content provider.” *Id.* at 933.

59. *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 506 F.3d 716, 716 (9th Cir. 2007) (ordering rehearing en banc).

60. See discussion *infra* Part III.A.

61. See discussion *infra* Part III.B.

62. See discussion *infra* Part III.C.

63. 141 CONG. REC. 15503 (1995) (statement of Sen. Exon) (stating that “the worst, most vile, most perverse pornography is only a few click-click-clicks away from any child on the Internet”).

64. *Id.* at 15504 (statement of Sen. Exon).

65. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

court held that an online computer service could be potentially liable for publishing a user's defamatory statements on a computer bulletin board devoted to the discussion of financial matters.⁶⁶ The court held that by exercising control over some of the website's content, such as by editing for grammatical changes and removing some content deemed offensive, the website became a traditional "publisher" and was therefore subject to heightened liability for its content, similar to the liability incurred by a newspaper publisher.⁶⁷ By contrast, if the website had taken a hands-off approach and refused to edit or review content, it would have remained more like a traditional bookseller or newsstand and would have been potentially liable only if it had been aware of the defamatory content.⁶⁸ Senators believed the decision created a disincentive for websites to filter the "vile" content that concerned Senator Exon.⁶⁹

Senator Exon introduced the "Communications Decency Act" as an amendment to the bill that would become the Telecommunications Act of 1996, a sweeping overhaul of federal telecommunications laws.⁷⁰ The proposal, which revised a 1934 act governing obscene phone calls, created new penalties for spreading obscenity by computer and for making "indecent" materials available to children through the Internet.⁷¹ It also charged the Federal Communications Commission with determining the appropriate measures websites and Internet providers should take to qualify for a statutory defense that they had acted in good faith to restrict access to prohibited content.⁷² In addition, the proposal addressed the concern created by the *Stratton Oakmont* decision by shielding a website from suit if the site took good-faith efforts to restrict the transmission of indecent communications.⁷³

Senator Patrick Leahy argued strenuously against giving the federal government such a broad role in regulating the web.⁷⁴ His competing proposal left the filtering of objectionable content to parents and the

66. *Id.* at *3, *4.

67. *Id.* at *3.

68. *Id.* at *5.

69. 141 CONG. REC. 16025 (1995) (statement of Sen. Coats) (stating, "I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable").

70. *Id.* at 15502.

71. *Id.* at 15505-06.

72. *Id.*

73. *See id.* at 16025 (statements of Sen. Coats). The defense in the Exon proposal was codified as 47 U.S.C. § 223(f)(1) and stated, "No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this section or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section." Telecommunications Act of 1996, 47 U.S.C. § 223(f)(1) (1996).

74. 141 CONG. REC. 16009-10 (statement of Sen. Leahy) (noting that the Internet "has grown as well as it has, as remarkably as it has, primarily because it has not had a whole lot of people restricting it, regulating it, and touching it and saying, do not do that or do this or the other thing").

private sector, but he lost the debate in the Senate when Senator Exon's amendment passed by a wide margin.⁷⁵

After the bill passed the Senate, an amendment by Representatives Christopher Cox and Ron Wyden surfaced in the House of Representatives (the Cox-Wyden Proposal).⁷⁶ Representative Cox derided the efforts of those who wanted to create a "Federal Computer Commission," and he urged the government to "get out of the way" of the Internet.⁷⁷ The proposed amendment was headlined "Online Family Empowerment" and proposed a new section to the 1934 telecommunications law titled, "Protection for Private Blocking and Screening of Offensive Material."⁷⁸ Significantly, the proposal went beyond merely immunizing the removal of objectionable content by stating that "[n]o provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider."⁷⁹ In addition, the Cox-Wyden Proposal cured the *Stratton Oakmont* problem by stating that no provider or user of an interactive computer service would be held liable based on actions taken in good faith to restrict access to objectionable material or to provide the technical tools to restrict such material.⁸⁰ The Cox-Wyden Proposal did not, however, spell out any adverse consequences for sites that made no good-faith efforts to screen objectionable content.⁸¹

Cox and other supporters of the amendment told colleagues they were setting out to overturn the result in *Stratton Oakmont*, but to do so without the kind of government regulation proposed by Exon.⁸² The Cox-Wyden Proposal stated that it was the policy of the United States to promote the development of the Internet "unfettered by State or Federal regulation."⁸³

The House passed the Cox-Wyden Proposal with a vote of 420 to 4.⁸⁴ Despite their apparently conflicting purposes, both the Exon proposal and the Cox-Wyden Proposal survived the conference process largely intact⁸⁵ and eventually became law as part of the same Commu-

75. *Id.* at 16026 (noting Exon's proposal passed in the Senate with a vote of 84 to 16).

76. *Id.* at 22044 (amendment offered by Rep. Cox).

77. *Id.* at 22045 (statement of Rep. Cox).

78. *Id.* at 22044.

79. *Id.*

80. *Id.*

81. *Id.* In this sense, the Cox-Wyden Proposal stands in contrast with Exon's proposal, which used a carrot-on-a-stick approach by providing an affirmative defense only to those sites that made good-faith efforts to remove indecent content. Telecommunications Act of 1996, 47 U.S.C. § 223(f)(1) (1996); *see supra* note 73.

82. *See, e.g.*, 141 CONG. REC. 22047 (statement of Rep. Goodlatte) (stating that "[t]he Cox-Wyden amendment empowers parents without Federal regulation").

83. *Id.* at 22044.

84. *Id.* at 22054.

85. *See* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 68-69 (stating that Wyden-Cox amendment was a "hollow" victory for lawmakers wanting to keep government

nications Decency Act.⁸⁶

It came as no great shock to observers that, shortly after the Communications Decency Act became law, the anti-obscenity provisions championed by Senator Exon were declared unconstitutional.⁸⁷ The Cox-Wyden Proposal, originally viewed as relatively insignificant,⁸⁸ remained standing, and is codified at 47 U.S.C. § 230.⁸⁹

Section 230 begins with several findings, including that the “Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”⁹⁰ In addition, the statute contains Cox’s original policy statements that emphasize the goals of promoting development of the Internet, minimizing regulation, and encouraging the private sector and parents to filter content on their own.⁹¹ Under the heading, “Protection for ‘Good Samaritan’ Blocking and Screening of Offensive Material,” the statute provides:

(c)(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—

(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

regulation to a minimum because it did not forbid regulation by the FCC and did not conflict with the original Exon proposal).

86. A House Conference Report states:

One of the specific purposes of this section is to overrule Stratton-Oakmont [sic] v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

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

87. See *Reno v. ACLU*, 521 U.S. 844, 874 (1997). Among those likely not surprised by the court’s finding of unconstitutionality was former House Speaker Newt Gingrich, who declared prior to the Communications Decency Act’s passage that Exon’s proposal “is clearly a violation of free speech.” See Cannon, *supra* note 85, at 67 (internal citation omitted).

88. See Cannon, *supra* note 85, at 69 (calling the addition of the Wyden-Cox amendment to the Communications Decency Act an “imaginary victory”).

89. Telecommunications Act of 1996, Pub. L. No. 104-140, 110 Stat. 133 (Cox-Wyden Proposal codified at 47 U.S.C. § 230).

90. 47 U.S.C. § 230(a)(4) (2000).

91. *Id.* § 230(b)(1)-(5).

restrict access to material described in paragraph (1).⁹²

The statute defines “information content provider” as “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.”⁹³ Subsection (e) of the statute addresses exceptions to the law and the issue of preemption of state laws.⁹⁴

Today, the provision that no information content provider may be treated as the speaker of information provided by another information content provider arguably has become the most significant phrase within the Act.⁹⁵ The phrase is significant even though, in 1995, lawmakers apparently were more concerned with keeping pornography away from children than with granting a new species of immunity to websites.⁹⁶ Even Representative Cox did not explicitly claim that he intended his proposal to wipe out long-standing common-law principles of liability for Internet publishers.⁹⁷ More than anything else, however, the law has evolved into a broad shield of immunity for Internet publishers who are sued because of their user-generated content.⁹⁸

B. Immunity in Action

The first test of § 230 came in 1997 in a landmark decision by the United States Court of Appeals for the Fourth Circuit, *Zeran v. America Online, Inc.*⁹⁹ The decision set the standard for broad immunity un-

92. *Id.* § 230(c).

93. *Id.* § 230(f)(3).

94. *Id.* § 230(e). The law explicitly states that it does not impair enforcement of federal criminal statutes and does not affect intellectual-property laws or the Electronic Communications Privacy Act of 1986. *Id.* The law also prohibits states from imposing liability under any law that is “inconsistent with this section.” *Id.* § 230(e)(3).

95. See Ken S. Myers, *Wikkimunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 174 (2006) (noting the “widespread usage” of § 230(c)(1) among Internet defendants and the “overwhelming success” of defendants in avoiding liability). Myers’ article also provides a useful compilation of § 230 cases and their outcomes. See *id.* app. VIII at 205-08.

96. See Larry Magid, *Digital Crossroads: Painful as Slander May Be, Don’t Turn Service Providers into Speech Police*, SAN JOSE MERCURY NEWS, Aug. 11, 2008, available at http://www.mercurynews.com/%20business/ci_10165561?nclick_check=1 (quoting Representative Zoe Lofgren as stating that at the time of the Communications Decency Act’s passage in 1996, most members of Congress thought the Act was only about pornography); see also 141 CONG. REC. 16025 (1995) (statement of Sen. Coats) (stating that the Exon proposal was not intended to create a defense for someone who has control over the provision of online information).

97. See 141 CONG. REC. 22045 (statement of Rep. Cox). When Cox introduced his amendment, he said that the proposal would do two things: (1) protect Internet providers that take steps to screen offensive content; and (2) establish that the federal government would not have a role in regulating content. *Id.*

98. See Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 671 (7th Cir. 2008) (discussing the legislative history of § 230 and noting that “a law’s scope often differs from its genesis. Once the legislative process gets rolling, interest groups seek (and often obtain) other provisions.”). The Court of Appeals for the Seventh Circuit questioned whether § 230 should be considered a “general prohibition of civil liability” for websites but nonetheless held that under the plain language of subsection (c)(1), a site that provided a forum for potentially discriminatory classified advertisements could not be liable as the publisher of those ads. *Id.* at 669, 671-72.

99. 129 F.3d 327 (4th Cir. 1997).

der § 230 as it exists today.¹⁰⁰

The lawsuit stemmed from a posting by an unidentified user of the America Online web service that advertised t-shirts with crude slogans related to the bombing of the Murrah Federal Building in Oklahoma City.¹⁰¹ The hoax message gave instructions to call Kenneth Zeran's home telephone number in Seattle and ask for "Ken."¹⁰² Zeran filed suit against America Online alleging that as soon as the service received notice of the harmful posting, it had the duty to remove it, to notify subscribers of its falsity, and to screen future material to prevent a recurrence.¹⁰³

The Fourth Circuit held in broad terms that § 230 "plainly immunizes" websites from lawsuits based on third-party content,¹⁰⁴ and that Congress intended § 230 to limit the threat of tort-based lawsuits against Internet providers.¹⁰⁵ Therefore, the court held, the statute barred any cause of action seeking to hold a website liable for the exercise of a publisher's traditional functions, such as deciding whether to publish, alter, or postpone content.¹⁰⁶ The court noted the sheer volume of information exchanged online and stated that Congress did not want to create a "chilling effect" on that information by allowing sites to be sued for merely acting as intermediaries.¹⁰⁷

Zeran, however, argued that even if such immunity existed for website publishers, America Online lost immunity when it received actual notice of the harmful content.¹⁰⁸ He invoked the traditional common-law rule that a "distributor" of media, such as a newsstand or a li-

100. See, e.g., *Barrett v. Rosenthal*, 146 P.3d 510, 514 (Cal. 2006) (describing *Zeran* as the leading case on § 230 immunity).

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

102. *Id.* *Zeran*, who relied on his home phone number for a business, became inundated with angry and harassing phone calls. *Id.* When he called America Online to describe the problem, an employee assured him the message would be removed but stated that the company would not issue a retraction. *Id.* America Online eventually removed the original message, but new, anonymous messages targeting Zeran continued to appear on the site. *Id.* The problem escalated when a radio announcer in Oklahoma read Zeran's number on the air and urged people to call it. *Id.* Eventually, a newspaper article in Oklahoma City exposed the hoax and the radio station apologized, but not before Zeran received death threats. *Id.*

103. *Id.* at 330.

104. *Id.* at 328.

105. *Id.* at 331. In emphasizing Congress' purported goal of limiting tort immunity, the court ignored that much of the debate about § 230 involved encouraging parents and the private sector to take it into their own hands to limit children's access to objectionable content, as opposed to having the FCC set online decency standards. See generally 141 CONG. REC. 16009, 16025 (1995). To support its interpretation of congressional intent, the court emphasized that one of the stated policy purposes of the statute was to preserve the free market online, "unfettered by Federal or State regulation." *Zeran*, 129 F.3d at 330. However, leaning toward the absence of regulation is hardly the same as granting broad immunity. In addition, the court's interpretation of the law's intent relegated what was arguably the main purpose of § 230(c)—to overrule *Stratton Oakmont* and remove disincentives to self-regulation—to secondary status. See H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.).

106. *Zeran*, 129 F.3d at 330 (referring specifically to § 230(c)(1)).

107. *Id.* at 331 ("Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.").

108. *Id.* at 331.

brary, can be held liable for defamatory content if the distributor has actual notice of the content.¹⁰⁹ *Zeran* argued that because § 230 made no mention of websites' potential liability as distributors, Congress meant to leave that aspect of the common law untouched.¹¹⁰ However, the Fourth Circuit held that distributor liability was merely a subset of publisher liability and Congress had intended to eliminate both.¹¹¹ Courts have followed *Zeran* by interpreting the term "publisher" broadly to encompass distributors who receive actual notice of objectionable content.¹¹²

The interpretation of § 230 in *Zeran* has found acceptance nationwide, both in federal and state courts.¹¹³ Unlike a publisher of a print newspaper or magazine, which is strictly liable for defamatory content, the publisher of a website escapes responsibility for whatever passes through its web pages as long as the information is originally provided by someone else.¹¹⁴ The reasoning of *Zeran* has shielded websites from liability for causes of action including defamation,¹¹⁵ negligence,¹¹⁶ unfair competition,¹¹⁷ violation of consumer-protection laws,¹¹⁸ and public-accommodations discrimination.¹¹⁹

109. *Id.*

110. *Id.* at 331-32.

111. *Id.* at 332. The court stated that to hold otherwise would defeat the dual purposes of § 230. *Id.* at 333. First, it would chill online speech rather than encourage it. *Id.* Second, it would deter Internet content providers from regulating themselves, lest they come across information that was potentially defamatory, be put on notice, and risk liability. *Id.*

112. *See, e.g.,* Barrett v. Rosenthal, 146 P.3d 510, 519-21 (Cal. 2006) (rejecting the idea that distributor liability could be used to hold a website accountable when publisher liability fails). As a result, a website is immune regardless of the semantics of whether it is a "publisher"—exercising traditional editorial functions, such as changing grammar or filtering content—or a "distributor"—merely relaying content without changing it, but potentially liable in the brick-and-mortar world if placed on notice of defamatory content. *See id.*

113. *See, e.g.,* Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 418-19 (1st Cir. 2007) (adopting broad immunity as described in *Zeran* and citing other circuits that have adopted *Zeran's* approach); *see also* Barrett, 146 P.3d at 518 n.9 (collecting state and federal cases).

114. *See, e.g.,* Batzel v. Smith, 333 F.3d 1018, 1026-27 (9th Cir. 2003) (discussing differences between legal treatment of print and online publishers with regard to defamation); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir. 2003) (stating that "Internet publishers are treated differently from corresponding publishers in print, television and radio").

115. *See, e.g.,* Blumenthal v. Drudge, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding that Internet provider is immune to suit based on alleged defamatory remarks of gossip columnist hired by Internet provider to write column).

116. Green v. Am. Online, 318 F.3d 465, 470-71 (3d Cir. 2003) (holding Internet service immune from suit based on allegations that it negligently failed to monitor, screen, or delete allegedly tortious information from its network).

117. Perfect 10, Inc. v. CCBill, LLC, 488 F.3d 1102, 1118-19 (9th Cir. 2007) (holding that only federal, not state, intellectual-property laws were specifically excluded from the scope of § 230 immunity, and therefore immunity extended to state law claims for unfair competition, false advertising, and right of publicity).

118. Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1117-18 (W.D. Wash. 2004) (holding provider of online retailing platform immune for allegedly infringing content posted by users).

119. Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 538 (E.D. Va. 2003) (holding that § 230 bars federal public-accommodation discrimination suit against Internet provider for failing to police chat room for anti-Muslim comments). Prior to *Roommates.com*, at least one observer believed the Internet to be a safe haven for housing discrimination. *See* Jeffrey M. Sussman, Note, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 215 (2007).

Courts generally hold that for a site to qualify for immunity, the following three criteria must be met: (1) the defendant is an “interactive computer service,” within the meaning of § 230; (2) the plaintiff’s cause of action seeks to hold the defendant liable for the exercise of a publisher’s traditional editorial functions; and (3) the information at issue in the suit was provided by another “information content provider.”¹²⁰ For a plaintiff suing an interactive website, a logical argument based on the above formulation is that the website, not the individual user, either created or developed the objectionable content and is therefore the “information content provider.”¹²¹ This argument often fails, however, in part because of courts’ traditionally narrow interpretation of what constitutes “creation” or “development” of “information.”¹²² The fact that a website is an information content provider with regard to some of the content on its site is irrelevant, as long it was not the provider of the specific content at issue in a particular case.¹²³

For example, when the Internet community America Online contracted with gossip columnist Matt Drudge and promoted his work to its members, a court held the company neither created nor developed allegedly defamatory content within the column, absent any “substantive or editorial” involvement in the particular comment at issue.¹²⁴ A website that provided an online retail platform and encouraged consumers to use it did not make the website the creator or developer of images uploaded by users to the website.¹²⁵ Another court held the auction website eBay, which maintained a sophisticated user-feedback system for its auction service, was not the information content provider for the actual feedback within the system.¹²⁶ In addition, a website’s effort to encourage the submission of anonymous profiles, coupled with its failure to verify whether a profile matched a user’s true identity, was not

120. See *Batzel v. Smith*, 333 F.3d 1018, 1037 (9th Cir. 2003). Courts have construed “interactive computer service” broadly to include websites. *Id.* at 1030 n.16 (citations omitted).

121. See *Myers*, *supra* note 95, at 187 (describing the issue of who is the “information content provider” as the “most litigated” aspect of § 230).

122. See *id.* at 195-96 (noting multiple courts’ acceptance of “deconstructive” view of information, which “deconstructs information into its constituent pieces of authorship and attributes responsibility to each party only for the piece of information that *it* alone ‘created or developed’”) (emphasis in original).

123. See *id.*

124. *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (holding that America Online was not the information content provider of alleged defamatory statements made by gossip columnist Matt Drudge, who had contracted with America Online to distribute and promote his columns).

125. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (holding that state-law consumer-protection and tort claims against Amazon.com were barred because Amazon.com was not the information content provider of images uploaded by users of the company’s zShops application).

126. *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833 n.11 (2002) (holding that eBay’s system of rating sellers with different-colored stars based on the quality of buyer feedback does not mean that it was the creator or developer of misleading substance within feedback submitted by users; noting that the “critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading”).

enough to make the site the “provider” of information within the profile submitted by a user.¹²⁷ Nor has a website’s failure to remove objectionable content after receiving actual notice of the content transformed the website into the “developer” or “creator” of the content.¹²⁸

Two Ninth Circuit cases, decided prior to *Roommates.com*, show the extent to which courts have shielded interactive websites from being treated as the “information content provider” of objectionable information on their sites.¹²⁹ In *Batzel v. Smith*,¹³⁰ a handyman who overheard a client talking about artwork in her home sent an e-mail to a website dedicated to the topic of stolen artwork, alleging that the woman owned an art collection that was composed of pieces taken by Nazis during World War II.¹³¹ The website’s operator received the message and made minor changes before re-publishing it on his website and on a listserv; in response, the artwork owner sued him for defamation.¹³² The court reasoned that “development” of information within the context of § 230 “means something more substantial than merely editing portions of an e-mail and selecting the material for publication,” and that a different interpretation would conflict with § 230’s immunization of publishers for content provided by third parties.¹³³ The court held that the site’s operator was immune to suit based on selection of the e-mail for republication, as long as a reasonable person would conclude that the e-mail had been “provided” to the site with the intent that it be published.¹³⁴ The dissent insisted that the court’s decision “encourages the casual spread of harmful lies” and “licenses professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity.”¹³⁵ The dissenting judge disagreed with the idea that selecting information for publication does not amount to content “development,” and he further insisted that “developing” content should be construed to mean changing information, adding to it, or presenting it in a novel way.¹³⁶

In *Carafano v. Metrosplash.com*,¹³⁷ an actress sued a dating website alleging invasion of privacy, defamation, and negligence after a user of

127. See *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294-95 (D.N.H. 2008) (citing *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-20 (1st Cir. 2007)).

128. See *Lycos*, 478 F.3d at 420; *Gentry*, 99 Cal. App. 4th at 835 (citing *Zeran* court’s rejection of notice-based distributor liability).

129. See *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003).

130. 333 F.3d 1018 (9th Cir. 2003).

131. *Id.* at 1020-21.

132. *Id.* at 1021-22.

133. *Id.* at 1031.

134. *Id.* at 1034.

135. *Id.* at 1038 (Gould, J., concurring in part and dissenting in part).

136. *Batzel v. Smith*, 351 F.3d 904, 905-06 (9th Cir. 2003) (denying petition for rehearing en banc) (Gould, J., dissenting).

137. 339 F.3d 1119 (9th Cir. 2003).

the site created a false “user profile” that purported to have been written by the actress.¹³⁸ The court held that the website was not the “information content provider” of the profile because an online profile has no content until the user actively provides it, regardless of whether the profile is created using a standardized questionnaire built by the website.¹³⁹

Despite this wide-ranging immunity, plaintiffs in a handful of cases have succeeded in arguing that the disputed content was provided not by a third-party user, but by the website itself.¹⁴⁰ In addition, at least one district court has held that encouraging or soliciting a certain type of content may cause a website to become an information content provider.¹⁴¹ Before *Roommates.com*, however, no federal court of appeals had denied immunity to a website because of its role as a “developer” of third-party content.¹⁴²

138. *Id.* at 1121.

139. *Id.* at 1124; *see* *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10 (M.D. Fla. Feb. 15, 2008) (citing *Carafano* to support holding that website is not an information content provider of reports submitted by users, even though users choose from the site’s multiple-choice list to label reports with titles such as “con artists” and “corrupt companies”).

140. *See* *Anthony v. Yahoo, Inc.*, 421 F. Supp. 2d 1257, 1262-63 (N.D. Cal. 2006) (holding that the website’s creation of false profiles made the site an information content provider of the profiles, and that site was not immune for publishing actual profiles of users who no longer belonged to the site because plaintiff alleged fraud based on manner of presentation, not based on information within the profiles); *FTC v. Accusearch, Inc.*, No. 06-CV-105-D, 2007 WL 4356786, at *6 (D. Wyo. Sept. 28, 2007) (holding that website’s act of buying misappropriated phone records and reselling them through the Internet amounted to participation in the creation or development of those records). The court’s holding in *Accusearch*, however, was in part because the cause of action related to the purchase and resale of the records and did not depend exclusively on holding the website liable for a publisher’s traditional editorial functions. *Id.* at *5. Like the *Accusearch* defendant, the publisher of a consumer-advocacy website, the “Rip-off Report,” was not immune to suit based on information contributed by users; in part because the site added its own editorial comments to users’ stories of being swindled, and in part because it solicited individuals to submit reports for pay. *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1149 (D. Ariz. 2005).

141. *See* *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ. A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) (holding that the publisher of “Rip-off Report” was a content developer because “actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher’s editorial role”). *But see* *Whitney Info. Network*, 2008 WL 450095, at *11 (holding that site’s encouragement and solicitation of reports about dishonest businesses did not amount to content creation or development, in part because the site required users to acknowledge the validity of reports, did not charge a fee to post a report, and did not encourage users to take particular photos related to the plaintiff).

142. In some cases, circuits have not addressed the argument that a website “developed” third-party content because the issue was not argued or timely raised by the plaintiff. *See* *Doe v. MySpace, Inc.*, 528 F.3d 413, 420-22 (5th Cir. 2008) (holding that plaintiffs’ argument that interactive site developed content by facilitating user profiles and offering online questionnaire was not supported by the record); *Green v. Am. Online, Inc.*, 318 F.3d 465, 470 (3d Cir. 2003) (stating that plaintiff did not dispute that information came from another content provider). In other cases, courts have offered counter-examples, describing only what “development” is not. *See* *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (stating that making it easier for others to develop or disseminate harmful information does not transform a site into an information content provider); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985-86 (10th Cir. 2000) (holding that web service’s deletion of some stock symbols within its database did not transform it into a creator or developer of allegedly inaccurate stock information).

C. Immunity Under Fire

As courts try to resolve the ambiguities within the language of § 230, a debate rages about whether Congress ever intended to grant websites such broad immunity, and, if it did, whether that policy should be revisited.¹⁴³ Those who argue that Congress intended such broad immunity emphasize that, in 2002, lawmakers signaled that they approved of courts' interpretations of § 230 up to that point.¹⁴⁴

Nevertheless, courts recently have signaled that websites' immunity under § 230 may not be as broad and all-encompassing as interpreted by *Zeran* and the cases that have followed it.¹⁴⁵ For example, in *Doe v. GTE*,¹⁴⁶ the United States Court of Appeals for the Seventh Circuit noted in dicta that the title of the statute's first subsection, "Protection for Good Samaritan Blocking and Screening of Offensive Material," is not an apt description if it induces websites to do nothing.¹⁴⁷

The question of whether broad immunity for websites is good public policy involves tension between two competing values: the need for order and accountability online on the one hand, and the need to maintain the Internet's democratic ideals on the other hand.¹⁴⁸ A subtext of the debate is the changing nature of the Internet, which today allows for the collection and publication of user-generated content in a way that

143. See, e.g., Sam Bayard, *New Jersey Prosecutors Set Sights on JuicyCampus*, CITIZEN MEDIA LAW PROJECT, Mar. 21, 2008, <http://www.citmedialaw.org/blog/2008/new-jersey-prosecutors-set-sights-juicycampus> ("CDA 230 has provided vital breathing space for the development and operation of the interactive Internet, but it also leads to perverse and unjust results in particular cases (which generally is a weak point of legal rules versus legal standards).").

144. H.R. REP. NO. 107-449, at 13 (2002). Congress cited *Zeran* as one example of how courts have "correctly interpreted" § 230(c). *Id.* The report stated, "The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence and defamation." *Id.* (internal citations omitted). Also, the California Supreme Court cited the committee report and noted that subsequent legislative history sometimes may be relevant when interpreting a statute. *Barrett v. Rosenthal*, 146 P.3d 510, 523 n.17 (Cal. 2006) (stating that H.R. REP. NO. 107-449 "reflects the Committee's intent that the existing statutory construction be maintained in a new legislative context," and noting that membership of the committee that produced the cited report included Rep. Cox, who co-sponsored § 230).

145. See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669-70 (7th Cir. 2008) (noting that § 230(c)(1) does not mention "immunity," and stating that the subsection has a "limited role").

146. 347 F.3d 655 (7th Cir. 2003).

147. *Id.* at 660. In *Doe v. GTE*, athletes who were filmed changing in their locker rooms via a hidden camera sued a web-hosting company that had provided web-hosting services to the film's producer and distributor. *Id.* at 656. Although the court ultimately held that the defendant owed no duty to protect plaintiffs from harm, it reopened the debate about the scope of § 230 by suggesting that the law does not mandate immunity for websites that fail to conduct "Good Samaritan" screening. *Id.* at 660. The court suggested that because immunity is not mandatory, the statute does not preempt state causes of action that require websites to protect others' interests or, in the alternative, that it bars any cause of action that treats the defendant as a publisher but allows states to regulate other functions of the site. *Id.*

148. See Keenan Mayo & Peter Newcomb, *An Oral History of the Internet: How the Web Was Won*, VANITY FAIR, July 2008, available at <http://www.vanityfair.com/culture/features/2008/07/internet200807?currentPage=8> (quoting Wikipedia founder Jimmy Wales as stating, "[I]f a Web site is essentially a brutal police state where every action could easily result in random blocking or banning from the site and nobody can trust anything—that doesn't work. Complete and total anarchy, where anyone can do anything, also doesn't work.").

was unforeseen fifteen years ago,¹⁴⁹ thus blurring the lines between the users of a website and the website itself.¹⁵⁰

Some observers have criticized *Zeran* and its offspring as allowing “shocking” behavior to flourish online, despite the original goal of using immunity as a tool to foster responsible behavior online.¹⁵¹ Proposals to change the immunity regime may be loosely grouped into the following categories, which are not mutually exclusive: (1) either repeal § 230 or modify it in a way that reinstates common-law principles of liability;¹⁵² (2) apply § 230’s provisions to a more narrow class of interactive computer services;¹⁵³ or (3) create a “notice and takedown” scheme that would allow aggrieved parties to petition for removal of objectionable

149. See David Pogue, *State of the Art: Serious Potential for Google’s Browser, Minimalist Chrome Is Built for a Future that Blurs the Lines of Web and Desktop*, N.Y. TIMES, Sept. 3, 2008, at C1 (quoting the Google company blog as saying the Internet has “evolved from mainly simple text pages to rich, interactive applications,” a trend that caused the company to rethink the idea of web-browsing software).

150. See Myers, *supra* note 95, at 201-02 (discussing the potential problems under § 230 presented by Wikipedia.org, an online, user-edited encyclopedia that grants varying levels of editing permission to its users). In 2005, an Internet user famously posted a hoax article on Wikipedia.org about journalist John Seigenthaler, Sr., falsely and libelously implicating him in the assassination of President John F. Kennedy. *Id.* at 170. The comment remained online for four months before one of Seigenthaler’s colleagues altered the posting, and the website’s administrator took steps to hide the comment from public view. *Id.* at 171.

151. *Appeals Judge: Don’t Bank on Courts for Broad Section 230 Immunity*, WASHINGTON INTERNET DAILY, May 19, 2008, available at 2008 WLNR 9607486 (quoting Anthony Kline, Presiding Justice of the California First Court of Appeals in San Francisco). Justice Kline wrote a decision that refused to extend § 230 immunity to knowing redistribution of libelous statements online, *Barrett v. Rosenthal*, 9 Cal Rptr. 3d 142 (Cal. Ct. App. 2004), but later was overturned by the California Supreme Court. *Barrett v. Rosenthal*, 146 P.3d 510, 513 (Cal. 2006).

152. See Robert G. Magee & Tae Hee Lee, *Information Conduits or Content Developers? Determining Whether News Portals Should Enjoy Blanket Immunity from Defamation Suits*, 12 COMM. L. & POL’Y 369, 371-72 (2007) (calling for traditional defamation rules to apply to news-aggregating websites based on a “continuum of involvement” in creation of the disputed content); Stephanie Blumstein, Note, *The New Immunity in Cyberspace: The Expanded Reach of the Communications Decency Act to the Libelous “Re-Poster,”* 9 B.U. J. SCI. & TECH. L. 407, 424 (2003) (suggesting that plaintiff be allowed to recover damages for serious injury when Internet service provider acts with “reckless disregard” of defamatory information posted on its site); Matthew G. Jeweler, Note, *The Communications Decency Act of 1996: Why § 230 Is Outdated and Publisher Liability for Defamation Should Be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL’Y 3 (2007), available at <http://tlp.law.pitt.edu/articles/jeweler.pdf> (calling for common-law defamation principles to be applied on a case-by-case basis); David V. Richards, Note, *Posting Personal Information on the Internet: A Case for Changing the Legal Regime Created by § 230 of the Communications Decency Act*, 85 TEX. L. REV. 1321, 1344-54 (applying economic analysis to support a proposal to reinstate a modified form of distributor liability); see generally Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. L. & TECH. 569 (2001) (describing § 230 as failed policy because it prevents courts from determining when liability is appropriate).

153. See Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247, 260-65 (2004) (proposing three factors to determine whether an interactive service provider becomes an information content provider: (1) the amount of control it exercised over the content; (2) whether it supplied the content; and (3) whether it facilitated development of the content); Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 806 (2007) (calling for immunity to be extended only to websites that take an affirmative role in policing their sites for offensive content); Melissa A. Troiano, Comment, *The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*, 55 AM. U. L. REV. 1447, 1475 (2006) (calling for removing immunity for blogs maintained by individual authors).

content.¹⁵⁴

On the other hand, representatives of Internet companies are concerned that any effort to change § 230 with legislative action would open a Pandora's box that would lead to more regulation of the Internet.¹⁵⁵ Industry representatives are arguing at all turns for maintaining the "robust" protections afforded by the *Zeran* line of cases.¹⁵⁶

Meanwhile, attorneys representing people aggrieved by user-generated web content are creatively devising ways to circumvent the provisions of § 230, such as threatening to sue individual website users but joining the website as a "necessary party,"¹⁵⁷ or alleging that misleading website policies regarding user comments violate consumer-fraud laws.¹⁵⁸

IV. COURT'S DECISION

In the en banc decision in *Roommates.com*, authored by Chief Judge Kozinski, the majority began by noting the legislative history of the Communications Decency Act and stating that the original purpose of § 230 was to immunize good-faith removal of content, not creation of content.¹⁵⁹ The court stated that § 230 was not intended to create a

154. See Lemley, *supra* note 8, at 115-18 (suggesting trademark law as a model for a uniform Internet safe harbor that would utilize aspects of the copyright law notice and takedown scheme but with modifications including a streamlined process for resolving disputes); Michael L. Rustad & Thomas H. Koenig, *Rebooting Cybertort Law*, 80 WASH. L. REV. 335, 390 (2005) (calling for an extension of copyright notice and takedown provisions to tort law).

155. Courts, WASHINGTON INTERNET DAILY, May 13, 2008, available at 2008 WLNR 9214292 (quoting Patrick Ross, Copyright Alliance Executive Director, noting that an effort to remedy immunity carved out by *Roommates.com* and Craigslist would provide a vehicle to lawmakers who want to regulate the Internet; also quoting Wikipedia general counsel's fears of possible cultural damage if there were incentives under a changed law not "to provide fully free-speech-capable platforms" and noting differences in U.S. and international law).

156. See generally Brief for Amazon.com et al. as Amici Curiae Supporting Appellees, *Roommates III*, 521 F.3d 1157 (9th Cir. 2008) (No. 04-56916). The brief, submitted by Internet heavyweights including Google, Inc., Amazon.com, and Yahoo! Inc., was rejected by the court but argued that a ruling for the plaintiffs "could create substantial uncertainty regarding the legal rules governing providers of online services and imperil the future growth and development of the online economy." *Id.* at 4.

157. Posting of Paul Alan Levy to Consumer Law & Policy Blog, <http://pubcit.typepad.com/clpblog/2008/06/mynutritionstor.html> (June 26, 2008, 15:51) (describing case of attorney who had threatened suit against operator of consumer-protection website 800notes.com by joining site as necessary party). Levy's blog entry described the concern that using this procedural maneuver could force the site into costly litigation if it did not accede to the plaintiff's demand to remove allegedly defamatory content. *Id.*

158. See *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at *10 (N.D. Cal. Mar. 4, 2008) (holding that online auction site is not immune for its own marketing representations); see also Bayard, *supra* note 143 (describing New Jersey prosecutors' subpoena of records from JuicyCampus.com as part of an investigation to determine whether it was violating consumer-fraud laws).

159. *Roommates III*, 521 F.3d. 1157, 1163 (9th Cir. 2008). This statement of § 230's purpose gives short shrift to § 230(c)(1), which, by stating that no "interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," arguably has nothing to do with removal of content. See 47 U.S.C. § 230(c)(1) (2000). The court's attempt to divine legislative intent behind § 230 conflicts with the Fourth Circuit's conclusion that Congress enacted § 230 to limit the threat of tort liability against websites. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997).

“lawless no-man’s-land on the Internet” and noted that because of the Internet’s growth in recent years, it was no longer in danger of being “smothered in the cradle.”¹⁶⁰

The court disagreed with Roommates.com’s argument that it was immune from suit for questioning potential users about their gender, sexual orientation, and familial status during the registration process.¹⁶¹ Instead, the court held that Roommates.com unquestionably provided the questionnaire’s content because it created the questions and all potential answers and made them an integral part of the registration process.¹⁶²

On the plaintiffs’ second claim, that the processing of users’ profile information amounted to content creation for which Roommates.com should not be immune, the court reached two distinct holdings.¹⁶³ First, the court held that because the website required users to answer its potentially discriminatory questions as a condition of using the site, and because the profiles were a collaborative effort between users and the website, Roommates.com was responsible in part under § 230 for providing the profiles’ content.¹⁶⁴ The court implied that “development” of content could be synonymous with solicitation of content.¹⁶⁵

Second, the court held that the plaintiffs could sue Roommates.com for the contents of the system it employed to screen user profiles and match prospective roommates because, unlike a “generic” search engine or one using the enigmatically labeled “neutral tools,” the site’s search function was designed to achieve ends that could violate fair-housing laws.¹⁶⁶ Based on Roommates.com’s conduct, the court provided a new definition for what it means to be a “developer” of content submitted by third parties: Even if it is ultimately a third party who submits a piece of information, a site loses its immunity to suit based on that content if the site “contributes materially to the alleged illegality of the conduct.”¹⁶⁷ The court bolstered its interpretation of the term “development” by referring to the most recent definition of “content devel-

160. *Roommates III*, 521 F.3d at 1164, 1164-65 n.15 (noting that the Internet’s “vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts”).

161. *Id.* at 1164-65.

162. *Id.* The court held the site could plausibly be found to violate fair-housing laws in either of two ways: first, by indicating an intent to discriminate against the users; or second, by causing them to express “illegal preferences.” *Id.* at 1165.

163. *Id.* at 1166-69.

164. *Id.* at 1166-67. The court stated that “by requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate[s.com] becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.” *Id.* at 1166.

165. *Id.* at 1166 (stating that “[u]nlawful questions solicit (a.k.a. ‘develop’) unlawful answers”).

166. *Id.* at 1167-69.

167. *Id.* at 1168.

opment” from the online, user-edited encyclopedia Wikipedia.org.¹⁶⁸ To quell the dissent’s concerns about the potential scope of the definition, the court offered four examples in dicta of what would not constitute “development” by hypothetical websites and, by contrast, offered one example of behavior by a hypothetical web publisher that would cross the line into “development.”¹⁶⁹

The court clarified the reasoning in *Batzel* and *Carafano*, two cases upon which Roommates.com had relied to bolster its argument for immunity.¹⁷⁰ The court stated that under its newly announced standard, the defendant in *Batzel* who selected an allegedly defamatory statement for inclusion in an online newsletter would still have been entitled to immunity, as long as the original author of the comment submitted it with the intent that it be published.¹⁷¹ If the original author had not intended the statement for publication, the majority stated, the website’s author would have become a non-immune “developer” of the content by selecting it and publishing it.¹⁷²

The court stated that *Carafano* was “unquestionably correct” but acknowledged that some of the language in the decision, specifically the maxim that no online profile has any content until a user actively creates it, was “unduly broad.”¹⁷³ Even though it is the user of a website who ultimately pushes the buttons and types the keystrokes to create an online profile in response to a questionnaire, the court stated that a website “may still contribute to the content’s illegality and thus be liable as a developer.”¹⁷⁴ The key difference between the two cases, the court stated, is that the website in *Carafano* provided “neutral tools” that did nothing to encourage the posting of defamatory content.¹⁷⁵ By contrast,

168. *Id.* (noting Wikipedia.org’s definition of “[web] content development” as “the process of researching, writing, gathering, organizing and editing information for publication on web sites”) (alteration in original). The court stated that its new definition of “development” was “entirely in line with the context-appropriate meaning of the term.” *Id.* at 1168-69. The court discounted the dissent’s definition of “development” pulled from Webster’s Dictionary: “a gradual advance or growth through progressive changes.” *See id.* at 1184. (McKeown, J., dissenting).

169. *Id.* at 1169 (majority opinion). In dicta, the court suggested that it would not constitute “development” for an “ordinary search engine” to allow an individual user to search for a “white roommate” because the search engine provided “neutral tools”; for a dating website to require users to enter their sex, race, religion, and marital status through drop-down menus because discrimination along such lines is legal for dating websites; for a housing website to allow users to screen out e-mails from other users of a particular race or sex, as long as the website did not require the use of discriminatory criteria; and for a website operator to edit user-created content as long as the edit was “unrelated to the illegality.” *Id.* By contrast, the court stated that a website operator who edited in a “manner that contributes to the alleged illegality”—for example, by taking a non-libelous message and rearranging the wording to make it a libelous message—would not be immune from suit. *Id.*

170. *Id.* at 1170-71.

171. *Id.*

172. *Id.* at 1171.

173. *Id.*

174. *Id.*

175. *Id.* at 1171-72. The court stated that the website in *Carafano*:

[P]rovided neutral tools, which the anonymous dastard used to publish the libel, but the website did absolutely nothing to encourage the posting of defamatory content—indeed, the defamatory posting was contrary to the website’s express policies. The claim against

the site at issue in *Roommates.com* actively solicited the type of content alleged to be illegal and incorporated it into the design of its search system.¹⁷⁶

In a dissenting opinion,¹⁷⁷ Judge McKeown, who was not a member of the original panel, warned that the majority had cut a “broad swath” out of immunity¹⁷⁸ in a way that threatened to chill the further development of the Internet.¹⁷⁹ Specifically, the dissent criticized the majority opinion for: (1) conflating the issue of liability under fair-housing laws with the existence of immunity under § 230;¹⁸⁰ (2) potentially stripping all interactive websites of immunity with its novel definition of content “development”;¹⁸¹ and (3) undermining Congress’ intent to protect websites’ sorting and filtering activities from traditional publisher liability.¹⁸² Essentially, the dissent maintained that whatever “development”

the website was, in effect, that it failed to review each user-created profile to ensure that it wasn’t defamatory. That is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230. With respect to the defamatory content, the website operator was merely a passive conduit and thus could not be held liable for failing to detect and remove it.

Id.

176. *Id.* at 1172 (stating that Roommates.com “does not merely provide a framework that could be utilized for proper or improper purposes; rather, Roommate[s.com]’s work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site”).

177. The dissent would have affirmed the district court’s judgment that Roommates.com was entitled to immunity, subject to the examination of whether its inquiries to users alone were unlawful. *Id.* at 1189 (McKeown, J., dissenting).

178. *Id.* at 1189.

179. *Id.* at 1176.

180. *Id.* at 1178 (suggesting that the majority based its decision in part on a presumption that the conduct of Roommates.com was reprehensible and unlawful). The proper approach, the dissent stated, would have been to simply apply § 230’s immunity provisions to the website without concern for whether the site would ultimately be found on remand to violate fair-housing statutes. *Id.* Linking a site’s immunity to the question of whether the information on a website potentially violates the law does not make sense, the dissent reasoned, because “[i]mmunity has meaning only when there is something to be immune from. . . . It would be nonsense to claim to be immune only from the innocuous.” *Id.* at 1182. The dissent also pointed out that the majority’s definition of “development” was inconsistent because it would lead to different results for the same type of information-handling practices, depending on whether the underlying information was objectionable. *Id.* at 1183. For this, the majority acknowledged that the dissent scored a “debater’s point.” See *id.* at 1171 n.30 (majority opinion). In addition, the dissent pointed out that tying a website’s role as a “developer” of content to the question of whether the information on the website potentially violated a statute or federal law “puts the webhost in the role of a policeman for the laws of the fifty states and the federal system. There are not enough Net Nannies in cyberspace to implement this restriction, and the burden of filtering content would be unfathomable.” *Id.* at 1188 (McKeown, J., dissenting).

181. *Id.* at 1182 (McKeown, J., dissenting). The dissent stated that the majority’s definition of what it means to develop content “is original to say the least and springs forth untethered to anything in the statute.” *Id.* at 1182. More troubling to the dissent than the originality of the definition, however, was the possibility that it could be applied to virtually any interactive website, ranging from dating sites such as Match.com to search engines such as Google. *Id.* at 1183. In response, the majority opinion offered examples to show that the dissent’s concerns about the potential scope of the term “development” were unfounded. *Id.* at 1169 (majority opinion). Not convinced, the dissent gave the example that a site that published defamatory content submitted by a third party could be held to have “materially contributed” to the alleged illegality of the content because publication is an element of defamation. *Id.* at 1183-84 (McKeown, J., dissenting). The dissent seemed particularly concerned about the implications for search engines. *Id.* (stating that “[a]t bottom, the majority’s definition of ‘development’ can be tucked in, let out, or hemmed up to fit almost any search engine, creating tremendous uncertainty in an area where Congress expected predictability”).

182. *Id.* at 1177 (McKeown, J., dissenting) (“Congress has spoken: third-party content on the

of content might mean, Roommates.com had not done it.¹⁸³

The dissent warned that the majority had set itself apart from other circuits¹⁸⁴ and injected uncertainty into the world of online publishing.¹⁸⁵ This warning, the dissent protested, was not “an empty Chicken Little ‘sky is falling’ alert.”¹⁸⁶

V. COMMENTARY

The *Roommates.com* decision quickly sparked discussion among Internet-industry observers.¹⁸⁷ Some believed the decision could signal the end of broad immunity for interactive content,¹⁸⁸ while others be-

Internet should not be burdened with the traditional legal framework.”). To support its view of Congress’ intent, the dissent cited the policy statements within § 230(c), the omission of fair-housing laws from the statutes exempt from § 230, and the 2002 Committee Report that explicitly endorsed the broad immunity extended by courts. *Id.* at 1179, 1187-88.

183. *See id.* at 1184. While insisting that the term “development” was not without meaning and supplying a dictionary definition, “gradual advance or growth through progressive changes,” the dissent mostly defined the term by counter-example. *See id.* For example, the dissent maintained that allowing users to choose from standardized options did not amount to development of information but rather was a method of selecting material for publication, which the court in *Batzel* had held to be a protected activity. *Id.* at 1182 (citing *Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003)). In addition, the dissent reasoned that under *Carafano*, displaying a prompt that asked users to choose from a list of types of sexual orientation did not amount to content development. *Id.* (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)). The dissent also emphasized that prompting, soliciting, and encouraging information did not rise to the level of development. *Id.* at 1185. The dissent came closest to giving an actual example of what its view of content development would look like when it noted that Roommates.com made no changes to the information provided by its users. *Id.* However, as noted by the majority, anything that fit within the dissent’s narrow view of development could just as easily be labeled content “creation.” *Id.* at 1168 (majority opinion). The dissent also pointed out that the definition of “interactive computer service” under § 230 included an “access software provider,” defined as one that provides enabling tools to filter and screen content. *Id.* at 1186 (McKeown, J., dissenting) (stating that Roommates.com “is performing tasks that Congress recognized as typical of entities that it intended to immunize”).

184. *Id.* at 1177 (McKeown, J., dissenting). The majority labeled the dissent’s hints at an inter-circuit split as coy, stating:

No other circuit has considered a case like ours and none has a case that even arguably conflicts with our holding today. No case cited by the dissent involves active participation by the defendant in the creation or development of the allegedly unlawful content; in each, the interactive computer service provider passively relayed content generated by third parties, just as in *Stratton Oakmont*, and did not design its system around the dissemination of unlawful content.

Id. at 1172 n.33 (majority opinion).

185. *Id.* at 1188-89 (McKeown, J., dissenting) (predicting that the decision would “ripple through the billions of web pages already online, and the countless pages to come in the future”).

186. *Id.* at 1176.

187. *See, e.g.*, Eric Goldman, *Roommates.com Denied 230 Immunity by Ninth Circuit En Banc (With My Comments)*, TECHNOLOGY AND MARKETING LAW BLOG, Apr. 4, 2008, http://blog.ericgoldman.org/archives/2008/04/roommatescom_de_1.htm. Goldman noted concern that *Roommates.com* could “dissuade some websites from providing structured searches of user-supplied content.” *Id.* Goldman’s other critiques were that the majority decision revived uncertainty about distinctions between active and passive roles of websites and that it reflected an implicit normative judgment that the Fair Housing Act should trump § 230. *Id.* Goldman noted the ambiguities within the decision, stating that “it’s virtually impossible to articulate in crystal-clear terms why Roommates.com crossed the line while many other websites with similar user interactions still qualify for 230.” *Id.*

188. *See, e.g.*, Marc S. Friedman et al., *Tom Just De-Friended the Ninth Circuit*, METROPOLITAN CORPORATE COUNSEL, June 2008, at 12, available at <http://www.metrocorp.counsel.com/pdf/2008/June/12.pdf> (stating that *Roommates.com* “may have sounded the death knell for the wide-ranging content-based immunity previously enjoyed by website operators hosting third party content”).

lieved the case would have a limited impact because of the unique structure of the Roommates.com website and the majority's efforts to confine the scope of its holding.¹⁸⁹ What is most significant about the decision, however, is not the specific holding but how the court arrived there: by assigning its own meaning to the ambiguous and superfluous term "development."¹⁹⁰

Another court could use this approach to strip immunity from virtually any kind of interactive website, depending on whether the court believed the site in question had crossed the line into content development.¹⁹¹ For this reason, other circuits should not follow the Ninth Circuit's approach in *Roommates.com* and should acknowledge that treating a site as an "information content provider" because it has "developed" third-party content is incompatible with the extensive precedent immunizing websites' editorial functions.¹⁹² Any further efforts to limit sites' immunity to suit based on the third-party content they publish should come from Congress, not from assigning meaning to the term "development."

A. *The Underlying Problem: Conflict Within § 230*

A fundamental problem that courts face as they attempt to interpret § 230 is the conflict between § 230(c)(1) and § 230(f)(3). Section 230(c)(1) states that no information content provider "shall be treated as the publisher or speaker of any information provided by another information content provider."¹⁹³ Section 230(f)(3) defines "information content provider" as one who is responsible, "in whole or in part, for the creation or development of information."¹⁹⁴ Whereas § 230(c)(1) suggests two mutually exclusive spheres of information "provided" by different parties, the definition of information content provider recognizes that information is often the product of collaboration.¹⁹⁵

189. See, e.g., Dan Levine, *9th Circuit: No Immunity for Roommates.com Under Communications Decency Act*, LAW.COM, Apr. 4, 2008, available at www.law.com/jsp/article.jsp?id=1207219563829 (quoting statement by Fair Housing Councils' attorney challenging Internet industry "to produce other Web sites that do this"); Posting of Daniel Solove to Concurring Opinions blog, http://www.concurringopinions.com/archives/2008/04/fair_housing_co.html (Apr. 5, 2008 10:55) (noting limited scope of *Roommates.com* holding, and suggesting that a site such as JuicyCampus.com would retain immunity under the decision because of the open-ended nature of its comment solicitation).

190. See discussion *supra* Part IV.

191. See *Roommates III*, 521 F.3d 1157, 1188-89 (9th Cir. 2008) (McKeown, J., dissenting) (noting wide range of sites that potentially could be labeled "developers" under the majority's interpretation of the term).

192. See *Roommates II*, 489 F.3d 921, 935 (9th Cir. 2007) (Ikuta, J., dissenting) (rejecting idea that Roommates.com was the information content provider of its user profiles, and noting that "our binding precedent has already addressed the question when a website operator has jointly created and developed content so as to become an 'information content provider'").

193. 47 U.S.C. § 230(c)(1) (2000).

194. *Id.* § 230(f)(3).

195. See Myers, *supra* note 95, at 191 (noting "ambiguous relationship between (c)(1) and (f)(3)" and expressing concern that court's choice to apply one over the other could limit scope of immu-

Even based on the plain language of the statute, these two clauses are difficult to reconcile.¹⁹⁶ The terms have been made even more difficult to reconcile by the broad immunity courts have extended to the exercise of traditional editorial functions, many of which overlap with the plain meaning of the term “development.”¹⁹⁷ The plain meaning of content “development” suggests activities such as soliciting content, selecting it for publication, publishing it, editing it, and re-formatting it.¹⁹⁸ The entire line of § 230 cases from *Zeran* forward, however, depends upon these kinds of activities not rising to the level of “development.”¹⁹⁹ Indeed, despite the dissent’s insistence in *Roommates.com* that the term “development” is not without meaning,²⁰⁰ there is simply no room for the concept of “development” within the narrow definition of “information content provider” as construed by the courts since *Zeran*.²⁰¹ The term has become nearly meaningless within the context of § 230,²⁰² and

nity).

196. See *id.* at 191-201 (articulating “taxonomy” of possible ways courts could resolve conflict between the two sections, ranging from a “permissive” approach to a “broad responsibility” approach). Before *Roommates.com*, several authors in addition to Myers had noted the potential problems with interpreting the meaning of “creation or development” of content under § 230. See Magee & Lee, *supra* note 152, at 393 (noting vagueness of statutory language); Glad, *supra* note 153, at 259-60 (arguing that overly expansive grant of immunity conflicts with concept of responsibility for creation or development “in whole or in part”); Miree Kim, Note, *Narrowing the Definition of an Interactive Service Provider Under § 230 of the Communications Decency Act*, 2003 B.C. INTELL. PROP. & TECH. F. 033102, Part IV.b., available at http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/2003033102.html (noting that the plain language of the statute appears to make information content providers and interactive computer services, which she refers to as interactive service providers, mutually exclusive, and noting the “impossible task” of determining whether a website is one or the other); Troiano, *supra* note 153, at 1479 (noting subjectivity and ambiguity of “development” language). The *Roommates.com* decision, however, crystallized the problems with the statutory language by creating a new definition for “development,” a term that had previously been defined largely by counter-example. See discussion *supra* note 142.

197. See, e.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) (citations omitted) (describing extensive precedent extending immunity “regardless of the specific editing or selection process”); Magee & Lee, *supra* note 152, at 375 (noting conflict between statutory language and courts’ extension of immunity to editorial functions).

198. See *Roommates III*, 521 F.3d 1157, 1168 (majority opinion). The breadth of “development” under its plain meaning is evident in the Wikipedia.org definition cited by the *Roommates.com* court: “the process of researching, writing, gathering, organizing and editing information for publication on web sites.” *Id.*

199. For a discussion of the extent to which courts have immunized traditional editorial functions, see discussion *supra* Part III.B.

200. *Roommates III*, 521 F.3d at 1184 (McKeown, J., dissenting) (quoting *Batzel* for the proposition that content development is “something more substantial than merely editing portions of an e-mail and selecting material for publication,” but failing to provide any concrete examples of activity held to be development).

201. *Cf. id.* at 1168 (majority opinion) (recognizing the “difficult statutory problem” posed by the use of both “create” and “develop” as separate bases for loss of immunity and the resulting narrow definition of development, yet insisting that it must assign meaning to “development” to avoid redundancy).

202. One unresolved question is whether the term “development” could encompass some form of culpable assistance by a website, such as inducement to post a particular type of content. See *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008) (suggesting that outcome of case might have been different if advertising site had induced users to post a particular type of listing, had expressed a preference for discriminatory content, or had offered a lower price for discriminatory ads); *Roommates II*, 489 F.3d 921, 928 (discussing “harassment.com” hypothetical and speculating about whether it would be protected by § 230). *But see Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-21 (1st Cir. 2007) (stating “[i]t is not at

any effort to give it meaning while remaining faithful to precedent descends into circular reasoning.²⁰³

As websites become more collaborative and powerful, however, the line between the website and the users of the website blurs,²⁰⁴ and the temptation increases for courts to resolve the ambiguity by holding that the website is the “developer” of collaborative information.²⁰⁵ The problem with this approach is that it allows a court to strip a website’s immunity anytime it sees fit²⁰⁶ while ostensibly remaining faithful to precedent²⁰⁷ and to the ambiguous legislative purposes of § 230.²⁰⁸

B. The Slippery Slope of “Development” as Evidenced by Roommates.com

It does not strain logic, precedent, or the language of § 230 to hold that Roommates.com’s inquiries about users’ protected characteristics as part of a questionnaire created by the site could amount to “creating” content.²⁰⁹ The court could have stopped there and still addressed the root of the problem of which the plaintiffs complained.²¹⁰

Instead, the court set foot on the slippery slope. The first evidence of the court’s unworkable and problematic interpretation of the term “development” came when the court stated without qualification that the collaborative nature of the Roommates.com profiles made the site responsible in part for the profiles’ development.²¹¹ The court equated

all clear that there is a culpable assistance exception” to § 230 immunity).

203. See *Roommates III*, 521 F.3d 1157, 1182-83, 1184 n.11 (9th Cir. 2008) (McKeown, J., dissenting) (describing circularity of majority’s approach to determining immunity).

204. See generally Anita Ramasastry, *Is an Online Encyclopedia, Such as Wikipedia, Immune from Libel Suits? Under Current Law, the Answer Is Most Likely Yes, but that Law Should Change*, FINDLAW, Dec. 12, 2005, available at <http://writ.news.findlaw.com/ramasastry/20051212.html> (noting need to adapt statute because “[t]he Internet offers new types of venues for expression—such as blogs and wikis, which were not prevalent in 1996”); Solove, *supra* note 189 (noting difficulty in applying § 230 to Web 2.0 applications because “it is often hard to figure out exactly who is responsible for providing content,” and stating that the *Roommates.com* decision does not provide a clear answer).

205. See generally *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ. A.3:02-CV-2727-G, 2004 WL 833595, at *10 n.12 (N.D. Tex. Apr. 19, 2004) (suggesting that a site may become an information content provider based on its content-aggregating functions).

206. See *Roommates III*, 521 F.3d at 1183 (McKeown, J., dissenting) (warning that the majority’s definition of development “would transform every interactive site into an information content provider and the result would render illusory any immunity under § 230(c)”).

207. See *id.* at 1170-72 (majority opinion). Short of overturning *Batzel* and *Carafano*, the *Roommates.com* majority distinguished the facts of those decisions and insisted, unconvincingly, that the *Batzel* and *Carafano* courts anticipated the approach in *Roommates.com*. See *id.*

208. See discussion *supra* Section III.A (discussing legislative history of § 230).

209. *Roommates III*, 521 F.3d 1157, 1164-66 (9th Cir. 2008) (majority opinion) (stating that Roommates.com was an information content provider for its questionnaire because it “created the questions and choice of answers, and designed its website registration process around them,” and noting that dissent “grudgingly admits” that immunity did not extend to the website’s own questionnaire).

210. See *Roommates II*, 489 F.3d 921, 933 (9th Cir. 2007) (Ikuta, J., dissenting) (noting unnecessary nature of inquiry into “development”).

211. *Roommates III*, 521 F.3d at 1167 (“By any reasonable use of the English language, Roommate[s.com] is ‘responsible’ at least ‘in part’ for each subscriber’s profile page, because every such

both collaborative creation of content and solicitation of content with “development,”²¹² a sweeping proposition that conflicts with precedent stretching from the America Online contract with Matt Drudge in *Blumenthal* to the dating-profile questionnaire in *Carafano*.²¹³

The court then suggested that a site would be less likely to be considered a “developer” if it used so-called “neutral tools.”²¹⁴ This draws a false distinction. The court mistakenly assumed that there is such a thing as a neutral tool on the Internet, ignoring that even what the court terms “generic” search functions have been created by human beings with desired results in mind and those search tools are increasingly being tailored to create a specific type of experience for users that is anything but “neutral.”²¹⁵ The vagaries of search-engine methodology became painfully clear in September 2008 to shareholders of United Airlines, which lost \$1 billion in market value within minutes after the search function behind the influential Google News page mistakenly retrieved a Florida newspaper article from 2002 and displayed it as if it were breaking news.²¹⁶

The majority further bolstered its holding that Roommates.com was a “developer” by citing the Wikipedia.org definition of web development, which, at the time of the court’s decision, defined the term to include the organization and editing of content displayed online.²¹⁷ Based on this definition, every website in existence would be a “developer” of all content within that site because the site provided a forum for the content’s existence, organized it, archived it, and published it.²¹⁸ Presumably, even those sites that the court dubbed “neutral” or “passive” would fit within this definition of development.²¹⁹

Apparently aware of the potentially limitless application of such a broad interpretation of content “development,” the court clarified the earlier parts of its decision by stating with remarkable circularity that a website only “develops” content if the development activities materially

page is a collaborative effort between Roommate[s.com] and the subscriber.”).

212. *Id.* at 1166 (“Unlawful questions solicit (a.k.a. ‘develop’) unlawful answers.”).

213. *See id.* at 1185-86 (McKeown, J., dissenting) (collecting cases that support the proposition that a website’s solicitation of content and its collection of specified content in a drop-down menu does not make it an information content provider).

214. *See, e.g., id.* at 1169 (majority opinion) (stating that “providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to ‘development’ for purposes of the immunity exception”) (emphasis in original).

215. *See, e.g.,* N’Gai Croal, *A Search Engine of Our Own*, NEWSWEEK, May 19, 2008, at 57 (describing the search engine RushmoreDrive, which uses geographical data to supply answers intended to be more relevant to the black community). *See generally* James Grimmelmann, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 7-14 (2007) (describing how search engines index content).

216. *See* Miguel Helft, *How Series of Mistakes Hurt Shares of United*, N.Y. TIMES, Sept. 15, 2008, at C1, C6.

217. *Roommates III*, 521 F.3d 1157, 1168-69 (9th Cir. 2008).

218. *See id.* at 1184 n.11 (McKeown, J., dissenting).

219. *See id.* at 1167, 1169, 1171, 1172, 1174 n.37, 1175 (majority opinion) (proclaiming immunity for “neutral” or “passive” websites).

contribute to the alleged illegality of the content at issue.²²⁰ As argued strenuously by the dissent, this approach improperly collapses the question of underlying substantive liability with the question of whether a site created or developed the information at issue, an inquiry that should not depend on the substance of the content.²²¹ Another problem with this approach is that it uses a formalistic distinction—development versus non-development—to make what is fundamentally a normative judgment about the wrongfulness of the website operator’s conduct.²²² Such an approach encourages websites to scramble to preserve their immunity by finessing the format of their websites, a process that is likely to cause courts in turn to scramble to catch up with them by tailoring the immunity inquiry to the equities of a particular case.²²³

The *Roommates.com* court repeatedly described its new definition of development as “common-sense.”²²⁴ However, the court recognized the need to clarify the reasoning set out in the recent cases.²²⁵ Based on *Batzel* and *Carafano*, the operators of Roommates.com apparently believed that their questionnaire about users’ protected housing characteristics could not be considered the website’s own content, and that no profile has any content until a user creates it.²²⁶ Of course, this guidance proved incorrect, providing yet another reminder of the nebulous nature of what it means to develop content, in whole or in part, under § 230.²²⁷

220. *Id.* at 1168.

221. *Id.* at 1182-83 (McKeown, J., dissenting).

222. *Cf.* *Batzel v. Smith*, 333 F.3d 1018, 1037 n.3 (9th Cir. 2003) (Gould, J., dissenting) (stating that § 230 immunity should depend on the site’s conduct, not upon classification of technology used by the website).

223. For example, a website that wanted to provide a forum for employment discrimination or defamation could create a site dedicated entirely to such a purpose and set it up in a way that skirted the *Roommates.com* court’s version of “development,” leaving out checklists, questionnaires, and search functions and only providing pages where users could post their own free-form comments. *Cf. Roommates III*, 521 F.3d 1157, 1174 (holding site immune for contents of “additional comments” within profiles). Perhaps the website could even decide that it would delete only non-defamatory or non-discriminatory content. The court’s description of “material contribution” to alleged illegality suggests that such a website would remain immune for users’ comments as long as it did not require users to enter defamatory or discriminatory information as a condition of using the site or specifically direct subscribers to enter discriminatory content within the text boxes. *Cf. id.* By contrast, an interactive website with a more benign mission statement—which happened to use searching and screening criteria that, unbeknownst to the site’s operators, ran afoul of some obscure statute—could conceivably be held to have “developed” that information and be liable for its content. *Cf. id.* at 1188 (McKeown, J., dissenting) (stating that majority opinion would require websites to understand all federal and state laws). Then again, if such a result seemed unjust, a court could still hold that the first site “materially contributed” to the alleged illegality of the content on its site, perhaps by providing users with too much guidance as to what types of comments to enter. A court might hold that such a site was similar to the “harassthem.com” hypothetical described in the *Roommates.com* panel decision, which the court speculated might not fall within the bounds of § 230 immunity. *Roommates II*, 489 F.3d 921, 928 (9th Cir. 2007). A court could conceivably hold that the latter site did not become an information content provider because it was not intentionally designed to achieve illegal ends. *Cf. Roommates III*, 521 F.3d at 1167 (explaining that search engines do not lose immunity if they are not “designed to achieve illegal ends”).

224. *Roommates III*, 521 F.3d at 1172, 1174.

225. *See id.* at 1170.

226. Appellee’s Answering Brief, *supra* note 41, at 31 n.49 (citing both *Batzel* and *Carafano* to establish that publisher is immune as long as the essential content is provided by someone else).

227. *See* 47 U.S.C. § 230(f)(3) (2000). It is not unreasonable to suppose that any number of web-

C. *The Potential Scope of Roommates.com*

The so-called Web 2.0 revolution has spawned an ever-growing array of powerful, interactive websites designed and built around content originally submitted by individual users.²²⁸ These sites allow users to build communities and to exchange and amplify information in novel ways.²²⁹ The subject matter these websites encompass reflects the breadth and diversity of human interests: having a baby,²³⁰ getting an education,²³¹ finding a mate,²³² earning money,²³³ and dealing with illness,²³⁴ to name just a few. As the case of JuicyCampus.com demonstrates, such content is fertile ground for legal conflict.²³⁵

The operators of these countless websites should take cold comfort from the *Roommates.com* court's effort to limit the scope of its holding.²³⁶ Many of these sites, if not all of them, collaborate with users, solicit specific types of content, and are arguably not "passive" conduits, all factors that the majority in *Roommates.com* viewed as relevant to its determination that the site had "developed" its third-party content.²³⁷ Moreover, the decision shows that if a court is faced with a problematic interactive website and believes that the site should not be immune to suit based on third-party content, there is enough play in the joints of § 230 to establish that the site partially "developed" the problematic information.

sites that escaped classification by the majority's hypotheticals will find themselves arguing in the not-too-distant future that they are protected by the logic of *Roommates.com*. As far as websites are willing to push the limits of acceptable legal conduct in publishing third-party information, courts are equipped to respond by removing those sites' immunity because of their responsibility for development, "in whole or in part," of information. *See id.*

228. *See, e.g.*, H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 398 (2008) (describing Web 2.0's "architecture of participation") (internal citation omitted).

229. *See id.* at 398-403; Richards, *supra* note 152, at 1323, 1325-29 (describing potential social harm from "interactive digital dossiers" that amass and organize user-submitted information about individuals).

230. *See, e.g.*, BabyCenter Home Page, <http://www.babycenter.com> (last visited Sept. 21, 2008).

231. *See, e.g.*, RateMyProfessor Home Page, <http://www.ratemyprofessors.com> (last visited Sept. 21, 2008).

232. *See, e.g.*, Yahoo! Personals Page, <http://personals.yahoo.com> (last visited Sept. 21, 2008); World Sexual Relationship Database Home Page, <http://www.sexualrelationshipdatabase.com> (last visited Sept. 21, 2008) (encouraging users to submit "information regarding the sexual past of anyone, at any period of time").

233. *See, e.g.*, The Big Money Home Page, <http://www.thebigmoney.com> (last visited Sept. 21, 2008); CareerBuilder Home Page, <http://careerbuilder.com> (last visited Sept. 21, 2008).

234. *See, e.g.*, MDJunction Home Page, <http://www.mdjunction.com> (last visited Sept. 21, 2008).

235. *See* Bayard, *supra* note 143.

236. *See Roommates III*, 521 F.3d 1157, 1169 (9th Cir 2008); *see also supra* note 181 (explaining that the *Roommates.com* majority engaged in a dialogue with the dissent to quell the dissent's concerns about the breadth of its holding).

237. *See* Sam Bayard, *Roommates.com—Just How Big a Hole Did the Ninth Circuit Poke in CDA 230?*, CITIZEN MEDIA LAW PROJECT, Apr. 4, 2008, <http://www.citmedialaw.org/blog/2008/roommatescom-just-how-big-hole-did-ninth-circuit-poke-cda-230> (discussing the decision's multiple references to "passive" websites and its use of words such as "encourage" and "solicit" in a "loose and imprecise manner").

D. The Solution: A Change to § 230

Any further efforts to limit sites' immunity based on their sorting, processing, filtering, and publication of third-party information should come from Congress, not from judicial attempts to assign meaning to the term "development" within § 230. Congress should at a minimum strike the words "or development" and "in whole or in part" from the definition of information content provider in § 230.²³⁸ If Congress truly believes that the broad immunity that has been a hallmark of the post-*Zeran* years is proper, this revised definition must make clear that content "creation" does not include the exercise of editorial functions such as soliciting content, sorting it, processing it, or filtering it.²³⁹ Until the statute is revised, courts that evaluate an interactive website's immunity under § 230 should recognize that deeming a website an information content provider based on its role as a content "developer" is incompatible with the broad immunity extended since *Zeran*.²⁴⁰

At the same time, Congress should take note of Chief Judge Kozinski's statement that the Internet is no longer in danger of being "smothered in the cradle,"²⁴¹ and should consider a way to provide more recourse for people who are harmed by online third-party content. Imposing the strict liability standard used for print publishers goes too far, imposing unrealistic and potentially crushing monitoring burdens.²⁴² One approach to finding a middle ground is to create a standard-based test for determining when a site should be liable for third-party content, based either on a theory that it helped create the content or that it did not act properly upon receiving actual or constructive notice of the content.²⁴³ This would prevent the problem of courts creating their own standards, but it may not prove any more predictable than allowing courts to make decisions about who is a content "developer" based on the existing statutory language. A more promising change to the statute would be to institute a modified notice and takedown scheme, similar but not identical to what exists under copyright law, which would allow people who were directly impacted by objectionable content to petition to have the content removed from the site and which would provide a mechanism for deterring frivolous requests.²⁴⁴ The ideal legislative solu-

238. The resulting text would define an information content provider as: any person or entity that is responsible for the creation of information provided through the Internet or any other interactive computer service. Cf. 47 U.S.C. § 230(f)(3) (2000).

239. One possible, although far from perfect, definition for content "creation" would be: the act of contributing original text, images, sound, or other information to the Internet.

240. See discussion *supra* Section V.A.

241. *Roommates III*, 521 F.3d at 1164 n.15.

242. See Lemley, *supra* note 8, at 110-12 (noting logistical problems that would be caused by removing the safe harbor for Internet intermediaries).

243. See Bayard, *supra* note 143 (suggesting possibilities for standards, including an inducement standard); Blumstein, *supra* note 152, at 424 (proposing "reckless disregard" standard).

244. See Lemley, *supra* note 8, at 115-18 (describing existing trademark-dispute resolution pro-

tion would affirm the interests of aggrieved parties instead of merely relying on formal classifications and soon-to-be-outdated assumptions about the nature of Internet publishing.

Internet industry groups likely would argue that any such changes would chill development and free speech on the Internet.²⁴⁵ However, Congress should recognize the legitimate policy interest in preserving Internet users' reputations and privacy,²⁴⁶ an interest that has been all but lost in a regime that gives sites such as JuicyCampus.com the generous benefit of immunity without the slightest burden of responsibility.²⁴⁷

VI. CONCLUSION

The *Roommates.com* decision demonstrated the ample, perhaps limitless room available under 47 U.S.C. § 230 for courts to establish that an interactive website is the “developer” of third-party content and therefore is not immune to suit based on that content. Courts faced with similar cases involving interactive websites should acknowledge this problem and should judge whether it is possible to resolve the issue of immunity under § 230 based on content that is undoubtedly created by the website. To eliminate the existing ambiguity within the statute, Congress should drop the concept of “development” from the statute and refine the definition of content “creation.” Finally, Congress should consider a creative way to balance the interests of individuals against the interests of the Internet industry.

cedures as ideal model for standardized Internet “safe harbor” law, which would apply to tort claims as well as intellectual property). The trademark model, which applies to both online and offline content, protects “innocent infringers” from paying monetary damages and provides for injunctive relief only when it will not interfere with the publisher’s normal operations. *Id.* at 105-06. Lemley suggests using the trademark law as a model for standardized Internet immunity but clarifying the definition of an “innocent” intermediary and adding streamlined procedures for arbitration and for subpoenas of individual defendants’ information. *Id.* at 115-18. Lemley also acknowledges the jurisdictional problems posed by the Internet’s international reach and urges governmental leaders to press for treaty obligations recognizing U.S. safe-harbor principles. *Id.* at 118-19.

245. See, e.g., Holland, *supra* note 228, at 395.

246. See, e.g., *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990) (recognizing that “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation”) (citing *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

247. Cf. *Blumenthal v. Drudge*, 992 F. Supp. 44, 52-53 (D.D.C. 1998) (discussing benefits without burdens in the context of § 230).