Curtailing Online Service Provider Immunity from Liability: An Advocacy for the Extension of *Roommates.com*

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INTRODUCTION

Section 230 of the Communications Decency Act (CDA)[1] was enacted following the controversial decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, where an interactive computer service provider was held liable for a libelous message posted by a user on one of its financial message boards.[2] The court determined that the service provider was a "publisher" of the libelous message for the purposes of state law because it had engaged in screening and moderating of other objectionable posts on its message boards but failed to remove the libelous message in question.[3] Because the service provider voluntarily self-policed *some* of the user-generated content on its forum, the court held that the service provider assumed liability, in a manner akin to a newspaper publisher, for *all* messages on its bulletin board that defamed third parties.[4]

The decision in *Stratton* affirmed that, by screening some of those posts, the service provider assumed liability for all content on its message board. The message board in question received over 60,000 posts a day.[5]

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1. Pub. L. No. 104–104, 79, 110 Stat. 56 (codified as amended at 47 U.S.C. § 230 (1996)).

2. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *5 (N.Y. Sup. May 24, 1995) (superseded by statute).

3. *Id.* at *4 ("PRODIGY has uniquely arrogated to itself the role of determining what is proper for its members to post and read on its bulletin boards. Based on the foregoing, this Court is compelled to conclude that for the purposes of Plaintiffs' claims in this action, PRODIGY is a publisher rather than a distributor.").

4. *Id.*

5. *Id.* at *3.

As one court opined, "[t]he amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen . . . for possible problems."[6] The same court recognized that because only service providers who voluntarily regulated at least some user-generated material risked subjecting themselves to liability, service providers could avoid liability by giving up moderating content altogether and simply acting as blind hosts.[7] By dissuading service providers from hosting and moderating user-generated content, *Stratton* thus ran counter to the congressional goal of facilitating the growth of online services that Americans were becoming increasingly reliant upon for engagement with politics, education, culture, and entertainment.[8]

Perturbed by the ramifications of imposing "tort liability on service providers for the communications of others[,]"[9] Congress responded to *Stratton* by distinguishing the "provider or user of an interactive computer service" from the "publisher or speaker of any information" in § 230 of the CDA.[10] To make this distinction clear, interactive computer service providers were given safe harbor from liability for the content generated by users of their services.[11] Congress also extended this safe harbor to service providers who, like the defendant in *Stratton*, engaged in some degree of self-regulation.[12]

Congress recognized that "interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[13] For that reason, Congress thought it was in the best interests of the United States to abstain from intrusive government regulation that might otherwise stifle the growth of the Internet as a "vibrant and competitive free market" of various types of information and services.[14]

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6. Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

7. *See id.*

8. Telecommunications Act of 1996, Pub. L. No. 104–104, § 230(a)–(b), 110 Stat. 56.

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

10. Telecommunications Act of 1996, Pub. L. No. 104–104, § 230(c)(1), 110 Stat. 56.

11. *Id.* ("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.").

12. *Id.* § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material . . . [or] any action taken to . . . make available to information content providers or others the technical means to restrict access to material . . . .").

13. *Id.* § 230(a)(3).

14. *Id.* § 230(b)(2).

Simultaneously, Congress sought to address concerns over the trend of obscene or otherwise objectionable content proliferating the Internet; namely, the lack of regulations on content accessible by children.[15]

In response, Congress declared in § 230 that the policy of the United States would be to "remove disincentives for the development and utilization of blocking and filtering technologies" that could be employed by end users to screen material they deemed objectionable or inappropriate.[16] Section 230's purpose was to maximize user control over content, without regulating the existence of the content itself or forcing service providers to accept liability for the objectionable actions of third parties.[17] As a result, the onus was placed on individuals, families, and schools to screen content that they deemed objectionable, especially as it pertained to children's access to that content.[18]

However, in the decades that followed the codification of § 230, the kinds of services that were available online continued to evolve, and § 230's safe harbor was interpreted broadly, to shield many different types of service providers from liability. This Note discusses one of the most notable contemporary challenges to broad § 230 immunity: the Ninth Circuit's ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.[19] Part I provides an overview of the way that § 230 immunity has been applied in the absence of the *Roommates.com* holding. Part II summarizes the *Roommates.com* ruling and evaluates the approach taken by the Ninth Circuit in curtailing the broad application of § 230 immunity while still preserving the congressional intent. Part III addresses some of the most pressing challenges to the *Roommates.com* holding and considers alternatives that have been suggested by other advocates. Part IV then makes a case that the extension of the *Roommates.com* holding is the most effective means of achieving the congressional goals of § 230.

I. APPLICATION OF § 230 IMMUNITY

Three elements are required for an entity to receive immunity from tort liability under § 230: "the defendant must be a provider or user of an 'interactive computer service'; the asserted claims must treat the defendant as a publisher or speaker of information; and the information must be provided by another 'information content provider.'"[20]

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15. *Id.* § 230(b)(4).

16. *Id.*

17. *Id.*, § 230(b)(3).

18. *Id.*

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

20. Schneider v. Amazon.com, Inc., 31 P.3d 37, 39 (Wash. Ct. App. 2001).

Section 230 defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[21] This definition has been applied to a number of contemporary online services, such as merchants,[22] search engines,[23] and web hosts.[24]

However, immunity only extends to service providers and users insofar as they act as an intermediary for third-party content and does not apply when they act as information content providers themselves.[25] Section 230 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."[26]

To this end, the courts provide some guidance for what types of conduct a provider or user of an interactive computer service may engage in without accepting liability as a publisher or speaker of third-party content. Archiving, caching, or simply providing access to offensive content posted by third parties does not transform a service provider into an information content provider.[27] Additionally, efforts to self-regulate offensive third-party content will not burden service providers with liability, "even where the self-policing is unsuccessful or not even attempted."[28]

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21. 47 U.S.C. § 230(f)(2) (2012).

22. *See, e.g.*, *Schneider*, 31 P.3d at 43 (holding that Amazon's ability to edit third-party posts and claim licensing rights on the posted material did not transform Amazon into an information content provider: "Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted. . . . Amazon was not a content provider under the allegations in Schneider's complaint.") (footnote omitted).

23. *See, e.g.*, Parker v. Google, Inc., 422 F.Supp. 2d 492, 501 (E.D. Pa. 2006), *aff'd*, 242 F. App'x 833 (3d Cir. 2007) (holding that because Google only archived, cached, or simply provided access to defamatory content created by third parties, it was an interactive computer service and not an information content provider: "The defamatory statements . . . were created by users of USENET and other internet users . . . . Google cannot be held liable for the claims of defamation, invasion of privacy, and negligence alleged here.").

24. *See, e.g.*, Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003) (holding that a web host was immune from liability stemming from the publication of a defamatory message via his email listserv: "There is, however, no need here to decide whether a listserv or website itself fits the broad statutory definition of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services.") (superseded by statute).

25. *See id.*

26. 47 U.S.C. § 230(f)(3) (2012).

27. *See, e.g.*, *Parker*, 422 F.Supp. 2d at 492.

28. *See* Blumenthal v. Drudge, 992 F.Supp. 44, 52 (D.D.C. 1998).

II. ROOMMATES.COM: OVERVIEW

While a service provider does not assume liability when it acts as a passive conduit for a facilitating a third party's unlawful behavior,[29] the Ninth Circuit has ruled that designing a service that actively facilitates illegal content or conduct violates the limitations of § 230 immunity, effectively transforming the service provider into an information content provider.[30]

The website, Roommates.com,[31] provided an online service "designed to match people renting out spare rooms with people looking for a place to live."[32] To accomplish this, Roommates.com asked users[33] to create a profile for the service, which required users to "disclose [their] sex, sexual orientation and whether [they] would bring children to a household . . . [as well as state their] preferences in roommates with respect to the same three criteria: sex, sexual orientation and whether they will bring children to the household."[34] Answers to these questions were not open-ended; users made a selection from drop-down menus,[35] populated by options provided by Roommates.com, to indicate their responses.[36] This information was then used by the website's search engine; a tool that "limit[ed] the listings available to subscribers based on sex, sexual orientation and presence of children" by hiding certain listings based on those stated attributes and preferences.[37]

Secondarily, the site encouraged users to augment the information on their profiles with an "Additional Comments" section that allowed users to "[describe] themselves and their desired roommate in an open-ended essay."[38] Whereas, the initial profile creation obliged users to select

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29. *See, e.g.*, Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008) ("If Craigslist 'causes' the discriminatory notices, then so do phone companies and courier services . . . , yet no one could think that Microsoft and Dell are liable for 'causing' discriminatory advertisements. . . . [The plaintiff] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination.").

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

31. "[T]he company goes by the singular name 'Roommate.com, LLC' but pluralizes its website's URL." *Id.* at 1161 n.2.

32. *Id.* at 1161.

33. The terms "users" and "subscribers" are used interchangeably in referring to people who utilize the services offered by Roommates.com. *Id.* at 1162.

34. *Id.* at 1161.

35. Drop-down menus, as they function here, allow a user to select answers to questions only from among options provided by the website. *Id.* at 1165 n.17.

36. *Id.* at 1165 ("For example, Roommate requires subscribers to specify . . . whether they are 'Male' or 'Female[,]' . . . whether there are currently 'Straight male(s),' 'Gay male(s),' 'Straight female(s)[,]' or 'Lesbian(s)' living in the dwelling[,] . . . [and] whether they are willing to live with 'Straight or gay' males, only with 'Straight' males, only with 'Gay' males or with 'No males.'").

37. *Id.* at 1169.

38. *Id.* at 1161.

responses to questions from a list of pre-constructed options, the "Additional Comments" section allowed users to input any information they wanted.[39]

Plaintiffs sued in federal court, alleging that Roommates.com's business violated the federal Fair Housing Act (FHA)[40] and California housing discrimination laws.[41] The district court held that Roommates.com was immune under § 230 of the CDA, 47 U.S.C. § 230(c), which was the issue on appellate review.[42]

The appellate court reversed the circuit court in part, holding that Roommates.com was liable for claims arising from (1) the obligatory components of profile creation and (2) the website's search engine parameters.[43] However, Roommates.com did qualify for § 230 immunity from liability arising from the "Additional Comments" section of the website.[44]

A. Majority Opinion

The appellate court emphasized the distinction that "[the grant of § 230 immunity] applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content."[45]

The court recognized that "the term 'develop' could [be interpreted broadly.] . . . But to read the term so broadly would defeat the purposes of [S]ection 230 by swallowing up every bit of the immunity that the section otherwise provides."[46] However, the court was also concerned that restricting the term "development" as applying "only to content that originates entirely with the website—as the dissent would seem to suggest—ignore[d] the words 'development . . . in part' in the [statute.]"[47] To strike a balance that granted § 230 immunity to "passive conduits" while leaving out genuine "co-developers" of content, the court interpreted the term "development" as referring "not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness."[48]

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39. *Id.* at 1174.
40. 42 U.S.C. §§ 3601–31 (1968).
41. *Roommates.com*, 521 F.3d at 1162.
42. *Id.*
43. *Id.* at 1169.
44. *Id.* at 1173–74.
45. *Id.* at 1162 (citing 47 U.S.C. § 230(c)).
46. *Id.* at 1167.
47. *Id.*
48. *Id.* at 1167–68.

As such, the court held that Roommates.com was liable for claims arising from the profile creation and search engine components of its service because the cultivation and dissemination of the offensive material produced via these components was "a collaborative effort between Roommate and the [user]."[49] The court noted that while the users themselves are obviously liable as content providers, this "does not preclude Roommate from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles."[50]

In addressing why Roommates.com was liable for the basic profiles of its users, the court highlighted that users were obliged to identify their sex and sexual orientation (and preferences in prospective roommates or tenants) via "a limited set of pre-populated answers" that Roommates.com had curated.[51] Therefore, in creating a profile that displayed discriminatory preferences, users were only responding to questions in a manner that Roommates.com expressly required for use of its service.[52] Consequently, Roommates.com "[became] much more than a passive transmitter of information provided by others; it [became] the developer, at least in part, of that information."[53]

Meanwhile, the court also held that Roommates.com was liable for the effects of its search engine because its search engine "differs materially from generic search engines such as Google . . . in that Roommate designed its system to use allegedly unlawful criteria so as to limit the results of each search, and to force users to participate in its discriminatory process."[54] In further distinguishing Roommates.com's search engine from more generic engines, the court stated that "Roommate's search is designed to make it more difficult or impossible for individuals with certain protected characteristics to find housing—something the law prohibits. By contrast, ordinary search engines do not use unlawful criteria to limit the scope of searches conducted on them[.]"[55]

However, the court did grant § 230 immunity as it pertained to liability arising from the "Additional Comments" section of user profiles because that section "[came] entirely from subscribers" and was not influenced in any way by Roommates.com.[56] Although the "Additional Comments" section of profiles often contained incredibly offensive and

49. *Id.* at 1167.
50. *Id.* at 1165.
51. *Id.* at 1166.
52. *Id.* at 1161.
53. *Id.* at 1166.
54. *Id.* at 1167.
55. *Id.*
56. *Id.* at 1173–74.

provocative language,[57] Roommates.com did not "encourage or enhance any discriminatory content created by users"; instead, Roommates.com only offered a "simple, generic prompt" that users were free to answer in any manner.[58]

B. Concerns of the Dissent

In responding to the majority's holding, the dissent in *Roommates.com* foremost characterized the majority as offering an "unprecedented expansion of liability for Internet service providers [that would threaten] to chill the robust development of the Internet[,]"[59] setting the Ninth Circuit "apart from five [other] circuits, contravene[ing] congressional intent[,] and violat[ing] the spirit and serendipity of the Internet."[60]

In addition to taking issue with the majority's apparent rogue expansion of liability for a number of service providers, the dissent criticized the majority for offering a confusing and inappropriate metric for deciding when a service provider has contributed materially to the illicit content in question.[61] The dissent claimed that "the majority's immunity analysis is built on substantive liability . . . depend[ing] on whether a webhost materially contributed to the unlawfulness of the information."[62] According to the dissent, this is the wrong inquiry, and the majority must first answer whether "substantive liability may be reached in the first place."[63]

Moreover, the dissent emphasized the impracticality of attempting to extend liability in the way described by the majority, noting that many "websites use prompts and drop-down menus . . . . Some of these sites are innocuous while others may not be. . . . But that is not the point. The majority's definition of 'development' would [mean] . . . [v]irtually every site could be responsible in part for developing content."[64] Specifically, the dissent questioned the efficacy of the majority's supposed carve out for providers of neutral tools, such as Google, noting that "Google is more than a match engine: it ranks search results, provides prompts beyond what

57. *Id.* at 1173 ("Subscribers provide a variety of provocative, and often very revealing, answers. The contents range from subscribers who '[p]ref[er] white Male roommates'" to "those who are 'NOT looking for black Muslims.'" (alterations in original)).

58. *Id.* at 1174.

59. *Id.* at 1176 (McKeown, J., dissenting).

60. *Id.* at 1177.

61. *Id.* at 1176 ("[I]nteractive service providers [would be] left scratching their heads and wondering where immunity ends and liability begins.").

62. *Id.* at 1182–83.

63. *Id.* at 1183.

64. *Id.*

the user enters, and answers questions. In contrast, Roommate . . . searches information and criteria provided by the user, not Roommate. It should be afforded no less protection than Google, Yahoo!, or other search engines."[65]

C. Majority Response and Clarification

The majority rebut the dissent's argument that the holding threatened to "chill the robust development of the Internet[,]"[66] by reasoning that the interpretation of the term "develop" was not as broad and expansive as the dissent asserted.[67] In response to the dissent's attempt to construe the term "develop" to exclude service providers like Roommates.com from liability, the majority argued that "[t]he dissent makes no attempt to explain or offer examples as to how its interpretation of the statute leaves room for 'development' as a separate basis for a website to lose its immunity" despite being advised by the Supreme Court that redundancy or duplication of terms should be avoided whenever possible.[68]

To further assuage the fears of the dissent, the majority articulated several examples of when a service provider does or does not "develop" content, at least in part, within the construction recognized by the Ninth Circuit.[69]

First, when a third party uses "an ordinary search engine[, like Google,] to query for a 'white roommate,' the search engine has not contributed to any alleged unlawfulness in the individual's conduct; providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to 'development' for purposes of the immunity exception."[70] Roommates.com did not merely provide neutral tools in that its search engine was designed in a way to specifically reinforce and facilitate discriminatory renting, thereby contributing materially to the development of offensive content.[71]

Second, "a dating [or other similar] website that requires users to enter their sex, race, religion and marital status through drop-down menus, and . . . [allows searches] along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality[.]"[72]

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65. *Id.*

66. *Id.* at 1176.

67. *Id.* at 1168 (majority opinion).

68. *Id.*

69. *Id.* at 1169.

70. *Id.*

71. *Id.* at 1172 ("By sharp contrast, Roommate's website is designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on criteria that appear to be prohibited by the FHA.").

72. *Id.* at 1169.

Roommates.com failed to retain immunity because its drop-down menu options and searching criteria were alleged to have violated the FHA.[73]

Third, "a housing website that allows users to specify whether they will or will not receive emails by means of *user-defined* criteria . . . [is] immune, so long as it does not *require* the use of discriminatory criteria."[74] Again, Roommates.com required users to input discriminatory criteria in a user's roommate preferences as a prerequisite for utilizing its service.[75]

Finally, a website that "edits user-created content—such as by correcting spelling, removing obscenity or trimming for length—retains [its] immunity for any illegality in the user-created content, provided that the edits are unrelated to the illegality."[76] However, the court clarified that a website that edits third-party content in a manner that does contribute to the illegality of the content by "transform[ing] an innocent message into a libelous one[,] is directly involved in the alleged illegality and thus not immune."[77] Hence, Roommates.com was not liable for the "Additional Comments" portions of user profiles because it had not edited any third-party content or provided guidelines to constrain what could be published.[78]

III. ALTERNATIVES TO EXTENDING THE NINTH CIRCUIT DECISION IN *ROOMMATES.COM*

Many advocates of broad § 230 immunity have questioned the viability of extending the majority holding in *Roommates.com* for fear that such an extension would curtail broad immunity at the expense of the status of the internet as an open platform for innovation. Several alternatives have been proposed that claim to better balance concerns of unchecked immunity without rendering § 230 wholly inefficacious, including: (1) the adoption of bad faith exceptions,[79] (2) the reclassification of service providers based on whether or not they engage in business through the internet as distributors,[80] and (3) the recognition

73. *Id.* at 1172.

74. *Id.* at 1169 (second emphasis added).

75. *Id.* at 1172.

76. *Id.* at 1169.

77. *Id.*

78. *Id*. at 1173–74 ("Roommate publishes these comments as written. It does not provide any specific guidance as to what the essay should contain, nor does it urge subscribers to input discriminatory preferences. . . . This is precisely the kind of situation for which [S]ection 230 was designed to provide immunity.").

79. *See generally* David Lukmire, Note, *Can the Courts Tame the Communications Decency Act?: The Reverberations of* Zeran v. America Online, 66 N.Y.U. ANN. SURV. AM. L. 371 (2010).

80. *See generally* Joey Ou, Note, *The Overexpansion of the Communications Decency Act Safe Harbor*, 35 HASTINGS COMM. & ENT. L.J. 455 (2013).

that § 230 only provides immunity insofar as the CDA does not conflict with the FHA or the stated purpose of the legislature.[81]

A. Bad Faith Exception

One author posits that an effective solution would be to create a bad faith exception that "would prevent websites and [internet service providers] from asserting [S]ection 230 immunity if they acted unreasonably in either posting or failing to remove defamatory content."[82] The author supports this solution because "courts evaluating [S]ection 230 claims usually refuse to inquire into the behavior of the Internet entity hosting allegedly defamatory content."[83] Although the author acknowledges that "subjective intent will often be implicit in a determination of a web entity's acting in bad faith," he asserts that "an objective bad faith standard is more comprehensive and easier to administer."[84] To this end, he proposes that we look to Wisconsin insurance law,[85] where objective bad faith is analyzed under a reasonableness standard.[86] He suggests that "adapted for purposes of defamation law," a website or ISP could be held to act in bad faith if it "either allows defamatory content postings or fails to remove them once notified."[87] He further clarifies that "while this language sounds of negligence, the bad faith standard would rely on affirmative acts such as failure to remove an obviously defamatory posting, making the effective level of culpability higher[,]" allowing courts to take a more holistic approach where they "apply this flexible standard based on all of the circumstances of the case before deciding whether the website or ISP is entitled to [S]ection 230 immunity."[88]

Applying this concept to *Roommates.com*, the author notes that "the court indicated that there are limits to the control that websites may have over third-party content if they are to claim [S]ection 230 immunity. . . . Roommates suggests that courts may be willing to police the boundaries of [S]ection 230 immunity, and that a bad faith exception does not present a great doctrinal obstacle."[89] As such, sites like

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81. *See generally* Jennifer C. Chang, *In Search of Fair Housing in Cyberspace: The Implication of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969 (2002).

82. Lukmire, *supra* note 79, at 407.

83. *Id.*

84. *Id.* at 408.

85. Anderson v. Cont'l Ins. Co., 271 N.W.2d 368, 376–77 (Wis. 1978). "[B]ad faith can be alleged only if the facts pleaded would, on the basis of an objective standard, show the absence of a reasonable basis for denying the claim . . . . " *Id.* at 377.

86. Lukmire, *supra* note 79, at 408.

87. *Id.*

88. *Id.* at 408–09.

89. *Id.* at 408.

Roommates.com would be held liable as bad faith actors if they "[seem] to invite defamatory content[,]" especially when the sites have "apparent awareness of the offending material."[90]

However, a bad faith standard is only efficacious insofar as a plaintiff can demonstrate that the service provider in question had knowledge of and failed to act appropriately with respect to unlawful content posted by a third party.[91] Because the author suggests that liability would only be extended to situations where the service provider allows defamatory content or fails to remove it "once notified,"[92] service providers would have to either (1) implement a reporting system, or (2) actively police content. Little consideration is given to the costs associated with both options. A service provider would need to employ moderators in proportion to the amount of user-generated content. With the staggering breadth of daily user submissions on highly trafficked websites, it is difficult to imagine most companies being able to employ enough moderators to review all the content. Ultimately, a bad faith standard would likely prove to be cost-prohibitive to all but the largest of service providers dealing in the facilitation of third-party activities.

Moreover, the author concedes that this method "would necessarily result in higher litigation costs for defendants"; although, he argues that "courts could still impose . . . sanctions to discourage frivolous claims while preventing online entities from 'abusing' CDA immunity."[93] Even assuming that such sanctions would be sufficient to curtail frivolous claims, it is not difficult to imagine that a bad faith exception would intimidate several smaller service providers due to the tangible prospect of facing extended litigation over whether a particular piece of third-party content is "obviously defamatory."[94]

B. Reclassification Based on Engagement in Business as a Distributor

Another author proposes that a solution may be "to treat ISPs and websites that conduct business through the Internet as distributors[,]" with service providers qualifying for immunity based on their level of Internet connectivity.[95] He suggests using the three categories discussed in *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*:[96] (1) websites that clearly do business over the Internet, (2) websites where a user can

90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 409.
94. *Id.*
95. Ou, *supra* note 80, at 468–69.
96. Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D. Pa. 1997).

exchange information with the host, and (3) websites that simply post information.[97] He envisions that the first category will not qualify for § 230 protection, the second category will not qualify for immunity "if there is enough interactivity and the exchanged information is of a commercial nature[,]" and the third category will only qualify "if the information was not solicited or where the ISPs or websites knew or should have known the information was defamatory or against protected civil rights."[98]

This approach is focused on addressing the chilling effect of widespread liability by only applying liability to service providers with a commercial stake in the transaction of third-party content. The author argues that "if a website generates income through user provided content or if its revenue is based on viewership of third party content," then it should not qualify for § 230 immunity because "[t]hese websites are profitable, and the additional cost imposed by distributor liability would not cripple their growth."[99] As such, the author contends that this model, as applied to *Roommates.com*, would preserve the Ninth Circuit holding that Roommates.com would not qualify for § 230 immunity "because it would be classified [under the first category,] as a website clearly doing business on the Internet."[100]

However, this method neglects to address liability for third-party content on websites operated for non-commercial purposes, and it assumes that the majority of offensive third-party content is necessarily tied the financial benefit of the service provider. While this method may find solvency in instances like *Roommates.com* where the website clearly operates as a business,[101] it ignores other service providers that choose not to monetize.

The author predicates his proposal on the assumption that most service providers are profitable enough to afford self-regulation, but his solution invariably encumbers service providers who do not generate enough income from their service to sufficiently reinvest in self-regulation.[102] This solution ignores whether the service provider is actually capable of using its decidedly modest income to reinvest in something as

97. Ou, *supra* note 80, at 469.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1161 (9th Cir. 2008).

102. Ou, *supra* note 80, at 469 ("Therefore, if a website generates income through user provided content or if its revenue is based on viewership of third party content, then it does not qualify for section 230 immunity and would be required to self-monitor. These websites are profitable, and the additional cost imposed by distributor liability would not cripple their growth.").

resource intensive as self-regulating content. Thus, a message board that only generates nominal revenue via advertisements or subscription fees would be accepting liability simply for monetizing regardless of how much profit it made. At the same time, a non-commercial message board that acts as a haven for hate speech would not incur liability, simply because it elects not to generate revenue. This disparity incentivizes service providers who anticipate the possibility of offensive third-party content to either (1) provide their service free of charge or (2) pass on the cost of self-regulation to users. The former means that this solution fails to address some of the more pernicious instances of service providers facilitating defamatory third-party content; the latter means that this solution ultimately hurts the market viability of several services, potentially hamstringing further innovation and development.

C. Giving the FHA Effect, Absent Irreconcilable Conflict or Legislative Comment

Finally, one author specifically addresses the issue of whether the CDA-created exceptions to FHA liability are valid, by looking at the way that federal courts treat other conflicts between two federal statutes.[103] This solution intends to achieve an appropriate balance by attempting to give effect to Congress's stated intentions both when it enacted the CDA and the FHA.

She argues that "the approach taken by federal courts confronting potential conflicts between two federal statutes in other contexts suggests that both statutes must be given effect if possible[,]"[104] citing a case in which the Supreme Court evaluated the facial conflict between two pieces of federal legislation to determine if one impliedly appealed the other.[105] There, the Court held that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."[106] In instances where two statutes can be construed as to permit them to coexist, "it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[107]

As applied here, she contends that "we should interpret the CDA to abrogate the FHA only if there has been a clearly expressed congressional

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103. Chang, *supra* note 81, at 1001–02.

104. *Id.* at 1002.

105. *Id.* (citing Morton v. Mancari, 417 U.S. 535, 550 (1974)). In *Morton*, the Court stated that "[a] provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race." *Morton*, 417 U.S. at 550.

106. *Morton*, 417 U.S. at 550–51.

107. *Id.* at 551.

intention of such, or if the substance and goals of the two statutes are such that we cannot preserve them both."[108] Ostensibly, such a standard could be applied to virtually any federal statute that may come into conflict with the CDA. Regarding the conflict between the FHA and CDA, the author observes that "a legal regime that allow[s] the Internet to become a safe haven for housing discrimination could have disastrous consequences for the important goals that Congress put on the national agenda in 1968[,]"[109] when the FHA was codified. She reasons that "Congress could not have intended, in [later] passing the CDA, to undermine these monumental commitments with nary a discussion of the possible consequences."[110] Thus, the author posits that silence as to congressional intent to limit the reach of the FHA should be interpreted to mean that the CDA does not dilute the FHA's applicability.[111]

However, this solution is limited by whether congressional intent in any given instance can be reasonably surmised. Furthermore, while there is no record of congressional intent as to the CDA's specific effect on the applicability of the FHA, it is disingenuous to say that Congress was entirely mute on the broader issue of resolving conflicts between the CDA and other federal statutes. In fact, Congress expressly exempts certain areas of law, such as intellectual property law and federal criminal laws, from the scope of § 230 immunity.[112] As such, extrapolating meaning from silence as to applicability of the FHA, when Congress explicitly discussed other federal statutes, is a precarious endeavor.

In codifying § 230, Congress stated that one of its policy goals was "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*."[113] Congress further elaborated later in the same policy statement that it sought to ensure the "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer."[114] Altogether, this language may indicate congressional intent to favor the CDA in irreconcilable conflicts with other legislation, except where the conflicting legislation pertains specifically to the enumerated evils of obscenity, stalking, and harassment. This language can also be interpreted to mean

108. Chang, *supra* note 81, at 1002.

109. *Id.* at 1001.

110. *Id.*

111. *Id.* at 1003 ("The complete legislative silence as to the potential interaction between § 230 and the FHA compels a conclusion that there was no clear or manifest congressional intent that § 230 should limit the applicability of the FHA's advertising provisions to OSPs.").

112. 47 U.S.C. § 230(e)(2) (1996).

113. *Id.* § 230(b)(2) (emphasis added).

114. *Id.* § 230(b)(5).

that Congress did not intend to limit the FHA and similar federal statutes, but it instead intended to curtail the applicability of federal laws that would otherwise impose liability on service providers for facilitating other types of criminal acts.

Moreover, treating congressional silence as implicit evidence of congressional intent may generate confusion amongst service providers as to which federal statutes apply to them. Without the resources necessary to sift through lengthy legislative histories for evidence of explicit or implicit congressional intent, new and innovative service providers may be deterred from entering the marketplace.

IV. EXTENSION OF THE NINTH CIRCUIT HOLDING

Extending the holding in *Roommates.com* should be preferred to other alternatives because the holding provides a judicially manageable scheme for discerning between distinct types of service providers and apportioning liability consistent with the congressional intent of § 230.[115] While service providers should continue to receive immunity from liability when passively interacting with third-party content, immunity should not extend to service providers who, by making material contributions to offensive third-party content, become information content providers themselves. Promulgating the scheme articulated in *Roommates.com* would ensure that courts, armed with an effective method for categorizing defendants, are consistent in their approach to assigning liability. This would in turn ensure that service providers are well-informed as to the kinds of activities that will compromise their immunity.

In *Roommates.com*, the court identified two terms that could be used to classify service providers and make future cases more judicially manageable: "passive conduits" and "co-developers."[116] The use of these terms would create a categorical distinction between service providers that merely provide neutral tools and service providers that have "materially contribut[ed]"[117] to allegedly unlawful content. The former would receive § 230 immunity as a passive conduit for any illicit third-party content; the latter would be liable for third-party content as co-developers.[118]

The *Roommates.com* holding does not define a material contribution; however, a "material contribution" should be defined as (1) any action on the part of the service provider that modifies the substance of third-party content, such as to alter its original meaning to turn it from something

115. *Id.* § 230(b)(1).

116. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1167 (9th Cir. 2008).

117. *Id.* at 1167–68.

118. *Id.*

innocuous into something illicit, and (2) any aspect of a service that necessarily obliges users to engage in illicit commentary or actions via the service. For example, *Roommates.com* materially contributed to third-party content because it required users to list discriminatory preferences.[119] In this way, materiality would be measured in a way consistent with the myriad examples articulated by the majority opinion.[120] Through those illustrations, the majority exemplified a desire to hold service providers accountable when they offer tools engineered to make illicit content a virtually certain consequence of their use, as well as when service providers modify third-party content to the extent that it transforms the original meaning of the content.[121]

To that end, the proposed definition of "material contribution" would ensure that § 230 affords immunity to a wide audience of service providers seeking to provide neutral tools, while precluding service providers that contribute in a "direct and palpable"[122] way to the creation of illicit content. Service providers will thus be emboldened to continue developing societally beneficial online services, while active participants in the creation of offensive content will no longer elude liability due to the overbroad application of § 230.

Applying the standards articulated in *Roommates.com* to a case like *Stratton* illustrates the propriety of relying upon "material contributions" to decide whether § 230 immunity should apply. Under an extension of the *Roommates.com* holding, the defendant in *Stratton* would receive § 230 immunity because it did not modify the substance of the offensive third-party message board posts, nor did any aspect of its service oblige third-party users to generate offensive content. Moreover, the defendant would not be penalized for attempting to engage in self-regulation of third-party content, thereby encouraging other service providers to engage in self-regulation by assuaging any apprehension that they might lose § 230 immunity by doing so.

This outcome is better aligned with the congressional intent of § 230 than probable outcomes that would result from the other proposed alternatives discussed in Part III. For example, the defendant in *Stratton* would potentially suffer liability under a bad faith exception regime because the defendant engaged in some self-policing of content and "held itself out to the public and its members as controlling the content of its

119. *Id.* at 1161.
120. *Id.* at 1169.
121. *Id.*
122. *Id.*

computer bulletin boards."[123] This outcome would suggest to other service providers that § 230 immunity is best secured by foregoing self-regulation entirely to avoid notice of offensive content.

Similarly, the defendant in *Stratton* would likely incur liability under an approach categorizing service providers based on their engagement in online business. Because classification under that type of regime necessarily turns on the service provider's profitability, the defendant in *Stratton* would be held liable for posts on its message board, assuming the message board was generating income. This result is problematic because it forces service providers to choose between redirecting profits towards extensive self-regulation measures or abandoning commercial aspirations entirely. Particularly for newer startups, the inability to reliably monetize a service without incurring liability may cause innovation to stagnate as entrepreneurs see less opportunity for profit. Only established economic juggernauts could possibly hope to take on the burden of self-regulation without crumbling financially. Comparatively, the method adopted in *Roommates.com* would enable all passive conduits to profit and utilize their earnings freely without opening themselves up to liability, allowing even modestly sized service providers to find success and contribute to a more diverse marketplace of online services.

While the dissent in *Roommates.com* prophesizes "doom and gloom for countless Internet services[,]" the majority's holding is consistent with the intent of Congress "to preserve the free-flowing nature of Internet speech and commerce without unduly prejudicing the enforcement of other important state and federal laws."[124] As the majority articulated, "[T]he message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be immune."[125] Service providers seeking to create neutral tools should feel secure in their ability to operate without fear of incurring liability from the actions of third-party users.

CONCLUSION

Until the United States Supreme Court offers a definitive answer on applying § 230 immunity, it is incumbent upon the circuit courts to evaluate the diverse options available to them and to incorporate some mechanism for narrowing the scope of § 230 to prevent abuse of the considerable immunities afforded by it. *Roommates.com* should be extended to provide that necessary mechanism because it best reflects the

123. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *10 (N.Y. Sup. May 24, 1995) (superseded by statute).

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

125. *Id.*

congressional motivations that drove the codification of § 230 in the aftermath of *Stratton*.

The line drawn should not be one based on the service provider's knowledge or intent, as consideration of those factors will tend to incentivize service providers to forego attempts at monitoring and self-regulating offensive content. Nor should liability turn on the financial viability of the service in question, as applying liability in this manner would penalize well-intentioned service providers that generate a menial profit while affording protections to non-profit service providers that create safe havens for illicit conduct.

Rather, liability should turn on whether there was a material contribution that implicates the service provider as an active participant in the generation of illicit content. A material contribution should be defined as (1) any action on the part of the service provider that modifies the substance of third-party content, such as to alter its original meaning to turn it from something innocuous into something illicit, and (2) any aspect of a service that necessarily obliges users to engage in illicit commentary or actions via the service. Using material contributions as the determining factor affords immunity to all passive creators of neutral tools—such as those enumerated by the majority in *Roommates.com*—and ensures that immunity will end at the point where service providers create tools that, by their design, obligate third-party users to create offensive material. In this way, the "vibrant and competitive free market"[126] valued by Congress can be preserved, and the treatment of the Internet as a unique venue for innovation can continue unfettered by excessive regulation.

126. 47 U.S.C. § 230(b)(2) (2012).