Neither the Seventh Circuit’s decision in *Craigslist* nor the Ninth Circuit’s decision in *Roommates.com* should be viewed as departing significantly from the broad immunity courts have consistently accorded interactive computer service providers under Section 230 of the Communications Decency Act.

Service providers should not rush to overcompensate by, for example, removing all multiple-choice questions or drop-down menus from their Web sites. Allowing users to provide standardized, fine-grained, and easily searchable sets of information and preferences has contributed to the growth, usefulness and pervasiveness of Internet communications in everyday life—just as Congress intended when it passed Section 230 over a decade ago.

**Contours of CDA Section 230 Immunity After *Craigslist* and *Roommates.com***

**By Patrick Carome and Samir Jain**

In the dozen years since Congress passed the Communications Decency Act, courts have repeatedly held that Section 230 of the Act (47 U.S.C. § 230) accords broad immunity to providers of interactive computer services, barring any lawsuit that would hold them liable for the third-party content on their networks. In recognition of the special nature and high volume of online communications, Congress gave interactive service providers protection going beyond the common law protections for traditional media. In the Web 2.0 revolution, where service providers are developing new and profitable ways to categorize vast troves of user-generated information, Section 230 remains critical to fostering innovation and growth in the Internet industry.

In highly anticipated decisions that were released in the past month, two federal courts of appeals had the opportunity to re-examine the broad reading of Section 230 adopted by numerous courts. Both cases involved discrimination claims under the Fair Housing Act. The Seventh Circuit, in *Chicago Lawyers Committee v. craigslist, Inc.*, __ F.3d __, 2008 WL 681168 (7th Cir. March 14, 2008), ruled that the popular online classifieds site could not be held liable for allegedly discriminatory housing advertisements posted to its network by its users. The court’s reasoning was rather opaque, however, and future plaintiffs may attempt to argue that the decision should be seen as endorsing a limited reading of Section 230. By contrast, the Ninth Circuit, in an en banc decision in *Fair Housing Council v. Roommates.com*, __ F.3d __, 2008 WL 879293 (9th Cir. Apr. 3, 2008), held that Section 230 does not immunize a roommate-matching Web site from liability for specifically requiring its users to include allegedly unlawful discriminatory statements in their online profiles and...
for categorizing and disseminating profiles based on those preferences. In reaching this result, however, the Roommates.com majority emphasized that its decision does not represent a significant retraction of Section 230 immunity.

Section 230's Role in Protecting The Robust Nature of Online Communications

Section 230 generally bars courts from imposing liability on a provider of an interactive computer service if doing so would "treat" the service provider as the "publisher or speaker" of information that originated with a third party. Specifically, Section 230 states that a provider of an interactive computer service cannot be "treated as the publisher or speaker of any information provided by another information content provider." An information content provider, in turn, is "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."

Therefore, unless one of Section 230's narrow exceptions applies, information on a service provider's network that is created and developed by a third party cannot be the basis for a lawsuit against the service provider itself.

Congress passed Section 230 to advance two important goals: facilitating the growth of Internet communications and removing disincentives to self-regulation by service providers that seek to remove offensive or illegal content. Congress understood that allowing service providers to be held liable for third-party speech would have a chilling effect on Internet communication by creating a "heckler's veto" under which service providers faced with complaints that particular content was tortious or otherwise unlawful would have strong reasons to remove the content regardless of the validity of the complaint. Additionally, Congress sought to negate the effect of a New York case, Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), in which Prodigy, the provider of an early online service, was held strictly liable as a "publisher" of a defamatory bulletin board posting. In the Stratton Oakmont court's view, Prodigy was subject to a publisher standard of liability because it had screened at least some of the content on its network and held itself out as a "family friendly" service. Congress found that the Stratton Oakmont decision actually discouraged service providers from regulating third-party content because doing so would increase, rather than decrease, their risk of liability. Section 230's grant of immunity corrected the incentive scheme.

Consistent with the statute's progressive and important purposes, courts have read Section 230 to provide broad-based immunity for service providers. Beginning with the Fourth Circuit's decision in Zeran v. America Online, 129 F.3d. 327 (4th Cir. 1997), courts have endorsed the view that this immunity bars any cause of action that would make service providers liable in the capacity of a publisher of third-party content. As Chief Judge Wilkinson recognized in Zeran, "Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum."

The First, Third, Ninth and Tenth Circuits—as well as a host of federal district and state trial and appellate courts—all adopted the Fourth Circuit's interpretation of Section 230, and the online industry has generally relied on this interpretation over the past decade.

Chicago Lawyers Committee v. Craigslist

The Craigslist decision, authored by Chief Judge Easterbrook and issued on March 14, is the first Seventh Circuit pronouncement on the scope of Section 230. The opinion, nevertheless, refrains from stating a definitive interpretation of the law. Given the relatively straightforward facts, the court did not need to do so.

The plaintiff in Craigslist argued that the Web site operator was liable under the Fair Housing Act for the allegedly discriminatory content of third-party housing ads that users had posted on the site. The Fair Housing Act makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. 3604 (c). Craigslist defended on the ground that Section 230, as interpreted by Zeran and subsequent decisions, barred the plaintiff's claims because the ads in question undisputably originated with third-party users.

In a 2006 decision, the district court explicitly rejected the Zeran interpretation and held that Section 230(c)(1) provides protection from only those claims for which, as a matter of applicable substantive law, publishing is formally an element of the cause of action. The district court nevertheless held that Craigslist was immune under Section 230 because Section 3604 (c) of the Fair Housing Act explicitly prohibits, among other things, the "publish[ing]" of discriminatory housing ads.

The district court in the Craigslist case cited, and obviously was heavily influenced by, dicta contained in a 2003 Seventh Circuit decision, Doe v. GTE Corp., 347 F.3d 655. In that case, a different district court judge had held that Section 230 immunized the defendants, Internet service providers, from liability arising from their passive dissemination of hidden-camera videos depicting student athletes undressing in locker rooms. The Seventh Circuit affirmed based on state law, without deciding anything regarding the scope or applicability of Section 230. Nevertheless, the Seventh Circuit's Doe v. GTE opinion, penned by Judge Easterbrook, included extensive, open-ended musings about whether Zeran and its progeny had fundamentally misconstrued Section 230(c)(1). Most of that dictum explored whether Section 230(c)(1) might be merely a "definitional" provision that provides no immunity at all, and that instead limits the reach of another part of the statute, Section 230(c)(2), which separately protects service providers from liability for censoring user-provided content. But the last sentence of the Doe v. GTE dicta mused that perhaps Section 230(c)(1) protects against only claims, such as defamation, for which "publishing" or "publication" is an essential element. That snippet of dicta, it seems, animated the district court's analysis in Craigslist.

In Craigslist, the Seventh Circuit affirmed the district court's holding that Section 230 barred the plaintiff's claim, but its grounds for doing so were not entirely
clear. Curiously, Judge Easterbrook’s opinion began with a lengthy, verbatim recitation of his entire dicta in the *Doe v. GTE* case. That dicta, Judge Easterbrook wrote in *Craigslist*, explains why Section 230 “cannot be understood as a general prohibition of civil liability for Web-site operators.” Judge Easterbrook also cited the Supreme Court’s decision in the famous *Grokster* copyright case as support for this same proposition. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, Ltd., 545 U.S. 913 (2005). This reference to *Grokster* is puzzling, given that Section 230 contains an explicit exception for intellectual property claims, which would seem to make that case irrelevant to assessing the statute’s scope.

Without adverting to the fact that it was doing so, Judge Easterbrook’s *Craigslist* decision in fact resoundingly rejects at least the bulk of his earlier *Doe v. GTE* dicta. While he earlier had mused at length that Section 230(c)(1) could be read as a “definitional” provision with no operative impact, the holding of *Craigslist* is that Section 230(c)(1), by itself, bars the plaintiff’s Fair Housing Act claim: “We read each [subsection] to do exactly what it says. So did the district court. A natural reading of 230(c)(1) in conjunction with [the Fair Housing Act] led that court to grant summary judgment for craigslist.”

As noted above, the district court in *Craigslist* relied on the last two lines of the *Doe v. GTE* dicta suggesting that the statute may provide immunity only as to claims that involve publishing as an element. But it was not clear if Judge Easterbrook was doing the same. His opinion merely noted that Craigslist could be held liable under the advertising provision of the FHA “only in a capacity as a publisher.” But there was no conclusive statement in the opinion’s text tying the availability of immunity to “publishing” as an element of a claim. Moreover, the opinion also recognized that immunity was appropriate because of the difficulties that would be imposed by requiring a service such as Craigslist to filter or screen for discriminatory content and how imposing such a duty would make the service impractical or substantially increase its costs. That, of course, would be true regardless of whether the claim at issue technically happened to have publication as an element. Indeed, as the *Zeran* court recognized, a claim for defamation—the paradigmatic cause of action for which publication is an element—almost always could be re-pled as another tort such as negligence, and Congress presumably did not intend for the fulfillment of its policy goals to turn on pleading technicalities.

Though presented with the question on a blank slate, the Seventh Circuit did not have to write, or rewrite, Section 230 law to reach a conclusion in the *Craigslist* case. Because publishing was an element of the discriminatory advertising claim, Craigslist would have prevailed under even a narrow reading of Section 230(c)(1), without any need for recourse to the broader principles established in other precedent. Thus, the appellate court did not have to choose a definitive interpretation of Section 230 here, and it apparently did not. As far as the law in the Seventh Circuit is concerned, the *Craigslist* decision leaves the precise scope of Section 230(c)(1) as an open question to be decided in later cases.

**Fair Housing Council v. Roommates.com**

While the legal analysis remains elusive in the *Craigslist* decision, the Ninth Circuit’s reasoning in the April 3 en banc *Roommates.com* decision is quite thorough and explicit—even if potentially problematic in some respects. Though the court, sitting en banc, might appear to have opened the door to greater liability for providers of interactive computer services, the decision does not announce itself as changing the law and goes to great lengths to square its holding with prior precedents supporting broad immunity. Because the holding itself was narrowly tailored to the specific architecture of the Roommates.com Web site, the decision should have little effect on the availability of immunity in the vast majority of situations.

The *Roommates.com* case involved a Web site, Roommates.com, that helps to match prospective roommates by allowing its users to create profiles about themselves, including their gender, sexual orientation and familial status, and their preferences for such traits in prospective roommates. The plaintiffs argued that the site violated the Fair Housing Act and state housing laws by requiring users to answer specific multiple-choice questions on these subjects and providing tools that made it easy for users to search for potential roommates using those criteria. The plaintiffs also argued that the site was liable under the Act for any and all unlawfully discriminatory statements written by its users in the open-ended “additional comments” section of their profiles.

The district court held that Section 230 squarely barred these claims under Ninth Circuit precedent, 2004 WL 3799488. In doing so, it relied principally on *Caraftano v. Metrosplash.com*, Inc., 339 F.3d. 1119 (9th Cir. 2003), in which the Court of Appeals had held that a dating Web site could not be treated as a “content provider” for a false and defamatory profile created by one of its users, even though the site required its users to answer a set list of multiple-choice questions in order to build their profiles. The district court held that *Caraftano* compelled a decision in favor of Roommates.com.

On appeal in the *Roommates.com* case, the initial three-judge panel split on the question of immunity, with Judge Koziowski writing for the majority that Section 230 immunity did not bar the claims based on the content of the multiple-choice questions, the content of user-profiles based on users’ answers to those questions, and the site’s search and classification functionalities, but did bar the claims based on what users said in the “additional comments” section of their profiles. 489 F.3d. 921 (9th Cir. 2007). Judge Reinhardt, in partial dissent, would have found no Section 230 immunity anywhere, even regarding the users’ additional comments. Judge Ikuta, in a partial dissent, agreed that the immunity did not cover the drop-down questions but, based on her interpretation of earlier Ninth Circuit precedent, would have barred both the profile searching/classifying claim and the additional comments claim. The key question on which the Ninth Circuit focused was whether Roommates.com had “in whole or in part, created or developed” the allegedly discriminatory content and therefore was an “information content provider” of that content. The “publishing as an element” inquiry that was a focus in *Craigslist* did not arise in *Roommates.com*. 
The Ninth Circuit subsequently re-heard the Roommates.com case en banc, with two of the three judges from the original panel sitting on the en banc panel. Judge Kozinski, now Chief Judge of the circuit, again authored a decision for the court, which, although reaching the same bottom line result, elaborated on, and in some significant respects narrowed, the panel’s discussion of the interpretation of “information content provider.” The en banc vote in favor of this outcome was 8-3. A dissenting opinion was issued by Judge McKeown, who would have found Roommates.com immune for all but the actual multiple-choice questions that it had authored. Judge Reinhardt abandoned his earlier dissenting view regarding the “additional comments” section of user profiles, thus making the en banc court unanimous in holding that Section 230 immunizes Roommates.com from liability for any unlawfully discriminatory preferences expressed by a user in that section.

In its more limited en banc decision, the court reasoned that Roommates.com had no immunity for the content of its own multiple-choice questions, because they were written entirely by the site operator itself. The en banc court also concluded that Roommates.com itself had “developed,” in part, the structured portion of its users’ profiles because, as a condition for using the service, it had required users to answer certain questions about their preferences and limited their responses to those pre-populated in a drop-down menu. Further, the court found that Roommates.com lacked immunity for providing search and related tools that specifically allowed users to search for roommates based on those illegal questions and answers.

If the en banc court’s analysis had simply ended at this point, it would have raised significant concerns, and arguably conflicted directly with the Ninth Circuit’s holding in Carafano, as Judge Ikuta had observed in her partial dissent for the original panel. In Carafano, the court held that the dating site’s users were still making the choices and developing the content themselves, even if the site structured their responses. The Roommates.com decision, arguably, was now holding the Web site operator responsible for similar user-generated content.

Chief Judge Kozinski, however, made clear that the en banc court had no intention of abandoning the decision in Carafano. He explained that the multiple-choice questions on Roommates.com had “materially contributed” to the alleged illegality of the users’ responses because those questions required its users to provide information that, according to the plaintiffs’ complaint, was inherently and necessarily unlawful. By contrast, he noted, the dating Web site in Carafano provided only “neutral tools” that had been abused by a user. In making this distinction, Chief Judge Kozinski seemed to be crafting a new test for when a service provider may disqualify itself from the protection of Section 230 by involving itself in the process of formulating user-supplied content: a Web site that affirmatively compels its users to submit illegal information will sacrifice its immunity, while a Web site that provides only “neutral tools”—including search engines such as those provided by Google and Yahoo!—will not. As the dissenting opinion of Judge McKeown explained, Judge Kozinski’s approach to this question was troubling, at least theoretically, because it arguably made the meaning of the phrase “information provided by another information content provider” dependent on an analysis of whether the content at issue was in fact illegal.

In light of this theoretical trouble, the Roommates.com decision is best read as a mandate for lower courts to scrutinize the role played by the provider of the interactive computer service in allegedly developing the precise content claimed to be unlawful in the complaint. Instead of asking whether the content is illegal and, then, whether the Web site has “materially contributed” to the illegality, lower courts must scrutinize closely which specific content is alleged to be illegal and whether the service provider helped to create or develop that specific content.

In Carafano, the plaintiff complained that the fake dating profile was tortious because it falsely associated her identity with unsavory traits that the impostor had selected from the Web site’s menus of multiple-choice answers. But the dating Web site had not mandated this particular permutation of the information, and the essential element that allegedly made the bogus profile tortious, namely plaintiff’s identity, originated entirely with the miscreant user. By contrast, in Roommates.com, the plaintiff complained about the content of the preset choices offered by the Web site and argued that “……” the Web site’s requested users to create illegal information.

Whether or not Roommates.com created a new “neutral tools” test or merely renewed the mandate to focus precisely and granularly on the role of the service provider with respect to the particular content alleged to be unlawful or tortious, its holding was clearly bound very tightly to the specific facts of the case. The court was presented with the rare situation where a Web site elicited answers that are alleged to be illegal in every possible permutation and additionally requires users to answer those questions as a condition of posting a profile.

The Roommates.com decision did not purport to disagree with Zeran and the other leading precedents, but rather professed to be in harmony with them. Moreover, the en banc court abandoned some of the more provocative language in the panel decision, including discussion of a hypothetical about a Web site called “Harassthem.com,” in which the panel suggested that a Web site’s overall purpose or intent may affect whether user-provided content was partly developed by the site itself. In light of the case’s unusual facts, the en banc decision—while offering the most thorough discussion to date of the meaning of the term “information content provider”—may have relatively little practical relevance to most providers of interactive computer services as they decide what services to offer and how to structure them.

The State of Section 230 Immunity

After Craigslist and Roommates.com

Ultimately, while both the Craigslist and Roommates.com cases offered the respective appellate courts opportunities to reconsider the scope and meaning of Section 230’s protections, neither decision appears to reflect a significant departure from the broad immunity courts have consistently accorded service providers under the statute. Writing on the issue de novo, the Seventh Circuit issued a decision that was short on legal analysis and devoid of any general pronouncement that could be easily applied in the future. The Ninth Circuit, given the chance to reshape its doctrine of Section 230 liability, opted instead to rely on reasoning tied to the
unique factual situation of the Roommates.com Web site.

Because these decisions do not appear to significantly disturb the prevailing interpretation of Section 230, service providers should not rush to overcompensate by, for example, removing all multiple-choice questions or drop-down menus from their Web sites. Allowing users to provide standardized, fine-grained, and easily searchable sets of information and preferences has contributed to the growth, usefulness and pervasiveness of Internet communications in everyday life—just as Congress intended when it passed Section 230 over a decade ago.