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# ***Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act***

## I. INTRODUCTION

The use of online advertisements is a relatively new, but rapidly-growing phenomenon. Consumers have latched onto the idea of holding an online garage sale and its use has seen a marked increase. For example, on-line classified advertising services users increased eighty percent between 2004 and 2005.<sup>1</sup> Consumers, however, sell more than baseball gloves and books online. One sector of the online advertisement market that has proven to be problematic is the sale of housing rental space. These advertisements would seemingly fit within the scope of the Fair Housing Act, which contains a provision regulating housing advertisements. However, these advertisements also fall within reach of the Communications Decency Act. These two statutes contain conflicting provisions, and it remains to be seen whether they can be harmonized.

This article will first discuss the scopes of both the Fair Housing Act and the Communications Decency Act. It will then look at two cases that have addressed the intersection of the two statutes. Finally, this article will discuss the merits of each court's decision and suggest a path for the future.

## II. STATUTORY CONFLICT

Two recent cases<sup>2</sup> address the issues that arise when section 804(c) of the Fair Housing Act (FHA)<sup>3</sup> seemingly conflicts with the Communications Decency Act of 1996 (CDA)<sup>4</sup> in the forum of the Internet. Before discussing the cases and their outcomes, however, it is first necessary to analyze the legal backdrop against which these cases were decided.

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1. Maria Aspan, *Great for Craigslist but Not for Newspapers*, N.Y. TIMES, Nov. 28, 2005, at C5.

2. Chi. Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006); Fair Hous. Council v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007).

3. 42 U.S.C.A. §§ 3601-3619, 3631 (2006). Section 804(c) will hereinafter be referred to as section 3604(c).

4. The CDA was codified in 47 U.S.C.A. § 230.

### A. *The Fair Housing Act*

The Fair Housing Act was enacted in 1968 and prohibits housing discrimination based on the protected categories of race, color, gender, disability, age, religion, and familial status. The basic policy behind the FHA is “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>5</sup> The FHA was a long overdue policy when Congress enacted the statute in 1968. From 1940 through 1970, racial segregation was “a permanent structural feature of the spatial organization of American cities.”<sup>6</sup> This segregation was the result of both private and governmental action. On the private side, the real estate industry was institutionalizing discrimination<sup>7</sup> and banks were frequently denying home loans to African Americans.<sup>8</sup> The government was also perpetuating the discrimination by channeling public mortgage funds away from established black areas or potentially black areas.<sup>9</sup> The FHA was an “attempt to alter the whole character of the housing market.”<sup>10</sup> Despite the enactment of the FHA and the resulting large-scale public and private abandonment of overtly racist housing tactics, a segregation problem still exists today.<sup>11</sup> For example, one recent study conducted in Boston found that nearly half of the African-American homebuyers were concentrated in only seven of 126 communities.<sup>12</sup> Thus, it is clear that the goals of the FHA have not yet been realized.

With the history of the FHA in mind, let us now turn to the specific provision of the FHA that is in issue in this article, section 3604(c). Section 3604(c) provides that it is 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, limita-

5. 42 U.S.C. § 3601.

6. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 46 (Harvard Univ. Press 1993).

7. One study from the 1950s “found that 80% of realtors refused to sell blacks property in white neighborhoods.” *Id.* at 50.

8. *Id.* at 50-51.

9. *Id.* at 52. The practice of “redlining” typified the government’s involvement in the discrimination. It entailed a ratings system for applying for government-financed home loans that undervalued housing in inner-city neighborhoods, most of which were comprised of racially or ethnically mixed populations. *Id.* at 51. Of the four possible grades a home applicant could receive, “black areas were invariably rated as fourth grade and ‘redlined.’” *Id.* at 52.

10. *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

11. *See, e.g.,* LEWIS MUMFORD CENTER, *ETHNIC DIVERSITY GROWS, NEIGHBORHOOD INTEGRATION LAGS BEHIND* 1 (December 18, 2001), available at <http://mumford.albany.edu/census/WholePop/WPreport/page1.html>.

12. Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 *FORDHAM URB. L.J.* 877, 880 (2006).

tion, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin.”<sup>13</sup> Even with this broad language, the Supreme Court has acknowledged and reinforced the “‘broad and inclusive’ compass” of the FHA<sup>14</sup> and has afforded the FHA “generous construction.”<sup>15</sup> Moreover, the section 3604(c) ban on discriminatory advertising is even more expansive in its reach than other FHA prohibitions on discrimination.

Other portions of section 3604 prohibit discriminatory refusals to rent, sell, or negotiate, as well as discrimination in the terms, conditions, or privileges of the sale or rental of a dwelling or in the provision of related services.<sup>16</sup> Section 3603(b) establishes some exemptions from the reach of section 3604.<sup>17</sup> However, no person is exempt from section 3604(c), as its language “‘does not provide any specific exemptions or designate the persons covered, but rather . . . applies on its face to anyone’ who makes prohibited statements.”<sup>18</sup> In effect, section 3604(c) is a “strict liability” provision because liability requires only that the notice, statement, or advertisement be made “‘with respect to the sale or rental of a dwelling’ and ‘indicate’ discrimination.”<sup>19</sup>

A final indicator of section 3604(c)’s expansive coverage is that it applies to anyone capable of making statements “in connection with the sale or rental of a dwelling.” This includes newspapers and other media that are not in the business of providing housing,<sup>20</sup> making its reach broader than that in Title VII and the ADEA.<sup>21</sup> The existence of section 3604(c) demonstrates “Congress’ desire to make the fair housing provision broader than its Title VII and ADEA counterparts.”<sup>22</sup>

The upshot is that the language of section 3604(c) is broad. No person or entity is exempt from its reach, provided that the statement is made in connection with the sale or rental of a dwelling and indicates discrimination on a

13. 42 U.S.C.A. § 3604 (2006).

14. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972)).

15. *Trafficante*, 490 U.S. at 212.

16. 42 U.S.C. § 3604.

17. One such exemption is the “Mrs. Murphy” exemption, which exempts certain owners of single family homes from section 3604 liability. For a thorough discussion of the Mrs. Murphy exemption and purposes, see James D. Walsh, *Reaching Mrs. Murphy: A Call for the Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 HARV. C.R.-C.L. L. REV. 605 (1999).

18. *United States v. Space Hunters, Inc.*, 429 F.3d 416, 424 (2d Cir. 2005) (quoting *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972)).

19. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act’s Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 216 (2001).

20. *See Hunter*, 459 F.2d at 210.

21. Schwemm, *supra* note 19, at 211.

22. *Id.*

prohibited basis. Although discrimination may be permissible in the sale or rental of housing when that housing falls into one of the statutory exemptions, it is never permissible to advertise that discriminatory animus.

One early case that demonstrates the effect of section 3604(c) is *United States v. Hunter*.<sup>23</sup> This case involved a defendant who was the editor and publisher of a newspaper that published classified advertisements that were facially discriminatory on the bases of race and sex.<sup>24</sup> Although the newspaper's involvement with the advertisement did not reach beyond publishing, the *Hunter* court nonetheless found the newspaper liable under the FHA.<sup>25</sup> Referencing the specific language of section 3604(c), the court said, "[i]n the context of classified real estate advertising, landlords and brokers 'cause' advertisements to be printed or published and generally newspapers 'print' and 'publish' them . . . both landlords and newspapers are within the section's reach."<sup>26</sup>

The FHA's broad prohibition on discriminatory advertising serves three principal goals.<sup>27</sup> First, it is intended to stave off the exclusionary effect of discriminatory advertising. The court in *Hunter* described the problem: "[S]eeing large numbers of 'white only' advertisements in one part of a city may deter nonwhites from venturing to seek homes there, even if other dwellings in the same area must be sold or rented on a non-discriminatory basis."<sup>28</sup> Second, it addresses the "discouraging psychological effect" of the expression of discriminatory preferences.<sup>29</sup> Courts have endorsed this policy goal by awarding emotional distress damages to aggrieved parties.<sup>30</sup> Furthermore, the legislative history of section 3604(c) indicates Congress' concern with the harm a person could suffer from hearing a discriminatory statement.<sup>31</sup> Courts have even allowed claims by "aggrieved persons" who were not in the market

23. 459 F.2d 205.

24. *Id.* at 209.

25. *Id.* at 210.

26. *Id.* (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

27. Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 974 (2002).

28. *Hunter*, 459 F.2d at 214. The exclusionary effect would run counter to the FHA's goal of realizing "truly integrated and balanced living patterns." *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 211 (1972).

29. *Mayers v. Ridley*, 465 F.2d 630, 653 (D.C. Cir. 1972) (Wilkey, J., concurring).

30. See, e.g., *HUD ex rel. Stover v. Gruzdaitis*, 1998 WL 482759 (HUD ALJ Aug. 14, 1998) (where African-American woman inquired about availability of apartment, she was told, "Not for you, no blacks. Fuck you, they don't pay rent").

31. Schwemm, *supra* note 19, at 211.

for housing.<sup>32</sup> Finally, the broad prohibition on discriminatory advertising seeks to prevent the spread of misinformation among the public at-large.<sup>33</sup>

### B. *The Communications Decency Act*

The Communications Decency Act is a statute that promotes free expression on the Internet by shielding website operators from liability for material posted by their users. This Act relates to the Fair Housing Act because section 3604(c) has faced statutory challenges from section 509 of the Communications Decency Act of 1996 (CDA)<sup>34</sup> (codified at 47 U.S.C. section 230), which establishes that “[n]o 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.”<sup>35</sup> By its plain language, this provision appears to insulate publishers of online housing advertisements from liability.

Section 230(c)<sup>36</sup> has two subparts. Section 230(c)(1) provides: “Treatment of publisher or speaker: No provider or user of an interactive computer service (ICS) shall be treated as the publisher or speaker of any information provided by another information content provider.” Courts consistently enforce the FHA against newspapers on the theory that the newspaper is publishing the alleged discriminatory material.<sup>37</sup> However, the language in section 230(c)(1) precludes this avenue for finding liability under the FHA on behalf of an interactive computer service (ICS) *as publisher* because the ICS provider cannot be treated as a publisher.

The second subpart of section 230(c) provides:

(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)

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32. HUD, Fair Hous.-Fair Lending Rptr. 25,106 (1995) (black female social worker helping a white woman find an apartment was told, “[the white woman is] ok for the apartment, you are not”).

33. Chang, *supra* note 27, at 976-77 (explaining that the appearance of discriminatory advertising causes those who see such advertisements to mistakenly believe discriminatory housing practices are legally permissible).

34. The Communications Decency Act of 1996 is comprised of Title V (§§ 501-509) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

35. 47 U.S.C. § 230(c)(1) (2006).

36. This section is entitled “Protection for ‘good samaritan’ blocking and screening of offensive material.” *Id.* § 230(c).

37. *E.g.*, United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>38</sup>

This section provides an exculpatory clause for the ICS, provided that the ICS's action falls within the parameters provided in the provision. In broadly construing section 230, courts have relied in part on section 230(c)(2) to preclude liability for all users and providers of an ICS.<sup>39</sup>

Section 230(f)(2) defines "interactive computer service" to encompass "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 offered by libraries or educational institutions."<sup>40</sup> The term "information content provider" is defined in section 230(f)(3) to mean "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."<sup>41</sup> Thus, section 230 seems to provide immunity not just for Internet access providers, but also for any entity or other service operating on the Internet.<sup>42</sup> Therefore, based on a reading of the plain language of the statute, the reach of civil liability immunity afforded ICSs under section 230 appears broad and absolute.

A broad reading would be consistent with the policy goals of section 230.<sup>43</sup> Among the other goals that section 230 seeks to achieve, Congress intended to promote the unfettered flow of information and to remove the disincentive of civil liability for service providers in self-policing their own systems for objectionable content.<sup>44</sup> But Congress also realized that service providers could engage in constructive self-regulation and chose to immunize the providers for such activity,<sup>45</sup> though there are exemptions from this immunity contained in section 230(e).<sup>46</sup> The legislative history of section 230 suggests that the immunity Congress intended to grant is limited. In fact, section 230(c) is in part a legislative response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, which held that an Internet access provider using filtering technology could be liable for libelous third-party statements posted on its

38. 47 U.S.C. § 230(c)(2).

39. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

40. 47 U.S.C. § 230(f)(2).

41. *Id.* § 230(f)(3).

42. Chang, *supra* note 27, at 984 (citing Mathias Strasser, *Beyond Napster: How the Law Might Respond to a Changing Internet Architecture*, 28 N. KY. L. REV. 660, 673 (2001)).

43. 47 U.S.C. § 230(b).

44. *Id.*

45. *Id.* § 230(b)(4).

46. Section 230(e) provides exceptions from immunity for federal criminal prosecutions and intellectual property and electronic privacy claims.

bulletin board service.<sup>47</sup> By enacting section 230(c), Congress sought to “address the problem of holding liable for defamation ICSs that reviewed third-party content while leaving free from liability ICSs that did not review content.”<sup>48</sup>

Courts have interpreted section 230 as granting broad immunity for ICS providers.<sup>49</sup> The broad interpretation of the immunity granted in section 230 is explained in the Fourth Circuit’s influential determination in *Zeran v. America Online, Inc.*<sup>50</sup> The case involved a posting on an America Online (AOL) open forum that advertised for a t-shirt featuring “offensive and tasteless” language.<sup>51</sup> The posting directed interested persons to dial Plaintiff Zeran’s phone number, though Zeran was not the one who posted the advertisement; in short, the posting was a prank that elicited hundreds of threatening calls to Zeran.<sup>52</sup> Zeran sued AOL, seeking to hold the company liable for defamatory speech initiated by a third party.<sup>53</sup>

The Fourth Circuit interpreted section 230 as precluding “courts from entertaining claims that would place a computer service provider in a publisher’s role . . . . [L]awsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content, are barred.”<sup>54</sup> The *Zeran* court reasoned that any finding of liability for AOL would result in a chilling effect of Internet speech.<sup>55</sup> That is, if providers like AOL were to be saddled with potential liability for each message posted through their service, they would greatly restrict the messages posted through their service, if not eliminate the service altogether.<sup>56</sup> An overwhelming majority of the courts that have reached the section 230(c) liability issue have echoed the ruling of *Zeran*,<sup>57</sup> finding that “Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others.”<sup>58</sup>

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47. 1995 WL 323710, at \*7 (N.Y. Sup. Ct. May 24, 1995).

48. Chi. Lawyers’ Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 696 (N.D. Ill. 2006)

49. E.g., *Zeran v. Am. Online, Inc.* 129 F.3d 327 (4th Cir. 1997).

50. *Id.*

51. *Id.* at 329.

52. *Id.*

53. *Id.* at 330.

54. *Id.*

55. *Id.* at 331

56. *Id.*

57. E.g., *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003) (finding that reviewing courts have treated the section 230 immunity as “quite robust”); see also *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003).

58. *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D. D.C. 1998).



The reasoning of *Zeran* has been influential, but not all courts have adopted its logic. One decision that questioned *Zeran* was *Doe v. GTE Corp.*<sup>59</sup> Although the Seventh Circuit ultimately found GTE (the ICS) not liable, it questioned in dicta the way courts have interpreted section 230.<sup>60</sup> It began the analysis by making special note of the title of section 230, which is “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”<sup>61</sup> The court opined that, in light of the fact that courts have interpreted section 230(c)(1) and (c)(2) to immunize an Internet Service Provider (ISP) regardless of whether the provider regulates the content of information it hosts or transmits, the title makes little sense when the effect of the section is “to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.”<sup>62</sup> With the broad immunity granted under *Zeran* and its progeny, an ISP has no incentive to regulate content. This immunity, coupled with the expense of regulating content, provides even further disincentive for ISPs to undertake regulation.<sup>63</sup> The court concluded that the title of section 230(c) does not reflect this position.<sup>64</sup>

The court offered one possibility for interpreting the statute this way. Under state law, a situation may arise where the law induces or requires ISPs to protect the interests of third parties.<sup>65</sup> If the *Zeran* reading of section 230 were to endure, the ISP would never be liable provided that it fits within the definition of an ICS in section 230. The alternative reading suggested in *GTE Corp.* is that regulation of ISPs as intermediaries (i.e., *not* as publishers<sup>66</sup>) under state law would be permissible and ISPs could not escape liability.<sup>67</sup>

### III. JUDICIAL RESPONSE TO THE CONFLICT

With section 3604(c) of the FHA and section 230(c) of the CDA at odds, litigation ensued to attempt to resolve the dispute. To date, two cases have addressed the issue. The first of the two cases was decided in the 2004 decision of *Fair Housing Council v. Roommate.com, LLC*<sup>68</sup> (hereinafter “*Roommate*”). In that 2007 case, the Ninth Circuit Court of Appeals reversed the district court.<sup>69</sup> The second case, *Chicago Lawyers’ Committee For Civil*

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59. 347 F.3d 655, 659 (7th Cir. 2003).

60. *Id.*

61. *Id.* at 660.

62. *Id.*

63. *Id.*

64. *Id.* at 659-60.

65. *Id.* at 660-61.

66. An example the court gives of publisher liability completely foreclosed by section 230 is defamation law. *Id.* at 660.

67. *Id.*

68. No. CV 03-09386PA, 2004 WL 3799488 (C.D. Cal. Sept. 30, 2004).

69. *Fair Hous. Council v. Roommate.com, LLC*, 489 F.3d 921 (9th Cir. 2007).

*Rights Under the Law, Inc. v. Craigslist, Inc.*,<sup>70</sup> (hereinafter “Craigslist”) was recently decided by a federal district court in Chicago. The *Craigslist* case is currently on appeal.<sup>71</sup>

*Roommate* involved a website that offered a roommate locator service. The service allowed persons with residences and persons looking for residences to post information about themselves and housing options in a website-maintained database.<sup>72</sup> Plaintiffs argued that the website violated federal fair housing laws<sup>73</sup> in three ways. First, the nicknames chosen by website users, which included names like “ChristianGrl” and “Blackguy”, characterized users by their protected class traits.<sup>74</sup> Second, the users were allowed to write essays that indicated potentially discriminatory preferences, such as “looking for an ASIAN FEMALE OR EURO GIRL.”<sup>75</sup> Third, the website’s questionnaire required disclosure of certain information about a person’s age, gender, sexual orientation, occupation, and familial status.<sup>76</sup> Specifically, Plaintiffs challenged the above three points on the theory that they violated section 3604(c) of the FHA.<sup>77</sup> The threshold issue in the case was whether the website was a “publisher,” as required for a cause of action under section 3604(c).<sup>78</sup>

The Ninth Circuit in *Roommate* first acknowledged the immunity of an ICS, such as Roommate, so long as it does not act as an “information content provider,” which is “any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet.”<sup>79</sup> Plaintiffs alleged Roommate was an information content provider under three different circumstances. First, Roommate requires users to fill out questionnaires and then posts them. Second, it posts and distributes its members’ profiles. Third, Roommate posts the information its members provide on an “Additional Comments” form.<sup>80</sup> The district court found that Roommate was not an information content provider because no characteris-

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70. 461 F. Supp. 2d 681 (N.D. Ill. 2006).

71. Mike Hughlett, *Judge: Craigslist Not Liable for Ad Content*, CHI. TRIB., Nov. 16, 2006, at 1.

72. *Roommate*, 2004 WL 3799488, at \*1.

73. Plaintiffs also alleged a violation of state fair housing laws, which will not be discussed here. *Id.* at \*2.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at \*3.

78. *See Fair Hous. Council v. Roommate.com, LLC*, 489 F.3d 921, 925 (9th Cir. 2007).

79. *Id.* (quoting 47 U.S.C. § 230(f)(3) (2006)).

80. *Id.* at 926.

tics of any user's profile could have content until a user created it.<sup>81</sup> The Ninth Circuit disagreed.<sup>82</sup>

In determining whether Roommate was an information content provider, the Ninth Circuit set forth two tests. First, if the ICS categorizes, channels, and limits the distribution of information, thereby creating another layer of information, the ICS is deemed an information content provider.<sup>83</sup> Second, the ICS is deemed an information content provider if it actively prompts, encourages, or solicits the unlawful information.<sup>84</sup> The court found Roommate to be an information content provider with regard to the questionnaires. By creating and developing the forms and questionnaires and their answer choices, the court held Roommate responsible for their content.

Similarly, the court also found Roommate to be an information content provider with respect to users' profiles, which Roommate generated from the answers to the form questionnaires.<sup>85</sup> The court found that "Roommate does more than merely publish information it solicits from its members. Roommate also channels information based on members' answers to various questions, as well as the answers of other members."<sup>86</sup> The court continued: "By categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information that it is 'responsible' at least 'in part' for creating or developing."<sup>87</sup>

On the third issue, regarding members' remarks posted on the "Additional Comments" portion of the website, the Ninth Circuit declined to find Roommate as an information content provider. Although Roommate advises its members to utilize the "Additional Comments" section, the court found Roommate's involvement insufficient to qualify it as an information content provider. This finding is based on the fact that, unlike with the questionnaires, Roommate does not suggest particular information to post in this section, nor does Roommate use the information from the comments to limit or channel access to any listings.<sup>88</sup>

The second recent case that has addressed the issues raised by the conflict in section 3604(c) of the FHA and section 230(c) of the CDA is the aforementioned *Craigslist* case.<sup>89</sup> Unlike the multiple practices challenged in *Roommate*, the plaintiffs in *Craigslist* only challenged Craigslist on account of it publishing "housing advertisements on its website that indicate a prefe-

81. *Roommate*, 2004 WL 3799488, at \*4.

82. *Roommate*, 489 F.3d at 930.

83. *Id.* at 928-29.

84. *Id.* at 929.

85. *Id.* at 927.

86. *Id.* at 928.

87. *Id.* at 929 (quoting 47 U.S.C. § 230(f)(3) (2006)).

88. *Id.*

89. *Chi. Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006). Craigslist, simply described, is an online community that features classified advertisements and assorted user fora.

rence, limitation, or discrimination, or an intention to make a preference, limitation, or discrimination, on the basis of race, color, national origin, sex, religion, and familial status.”<sup>90</sup> A sampling of the challenged advertisements posted on the Craigslist website included language such as “NO MINORITIES” and “This is what I am looking for . . . and the more a candidate has, the less I will ask in rent: Female Christian.”<sup>91</sup>

The *Craigslist* court rejected the holding in *Zeran*, finding that *Zeran* overstated the plain language of section 230(c)(1).<sup>92</sup> First, the court found that the broad immunity grant that *Zeran* and its progeny have read into section 230(c) is misguided. Whereas section 230(c)(2) grants “unequivocal immunity,”<sup>93</sup> the same is not true of section 230(c)(1).<sup>94</sup> Second, the court found *Zeran*’s logic to be marred by an inconsistency in its application of section 230(c)(1) because of the way it treats the publisher’s role, which reduces the persuasiveness of *Zeran*.<sup>95</sup> Specifically, Judge St. Eve found an internal inconsistency with *Zeran*: whereas *Zeran* purported to grant unbridled immunity to ICSs, it also purports only to “hold a service provider liable for its exercise of a publisher’s traditional editorial functions.”<sup>96</sup> This is problematic, according to Judge St. Eve, because it leaves open the possibility of not holding an ICS liable when it is merely a publisher in the sense of making information known to the public. Thus, there is an internal inconsistency in the *Zeran* opinion.

Instead of following *Zeran*, the court defined its own scope of section 230(c)(1). It first established that the plain language of section 230(c)(1) prohibits “treatment as a publisher, which, quite plainly, would bar any cause of action that requires, to establish liability, a finding that an ICS published third-party content.”<sup>97</sup> Indeed, the court observed that Congress did not intend section 230(c)(1) to provide unconfined immunity, but instead to overrule past decisions that had treated providers or users of an ICS as publishers or speakers of content merely because the ICS regulated objectionable content.<sup>98</sup> By interpreting section 230(c)(1) to immunize only claims that require “publishing” as an essential element of the cause of action, the court was giving effect to the differing language from section 230(c)(1) to section

90. *Id.* at 685.

91. *Id.* at 685-86.

92. *Id.* at 693.

93. 47 U.S.C. § 230(c)(2) (2006) provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . .”

94. *Id.* § 230(c)(2) (providing that, “[n]o 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”).

95. *Craigslist*, 461 F. Supp. 2d at 694-95.

96. *Id.* at 694.

97. *Id.* at 696.

98. *Id.* (citing H.R. REP. No. 104-458, at 194 (1996)).

230(c)(2).<sup>99</sup> In this way, the court adopted the reasoning of the Seventh Circuit in *Doe v. GTE Corp.*<sup>100</sup> that it is unlikely Congress intended to grant immunity for ICSs that do not screen any third-party content whatsoever.<sup>101</sup>

With this legal framework, the court dismissed the FHA claim on the pleadings. It first found that Craigslist was an ICS under section 230(c)(1).<sup>102</sup> It then classified the disputed discriminatory housing notices as information that originates from “another information content provider.”<sup>103</sup> Finally, because Craigslist was serving as an ICS and was merely acting as a conduit for information provided by another information content provider, the court concluded that section 230(c)(1) mandated *not* treating Craigslist as a publisher. In other words, “to hold Craigslist liable under Section 3604(c) would be to treat Craigslist as if it were the publisher of third-party content, [and] the plain language of Section 230(c)(1) forecloses [plaintiff’s] cause of action.”<sup>104</sup>

Plaintiff alternatively posited that section 230 did not bar its claim because Craigslist violated section 3604(c) by “making” and “printing” the discriminatory housing notices.<sup>105</sup> Using reasonable interpretations of the words, the court found that even when viewed in a light most favorable to the plaintiff, Craigslist did not make or print the notices.<sup>106</sup>

#### IV. DISCUSSION

This discussion section will address three issues. First, it is important to compare and contrast the *Craigslist* court’s analysis with that of the *Roommate* court. Second, this section will address the issues of where the statutes – the FHA and CDA – and the *Roommates* and *Craigslist* cases leave the current state of the law. Finally, the discussion will examine what should be done, if anything, about the present state of the law.

##### A. Statutory Analysis

Although the *Craigslist* and *Roommate* courts reached different results, they employed similar reasoning. The *Roommate* decision relied on section 230(c) in finding the website immune from section 3604(c) prosecution.<sup>107</sup>

99. *Id.* at 697.

100. 347 F.3d 655, 660 (7th Cir. 2003).

101. *Craigslist*, 461 F. Supp. 2d. at 697.

102. *Id.* at 698.

103. *Id.* (quoting 47 U.S.C. § 230(c)(1) (2006)).

104. *Id.*

105. *Id.* n.18.

106. *Id.* at 699.

107. *Fair Hous. Council v. Roommate.com, LLC*, No. CV 03-09386PA, 2004 WL 3799488, at \*3 (C.D. Cal. Sept. 30, 2004).

The court adopted the reasoning of a case<sup>108</sup> that endorsed the *Zeran* interpretation of immunity, saying that an ICS qualifies for immunity so long as it does not function as an information content provider for the allegedly discriminatory material.<sup>109</sup> The *Craigslist* court relied on section 230(c)(1) in finding that Craigslist could not be held liable for a section 3604(c) violation.<sup>110</sup>

Although the *Roommate* and *Craigslist* courts reached different results, each court reached the proper decision. Both decisions involved the same legal issues and similar reasoning, but the courts' analyses varied slightly. While both Judge St. Eve's opinion in *Craigslist* and Judge Kozinski's opinion in *Roommate* are thoughtful and methodical, the *Roommate* opinion misses the analytical mark in one important respect.

The approach in *Roommate* is to grant unqualified immunity to an ICS if the ICS is not an information content provider.<sup>111</sup> This approach is improper. The problem is that the plain language of section 230(c)(1) is not a broad immunity-granting provision.<sup>112</sup> If section 230(c)(1) were the broad provision the *Roommate* court read it to be, an ICS has the same incentive to filter the content of its information content providers as it does not to monitor such content – none.<sup>113</sup> That is, the *Roommate* court<sup>114</sup> ignores the existence of section 230(c)(2), which *is* a broad immunity-granting provision. Section 230(c)(2) grants immunity to any ICS that voluntarily filters information; Section 230(c)(1), according to the *Roommate* court, grants immunity to an ICS<sup>115</sup> that does not screen any third-party content whatsoever.<sup>116</sup> If Congress intended this result when it enacted the CDA, it would have written the statute to reflect such a straightforward objective. Instead, it seems the *Roommate* court divined the simplistic result for itself.<sup>117</sup>

In departing from the reasoning of *Zeran*, the *Craigslist* court took a more sound legal approach to the conflict between the CDA and the FHA.

108. *Carafano v. Metrosplash*, 339 F.3d 1119 (9th Cir. 2003).

109. *Roommate*, 2004 WL 3799488, at \*3 (citing *Carafano*, 339 F.3d at 1123).

110. *Craigslist*, 461 F. Supp. at 698.

111. *Fair Hous. Council v. Roommate.com, LLC*, 489 F.3d 921, 925 (9th Cir. 2007).

112. *Cf.* 47 U.S.C. § 230(c)(2) (2006) (providing, “No provider or user of an interactive computer service shall be held liable . . .”).

113. *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003).

114. It should be noted that the *Roommate* court adopts the same reasoning as *Zeran* and its progeny, and thus its logic implicates the reasoning used in those cases, too. *Roommate*, 489 F.3d at 925.

115. Immunity is granted so long as the ICS is not also an information content provider. 47 U.S.C. § 230(c)(2) (2006).

116. *See Chi. Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006).

117. *See id.* at 694. The fact that the *Roommate* court eventually found the website to be an information content provider does not detract from its flawed approach that if the website were not an information content provider it could not be liable under the CDA.

The court made an attempt to derive the congressional intent of the FHA and CDA that is not present to the same degree in *Roommate*. By compartmentalizing the two constituent parts of section 230(c), Judge St. Eve crafted her interpretation of section 230(c) to find immunity for the ICS, Craigslist, but also to comport with the ostensible intent of the CDA.

First, the *Craigslist* court's choice to read section 230(c)(1) alongside section 230(c)(2) honors the congressional intent of the section. Judge St. Eve's interpretation avoids the anomalous result of reading section 230(c) to grant immunity to those who both do and do not make an effort to filter content. Second, Judge St. Eve's reading of the statute allows for the possibility that states could enact initiatives that require filtering of content submitted by the information content provider.<sup>118</sup> She reasoned that by reading section 230(c)(1) as granting something less than complete immunity, state legislatures could enact initiatives "that induce or require online service providers to protect the interests of third parties."<sup>119</sup> The court's interpretation leaves open the possibility that states could enact laws that would *require* ICS filtering, and these laws would not run afoul of section 230(e)(3), which says that states cannot enact laws inconsistent with the CDA.<sup>120</sup> This possibility is not available under the *Roommate* reading because its reading grants absolute immunity to the ICS.

Moreover, the *Craigslist* court's reading is consistent with the intent of the drafters of section 230(c). The court reads into the statute only the direct immunity grant for *not* filtering content and for a non-content-providing ICS where treatment as a publisher is an element of the claim. This interpretation is consistent with a primary purpose of section 230(c), namely to overrule *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>121</sup> Contrastingly, the *Roommate* court relied on *Carafano v. Metrosplash.com, Inc.*<sup>122</sup> for the analysis of ICS liability, whose reasoning is faulty because of its reliance on *Zeran's* rationale.<sup>123</sup> Thus, the *Craigslist* court's reasoning is more persuasive than the *Roommate* court on the scope of section 230(c). Judge St. Eve's reading of section 230(c) effects an interpretation of section 230(c) that is consistent with the title of the statute, with the text of the statute, and with the apparent Congressional intent driving the passage of section 230(c).<sup>124</sup>

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118. *Id.* at 697.

119. *Id.*

120. *See id.*

121. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *see also* *Zeran v. Am. Online, Inc.* 129 F.3d 327 (4th Cir. 1997).

122. 207 F. Supp. 2d 1055 (C.D. Cal. 2002), *aff'd* 339 F.3d 1119 (9th Cir. 2003).

123. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

124. *Craigslist*, 461 F. Supp. 2d at 696.

### B. Policy Analysis

The conflict between the CDA and the FHA raises important policy issues. The district court in *Roommate* addressed the argument that applying immunity under the CDA will eviscerate the FHA.<sup>125</sup> This argument is persuasive because the Internet is becoming an increasingly pervasive tool for people to find housing.<sup>126</sup> In spite of this claim, the district court dismissed the argument, saying that websites like the one in *Roommate* have an advantage over traditional print media, but this issue is created by Congress and the court is not the proper forum to air this grievance.<sup>127</sup>

The *Craigslist* court heard a similar argument.<sup>128</sup> The assertion was that enforcing the CDA against FHA claims creates an anomalous result, because immunizing websites results in newspapers being held liable for identical advertisements posted online, even if on that same newspaper's website.<sup>129</sup> The *Craigslist* court also heard other persuasive arguments in favor of enforcing the section 3604(c) against ICSs. One argument was that since the CDA was not meant to "impliedly repeal" section 3604(c), both statutes must be given effect.<sup>130</sup> Yet another policy argument the *Craigslist* court heard was that the plaintiffs' claim should proceed in spite of the CDA because the online advertising is not publishing, but is instead the "making" or "printing" of an advertisement.<sup>131</sup> This interpretation of the statute's language would be consistent with the broad interpretation that has been traditionally afforded to enforcement of the FHA.<sup>132</sup>

Notwithstanding the foregoing policy considerations and their different rationales, both the *Craigslist* and *Roommate* courts came to the correct re-

125. *Fair Hous. Council v. Roommate.com, LLC*, No. CV 03-09386PA, 2004 WL 3799488, at \*4 (C.D. Cal. Sept. 30, 2004).

126. *See, e.g.*, Adam Lashinsky, *Wanted: Some Hope for Newspapers*, FORTUNE, Dec. 2, 2005, [http://money.cnn.com/2005/12/02/technology/craigslist\\_fortune\\_121205/index.htm](http://money.cnn.com/2005/12/02/technology/craigslist_fortune_121205/index.htm) (finding in one established city with Craigslist, San Francisco, newspapers lost more than \$50 million in classified revenue because of the Craigslist phenomena).

127. *Roommate*, No. CV 03-09386PA, 2004 WL 3799488, at \*4 (C.D. Cal. Sept. 30, 2004).

128. Brief of Amicus Curiae National Fair Housing Alliance in Support of Plaintiff at 8, *Chi. Lawyers' Comm. For Civil Rights Under The Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681 (N.D. Ill. 2006) (No. 06 C 0657), 2006 WL 1708503.

129. *Id.*

130. *Id.* at 9. On the issue of Congress impliedly repealing statutes, see *Branch v. Smith*, 538 U.S. 254, 273 (2003).

131. *Chi. Lawyers' Comm. For Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 699 n.18 (N.D. Ill. 2006).

132. *See, e.g.*, *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972).



sult. At a minimum,<sup>133</sup> the patent mandate of section 230(c)(1) is to treat an ICS that is not involved as an information content provider as a non-publisher of that information. In the *Roommate* case, because the court found *Roommate* to be an information content provider, it did not grant the website section 230(c) immunity. Alternatively, because the *Craigslist* court found that the website acted solely as an ICS, it granted the website section 230(c) immunity.

The result of the two cases creates a state of the law that is unfortunate for consumers of online housing resources, for the websites operating as ICSs, and for the enforcement of the FHA. Because a website may avoid liability under the FHA by turning its website into a free-for-all (the less oversight, the greater the chance of immunity), online housing consumers will be left to negotiate thousands of unfiltered advertisements, like on Craigslist. This is inefficient, and it likely exposes the web-surfer to more incidences of discriminatory advertisements. This is a bad result for the ICS, too, which is likely seeking to satisfy customers, but may choose immunity over customer service and opt to reduce its involvement in the website. Further, at a more fundamental level, the *Craigslist* and *Roommate* results, if they in fact lead to more ICSs turning their websites into a free-for-all, will lead to more unpunished violations of the FHA. Although an ICS may gain immunity under the Good Samaritan provision of section 230(c)(2), this is likely to be viewed as an expensive alternative relative to the website doing nothing and acquiring immunity under the CDA.

The foregoing policy discussion illuminates a problem that is bound to become more pervasive. Congress passed the FHA in an attempt to fundamentally reform the housing market,<sup>134</sup> and section 3604(c) reaches even further because it is not subject to any of the exceptions that apply to other parts of the FHA.<sup>135</sup> Moreover, the FHA was passed during the civil rights movement, a time of sweeping social changes. These two elements – the language of the statute and the political and social climate at the time of its passage – make clear that the statute was meant to be a ground-breaking and far-reaching tool of change.

The CDA was similarly meant to be a far-reaching tool of change. The policy of preserving “the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by . . . regulation”<sup>136</sup> strikes at the heart of preserving the marketplace of ideas.<sup>137</sup> But, the CDA was also meant to provide protection for those who undertook

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133. I.e., taking a restrictive view of the immunity granted under section 230(c)(1) as advocated by Judge St. Eve in *Craigslist*. See *Craigslist*, 461 F. Supp.2d at 698.

134. *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972) (en banc) (Wilkey, J., concurring).

135. Schwemm, *supra* note 19, at 191.

136. 47 U.S.C. § 230(b)(2) (2006).

137. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

in good faith to screen objectionable material.<sup>138</sup> These dueling purposes of the CDA indicate that Congress was acting with an eye toward the future, aware that the Internet was a rapidly-developing outlet on the marketplace of ideas, but also cognizant of the dangers posed by the proliferation of the Internet. In this way, then, Congress intended the CDA, like the FHA, to be a tool to change the future.

The state of the law is left in flux, as these two massive statutes with broad purposes seemingly lie in conflict. It is possible, but not probable, that Congress had the FHA in mind when it passed the CDA. The confusion has resulted in calls to reconcile the two statutes,<sup>139</sup> which would result in enforcing the spirit of each statute. As discussed herein, though, the enforcement of the spirit of the law would come at the expense of the letter of the law, which is an unacceptable result. This demonstrates that the courts are not the appropriate mechanism of change to interpret the two competing statutes. The language of section 230(c) is clear in the result that it demands, but it is a distasteful result and is inconsistent with the letter of section 3604(c) and with how the FHA has been interpreted by courts.

Consequently, it is Congress' duty to act on the matter to clear up the confusion. One possibility would be amending section 230(e) of the CDA to include the FHA as an express exception from the immunity offered under section 230(c). This option would entail a weighing of factors. On the one hand, the costs associated with forcing ICSs to screen all its content could be high. On the other hand, one must consider the damage caused by discriminatory housing advertising, including the emotional distress to the reader and the fact that Congress' sanctioning such activity would reverse a key component of the FHA. Regardless of the outcome, it is clear that the tools necessary for courts to deal with the conflict that currently exists between the CDA and FHA are not available. Despite the fact that the *Craigslist* and *Roommate* courts came to the proper legal result, the result is undesirable; that is, a key component the FHA should not be overruled based on the reading of another statute. If Congress did not intend for section 3604(c) to apply where it otherwise would in a paper world – for example, with newspapers – Congress should expressly say so.

## V. CONCLUSION

The conflict is clear: on one side stand housing scholars and plaintiffs aggrieved by discriminatory statements posted on websites like Craigslist, and on the other side stand judges who are left with no choice but to interpret the letter of the law under the CDA. The law has yielded two cases, *Craigslist* and *Roommate*, that stand on solid legal ground for the results they reach. However, the results come at the expense of the enforcement of the FHA

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138. See 47 U.S.C. § 230(b)(4).

139. See, e.g., Chang, *supra* note 27, at 1003.

without any notion that this was Congress' intent. This result is unacceptable and must be rectified by congressional action.

J. ANDREW CROSSETT