

# All Claims Are Not Created Equal: Challenging the Breadth of Immunity Granted by the Communications Decency Act

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## I. INTRODUCTION

In the digital sex world, “roses” means dollars and “greek” refers to anal sex.<sup>1</sup> Advertisements such as these run rampant: “15 Min \$50 Roses . . . 1 hour \$150 Roses,” and “How About A G-R-E-E-K Lesson I’m a Great Student!!”<sup>2</sup> Other advertisements do not use code words: “HELLO GENETLEMEN NOW YOU MEET JADE AND TIPHANY WE DO TWO GIRL SHOWS AND INDIVISUAL CALLS!! WE GUARANTEE THE TIME OF YOUR LIFE!!!”<sup>3</sup> These are the types of advertisements that Sheriff Thomas Dart of the Chicago Police Department frequently encountered when scrolling through the “Erotic Services” portion of the popular website, Craigslist.com (hereinafter “Craigslist”).<sup>4</sup> Despite these shocking sex solicitations, a federal court in Illinois recently held that Craigslist was immune from suit despite allowing these advertisements on its website.<sup>5</sup> How can such a blatant promise for sex be permitted through the Internet? The answer lies with the Communications Decency Act (hereinafter “CDA”).<sup>6</sup>

Congress enacted the CDA to help promote the growth of the Internet and to encourage Web sites to self-police their content.<sup>7</sup> With the intention of enforcing these policy goals, courts have extended the statutory immunity of the CDA immensely, creating what one court has called a “lawless no-man’s-land on the Internet.”<sup>8</sup> The underlying purpose of these policy goals and the language of the statute, however, were not meant to immunize Web sites from engaging in illegal behavior or facilitating others in engaging in such behavior.<sup>9</sup>

When Congress passed the CDA in 1996, the state of the Internet was significantly different than it is now.<sup>10</sup> Over the past decade, the

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<sup>1</sup> Dart v. Craigslist, Inc., 665 F. Supp. 2d 961, 962–63 (N.D. Ill. 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* (spelling errors in original).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 966–69.

<sup>6</sup> 47 U.S.C. § 230(b) (2009).

<sup>7</sup> *Id.*; see also Batzel v. Smith, 333 F.3d 1018, 1027–28 (9th Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 330–31, 333 (4th Cir. 1997); Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998); 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statements of Rep. Cox, Wyden, and Barton).

<sup>8</sup> Fair Hous. Council v. Roommate.com, LLC, 521 F.3d 1157, 1164 (9th Cir. 2008) (*en banc*).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1164, n.15 (“The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant – perhaps the preeminent – means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair

Internet has flourished to a point where such a broad concept of immunity under the CDA is not as imperative as it was in the Internet's early stages.<sup>11</sup> It is therefore appropriate to reconsider the overwhelming sweep of immunity granted to Web sites by previous courts.

Two recent cases demonstrate how courts have applied this seemingly limitless concept of immunity: *Doe v. SexSearch.com* (hereinafter "*SexSearch*")<sup>12</sup> and *Dart v. Craigslist, Inc.* (hereinafter "*Dart*").<sup>13</sup> Both of these cases arose from an "adult" website or an "adult" section of a website. Each of these cases had egregious facts and claims. The harsh result—denying the injured parties relief against these Web sites—is hard to justify given the general policy concerns regarding sexual crimes involving minors and prostitution.<sup>14</sup> These cases demonstrate the need for a more factually intensive inquiry before immunity is granted.

Part II of this Note sets forth the legislative background of the CDA, including the language of the statute and the policy reasons for enacting it. This part examines the first case to interpret the CDA's § 230 immunity, *Zeran v. America Online* (hereinafter "*Zeran*"),<sup>15</sup> and analyzes how courts have construed and expanded that decision. Part III discusses the facts and holdings of the two cases central to this note: *SexSearch* and *Dart*. These cases demonstrate the harsh results that flow from granting broad immunity without consideration for the facts and circumstances of the case. Part IV analyzes *Fair Housing Council v. Roommate.com, LLC* (hereinafter "*Roommate*") and explores how the court delved into a deeper factual analysis in that case rather than blindly granting the Web site blanket immunity for its actions.<sup>16</sup>

Finally, Part V articulates a new test, which courts should consider when determining whether CDA immunity is appropriate. The principles announced in *Roommate* seek to limit the breadth of immunity available and thus present a step in the right direction; however, these principles need to be expanded to allow courts to intervene and preclude immunity

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advantage over their real-world counterparts, which must comply with laws of general applicability.”).

<sup>11</sup> *Id.*

<sup>12</sup> 502 F. Supp. 2d 719 (N.D. Ohio 2007), *aff'd on other grounds*, 551 F.3d 412 (6th Cir. 2008).

<sup>13</sup> No. 09-C1385, 2009 U.S. Dist. LEXIS 97596 (N.D. Ill. Oct. 20, 2009).

<sup>14</sup> See Jessica S. Groppe, Comment, *A Child's Playground or a Predator's Hunting Ground? – How to Protect Children on Internet Social Networking Sites*, 16 *COMMLAW CONSPICUOUS* 215, 217–24 (2007) (arguing that curbing sexual solicitation of minors on the Internet is a high priority).

<sup>15</sup> 129 F.3d 327 (4th Cir. 1997).

<sup>16</sup> *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

when necessary. The best way to effectuate Congress's intent in passing the CDA is to conduct a fact-specific inquiry, in which the court considers the nature of the Web site at issue, the underlying facts of the case, and the claims brought by the plaintiff.

## II. THE BACKGROUND OF THE CDA

### A. Legislative Background

Congress passed the CDA as an amendment to the Telecommunications Act of 1996.<sup>17</sup> The Telecommunications Act of 1996 was passed "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."<sup>18</sup> The CDA was therefore one small piece of a much larger statute. The portion of the statute referred to as the CDA is entitled, "Protection for Private Blocking and Screening of Offensive Material."<sup>19</sup> Under this title, the CDA states, "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."<sup>20</sup> The CDA provides immunity when three specific requirements are met.<sup>21</sup>

First, the defendant must be a "provider or user of an interactive computer service."<sup>22</sup> An interactive computer service is defined 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."<sup>23</sup> The most common interactive computer services are Web sites because they provide a service that enables multiple users to access the service.<sup>24</sup> Therefore, this requirement is generally easily met.<sup>25</sup>

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<sup>17</sup> 47 U.S.C. § 609 (2009).

<sup>18</sup> *Id.*

<sup>19</sup> 47 U.S.C. § 230 (2009).

<sup>20</sup> 47 U.S.C. § 230(c)(1) (2009).

<sup>21</sup> *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

<sup>22</sup> *Id.*

<sup>23</sup> 47 U.S.C. § 230(f)(2).

<sup>24</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162, n.6 (9th Cir. 2008) (en banc).

<sup>25</sup> *Id.* The Web sites at issue in this note, SexSearch.com, Craigslist.com, and Roommate.com, are all information content providers.

Second, the claim must be based on “information provided by another information content provider.”<sup>26</sup> An information content provider is defined 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.”<sup>27</sup> In any given situation, there may be more than one information content provider.<sup>28</sup> Users of the Web site and the Web sites themselves can both be information content providers.<sup>29</sup> Thus, a Web site may simultaneously be an interactive computer service provider when it passively displays information, and an information content provider when it creates or develops content.<sup>30</sup> Whenever a Web site acts as an information content provider, it subjects itself to liability for the information that it created or developed.<sup>31</sup>

Finally, the claim must treat the defendant “as [a] publisher or speaker” of that information even though it was provided by an outside “information content provider.”<sup>32</sup> On its face the CDA does not define the terms “publisher” and “speaker.”<sup>33</sup> However, subsequent courts have read the terms as requiring that the claim must treat the defendant as if he were the one who created or presented the information.<sup>34</sup>

The CDA was passed with two primary objectives: Congress wanted to encourage the growth of the Internet through fostering free speech and removing the potentially stifling liability in this area,<sup>35</sup> and Congress wanted to “encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material. . . .”<sup>36</sup> Congress’s specific findings and policy objectives are listed within the statute to make its intent clear to the

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<sup>26</sup> *Universal Commc’n Sys.*, 478 F.3d at 418.

<sup>27</sup> 47 U.S.C. § 230(f)(3).

<sup>28</sup> *See Roommates*, 521 F.3d at 1165.

<sup>29</sup> *Id.* (“The fact that users are information content providers does not preclude Roommate from *also* being an information content provider by helping ‘develop’ at least ‘in part’ the information in the profiles. . . [T]he party responsible for putting information online may be subject to liability, even if the information originated with a user.”); *see also* *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003).

<sup>30</sup> *Id.* at 1162–63; *see also* *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006).

<sup>31</sup> *Id.*

<sup>32</sup> *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007).

<sup>33</sup> *See generally*, 47 U.S.C. § 230(c)(1), (f).

<sup>34</sup> *See, e.g., Universal Commc’n Sys.*, 478 F.3d at 421–22.

<sup>35</sup> *See, e.g.*, 47 U.S.C. § 230(b)(1), (2); *Batzel*, 333 F.3d at 1027; *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997).

<sup>36</sup> *Batzel*, 333 F.3d at 1028; *see also* 47 U.S.C. § 230(b)(4); *Zeran*, 129 F.3d at 331; *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998); 141 CONG. REC. H8469–70 (daily ed. Aug. 4, 1995) (statements of Rep. Cox, Wyden, and Barton).

courts.<sup>37</sup> The impetus to propose CDA immunity also came from two court cases that illustrated the disparity of treatment of interactive computer services under common law principles.<sup>38</sup> Under common law, interactive computer services can be treated as either publishers or distributors when they supply third-party content to their users.<sup>39</sup> The distinguishing factor between being considered a publisher or a distributor is the amount of control that the service has over the content that it publishes.<sup>40</sup> A publisher is responsible for the creation and editing of its publication and is thus responsible for the content of its work.<sup>41</sup> A distributor, on the other hand, is only responsible for distributing material and is thus not liable for the content of its publication unless it knew or had reason to know of defamatory content.<sup>42</sup> The most well-known example of a distributor is a bookstore, because a bookstore does not exert any control over the contents of the books that it sells.<sup>43</sup>

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<sup>37</sup> Congress's findings include: "The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. § 230(a)(1); "[t]hese services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops." 47 U.S.C. § 230(a)(2); "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3); "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4); "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services." 47 U.S.C. § 230(a)(5). Congress's policy reasons behind the CDA include: "to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1); "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." 47 U.S.C. § 230(b)(2); "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." 47 U.S.C. § 230(b)(3); "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material" 47 U.S.C. § 230(b)(4); "to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." 47 U.S.C. § 230(b)(5).

<sup>38</sup> *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995). See also, H.R. REP. NO. 104-458 (1996); Thomas D. Huycke, Note, *Licensed Anarchy: Anything Goes on the Internet? Revisiting the Boundaries of Section 230 Protection*, 111 W. VA. L. REV. 581, 583-86 (2009).

<sup>39</sup> Huycke, *supra* note 37, at 583.

<sup>40</sup> *Id.* at 583-84.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Cubby*, 776 F. Supp. at 140.

In *Cubby, Inc. v. Compuserve, Inc.*, Compuserve obtained information from third parties, used the information to compile an electronic rumor publication, and posted the publication on its bulletin board.<sup>44</sup> The publication contained defamatory statements about the plaintiff, who then sued Compuserve for libel.<sup>45</sup> The court held that Compuserve was akin to a distributor, as opposed to a publisher, because it did not review the contents of the publication before the publication was uploaded.<sup>46</sup> Therefore, since the plaintiff did not prove knowledge or a reason to know of the defamatory content, Compuserve was not found liable.<sup>47</sup>

The opposite conclusion was reached in *Stratton Oakmont, Inc. v. Prodigy Services Co.* (hereinafter “*Stratton*”).<sup>48</sup> In *Stratton*, an investment banking firm sued a Web site based on defamatory statements about the firm, which were posted on the Web site’s electronic bulletin board.<sup>49</sup> The court held that the Web site was a publisher because it claimed to exercise “editorial control over the content of messages posted on its computer bulletin boards[.]”<sup>50</sup> Due to its status as a publisher, the Web site was found liable.<sup>51</sup>

Read together, these decisions may be taken to establish that interactive computer services will not be held liable if they do not police their Web sites and do not know or have reason to know of tortious activity, but they will be held liable if they do police their Web sites.<sup>52</sup> In effect, these decisions support the policy that Web sites should maintain a “hands-off” approach and avoid ensuring the safety of their sites. In order to set aside the deterrent to monitor one’s Web site, Congress enacted the CDA to immunize interactive computer services from suits based on information provided by third parties that have been published by the Web site.<sup>53</sup> In reference to Internet-based suits, Congress

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<sup>44</sup> *Id.* at 137.

<sup>45</sup> *Id.* at 137–38.

<sup>46</sup> *Id.* at 141.

<sup>47</sup> *Id.*

<sup>48</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

<sup>49</sup> *Id.* at \*1, 4.

<sup>50</sup> *Id.* at \*3, 6–11.

<sup>51</sup> *Id.* at \*10–11.

<sup>52</sup> *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 140–41 (S.D.N.Y. 1991); *Stratton Oakmont*, 1995 N.Y. Misc. LEXIS 229, at \*6–11.

<sup>53</sup> See H.R. REP. NO. 104–58 (1996) (Conf. Rep.) (“[S]ection [230] provides ‘Good Samaritan’ protections from civil liability for providers . . . of an interactive computer service for actions to restrict . . . access to objectionable online material. One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers . . . as publishers or speakers of

abolished the difference between distributor and publisher liability found at common law.<sup>54</sup> Congress sought to allow interactive computer services to perform some editing and policing of user-generated content without holding them liable for all of the unlawful or defamatory messages that they did not find and delete.<sup>55</sup> Congress also sought to protect the good faith removal of any material that was viewed as “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”<sup>56</sup> Therefore, although Congress sought to protect Web sites engaging in an effort to cleanse their Web sites of illegal or inappropriate material, there is no indication in the statute that Congress intended to immunize Web sites that knew of illegal or defamatory material on their Web sites and refused to remove the material.<sup>57</sup>

#### B. *Zeran v. America Online*

The Fourth Circuit in *Zeran v. America Online* presented the first interpretation by an appellate court of the CDA.<sup>58</sup> In this case, the plaintiff, Zeran, sought to hold America Online (hereinafter “AOL”) liable for defamatory messages posted on AOL’s bulletin board by an unidentified third party.<sup>59</sup> The postings advertised shirts with tasteless slogans referencing the Oklahoma City bombing and told interested parties to contact the plaintiff, Zeran, at his home phone number.<sup>60</sup> As a result of these messages, Zeran received multiple threatening phone calls that intensified further when a local radio host talked about the advertisements during his radio show.<sup>61</sup> Zeran notified AOL about the defamatory postings. Eventually, AOL took the postings down but refused to post a retraction.<sup>62</sup>

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content that is not their own because they have restricted access to objectionable material.”).

<sup>54</sup> *Id.*

<sup>55</sup> See *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (“Congress sought to immunize the *removal* of user-generated content, not the *creation* of the content.”) (emphasis in original).

<sup>56</sup> 47 U.S.C. § 230(c)(2)(A).

<sup>57</sup> See generally 47 U.S.C. § 230(c) (2009).

<sup>58</sup> See *Zeran*, 129 F.3d 327 (4th Cir. 1997).

<sup>59</sup> *Id.* at 328.

<sup>60</sup> *Id.* at 329.

<sup>61</sup> *Id.* Zeran was a completely innocent victim of defamation, which resulted in an exorbitant number of death threats. Even after the radio show and a local newspaper revealed that the advertisements were a hoax, Zeran was still receiving fifteen outraged phone calls per day. *Id.*

<sup>62</sup> *Id.*

The Fourth Circuit held that AOL was immune from suit even though it was notified of the statements because AOL is an interactive computer service, and the plaintiff sought to hold AOL liable as a publisher for the postings provided by an outside information content provider.<sup>63</sup> Zeran argued that he was seeking to hold AOL liable for being a distributor rather than a publisher, because AOL knew of the defamatory postings.<sup>64</sup> He supported his argument by stating that Congress only meant to protect publishers under the CDA, based on the language of the statute, and that the statute left distributors unprotected.<sup>65</sup> The court held that the distinction between distributor liability and publisher liability is immaterial because both are merely subsets of publisher liability.<sup>66</sup> The terms “publisher” and “distributor” derive their meanings from defamation law.<sup>67</sup> For purposes of defamation law, both publishers and distributors are considered to be “publishers” because they provide information to the public, regardless of their knowledge of the material.<sup>68</sup> The different nomenclature signifies only “the different standards of liability [that] may be applied *within* the larger publisher category, depending on the specific type of publisher concerned.”<sup>69</sup> The court reasoned that once a website receives notice of a potentially defamatory posting, the Web site assumes the role of a traditional publisher.<sup>70</sup> Thus, the court held, “lawsuits 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>71</sup>

Since the decision in *Zeran*, many courts throughout the country have used the case’s analysis to advance a broad interpretation of immunity.<sup>72</sup> Some courts have granted immunity to defendants even if they take an active role in selecting and posting defamatory material, as long as someone else wrote the original material.<sup>73</sup> This broad

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<sup>63</sup> *Id.* at 332–33.

<sup>64</sup> *Id.* at 331.

<sup>65</sup> *Zeran*, 129 F. 3d at 331–32.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 332.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 332.

<sup>71</sup> *Zeran*, 129 F. 3d at 330. The *Zeran* court’s holding that publishers and distributors should both be considered publishers under the CDA was upheld in *Barrett v. Rosenthal* 146 P.3d 510 at 518–20 (Cal. 2006).

<sup>72</sup> See Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 690 n.7 (N.D. Ill. 2006) (listing cases that have stated that Section 230(c)(1) offers information computer services a “broad,” and “robust” immunity).

<sup>73</sup> See, e.g., *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. 2006).

interpretation can partially be attributed to the *Zeran* court's characterization of publisher liability.<sup>74</sup> The conflation of the roles of publisher and distributor is troubling given that the statutory language of the CDA specifically uses the term "publisher," to the exclusion of the term "distributor."<sup>75</sup> The CDA states: "[n]o provider or user of an interactive computer service shall be treated as the *publisher* or *speaker* of any information. . . ." <sup>76</sup> Therefore, Congress arguably only meant to grant immunity to Web sites when they are being treated as traditional publishers, instead of being treated as either publishers or distributors.

Despite the overwhelming majority of courts advocating a broad grant of immunity, some courts have recently taken the view that *Zeran* has been applied too broadly.<sup>77</sup> Many scholars argue that the breadth of immunity has become too large and out of control.<sup>78</sup> These courts and scholars espouse taking a more comprehensive view of the entire case before granting immunity for every kind of action regardless of how active the interactive computer service is in the creation or development of the material provided.

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<sup>74</sup> *Zeran*, 129 F. 3d at 330.

<sup>75</sup> 47 U.S.C. § 230(c)(1) (2009).

<sup>76</sup> *Id.* (emphasis added)

<sup>77</sup> *See Doe v. GTE*, 347 F. 3d 655, 660 (7th Cir. 2003) (The Seventh Circuit stated that § 230(c)(1) should be read as a "definitional clause rather than as an immunity from liability . . . . The difference between this reading and [the courts that consider it to be a clause granting immunity] is that § 230(c)(2) never requires ISPs (interactive service providers) to filter offensive content, and thus § 230(e)(3) would not preempt state laws or common-law doctrines that induce or require ISPs to protect the interests of third parties, [] for such laws would not be 'inconsistent with' this understanding of § 230(c)(1)."); *see also Chi. Lawyers' Comm. for Civil Rights Under Law*, 519 F. 3d at 669–70 (citing and agreeing with the proposition in *Doe v. GTE* that § 230(c)(1) was meant to be a "definitional clause."); *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157, 1163–64 (9th Cir. 2008) (en banc) (agreeing with the Seventh Circuit that the interpretation of the substance of section 230(c) should be consistent with the title of the section, "Protection of 'good samaritan' blocking and screening of offensive material" and thus § 230(c)(1) should be considered a definitional clause.)

<sup>78</sup> *See, e.g., Huycke, supra* note 37, at 596 ("[C]ourts analyzing Section 230 routinely ignore Congress's definition of an [information content provider] to find [interactive computer services] immunized even if they alter, manipulate, select or facilitate third party content, simply because the content originated with the third party."); Katy Noeth, Note, *The Never-Ending Limits of § 230: Extending ISP Immunity to the Sexual Exploitation of Children*, 61 FED. COMM. L.J. 765, 769 (2008) ("The end result is that courts have expanded § 230 to immunize [interactive computer services] from virtually every tort action.").

III. *SEXSEARCH* AND *DART*A. *Doe v. SexSearch*

One instance of a court granting broad immunity to an undeserving defendant is *Doe v. SexSearch*.<sup>79</sup> In *SexSearch*, the Web site at issue offers an adult dating service that encouraged its members to meet and have sex.<sup>80</sup> Plaintiff John Doe met Jane Roe on SexSearch's Web site, and pursuant to conversations and plans made through the Web site, the two met at Roe's home and engaged in sexual relations.<sup>81</sup> Although Roe represented herself to be eighteen years-old in her profile on the website, she was in fact fourteen at the time of the meeting.<sup>82</sup> As a result of the sexual relations, Doe was arrested and charged with engaging in unlawful conduct with a minor.<sup>83</sup> Doe then sued SexSearch alleging breach of contract, fraud, negligent infliction of emotional distress, negligent misrepresentation, breach of warranty, violations of the Ohio Consumer Sales Practices Act, and failure to warn.<sup>84</sup> These claims ultimately boiled down to whether "(a) [d]efendants failed to discover Jane Roe lied about her age to join the website, or (b) the contract terms [were] unconscionable."<sup>85</sup>

In granting immunity, the court rejected plaintiff's arguments that SexSearch is an information content provider because the Web site reserves the power to alter and delete the content of profiles that disobey the profile guidelines.<sup>86</sup> Furthermore, the court denied the argument that CDA immunity can only be granted to defendants when faced with defamation claims.<sup>87</sup> The court held that SexSearch is an interactive computer service and not an information content provider.<sup>88</sup> In addition, the court held that the suit brought by Doe sought to hold SexSearch liable for acting as a publisher in publishing information provided by a third party.<sup>89</sup> The Court rejected Doe's reliance on *Anthony v. Yahoo! Inc.* (hereinafter "*Anthony*")<sup>90</sup> in determining that SexSearch is not an

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<sup>79</sup> *Doe v. SexSearch*, 502 F. Supp. 2d 719 (N.D. Ohio 2007).

<sup>80</sup> *Id.*

<sup>81</sup> *SexSearch*, 502 F. Supp. 2d at 722.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 723–24.

<sup>85</sup> *SexSearch*, 502 F. Supp. 2d at 724.

<sup>86</sup> *Id.* at 725–26.

<sup>87</sup> *Id.* at 726.

<sup>88</sup> *Id.* at 725–26.

<sup>89</sup> *Id.* at 726–27.

<sup>90</sup> 421 F. Supp. 2d 1257 (N.D. Cal. 2006). In *Anthony*, the interactive computer service at issue consisted of two dating services that were subsections of Yahoo! The plaintiff alleged that Yahoo! produced false member profiles and that it distributed

information content provider.<sup>91</sup> The court distinguished *Anthony* because in *Anthony*, the defendant Web site created the tortious content itself, but in *SexSearch*, plaintiff did not allege that SexSearch created false information or modified Jane Roe's profile.<sup>92</sup> The court further relied on *Carafano v. Metrosplash.com, Inc.* (hereinafter "*Carafano*")<sup>93</sup> and held that despite the fact that SexSearch provided the questionnaire that Roe answered falsely, that fact is not enough to prove that SexSearch is the developer of the false profile.<sup>94</sup>

The court in *SexSearch* also relied on the reasoning from *Doe v. MySpace*, (hereinafter "*MySpace*"),<sup>95</sup> to grant immunity to SexSearch. In *MySpace*, plaintiff Julie Roe sued MySpace, alleging the defendant negligently failed to monitor its Web site.<sup>96</sup> MySpace is a social networking site that allows individuals to create profiles and communicate with other users.<sup>97</sup> Plaintiff Julie Doe met Peter Solis through MySpace and the two exchanged contact information.<sup>98</sup> Doe and Solis arranged a meeting in person, during which Solis sexually assaulted Doe.<sup>99</sup> At the time of the meeting, Doe was fourteen years-old and Solis was nineteen.<sup>100</sup> Doe had created her MySpace profile and originally met Solis when she was thirteen, in violation of MySpace's minimum age requirement.<sup>101</sup> The court found that despite Doe's claim that the Web site negligently failed to keep minors off the website, Doe was really seeking to hold MySpace responsible for publishing the content of her profile, which led to her attack.<sup>102</sup> Therefore, the court granted immunity to MySpace.<sup>103</sup> Relying on this reasoning, the court in *SexSearch* held that Doe was seeking to hold SexSearch liable for failure to monitor its

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former members' profiles that had discontinued their service to its current members to retain their service. Yahoo! was found to be liable for both the false profiles and the former profiles. *SexSearch* distinguished the false profiles in *Anthony* from Roe's profile, but it did not consider the misrepresentations associated with the former profiles.

<sup>91</sup> *SexSearch*, 502 F. Supp. 2d at 725.

<sup>92</sup> *Id.*

<sup>93</sup> 339 F.3d 1119 (9th. Cir. 2003).

<sup>94</sup> *SexSearch*, 502 F. Supp. 2d at 725–26.

<sup>95</sup> 474 F. Supp. 2d 843 (W.D. Tex. 2007), *aff'd*, 528 F.3d 413, 415–16 (5th Cir. 2008).

<sup>96</sup> *MySpace*, 528 F.3d at 416.

<sup>97</sup> *Id.* at 415.

<sup>98</sup> *Id.* at 416.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Myspace*, 528 F.3d at 419–20.

<sup>103</sup> *Id.* at 420–22.

website for the publication of third-party content and for failure to keep minors off its website.<sup>104</sup>

The court's reliance on *MySpace* indicates that if the facts in *SexSearch* were different, and the plaintiff in the case was really Jane Roe, the court would have still found *SexSearch* to be immune from suit. *SexSearch* and *MySpace* stand for the same proposition: regardless of the underlying facts of the suit, if the claims brought against a Web site seek to hold it liable for failing to monitor the content provided by third parties, then the Web site will be immune. While it is true that an adult male is not the most sympathetic plaintiff in a suit against a sex Web site seeking to hold it liable for his actions, the claims and underlying facts at issue still implicate the sexual assault of a minor.

The district court in *SexSearch* went on to conduct an analysis of the merits of each of the claims and found that regardless of the CDA immunity, none of the claims stated a basis upon which relief could be granted.<sup>105</sup> On appeal, the Sixth Circuit upheld the dismissal of the claims on Federal Rule of Civil Procedure 12(b)(6) grounds,<sup>106</sup> but the court did not address whether *SexSearch* was immune from suit under the CDA.<sup>107</sup> The Sixth Circuit stated that it did not adopt the lower court's analysis of immunity because the District Court "read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services."<sup>108</sup>

#### B. *Dart v. Craigslist, Inc.*

In *Dart v. Craigslist, Inc.*,<sup>109</sup> plaintiff, Sheriff Thomas Dart of the Chicago Police Department, sought to hold Craigslist liable for the contents of the "Erotic Services" portion of its Web site.<sup>110</sup> Craigslist is a Web site that publishes millions of classified advertisements for various things, such as housing, jobs, dating, used items, and communication information.<sup>111</sup> The Web site is divided into categories and subcategories established by Craigslist to help streamline its users' interests.<sup>112</sup> The content of the ads and the selection of where to place their ads are

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<sup>104</sup> *Doe v. SexSearch*, 502 F. Supp. 2d 719, 727 (N.D. Ohio 2007).

<sup>105</sup> *Id.* at 728–37.

<sup>106</sup> FED. R. CIV. P. 12(b)(6).

<sup>107</sup> *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008).

<sup>108</sup> *Id.* The Sixth Circuit did not elaborate on why the lower court had read the statute so broadly and why it refused to affirm the lower court's granting of immunity.

<sup>109</sup> 665 F. Supp. 2d 961, 961 (N.D. Ill. 2009).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 962.

provided by the users of the website.<sup>113</sup> Users posting any content on the Web site must agree to abide by Craigslist's "Terms of Use."<sup>114</sup> Craigslist also provides a search engine that permits users to search through ads using a word-search function.<sup>115</sup> The area at issue in this case was the subcategory of "services" within the "erotic" category (now the "adult" category).<sup>116</sup> Whenever users access this part of the Web site, they receive an additional "warning & disclaimer" in which they must agree to flag as "prohibited" any information that violates Craigslist's Terms of Use, including "offers for or the solicitation of prostitution."<sup>117</sup> In this case, the plaintiff, Thomas Dart, the sheriff of Cook County, stated that prostitution is rampant on Craigslist and claimed that Craigslist's "Erotic Services" category serves as a public nuisance.<sup>118</sup> To support this claim, Dart alleged that Craigslist violates federal, state and local prostitution laws by "solicit[ing] for a prostitute," by "'arrang[ing] meetings of persons for purposes of prostitution and 'direct[ing]' persons to places of prostitution," and by making it easier for prostitutes, pimps, and patrons to conduct business.<sup>119</sup>

The court found that Craigslist was entitled to a dismissal based on CDA immunity.<sup>120</sup> The court held that Craigslist is an interactive computer service,<sup>121</sup> and it is not an information content provider with regard to the illegal information.<sup>122</sup> In addition, the court held that plaintiff's claims sought to hold Craigslist liable as the publisher or speaker of information created by others.<sup>123</sup> The court specifically rejected the arguments that "Craigslist knowingly 'arranges' meetings for the purpose of prostitution and 'directs' people to places of prostitution," and that Craigslist "provid[es] the contact information of prostitutes and brothels."<sup>124</sup> Therefore, regardless of the underlying illegal content Craigslist provided, the court precluded claims that the Web site should be liable for its function as the publisher of the information.<sup>125</sup> The court further held that Craigslist does not induce users to post illegal material

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Dart*, 665 F. Supp. at 962.

<sup>116</sup> *Id.* at 961-62.

<sup>117</sup> *Id.* at 962.

<sup>118</sup> *Id.* at 963. This case specifically concerns "chicago.craigslist.org," one of the region-specific webpages on Craigslist's website.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 965-69.

<sup>121</sup> *Dart*, 665 F. Supp. at 965.

<sup>122</sup> *Id.* at 967-69.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 967.

<sup>125</sup> *Id.*

by providing an “adult services” section,<sup>126</sup> stating that the word-search function is a “neutral tool” also subject to immunity.<sup>127</sup>

In both of these cases, the courts used a broad interpretation of immunity without considering the nature of the underlying Web sites and the Web sites’ efforts to elicit dangerous and potentially illegal information. The courts used the same tunnel vision to grant immunity as the majority of the courts have used before them, instead of seeking to tie the facts to the purpose behind the law. The Ninth Circuit reconsidered this restricting outlook in *Fair Housing v. Roommate.com, LLC*.

#### IV. ROOMMATE

##### A. Case Summary

The seminal case that represents a shift away from granting broad immunity is *Fair Housing v. Roommate.com, LLC*.<sup>128</sup> Plaintiffs, the Fair Housing Council of San Fernando Valley and the Fair Housing Council of San Diego, brought suit against Roommate.com for various violations of the Fair Housing Act and California housing discrimination laws.<sup>129</sup> Defendant Roommate.com runs a Web site “designed to match people renting out spare rooms with people looking for a place to live.”<sup>130</sup> To use the Web site, individuals must create profiles by answering questions provided by Roommate.com about themselves and their roommate preferences, using pre-selected answers from a drop-down menu, and writing in an optional “Additional Comments” section in which there are no pre-selected answers and individuals can write anything they desire.<sup>131</sup> The questions posed by the Web site ask about an individual’s sex, familial status, sexual orientation, and about the user’s preferences in regards to those characteristics.<sup>132</sup> These questions must be answered as a prerequisite to using the Web site.<sup>133</sup> The Web site allows users to search the listings by entering their preferences into a search engine that returns listings that correspond to their preferences.<sup>134</sup> The Web site

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<sup>126</sup> *Id.* at 967–69.

<sup>127</sup> *Dart*, 665 F. Supp. at 969. (The court relied on the standard advanced by *Roommate*, 521 F.3d 1157, that is further explained in Part IV.)

<sup>128</sup> *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

<sup>129</sup> *Id.* at 1162.

<sup>130</sup> *Id.* at 1161.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Roommate*, 521 F.3d at 1162.

further provides an email service for which users must pay an additional fee to receive periodic emails from Roommate.com; the emails suggest available housing options that meet the users' preferences.<sup>135</sup>

Plaintiffs brought suit under the Fair Housing Act and other state laws pertaining to housing discrimination.<sup>136</sup> Defendant contended that it was immune from suit under the CDA.<sup>137</sup> Plaintiffs conceded that Roommate.com is an interactive computer service, establishing the first element of immunity.<sup>138</sup> The district court granted CDA immunity to that defendant Roommate.com for all of the Fair Housing Act violations and California housing discrimination violations alleged against it because it was not an information content provider.<sup>139</sup> The case was then appealed and reviewed twice by the Ninth Circuit.<sup>140</sup> In a panel decision, the Ninth Circuit upheld only partial immunity for the Web site,<sup>141</sup> though in an *en banc* decision, it found that Roommate.com was not immune from suit for some of the violations alleged against it.<sup>142</sup>

In the panel decision, the court set forth a fragmented opinion on what aspects of the website that Roommate.com was entitled to immunity for.<sup>143</sup> Judge Kozinski divided the analysis into three issues: the questionnaires that users were forced to fill out; the completed users' profiles; and the "Additional Comments" portion of the users' profiles.<sup>144</sup> In considering the first issue, all the judges agreed that Roommate.com was an information content provider because it created the questions and answer choices.<sup>145</sup> The second issue—whether the users' answers that were published as their profiles were subject to CDA immunity—provided a more difficult issue for the judges.<sup>146</sup> The majority opined that Roommate.com was not immune for the users' profiles because it actively solicited and processed them.<sup>147</sup> The majority drew a distinction between the facts in this case and the facts in *Carafano* by stating that the *Carafano* court did not grant immunity "to those who actively

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 1162, n.6.

<sup>139</sup> Fair Hous. Council v. Roommate.com, LLC, No. 03-09386, 2004 U.S. Dist. LEXIS 27987 (Cent. D. Cal. Sept. 20, 2004).

<sup>140</sup> Fair Hous. Council v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007); *rev'd en banc*, 521 F.3d 1157 (9th Cir. 2008).

<sup>141</sup> Fair Hous. Council v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007).

<sup>142</sup> *Roommate*, 521 F.3d 1157 (9th Cir. 2008) (*en banc*).

<sup>143</sup> Fair Hous. Council v. Roommate.com, LLC, 489 F.3d 921 (9th Cir. 2007).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 926–27.

<sup>146</sup> *Id.* at 927–29.

<sup>147</sup> *Id.*

encourage, solicit and profit from the tortious and unlawful communication of others.”<sup>148</sup> The majority further reasoned that by providing a search mechanism and e-mail service, Roommate.com provides an “additional layer of information that it is ‘responsible’ at least ‘in part’ for creating or developing.”<sup>149</sup> The majority, however, found that Roommate.com was immune from liability for the content of users’ “Additional Comments” sections.<sup>150</sup> The court found that the difference between the “Additional Comments” section and the rest of the users’ profiles was that the “Additional Comments” section lacked the specific encouragement by Roommate.com to provide discriminatory information.<sup>151</sup>

Two judges dissented. One judge on the panel argued that the majority had gone too far in stripping immunity from Roommate.com. However, another judge argued that the majority had not gone far enough and believed that Roommate.com should have been completely stripped of immunity.<sup>152</sup> Specifically, Judge Reinhardt dissented from the majority in arguing that Roommate.com should not have been granted immunity for the “Additional Comments” section; he believed that the comments were an integral part of the discriminatory users’ profiles, and the site actively solicited and encouraged individuals to post discriminatory comments in that section.<sup>153</sup> Judge Reinhardt looked at the users’ profiles as a whole, in contrast to the majority that examined each section of the profiles separately.<sup>154</sup>

Judge Ikuta concurred with the majority in granting immunity for the “Additional Comments” section and dissented from the decision not to grant immunity to Roommate.com for the content of the users’ profiles.<sup>155</sup> She argued that the majority adopted an overly expansive interpretation of “information content provider” unsupported by case law, and that Roommate.com did not become an information content provider by soliciting specific type of information.<sup>156</sup>

Five months later, the Ninth Circuit heard the case *en banc*. The court upheld the panel’s findings that Roommate.com was an information content provider with respect to the questions posed during

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<sup>148</sup> *Id.* at 927–28.

<sup>149</sup> *Roommate*, 489 F.3d at 929.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 930–35.

<sup>153</sup> *Id.* at 930–33 (Reinhardt J., dissenting).

<sup>154</sup> *Id.* at 931.

<sup>155</sup> *Roommate*, 489 F.3d at 933–35.

<sup>156</sup> *Id.* at 933–35.

the registration process and the profiles created from those questions.<sup>157</sup> The court reasoned that even though users are information content providers in principle, that does not preclude Roommate.com or any other interactive computer service from also being an information content provider “by helping ‘develop’ at least ‘in part’ the information in the profiles.”<sup>158</sup> The court further stated that “Roommate is ‘responsible’ at least ‘in part’ for each subscriber’s profile page, because every such page is a collaborative effort between Roommate and the subscriber.”<sup>159</sup>

The court next considered Roommate.com’s search system and e-mail notification system, holding that Roommate.com acted as an information content provider with respect to both systems.<sup>160</sup> The court sought to define the term “develop,” which had not been analyzed in the panel’s decision.<sup>161</sup> The court carefully considered the language of the statute and stated that “develop” must have an additional meaning other than “create;” otherwise, the use of both words in the statute would have been superfluous.<sup>162</sup> The court set forth a definition of “develop” by stating, “a website helps to develop unlawful content, and thus falls within the exception to § 230, if it contributes materially to the alleged illegality of the conduct.”<sup>163</sup> By allowing users to search based on illegal preferences and sending e-mails pursuant to these preferences, Roommate.com was no longer a passive conduit, but instead a partial “developer” of the information.<sup>164</sup> The court stated, “[i]f Roommate.com has no immunity for asking discriminatory questions, as we concluded above, it can certainly have no immunity for using the answers to the unlawful questions to limit who has access to housing.”<sup>165</sup>

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<sup>157</sup> *Fair Hous. Council v. Roommate.com, LLC*, 521 F.3d 1157, 1164–67 (9th Cir. 2008) (en banc).

<sup>158</sup> *Id.* at 1165. (The court stated that requiring subscribers to answer the questions as a condition of using Roommate’s services unlawfully “cause[s]” subscribers to make a “statement . . . with respect to the sale or rental of a dwelling that indicates [a] preference, limitation, or discrimination,” in violation of [the Fair Housing Act]. The CDA does not grant immunity for inducing third parties to express illegal preferences.”) *See also* *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003).

<sup>159</sup> *Roommate*, 521 F.3d at 1167.

<sup>160</sup> *Id.* at 1167–72.

<sup>161</sup> *Id.* at 1166–68.

<sup>162</sup> *Id.*; *See also* *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198 (10th Cir. 2009).

<sup>163</sup> *Roommate*, 521 F.3d at 1168.

<sup>164</sup> *Id.* at 1167.

<sup>165</sup> *Id.* (The court sought to distinguish the search engine at issue from generic search engines, such as Google and Yahoo! because the search functions used by these search engines do not “develop” the information sufficiently to meet the court’s announced rule).

The court then analyzed the “Additional Comments” section of users’ profiles and upheld the panel’s decision that Roommate.com was immune for that section.<sup>166</sup> The court characterized the “Additional Comments” as a neutral tool, which was fully protected by CDA immunity.<sup>167</sup> The court’s analysis of the “Additional Comments” section focused on the proclaimed definition of “develop” set forth in the decision.<sup>168</sup>

### B. Case Analysis

The analysis of whether a Web site should qualify as an information content provider, advanced in *Roommate*, is a step in the right direction for adhering to Congress’s goals in passing the CDA.<sup>169</sup> The decision does not affect Congress’s attempts to avoid disincentives to self-police Web sites. Roommate.com contributed to the content of the discriminatory information, and thus, this case did not present an issue of self-policing material provided by other information content providers.<sup>170</sup> Furthermore, this decision does not affect the policy goal of providing for the free flow of the Internet. *Roommate* portrays the outward limits of allowing the free flow of the Internet.

The court creates a clear divide by drawing the line between the profiles created through questions posed by Roommate.com, the e-mail notification, and search system, on the one hand, and the “Additional Comments” section, on the other. The court announced the rule that whenever the Web-site helps to “develop,” at least “in part,” the illegal information provided, it transforms from a passive conduit into a responsible party that does not receive immunity.<sup>171</sup> However, providing a forum in which individuals can provide information on their own, such as the “Additional Comments” section, does not pass this threshold without some kind of active inducement of the supplied content.<sup>172</sup>

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<sup>166</sup> *Id.* at 1173–74.

<sup>167</sup> *Id.* at 1174. (“Roommate publishes these comments as written . . . [it] is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate.”)

<sup>168</sup> *Id.*

<sup>169</sup> *Roommate*, 521 F.3d at 1170, 1175.

<sup>170</sup> *Id.* at 1170. (“Here, Roommate is not being sued for removing some harmful messages while failing to remove others; instead, it is being sued for the predictable consequences of creating a website designed to solicit and enforce housing preferences that are alleged to be illegal.”)

<sup>171</sup> *Id.* at 1166.

<sup>172</sup> *Id.* at 1173–74. *See also* *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009) (This distinction can be more readily observable through the analogy, “[w]e would not ordinarily say that one who builds a highway is ‘responsible’ for the use of that highway by a fleeing bank robber, even though the culprit’s escape was facilitated by the

The Ninth Circuit, in the *en banc* decision, also sought to explain and distinguish previous case law to further develop its rule. In considering the previous case of *Carafano v. Metrosplash.com, Inc.*,<sup>173</sup> the court affirmed the grant CDA immunity to the Web site while stating that some of the case's reasoning was incorrect.<sup>174</sup> In *Carafano*, the court granted immunity to a dating Web site that had published an unauthorized profile created by an unknown party.<sup>175</sup> The profile contained an actress's personal information, which led to threatening phone calls.<sup>176</sup> In *Roommate*, the court stated that the *Carafano* court properly granted immunity because the dating Web site did not induce the illegal content, but rather provided neutral tools to individuals who independently created illegal content.<sup>177</sup> However, the *Carafano* court was incorrect in stating that "no [dating] profile has any content until a user actively creates it," and finding that a website may still be granted immunity if it asked questions and provided drop down answers that then created users' profiles.<sup>178</sup> The Ninth Circuit stated in *Roommate* that "even if the data [is] supplied by third parties, a Web site operator may still contribute to the content's illegality and thus be liable as a developer."<sup>179</sup>

The analysis set forth in *Roommate* considers the amount of control and input an interactive service provider has in creating information. The Ninth Circuit created a sliding scale to determine how much information a Web site can solicit before losing immunity. The *Roommate* decision is a good example of a court considering the facts and claims at issue in the case, as opposed to blindly granting broad immunity.

Since the decision in *Roommate*, many courts have followed the Ninth Circuit's reasoning,<sup>180</sup> but some courts have rejected *Roommate* as too expansive or have misapplied the reasoning.<sup>181</sup> The mixed reception

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availability of the highway." Therefore, merely because the existence of illegal content was facilitated by the presence of a neutral conduit, that is not enough to hold that conduit responsible for "development" of information.)

<sup>173</sup> 339 F.3d 1119 (9th Cir. 2003).

<sup>174</sup> *Roommate*, 521 F.3d at 1171–72.

<sup>175</sup> *Carafano*, 339 F.3d at 1121, 1125.

<sup>176</sup> *Id.* at 1121–22.

<sup>177</sup> *Roommate*, 521 F.3d at 1171–72.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1171.

<sup>180</sup> *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198–1200 (10th Cir. 2009); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196–1201 (N.D. Cal. 2009); *Certain Approval Programs, L.L.C. v. Xcentric Ventures, L.L.C.*, No. CV08-1608-PHX-NVW, 2009 U.S. Dist. LEXIS 22318 at \*5–6 (D. Ariz. Mar. 9, 2009).

<sup>181</sup> *See Doe v. SexSearch*, 502 F. Supp. 2d 719, 725 (N.D. Ohio 2007). (*SexSearch* was decided after the initial Ninth Circuit ruling in *Roommate* and the court in *SexSearch*

of *Roommate* by courts is interesting when the interpretation of the CDA is traced back to *Zeran v. AOL*, the seminal case on the subject.<sup>182</sup> The Fourth Circuit merely sought to define the traditional jobs of a publisher that the CDA intended to immunize, and to set forth the proposition that whether a Web site would be considered a distributor or a publisher at common law, that distinction is immaterial under the CDA, as both would be immunized for doing the traditional jobs of a publisher.<sup>183</sup> Following that interpretation, the Ninth Circuit did not grant *Roommate.com* immunity because it actively created users' profiles and solicited discriminatory information that led to alleged violations of the Fair Housing Act and California's anti-discrimination laws.<sup>184</sup> *Roommate.com* was not a neutral conduit, but rather an information content provider itself because it helped develop the allegedly discriminatory information.<sup>185</sup>

## V. PROPOSED TEST

### A. Introduction of New Test

A more comprehensive test is needed that will work in conjunction with the *Roommate* reasoning, and expand upon that analysis in order to halt the dissemination of sweeping immunity. The appropriate test should utilize the *Roommate* standard when determining whether an entity is an information content provider, and a new test should be adopted to ensure that the claims at issue fall within the ambit of the CDA, so as to grant immunity to Web sites for these claims. Under the proposed test, the court should consider the collective effect of the nature of the interactive computer service, the claim(s) at issue, and the underlying facts alleged.<sup>186</sup> This new test will build upon the test

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relied on the analysis of *Carafano* instead of *Roommate*, which may have been one of the reasons why the Circuit refused to consider the district court's holding granting CDA immunity.). See also *Dart v. Craigslist*, 665 F. Supp. 2d at 961, 968–69 (N.D. Ill. 2009) (*Dart* was decided after the en banc ruling in *Roommate* and actually used *Roommate* as precedent in the opinion to draw a comparison between the open-ended "Additional Comments" sections in *Roommate* and the structure of *Craigslist's* service, providing categories and subcategories. The court found that the aforementioned aspects of the website were akin to one another. The court further found that the word search tool provided by *Craigslist* was a "neutral tool" under the reasoning of *Roommate*).

<sup>182</sup> *Zeran v. America Online*, 129 F.3d 327(4th Cir. 1997).

<sup>183</sup> *Zeran*, 129 F.3d at 330–34.

<sup>184</sup> *Roommate*, 521 F.3d at 1164–68.

<sup>185</sup> *Id.*

<sup>186</sup> See *Doe v. SexSearch.com*, 551 F.3d 412, 415 (6th Cir. 2008). The implementation of this test is somewhat supported by the Circuit court in *SexSearch*. Although the Circuit court did not rule on whether *SexSearch* would be immune from suit under the

advanced in *Roommate* that looked for Web sites that help “to develop unlawful content” and to “contribute materially to the alleged illegality of the conduct.”<sup>187</sup> More importantly, this test will place the *Roommate* inquiry into the larger scheme of promoting use of the Internet, while setting some important guidelines.

### B. Elements of the Test

#### 1. The Nature of the Interactive Computer Service

The cases concerning CDA immunity have presented a vast array of Web sites that target different types of people and activities.<sup>188</sup> Some are Web sites that many would consider to be harmless, whereas some, such as SexSearch and the “Erotic Services”<sup>189</sup> section of Craigslist, are sexually explicit Web sites that facilitate prostitution and the exploitation of minors. Courts should consider the nature of a specific Web site as one factor when determining whether to grant immunity for a specific claim, because different societal concerns flow from different Web sites.

This part of the analysis should determine whether or not the Web site at issue is solely an interactive computer service provider or both an interactive computer service provider and an information content provider based on the *Roommate* test. However, the test should be altered somewhat to allow for a broader definition of information content provider for Web sites that encourage illegal or risky behavior and could easily lead to such behavior based upon the information asked for by the Web site. The content of the material requested by the Web site would thus pose a higher burden on Web sites such as SexSearch and the

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Communications Decency Act, it did say that it refused to accept the district court’s analysis of the CDA because it “would read § 230 more broadly than any previous Court of Appeals decision has read it, potentially abrogating all state- or common-law causes of action brought against interactive Internet services.” The Circuit Court suggests that the district court should have provided a more thorough analysis into the type of claim set forth.

<sup>187</sup> *Roommate*, 521 F.3d at 1168.

<sup>188</sup> See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008) (involving MySpace, a social networking website that seeks to build friendships); *Universal Comm’n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (involving a website that lists stock prices and has a message board that conveys financial information); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (involving Matchmaker.com, a commercial Internet dating service); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (involving an AOL chatroom); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (involving an AOL bulletin board); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006) (involving a portion of Yahoo! dedicated to dating).

<sup>189</sup> *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d at 963 (N.D. Ill. 2009) (Craigslist has changed the name from “Erotic Services” to “Adult Services.”).

“Erotic Services” section of Craigslist because of the overarching policy concerns that stem from sexually related Web sites.

The imposition of a higher burden on sexually related Web sites is likely to be met with First Amendment concerns. For example, SexSearch would argue that although its Web site may be unsavory, it is completely lawful when used by consenting adults and as such, holding the Web site to a higher burden violates the Constitution. However, this higher burden would only be applied when the court considers the nature of the Web site, along with the underlying facts and claims at issue, and the balancing as a whole calls for a higher burden. In *SexSearch*, the plaintiff was suing the Web site for allowing minors to access the Web site and participate in active sex solicitations.<sup>190</sup> The claim was not attacking the nature of the Web site generally, but rather focusing on the specific concerns involving the nature of the website when used by minors.<sup>191</sup> In a case concerning consenting adults, such as a defamation claim against SexSearch, the higher burden would not be imposed on the Web site because the underlying facts and claims do not demand such a burden. Therefore, a heightened burden would only be applied in a small amount of cases, where sexually natured Web sites are not instilling the safety of their Web sites. This test is thus sufficiently narrowly tailored to avoid the curtailment of free speech while promoting other important societal interests.<sup>192</sup>

## 2. The Claims Alleged and Their Underlying Facts

The second part of the analysis should focus on the claims brought by plaintiff. Based on prior case law, if the claims relate a Web site’s alleged security, the court should not generally hold Web sites liable for their actions if they are trying to self-police or work as a publisher. Security in this context refers to Web sites proclaiming that they will ensure that their users abide by all the rules implemented by them. This expansive protection given to Web sites has been stretched too far and needs to be subject to one main limitation. Courts should hold that if the Web site proclaims that it will police its material, and it fails to provide such security, then it should be held responsible for those

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<sup>190</sup> Doe v. SexSearch.com, 502 F. Supp. 2d 719, 723–24 (N.D. Ohio 2007).

<sup>191</sup> *Id.*

<sup>192</sup> *Compare* U.S. v. Playboy Entm’t Group, 529 U.S. 803, 803 (2000) (The Court found that 47 U.S.C.S. § 561 violated the First Amendment because it was not the least restrictive alternative available. The statute required cable operators to either fully block channels reserved for adult programming or to “time channel” the programming, limiting the transmission to hours when children were unlikely to be viewing. The Court found that there was a less restrictive alternative, to allow viewers to order signal blocking on a household-by-household basis.)

representations. Otherwise, this amounts to a misrepresentation by the Web site that encourages users to trust and rely upon the Web sites' representations. Under this proposed limitation, Web sites are still encouraged to self-police. However, Web sites are not encouraged to tell their users that they are self-policing, when in fact they are not policing at all or are doing so in a negligent fashion.

Advocates of the broad interpretation of the CDA would likely consider this part of the proposed test to be a revival of the distinction between publisher and distributor liability at common law.<sup>193</sup> Although this part of the test does limit the representations of Web sites to actually be grounded in the actions they undertake to self-police their Web sites, it does not completely revert the state of the law to that of a pre-CDA society. Rather, it "revives" the holding in *Stratton Oakmont, Inc. v. Prodigy Services Co.* and applies it in a very narrow context.<sup>194</sup> The *Stratton* court held that a Web site representing itself as self-policed was responsible for its content.<sup>195</sup> This proposition would only be applied when the other two elements of the proposed test are met—when the nature of the website is dangerous, and the underlying events and facts are so heinous as to call for heightened scrutiny of the Web site's representations. Under the proposed test, the limited use of the *Stratton* holding would not require a court to find a Web site liable based on the facts in *Stratton*: the plaintiffs brought suit against Prodigy because a third party had posted defamatory statements about the plaintiffs' business and personal motives.<sup>196</sup> Using the proposed test, Prodigy would be found immune from suit despite its representations ensuring the safety of its Web site because the facts and underlying claims of the case do not mandate a heightened level of scrutiny. On the other hand, *SexSearch* and *Dart* mandate a heightened level of scrutiny because of their security misrepresentations, the egregious underlying facts and claims in the cases, and the nature of their Web site.

Furthermore, the revival of *Stratton's* holding is permissible because at the time it was abrogated by the CDA, the CDA sought to promote the growth of the Internet above all other costs.<sup>197</sup> Today, as the Internet has flourished exponentially, that policy concern must be weighed against the other policy concerns of sexual exploitation of

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<sup>193</sup> See, e.g., Huycke, *supra* note 37, at 583–84.

<sup>194</sup> *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 21063/94, 1995 N.Y. Misc. LEXIS 229 at \*6–11 (N.Y. Sup. Ct. May 24, 1995).

<sup>195</sup> *Id.* at \*10–11.

<sup>196</sup> *Id.* at \*1–2.

<sup>197</sup> 47 U.S.C. § 230(b)(1), (2) (2009); see also *Batzel v. Smith*, 333 F.3d 1018, 1027–28 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997). Parenthical explanation of relevance of these cases?

minors and prostitution.<sup>198</sup> Although the balancing of these policy interests may be more suited for Congress, the courts can no languish as more atrocious scenarios unfold from the lack of accountability held by Web sites. The courts must use judicial interpretation to reconcile the CDA with other pieces of legislation from Congress, regarding issues such as the sexual exploitation of minors and prostitution. Therefore, the use of the holding in *Stratton* is so narrow that it should not be considered *Stratton*'s revival, but rather a necessary utilization of old legal principles applied to effectuate important policy considerations in a new and more dangerous world.

This suggested limitation would seek to abolish the arbitrary line drawn in *Mazur v. eBay*, in which the court held that eBay was immune from some of its representations to its users, but not for others.<sup>199</sup> In that case, the district court held that eBay was immune regarding its site's representations, which stated that it used "reputable" auction houses and screened them before using them.<sup>200</sup> The court explained that these assertions were akin to a traditional publisher's role because deciding whether to include a live auction house when screening is similar to deciding whether to publish.<sup>201</sup> In contrast, the court held that eBay's affirmative representations that the Web site was "safe" may still be actionable.<sup>202</sup> The court reasoned that eBay made the statements that the Web site was "safe" of its own volition, without using any comments or feedback provided by users.<sup>203</sup> As such, the court found that eBay was the speaker of those statements.<sup>204</sup> The court's distinction between the plaintiff's two claims turned on semantics and thereby exhibits the need to hold Web sites liable when they make affirmative representations about their own safety features. The holding from this case potentially provides confusion when applying it to different sets of facts.<sup>205</sup>

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<sup>198</sup> Fair Hous. Council v. Roommate.com, LLC, 521 F.3d 1157, 1164, n.15 (9th Cir. 2008) (en banc).

<sup>199</sup> 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. Mar. 3, 2008).

<sup>200</sup> *Id.* at \*28–30.

<sup>201</sup> *Id.* at \*28–29.

<sup>202</sup> *Id.* at \*29–33 (The court further stated that the statements that eBay included in its Live Auction User Agreement were not enough to overcome this representation of safety. These statements included that eBay "1) only provides a venue; 2) is not involved in the actual transaction between buyer and seller; and 3) does not guarantee any of the goods offered in any auction. Specifically, eBay is 'solely a passive conduit' and 'not an auction house,' it is 'not conducting the live auctions' and it does not have control over the 'quality, safety or legality of the items advertised.'").

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> See *Mazur*, 2008 U.S. Dist. LEXIS 16561 at \*34–35. (The confusion of this holding is exemplified in the *Mazur* court's characterization of *SexSearch*. When analyzing whether the affirmative representations made by eBay should be actionable, the

When considering the claims at issue, the court should also analyze the underlying facts that support those claims. In the majority of the cases in which courts have granted CDA immunity, the defendant was sued for tort claims such as defamation or libel, with the underlying facts alleging that the Web site should be held responsible for the injurious content provided by another.<sup>206</sup> The application of CDA immunity in reference to cases involving underlying facts like fulfills congressional intent because those cases sought to hold an interactive computer service liable as a publisher or speaker of the claims. However, Congress did not intend to allow Web sites immunity from all suits based on all kinds of underlying facts, no matter how egregious. This intent can be gleaned from specific statements within the CDA. First, Congress only meant for immunity to be extended when interactive computer services were being treated as “publishers” or “speakers” of third party information.<sup>207</sup> Congress did not intend to immunize Web sites for all of their activities, including serving as gatekeepers responsible for ensuring the safety of their Web sites and the truthfulness of their own assertions.

Second, Congress has explicitly stated that CDA immunity should not be extended to alleged violations of criminal law.<sup>208</sup> Although this exception to CDA immunity is included to prevent the granting of immunity when a Web site faces criminal charges, the policy behind the exception should be interpreted broadly. The policy should be read so that courts should not grant immunity when a Web site actively participates in a criminal wrong. Specifically, the statute enumerates crimes related to obscenity and the sexual exploitation of children.<sup>209</sup>

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court distinguished this case from *SexSearch*. The court said that the granting of immunity in *SexSearch* was not applicable here for three reasons. First, the court reasoned that in *SexSearch*, defendant’s statements about its users were a regurgitation of its users’ representations. Second, the court noted that in *Mazur*, eBay did not present evidence of safety assurances that it received from HJA, whereas *SexSearch* presented the Terms of Conditions that stated that SexSearch was not liable for third party content. Finally, the court set forth that the plaintiff in *SexSearch* knew of the safeguards that the website provided, whereas the plaintiff in this case did not. However the court’s analysis was a mischaracterization because in both cases, the statements about defendant’s website were related to the information provided by the website’s users, there were Terms and Conditions agreements in both cases where the defendant’s Web sites disclaimed liability, and in both cases, the plaintiffs knew of the safeguards of the website.)

<sup>206</sup> See, e.g., *Universal Comm’n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (suing for defamation); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003) (suing for defamation); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) (suing for defamation); *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000) (suing for defamation and negligence).

<sup>207</sup> 47 U.S.C. § 230(c)(1) (2009).

<sup>208</sup> 47 U.S.C. § 230(e)(1) (2009).

<sup>209</sup> *Id.*

Therefore, sexually related crimes should be held to a heightened burden when seeking immunity. Congress has made numerous efforts to prevent such crimes from occurring through the Internet, and those efforts should be considered when courts determine whether to grant Web sites immunity.<sup>210</sup> This test seeks to place more responsibility on interactive computer services that are being sued based on crimes of a sexual nature.

### C. Application of the Test

#### 1. Interactive Service Provider

The natures of SexSearch and the “Erotic Services” section of Craigslist require the use of heightened scrutiny when seeking to apply CDA immunity. SexSearch is a Web site that offers an online adult dating service.<sup>211</sup> The main goal of SexSearch is for its users to meet one another and engage in sexual acts.<sup>212</sup> The outcome that SexSearch seeks is more dangerous than the outcome from other social networking sites that courts have compared it to, such as Yahoo! Personals and Yahoo! Premier,<sup>213</sup> MySpace,<sup>214</sup> or Matchmaker.<sup>215</sup> In *Doe v. SexSearch*, the court barred as immune the assertion that defendant should be liable because a minor was permitted to be on its Web site.<sup>216</sup> The court analogized the claim in *SexSearch* to the claim in *Doe v. MySpace*, in which the court held that arguing for failure to implement safety procedures for minors really meant that plaintiff was seeking to hold MySpace liable for its actions as a publisher of third party information.<sup>217</sup>

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<sup>210</sup> The statutory history of Congress’s attempts to help curb the sexual exploitations of minors on the internet is outside the scope of this note. See John Nisbett, Comment, *Checkmate: How Sexual Predators in (Your)Space Have Strategically Employed Existing Cyber-Laws to Outflank Their Prey*, 28 MISS. C. L. REV. 181, 191–96 (2009) (outlining the history of Congress’s initiative.); Sandra J.C. van der Heide, Note, *Social Networking and Sexual Predators: The Case of Self-Regulation*, 31 HASTINGS COMM. & ENT. L.J. 173, 183–86 (2008) (explaining COPA and Deleting Online Predators Act of 2007 (“DOPA”)); Gropp, *supra* note 13, at 229–37 (outlining the statutes that have been passed and the pending statutes.).

<sup>211</sup> *Doe v. SexSearch*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 725 (The court compared the facts of this case to the facts in *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006), which involved a section of Yahoo! that served as a dating service.).

<sup>214</sup> *Id.* at 727 (The court compared the facts of this case to the facts in *Doe v. MySpace*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007).).

<sup>215</sup> *Id.* at 725–26. (The court also compared the facts of this case to the facts in *Carafano v. Metrosplash*, 339 F. 3d 1119, 1121 (9th Cir. 2003).).

<sup>216</sup> *Id.* at 727–28.

<sup>217</sup> *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007).

Although the two claims are similar, the distinction that can be drawn between them is the difference between the Web sites at issue. MySpace is a social networking website that allows users to create profiles, which include personal information and information about their lives and their interests.<sup>218</sup> MySpace allows users to extend “friend invitations” to other users and to communicate with them.<sup>219</sup> The basic idea behind MySpace is to allow users to build friendships.<sup>220</sup> This idea runs counter to the idea behind SexSearch. Although both Web sites could be termed “social networking sites,”<sup>221</sup> the social networking intended to occur on MySpace varies greatly from that activities intended to occur via SexSearch; the former provides a platform for seeking friendships while the latter encourages people to seek sex.<sup>222</sup> The Web sites’ respective age requirements further illustrate the distinction between their natures: while MySpace conditions membership on individuals being fourteen years-old or older, SexSearch mandates that users are eighteen years or older.<sup>223</sup> If these restrictions were enforced and only adults were present on the Web site, then the activities of SexSearch would be entirely legal.

The interactive computer service in *Dart* is of a similar nature to the one in *SexSearch*. The interactive computer service in *Dart* is a subcategory of Craigslist, “Erotic Services.”<sup>224</sup> Plaintiff, Sheriff Dart, argued that this section of the Web site induced individuals to post listings advertising prostitution.<sup>225</sup> In support of his claim, he provided statistics of how many arrests were effectuated from content posted on Craigslist, and he submitted examples of some of the advertisements found.<sup>226</sup> Craigslist countered this argument by citing various services covered by the “Erotic Services” category that did not implicate prostitution.<sup>227</sup>

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<sup>218</sup> Doe v. MySpace, Inc., 528 F.3d 413, 415 (5th Cir. 2008).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 415–16.

<sup>221</sup> *MySpace*, 474 F. Supp. 2d at 845–46 (“The idea of online social networking is that members will use their online profiles to become part of an online community of people with common interests.”).

<sup>222</sup> *MySpace*, 528 F.3d at 415–16; Doe v. SexSearch, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

<sup>223</sup> *MySpace*, 528 F. 3d at 416; *SexSearch*, 502 F. Supp. 2d at 723.

<sup>224</sup> Dart v. Craigslist, 665 F. Supp. 2d 961, 961 (N.D. Ill. 2009) (The name of the subsection was later changed to “Adult Services.”).

<sup>225</sup> *Id.* at 962.

<sup>226</sup> *Id.* at 962–63.

<sup>227</sup> Dart v. Craigslist, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (stating that the “Erotic Services” section included advertisements for “legal escort services, massage workers, [and] exotic dancers”).

The dangerousness of this section of Craigslist is not a secret. On April 14, 2009, the peril of the website became public when the “Craigslist killer” murdered a young woman named Julissa Brisman.<sup>228</sup> The killer met up with Brisman in response to a masseuse advertisement she placed within Craigslist’s “Erotic Services” category.<sup>229</sup> For a few years prior to Brisman’s murder, many attorneys general were fighting Craigslist to implement more effective safety procedures.<sup>230</sup> Although Craigslist installed some rudimentary safety procedures to appease the attorneys general, such procedures were not sufficient to prevent Brisman’s murder.<sup>231</sup> After the murder, Craigslist changed the name of the “Erotic Services” category to “Adult Services” within the United States.<sup>232</sup> Craigslist Chief Executive Officer Jim Buckmaster also claimed that the postings in that category undergo consistent manual review.<sup>233</sup> Despite Buckmaster’s claims, many skeptics argue that the “Adult Services” section provides a forum for the exact same type of content that existed within the “Erotic Services” section.<sup>234</sup> The dangerousness of this section is demonstrated by a horrific murder, and the safety procedures that have been installed fail to deter the sexual exploitation and prostitution that is still occurs. Despite the fact that Brisman was intentionally advertising sexual services on the Web site, Craigslist still should have intervened and prevented the solicitation of sexual services on its Web site.

This portion of the Web site is similar to SexSearch in promoting sexually dangerous activities. Although there may be some legal advertisements posted under this section, the title of the section implies the existence of illicit material. This category can be distinguished from other categories on the Web site,<sup>235</sup> based on the type of content included

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<sup>228</sup> Maureen Orth, *Killer @ Craigslist*, VANITY FAIR, Oct. 2009 at 156; Aaron C. Davis, *Craigslist Vows to Improve Monitoring of ‘Adult’ Ads*, WASH. POST, May 14, 2009, at A03.

<sup>229</sup> Orth, *supra* note 224 at 156; Davis, *supra* note 224 at A03.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* (In November 2008, “the attorneys general got Craigslist to toughen its rules by requiring a working landline or proper cell phone, a valid credit card, an e-mail address, and an I.P. address that can be traced back to the individual from everyone placing a posting on Erotic Services.”)

<sup>232</sup> *Id.*; Brad Stone, *Craigslist to Remove ‘Erotic’ Ads*, N.Y. TIMES, May 14, 2009 at 1; Davis, *supra* note 224.

<sup>233</sup> Orth, *supra* note 224; Stone, *supra* note 228; Davis, *supra* note 224.

<sup>234</sup> Orth, *supra* note 224; Davis, *supra* note 224 (Inspector Brian Bray, who oversees the D.C. police department’s prostitution unit said “I believe it’ll just transfer [the prostitution postings] over under a different name.”)

<sup>235</sup> *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961 (N.D. Ill. 2009) (listing other examples of Craigslist’s categories and subcategories as “community,” “personals,” “discussion forums,” “housing,” “for sale,” “services,” and “jobs.”).

in each category and the connotations surrounding the categories. Like SexSearch, the subcategory of “Erotic Services” requires that an individual must be eighteen years-old to use the service, further exhibiting the adult nature of the website.<sup>236</sup> Because of the foreseeable content of the information available under “Erotic Services” and the foreseeable behavior that will result from interactions on SexSearch, the courts should hold these Web sites to a higher burden in order to qualify for CDA immunity.

In addition to considering the nature of the Web site, the court should also look at the amount of development and solicitation of information that the Web site engaged in. Under the proposed test, the courts should be more willing to characterize SexSearch and Craigslist as information content providers. Using the *Roommates* standard, it can be argued that both of these Web sites have solicited the information provided by third parties. The layout of each of these Web sites falls somewhere on the *Roommates* sliding scale between the users’ profiles and the “Additional Comments” section of Roommates.com.<sup>237</sup> Although the Web sites did not create discriminatory question and answer choices as Roommates.com did, the purpose of each of these Web sites encouraged individuals to provide information that would lead to sexual relations, whether consensual or not.<sup>238</sup> The formats of SexSearch and Craigslist lend themselves less toward granting immunity than does the “Additional Comments” section of Roommates.com because of the kind of information solicited. The “Additional Comments” section sought any other pertinent information that a roommate may want to provide about housing options, whereas the Web sites at issue sought information about “Erotic Services” and meeting offline to engage in sexual relations.<sup>239</sup> Looking merely at the type of information solicited and the purposes behind acquiring that information, a court should find that there was more active solicitation and encouragement from SexSearch and Craigslist than from Roommates.com regarding its “Additional Comments” section.

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<sup>236</sup> Craigslist, <http://chicago.craigslist.org/> (follow “Adult” hyperlink under the “Services” category). (last visited \_\_)

<sup>237</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164–74 (9th Cir. 2008).

<sup>238</sup> *Dart*, 665 F. Supp. 2d at 961–62; *Doe v. SexSearch*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

<sup>239</sup> *Compare Roommates*, 521 F.3d at 1173, with *Dart* 665 F. Supp. 2d at 961–62; *SexSearch*, 502 F. Supp. 2d at 722.

## 2. The Claims and the Underlying Facts

The claims in *SexSearch* and *Dart* warrant a heightened burden to receive immunity. In *SexSearch*, the relevant claims<sup>240</sup> could be boiled down to the failure of the website to monitor and exclude minors from becoming members.<sup>241</sup> Plaintiff's claims did not center on treating *SexSearch* as a publisher, but rather on the misrepresentations that *SexSearch* engaged in through allowing minors to be present on the website.<sup>242</sup>

In *Dart*, the claim alleged was public nuisance, but it was ultimately based on Craigslist soliciting and facilitating prostitution.<sup>243</sup> These failure-to-monitor and solicitation/facilitation claims occurred in both cases despite the mechanisms in place to ensure that users of the Web sites were at least eighteen years-old.<sup>244</sup> *SexSearch* and Craigslist represented to its users that the Web sites were free from minors and

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<sup>240</sup> *SexSearch*, 502 F. Supp. 2d. at 723–24 (relevant claims include breach of contract, fraud, negligent infliction of emotional distress, negligent misrepresentation, failure to warn, and deceptive trade practice and unfair and deceptive acts in violation of the Ohio Consumer Sales Practices Act).

<sup>241</sup> *Id.* at 724.

<sup>242</sup> *See Doe v. SexSearch*, 2007 U.S. Dist. Ct. Motions 604, 2-5 (N.D. Ohio May 18, 2007). *SexSearch* can be analogized to *Anthony v. Yahoo!*, 421 F. Supp. 2d 1257, 1259–60 (N.D. Cal. 2006), in which Yahoo! operated a dating website that was alleged to have engaged in fraud. Plaintiff claimed that Yahoo! created false profiles of individuals and additionally, sent profiles of actual subscribers who were no longer members to other users to entice them to continue their subscriptions. *Anthony*, 421 F. Supp. 2d at 1259–60. In *SexSearch*, the court considered plaintiff's reliance on *Anthony* and rejected it because the claims at issue did not center on fraudulent profiles that were created by the interactive service provider. *SexSearch*, 502 F. Supp. 2d at 725. The *SexSearch* court, however, did not address the second holding in *Anthony*, that CDA immunity was unavailable for Yahoo!'s use of the profiles of former users because "Yahoo!'s manner of presenting the profiles – not the underlying profiles themselves – constitute[d] fraud." *Anthony*, 421 F. Supp. 2d at 1263. Although the facts are somewhat different, the rationale from *Anthony* about the former members' profiles can be imputed to *SexSearch*. In *SexSearch*, plaintiff sought to impose liability on *SexSearch* based on its accompanying misrepresentations of age and the way in which *SexSearch* presented the profiles – that all of its users were at least 18 years old.

<sup>243</sup> *Dart*, 665 F. Supp. 2d at 963.

<sup>244</sup> *Id.* at 961–62 (users posting on the Craigslist website under any category must agree to abide by the "Terms and Conditions" which prohibit posting unlawful content. Users posting in the "Erotic" category also receive an additional "warning and disclaimer" stating that users agree to report any illegal content that they find with the section, including the "solicitation of prostitution"); *see also* Craigslist, <http://chicago.craigslist.org/> (follow "Adult" hyperlink under the "Services" category) (requiring users to represent that they are at least 18 years old.); *SexSearch*, 502 F. Supp. 2d at 723 (users posting on *SexSearch* must agree to the Terms and Conditions and the profile guidelines, which indicate that all persons are 18 years or older. Users are also required to check a box affirming that they are at least 18 years old).

prostitution, respectively, and thus, the Web sites should be held to those representations.

Although the specific claims brought against each Web site may seem like other cases in which courts have granted immunity to interactive computer services, the claims in *SexSearch* and *Dart* can be distinguished from the majority of these cases based on their underlying facts. *SexSearch* and *Dart* are both based on criminal wrongs—statutory rape and prostitution, respectively<sup>245</sup>—as opposed to the numerous cases that have dealt with civil wrongs, such as defamation and libel. Furthermore, it is immaterial that the plaintiff in *SexSearch* was an adult male who sued SexSearch after engaging in sexual relations with a minor female. The plaintiff's claims were still based on an exploitation of a minor that occurred as a result of the representations of SexSearch. This case could have easily been flipped around with the female suing the Web site, and based on the reasoning of the *SexSearch* court, her claims would have also failed. Therefore, the policy reasons behind holding Web sites to a higher standard when criminal wrongs are alleged are enormous. Specifically, the importance of curbing sexual crimes calls for imposing a heightened burden on Web sites that are accused of facilitating these criminal wrongs.<sup>246</sup>

The proposed test essentially boils down to considering all the facts presented and balancing different public policies and societal goals. In the case of sexually related Web sites, such as SexSearch and Craigslist's "Erotic Services" category, the potential danger that stems from the information solicited by these Web sites is enormous. In considering the nature of these Web sites, the claims at issue, and the underlying facts, the courts should have applied a less rigid test; they should have ultimately determined that SexSearch and the "Erotic Services" category of Craigslist are information content providers and thus, not entitled to immunity for the claims brought against them.

## VI. CONCLUSION

Since the inception of the CDA, courts have sought to apply § 230(c)(1) broadly to grant immunity to a Web site whenever a Web site merely portrayed content provided by a third party. When the CDA was passed, this attitude towards broad immunity was appropriate, but over the years, as the Internet has expanded exponentially, the idea of broad immunity seems to be less necessary. Regardless of this lack of

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<sup>245</sup> *SexSearch*, 502 F. Supp. at 721; *Dart*, 665 F. Supp. 2d at 962–63.

<sup>246</sup> See Nisbett, *supra* note 206; van der Heide, *supra* note 206; Groppe, *supra* note 13s.

necessity, most courts are still blindly implementing the concept of robust immunity. There has been a backlash though, through a few court cases and some scholarly dissent. *Roommate* served as the seminal case that could stand for the potential downfall of the CDA immunity stronghold.

Specifically, *SexSearch* and *Dart* have exhibited the need to reform the application of CDA immunity, at least in reference to Web sites and claims of a sexual nature. This need can be satisfied by extending the principles announced in *Roommate* through a fact intensive inquiry that creates a higher threshold for Web sites to meet in order to avoid being considered information content providers. This approach will in effect make obtaining immunity for Web sites of a sexually explicit or dangerous nature more difficult depending on the claims and facts alleged, but will leave more generic Web sites with the same outcome as they would have received before this test was created. This approach will also make acquiring immunity more difficult if the claims and underlying facts are based on criminal wrongs or wrongs associated with misrepresentations by Web sites. However, the truly passive interactive computer services should survive this new test unscathed. All claims are not created equal and therefore should not be treated equally.

A fact intensive analysis is necessary to obtain just results in every case that seeks to invoke the CDA. This analysis will consider the nature of the website, the claims, and the underlying facts together to determine what level of scrutiny should be applied. This test will likely end the “lawless” nature of the Internet and instill more order into an area where the courts seem to have followed blindly and unintentionally expanded immunity, one case at a time.