Rethinking the Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet

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I. INTRODUCTION

Congress passed the Communications Decency Act ("CDA") with the intention of supporting and encouraging the proliferation of information on the Internet.[1] The CDA gives Internet service providers immunity to any

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1. 47 U.S.C. § 230(c) (2000).

cause of action in which they might be treated as publishers of content originating from third parties. A significant goal of this legislation was to remove such operators' disincentives to voluntarily provide mechanisms to police the content on their Web sites.

The 1968 Fair Housing Act ("FHA") protects the supply of housing for those who may otherwise be discriminated against and functions to reduce overall discrimination in the housing market.[2] The plain language of the statute indicates that it is intended to prevent newspapers and other publishing media from publishing classified advertisements that mention statutorily proscribed preferences in the sale or rental of a dwelling. The FHA holds publishers of discriminatory advertisements legally responsible for content provided by third parties.

The recent ruling in *Chicago Lawyers' Commission for Civil Rights Under the Law, Inc., v. Craigslist, Inc.* renews past criticisms of the CDA and foreshadows the unexpected yet nebulous marginalization of the FHA.[3] As individuals seeking to advertise continue to migrate exponentially from traditional print media to Internet bulletin boards and online classified sections, the protections from discriminatory advertisements provided by the FHA will be completely eroded.

This Note argues that Congress should add the FHA to the list of exceptions to CDA immunity and is organized as follows: Section II is a review of the history of the CDA and the application of § 230 immunity during the rapid growth of Internet services; Section III discusses relevant sections of the FHA dealing with housing advertisements; Section IV provides a review and commentary on the recent decision in *Craigslist*; Section V recommends congressional action; and Section VI concludes the Note.

II. THE COMMUNICATIONS DECENCY ACT

A. Pre-CDA

In 1995, Stratton Oakmont, Inc., a securities investment firm, brought a defamation suit against Prodigy Services, an Internet company that operated an online bulletin board.[4] An unidentified user of the online

2. 42 U.S.C. §§ 3603, 3607 (2000).

3. Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc., v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006).

4. Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *2 (N.Y.S.).

bulletin board accused Stratton of criminal and fraudulent acts in connection with an Initial Public Offering ("IPO"). The major issue facing the court was whether Prodigy was the "publisher" of the third party information.[5]

Stratton argued that Prodigy qualified as the publisher of the defamatory statements found on the online posting because the company exercised editorial control over the forum. They further advocated that Prodigy was liable for the damages resulting from the defamatory statements under common law.[6] In contrast, Prodigy relied on the language from an earlier defamation case where an analogous defendant was treated as "a public library, book store, or newsstand," and not as the publisher of defamatory statements posted by a third party.[7]

The language on which Prodigy relies is found in an earlier case, *Cubby, Inc. v. CompuServe, Inc*. In that case, the defendant, CompuServe, operated an online general information service and provided access to a variety of forums for its subscribers.[8] Subscribers had access through a journalism forum to Rumorville USA, a daily newsletter covering developments in the world of journalism.[9] Cubby developed a similar newsletter intended to compete with Rumorville. After the new service was launched, false and defamatory statements regarding the Cubby newsletter were published in Rumorville.[10]

Cubby brought suit against CompuServe seeking damages for the allegedly defamatory statements. The district court granted summary judgment on the libel claim in favor of CompuServe. The court treated the defendant as a news distributor and held that it "may not be held liable if it neither knew nor had reason to know of the allegedly defamatory Rumorville statements."[11] Based on this holding, Prodigy hoped for the same judicial protection.

Unfortunately for Prodigy, the court distinguished the earlier claim in *Cubby* and held that the services it offered qualified the Internet service provider as a publisher.[12] Prodigy, unlike CompuServe, "implemented . . . control through its automatic software screening program."[13] It was

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5. *See id.* at *3.
6. *See id.*
7. Cubby, Inc. v. CompuServe, Inc., 776 F.Supp. 135, 140 (S.D.N.Y. 1991).
8. *Id*. at 137.
9. *Id*.
10. *Id*. at 138.
11. *Id*. at 141.
12. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *4.
13. *Id.* ("By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and bad taste, for example, Prodigy is clearly making decisions as to content.").

Prodigy's affirmative action to police or attempt to control content published on its Web site that gave rise to this tort liability. The stark difference between rulings in *Cubby* and *Stratton* created the perverse incentive for providers of interactive computer services to keep away from policing third party content in order to avoid liability. Under *Stratton*, any attempts to monitor the hundreds of thousands of postings could potentially lead to liability for claims in which being defined as a "publisher" is an essential element.

B. CDA as Congressional Response

Following the holding in *Stratton*, Congress was quick to respond. The congressional solution to the dilemma was the Communications Decency Act of 1996.[14] The CDA overruled *Stratton* and removed the deterrent to "Good Samaritan" blocking.[15] The CDA is meant to further two important policies: to remove the disincentive to police content and to encourage the dissemination of words and ideas on the Internet. The portion of the CDA that has been codified in § 230 is the most essential for the purposes of this Note, and it demonstrates congressional intent to further both of these policies.

The CDA establishes that it is the policy of the United States to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their childrens' access to objectionable or inappropriate online material."[16] In fact, as the name suggests, one of the primary purposes of the CDA is "to control the exposure of minors to indecent material."[17] It is § 230(c)(1) that eliminates the disincentive to utilize such technologies. This section provides that "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."[18]

The second central policy of the CDA is the preservation of "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State

14. *See* Pub. L. No. 104-104, Title V (1996) (portions of the CDA have been struck down as unconstitutional, but the section relevant to this article, Section 230, remains good law).

15. 47 U.S.C. § 230(c) (2000).

16. 47 U.S.C. § 230(b)(4).

17. Batzel v. Smith, 333 F.3d 1018, 1026 (9th Cir. 2003).

18. 47 U.S.C. § 230(c)(1).

regulation."[19] Congress, in its findings, commented that "the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[20] Americans are increasingly "relying on interactive media for a variety of political, educational, cultural, and entertainment services."[21] This second objective of the CDA is meant to "avoid the chilling effect upon Internet free speech that would be occasioned by the imposition of . . . liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery."[22]

It is the second objective that seems to have been given the most deference in the subsequent case law. The legislature has recognized that the "developing array of Internet and other interactive computer services available . . . represent an extraordinary advance in the availability of . . . information resources."[23] Immunity under the CDA is essential to the proliferation of information on the Internet because it protects those channels through which such information is supplied. However, this immunity is not absolute. Namely, there are three elements that are required for immunity under the CDA: the defendant must be a provider or user of an "interactive computer service,"[24] the asserted claims must treat the defendant as a publisher or speaker of the information, and the information must be provided by another "information content provider."[25] Finally, by specific statutory exclusion, certain causes of action are not proscribed.[26]

C. The CDA and the Internet

Internet service providers are treated differently from corresponding publishers in print, television, and radio.[27] This is the result of a

19. 47 U.S.C. § 230(b)(2).

20. 47 U.S.C. § 230(a)(4).

21. 47 U.S.C. § 230(a)(5).

22. Delfino v. Agilent Techs., Inc., 145 Cal.App.4th 790, 802-03 (Cal. Ct. App. 2006).

23. 47 U.S.C. § 230(a)(1).

24. 47 U.S.C. § 230(f)(2) ("The term 'interactive computer service' means 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.").

25. 47 U.S.C. § 230(f)(3) ("The term 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.").

26. 47 U.S.C. § 230(e)(1)-(4) (Causes of action based on (1) federal criminal law, (2) intellectual property law, (3) state law that is "consistent with this section," and (4) the Electronic Communications Privacy Act of 1986).

27. *See* Batzel v. Smith, 333 F.3d 1018, 1026-27 (9th Cir. 2003).

congressional realization that civil, primarily tort-based, lawsuits pose a significant threat to the spread of words and ideas in the "new and burgeoning Internet medium."[28]

One reason that Internet service providers are treated differently is that it is impossible for many of them to screen every posting, police every forum, or monitor all of the content generated by the millions of regular users.[29] "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."[30] The policy language of § 230 indicates that Congress considered the speech interests implicated by the imposition of liability and determined that immunity for these providers was a solution that would encourage, rather than mute, the development of the Internet.

Any lawsuit that holds an Internet service provider out as a publisher is prohibited by the statute. "Specifically, Section 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role."[31] Traditional functions of a publisher include decisions "whether to publish, withdraw, postpone or alter content."[32] Additionally, this immunity extends to an Internet service provider that holds itself out as reserving the right to exercise editorial functions, or utilizes terms or conditions in the provision of Internet access.[33]

While the plain text of § 230 only mentions immunity from publisher liability, courts read the language broadly to include distributors as well. In so doing, they treat distributor liability as a "subset, or species of publisher liability."[34] Courts justify this broad reading by first alluding to the congressional intent of the CDA. "Congress meant to insulate distributors as well as publishers from liability for defamation."[35] Some courts also ground this extension in the common law by pointing out that publishers and distributors are equally liable for defamatory content.[36]

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28. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

29. *See* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 538 (E.D. Va. 2003).

30. *Zeran*, 129 F.3d at 331.

31. *Id.* at 330.

32. *Id.*

33. Schneider v. Amazon.com, 31 P.3d 37, 43 (Wash. App. 2001) ("[I]f actual editing does not create liability, the mere right to edit can hardly do so.").

34. *Zeran*, 129 F.3d at 332.

35. Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001).

36. *Zeran*, 129 F.3d at 332 ("[D]istributors are considered to be publishers for purposes of defamation law.").

Section 230 immunity is a threshold question and, when successfully invoked, stops a claim at the pleadings.[37] While immunity is not absolute, since its passing, § 230 has provided blanket immunity to many Internet and interactive computer service providers on a variety of causes of action.[38] Decisions concerning the propriety of immunity tend to embrace a broad interpretation of the statute in order to further the congressional goals set out in the CDA. Section 230 "tends to promote the kind of unrestrained, robust communication that many people view as the Internet's most important contribution to society."[39]

"[C]ourts that have considered the question have held Section 230 provides immunity to civil claims generally."[40] The earliest instances where CDA immunity was invoked often involved claims of online defamation. For example, in *Zeran v. America Online, Inc.*, the plaintiff sued America Online ("AOL") after the company failed to promptly remove defamatory statements posted in a chat room.[41]

In that case, an unidentified third party posted an advertisement for "offensive and tasteless slogans related to the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City."[42] The advertisements encouraged people to call Zeran's home phone number. Within eleven days Zeran was "receiving an abusive phone call approximately every two minutes."[43] These calls included threats of violence and death.[44] The court held that § 230 gave AOL immunity from the claim and, in so doing, ruled that the broad class of "Internet service providers" are to be recognized as providers of interactive computer services for the purpose of the statute.[45]

CDA immunity was expanded to Internet service providers who act as distributors of defamatory material in *Patentwizard, Inc. v. Kinko's, Inc.*[46] The plaintiff, Patentwizard, marketed software for people interested in

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37. *See Noah*, 261 F. Supp. 2d at 537.

38. *See generally* Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The* Communications Decency Act *and the* Digital Millennium Copyright Act, 20 CARDOZO ARTS & ENT. L.J. 295 *passim* (2002).

39. *Patentwizard.*,163 F. Supp. 2d at 1072; *see* Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 n. 6 (E.D. Pa. 2006) (noting that "Courts have treated Section 230 immunity as 'quite robust.'").

40. Schneider v. Amazon.com, 31 P.3d at 42; *see also*, Kathleen R. v. City of Livermore, 87 Cal. App. 4th 684 (2001).

41. *Zeran*, 129 F.3d at 328 (Zeran argued "that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party.").

42. *Id*. at 329.

43. *Id*.

44. *Id.*

45. *Id*. at 332; 47 U.S.C. § 230(f)(2).

46. *Patentwizard,* 163 F. Supp. 2d at 1072.

creating patents for their inventions and was operated by a patent law firm.[47] Kinko's rented computers to individual users thereby giving them access to the Internet. Kinko's made no attempts to record identities of the persons to whom they rented and did not have a system to provide unique Internet Protocol addresses to differentiate who was accessing the Internet through their service.[48]

The court held that reclassifying Kinko's as a distributor was not a legitimate way to avoid statutory immunity granted under § 230. The holding acknowledged that such an attempt would impermissibly make the defendant responsible for allegedly defamatory content that was published by a third party.[49] That is precisely the result Congress intended to avoid, and thus why distributors are also protected by statutory immunity.

In *Parker v. Google, Inc.*, the plaintiff alleged invasion of privacy in addition to defamation.[50] Defendant Google maintains a popular Web site that provides technology that allows users to search for Web sites, images, news, and maps.[51] Google derives "substantial financial benefit . . . in the form of advertising revenue and goodwill."[52] The court rejected the plaintiff's attempt to hold Google liable for archived defamatory messages posted by third parties. "In each instance raised by Plaintiff's tort claims, Google either archived, cached, or simply provided access to content that was created by a third party."[53] The court also held that § 230 barred the claim that Google facilitated the invasion of plaintiff's privacy by generating "an unauthorized biography" when a user enters his name in a search query. [54]

In *Carafano v. Metrosplash.com, Inc.*,[55] § 230 was found to preclude claims for invasion of privacy and misappropriation of right of publicity that arose from the action of third parties utilizing Internet services. The court held that the computer match-making service was immune from

47. *See id.* at 1070.

48. *See id.*

49. *See id.*

50. Parker v. Google, Inc., 422 F. Supp. 2d 492, 501 (E.D. Pa. 2006) ("It is clear that Section 230 was intended to provide immunity for service providers like Google on exactly the claims Plaintiff raises here.").

51. Google Home Page, http://www.google.com (last visited Nov. 6, 2007).

52. *Parker,* 422 F. Supp. 2d at 499.

53. *Id*. at 501.

54. *See id*. at 500.

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

claims arising out of false content in a dating profile provided by someone posing as another person.[56]

One of the parties, Matchmaker,[57] is an Internet dating service that provides members with access for a fee. These members post anonymous profiles and are then allowed access to view profiles of other members in their area. Users have control of the information displayed in their profile, although some of the content is formulated in response to a questionnaire provided by Matchmaker.[58] Members contact each other via electronic mail sent through the Matchmaker server.[59]

An unknown third party posted a fake profile of Carafano in the Los Angeles section.[60] Carafano is a popular actress who has appeared in episodes of *Star Trek: Deep Space Nine* and *General Hospital*.[61] This profile provided Carafano's home address and telephone number. She began to receive messages responding to the profile, some of which were highly threatening and sexually explicit.

The court held that Matchmaker was not an "information content provider" as contemplated by the statute because third parties, not Matchmaker, determined the content of their profiles.[62] This conclusion was not affected by the fact that some of the content was formulated in response to Matchmaker's questionnaire. The court added that even though Matchmaker may be considered an information content provider in that it generated the questionnaire, the statute precludes the treatment of a content provider as a publisher or speaker for "*any* information provided by *another* information content provider."[63]

In *Doe v. GTE Corp.*,[64] the Seventh Circuit held that a plaintiff's attempt to hold GTE liable for negligent entrustment must fail under § 230. GTE provided Web hosting services to risqué Web sites[65] that, among other things, sold videotapes displaying undressed athletes. These tapes were the product of secret video cameras placed in the locker rooms, bathrooms, and showers of several college sports teams.[66] GTE provided the services that gave a third party the capability to publish a Web site on the Internet. An

56. *Id*. at 1121.

57. Online Dating, Singles, and Personals at Matchmaker.com, http://www.matchmaker .com (last visited Nov. 6, 2007).

58. *See Carafano*, 339 F.3d at 1124.

59. *See id.* at 1121.

60. *Id.*

61. *Id.*

62. *Id.* at 1124.

63. *Id.*at 1125 (emphasis provided in original).

64. Doe v. GTE Corp., 347 F.3d 655 (7th Cir. 2003).

65. *Id.* at 657 (one such site included in the opinion was www.youngstuds.com).

66. *Id.* at 656.

unknown customer used this capability to publish nude images and videos over GTE's network.[67]

The plaintiffs unsuccessfully alleged that GTE was negligent in allowing a person to use its Web services to disseminate injurious content. In its ruling, the court established that there is no requirement "that a service provider must take reasonable care to prevent injury to third parties."[68] A ruling to the contrary would not be faithful to the efforts to encourage the development of such networks.

In *Schneider v. Amazon.com*,[69] the number of claims precluded by § 230 was further broadened to include negligent misrepresentation and tortious interference. In that case, the plaintiff wrote several books relating to taxation and asset protection and made them available for sale on Amazon.com.[70] A feature of the Amazon Web site was a forum that allowed visitors to voice their opinions about books they have read.[71] To the chagrin of the plaintiff, this forum included postings of negative third party comments about the plaintiff and his books.[72]

Among the many claims, the plaintiff alleged negligent misrepresentation and tortious interference.[73] The court concluded that the ultimate effect would be to hold Amazon out as the source of the negative comments and reviews, which is impermissible under § 230.[74] The court analogized Amazon's feedback forum to AOL's message board for § 230 purposes.[75]

AOL was again named as a defendant in *Green v. America Online,*[76] and *Noah v. AOL Time Warner, Inc*.[77] AOL provides a "number of online communications tools, such as e-mail, news groups, and chat rooms, that allow its subscribers to communicate with one another and with other users of the Internet."[78] The company's millions of subscribers generate a substantial volume of information that is constantly transmitted over its

67. *Id.* at 657.
68. *Id*. at 661.
69. Schneider v. Amazon.com, 31 P.3d 37 (Wash. App. 2001).
70. *Id.* at 38.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 40.
76. Green v. Am. Online, Inc., 318 F.3d 465 (3d Cir. 2003).
77. Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532 (E.D. Va. 2003).
78. *Green*, 318 F.3d at 469.

network.[79] AOL is one of the world's largest interactive computer services with millions of members.[80]

In *Green*, the plaintiff alleged "that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network."[81] The plaintiff argued that the existence and terms of a member agreement[82] between AOL and its customers gave rise to a duty on its part to enforce the agreement. The plaintiff asserted that messages transmitted during the course of conversations over the AOL network were in violation of this member agreement.[83] The court held that the agreement "tracks the provisions of section 230," and that Green's tort claims were subject to AOL's immunity under § 230.[84] Regardless of the agreement, the purpose of § 230 is to protect service providers, such as AOL, who facilitate the spread of large volumes of third party content.

Finally, in *Noah*, the court held that § 230 immunity precluded a claim under Title II of the Civil Rights Act of 1964 and a claim for injunctive relief.[85] Noah, a Muslim, alleged that AOL "wrongfully refused to prevent participants in an online chat room from posting or submitting harassing comments that blasphemed and defamed plaintiff's Islamic religion."[86] The plaintiff complained that he and other Muslims were treated poorly in AOL chat rooms due to their religious beliefs.[87] If true, this behavior was in direct violation of the Member Agreement and Community Guidelines established by AOL for each of its subscribing members.[88]

The court held that the equitable relief sought, the injunction, was within the scope of § 230 immunity. The judge explained that the purpose of § 230 is to protect Internet service providers from legal liability for content provided by third parties.[89] The court broadened the protections granted under § 230 by declaring that statutory immunity is not restricted to actions for monetary damages.

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79. Zeran v. Am. Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997).

80. *Green*, 318 F.3d at 469.

81. *Id*. at 471.

82. *Id.* at 469 ("A subscriber to AOL must agree to the terms of its Member Agreement, which requires subscribers to adhere to AOL's standards for online speech and conduct set forth in AOL's 'Community Guidelines.'").

83. *Id.* at 468.

84. *Id*. at 471.

85. Noah v. AOL Time Warner, Inc. 261 F.Supp. 2d 532, 537 (E.D. Va. 2003).

86. *Id*. at 534.

87. *See id.* at 535 (claiming that other AOL members "harassed, insulted, threatened, ridiculed and slandered" the plaintiff and other Muslims).

88. *Id.*

89. *Id.* at 540.

The court concluded that the injury claimed by the plaintiff and the remedy sought requires AOL to be treated as a publisher of the content that was in violation of Title II.[90] Such treatment would itself violate § 230.[91] In its discussion, the court returned to the congressional finding that liability in such situations would lead to a restriction of access to public forums.[92] Specifically, AOL's immunity from liability under § 230 stems from the fact that third party members, not AOL itself, provided the egregious content complained of by the plaintiff.[93] Most interestingly, the court explained further that the language in § 230 is sufficiently broad to include claims brought under the federal civil rights statutes.[94]

For all of its virtues and policy objectives, immunity under § 230 has not survived without scrutiny.[95] With that said, it would seem that the original end of § 230 has been realized: the defeat of the specter of tort liability for service providers. Looking forward, the *Noah* decision foreshadows the potential reach of § 230 immunity. The court itself recognized "a darker side of what has been called 'the robust nature of Internet communication.'"[96] This decision reveals that the next victim of § 230 could be the protections afforded by traditional civil rights statutes.

III. THE FAIR HOUSING ACT

The Fair Housing Act was enacted in 1968, and it makes discrimination in most residential dwellings on the basis of race, color, religion, and national origin illegal.[97] Congress amended the FHA in 1974 to include "sex" as a protected status.[98] In 1988, the FHA was expanded

90. *Id.* at 538.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 539.

95. Jonathan Band & Matthew Schruers, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295 (2002); Robert T. Langdon, *The Communications Decency Act §230: Make Sense? Or Nonsense? – A Private Person's Inability to Recover if Defamed in Cyberspace*, 73 ST. JOHN'S L. REV. 829 (1999).

96. *Noah*, 261 F.Supp.2d at 540.

97. 42 U.S.C. §§ 3603, 3607 (2000). The FHA exempts certain single-family houses sold or rented by their owners, units in owner-occupied apartment buildings containing four or fewer units, and certain dwellings operated by religious organizations and private clubs.

98. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 808, 88 Stat. 633, 728 (1974).

further to protect "handicap" and "familial status."[99] The relevant section of the FHA, for the purposes of this Note, is § 3604(c), which makes it unlawful to:

> make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[100]

Section 3604(c) of the FHA serves two primary purposes. The first is to protect and increase housing choices of individuals who may otherwise be discriminated against because of their "status."[101] The second is to eliminate prejudices based on race, religion, sex, familial status, handicap, and ethnicity in the housing market.[102]

This section has also withstood constitutional challenges under the First Amendment. In *Ragin v. New York Times Co.*,[103] the court held that the prohibition of discriminatory advertisements does not violate the First Amendment right to free speech, and that the publication of advertisements indicating the prohibited preferences is not protected commercial speech.[104] In *United States v. Hunter*,[105] the court ruled that § 3604(c) did not violate the First Amendment guarantee of freedom of the press because it did not restrict the free function of news operations.[106] The court insisted that a newspaper publisher can "easily distinguish between permissible and impermissible advertisements."[107]

When determining whether an advertisement or notice violates § 3604(c), the court must "ask whether [the advertisement or notice] suggests to an ordinary listener that people with a particular familial status are preferred or dispreferred for the housing in question."[108] To establish a violation of § 3604(c), the plaintiff only needs to prove that the challenged advertisement or notice has a discriminatory effect, not necessarily that there exists a discriminatory intent.[109]

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99. *See* Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 6, 102 Stat. 1619, 1622 (1988).

100. 42 U.S.C. § 3604(c) (2000).

101. *See* 42 U.S.C. §§ 3604 (a),(d),(f) (specifically noting the "otherwise make unavailable" language in each of the sections).

102. *See* Fair Hous. Council of Bergen County, Inc., v. E. Bergen County Multiple Listing Serv., Inc., 422 F. Supp. 1071, 1075 (D.N.J. 1976).

103. Ragin v. New York Times Co., 923 F.2d 995 (2d Cir. 1991).

104. *Id.* at 1002-03.

105. United States v. Hunter, 459 F.2d 205 (4th Cir. 1972).

106. *Id.* at 213.

107. *Id.*

108. Burnett v. Venturi, 903 F. Supp. 304, 315 (N.D.N.Y. 1995).

109. Davis v. New York City Hous. Auth., 278 F.3d 64, 81 (2d Cir. 2002).

The plain language of § 3604(c) indicates that it is intended to prevent newspapers from publishing classified advertisements that mention "statutorily proscribed preferences in the sale or rental of a dwelling."[110] *Hunter* extrapolates the applicability of § 3604(c) from "newspapers" to "any publishing medium."[111] While it is third parties, landlords, and brokers who generate listings, it is the traditional print media that ultimately prints and publishes them.[112]

In *Saunders v. General Services Corp.,*[113] the court held that advertising brochures with a fairly homogenous nondiverse set of models demonstrated illegal racial preferences. The court determined that the "natural interpretation of the. . . brochure" was that apartment complexes were for white tenants, and that such a message discouraged blacks from seeking housing there.[114]

The court extended liability to a housing information vendor for the actions of its agents in *United States v. Space Hunters, Inc*.[115] It determined that an employee of the vendor violated § 3604(c) when he made discriminatory statements to deaf individuals who called to express an interest in housing.[116] All attempts at contacting the service that originated from a deaf individual and were relayed through a telecommunication device for the deaf ("TDD")[117] were met with inflammatory comments and a refusal to continue with the call.[118]

The FHA has also been used to stop or terminate attempts to "racially steer"[119] a population. Often geographic areas are served by a multiple listing service which aggregates listings, issues regular updates, and

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110. *Hunter*, 459 F.2d at 210; *see also Ragin* 923 F.2d at 999-1002.

111. *Hunter,* 459 F.2d at 211.

112. *Id.* at 210.

113. Saunders v. General Services Corp., 659 F. Supp 1042, 1057-59 (E.D. Va. 1987).

114. *Id.* at 1058.

115. United States v. Space Hunters, Inc., 429 F.3d 416, 424-25 (2d Cir. 2005).

116. *Id.* at 427-30.

117. *See id*. at 420 n.1 ("The deaf individual types a message on the TDD keyboard, which is transmitted over telephone lines to a relay service operator who reads the message to the person on the other end of the call. The relay service operator then types the person's response, which is transmitted back to the screen of the deaf individual's TDD") (internal citation omitted).

118. *See id.* at 420.

119. *See Fair Hous. Council of Bergen County*, 422 F. Supp. at 1075 (defining racial steering as "directing white customers away from black or interracial neighborhoods and directing black customers away from white or interracial neighborhoods").

engages in cooperative advertising.[120] In *Bergen*, a multiple listing service used selective advertising as one of many tactics to discriminate on the basis of race among prospective customers.[121]

As noted in *Hunter*, in addition to the original source of a notice, statement, or advertisement, liability under the FHA falls on those who publish such advertisements.[122] It is immediately apparent how § 3604(c) of the FHA and § 230 of the CDA are at odds with each other. Publishers who were once deterred from publishing advertisements in violation of § 3604(c) by the risk of liability are now shrouded in immunity on the Internet. Section 3604(c) will be particularly challenged as the Internet expands and online forums and posting boards become the classified sections of the twenty-first century.

IV. CRAIGSLIST

A. Decision

Craigslist began in 1995 as an online source of advertisements and forums and now serves 450 cities throughout the United States.[123] The Web site is user-moderated and was incorporated as a for-profit entity in 1999, earning income from job postings and residential brokers in select cities.[124] Craigslist gets five billion hits per year, making it the seventh most frequented Web site on the Internet behind those operated by Yahoo!, AOL, Microsoft, Google, eBay, and Newscorp.[125] Originally, postings on Craigslist were relevant only to those in the San Francisco community—the locale of founder and programmer Craig Newmark.[126] Since then, Craigslist has experienced tremendous growth that is expected to continue into the future.[127] In 2004, eBay acquired a twenty-five percent stake in the company.[128]

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120. *See* Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 447 F. Supp. 838, 840-42 (E.D.N.Y. 1978); *Bergen*, 422 F. Supp. at 1075.

121. *Bergen*, 422 F. Supp. at 1075.

122. *Hunter*, 459 F.2d at 209-10.

123. *See* Craigslist Factsheet, http://sfbay.craigslist.org/about/factsheet.html (last visited Nov. 6, 2007).

124. *Id*.

125. *See* Pages vs Employees, http://www.craigslist.org/about/pages.and.peeps.html (last visited Nov. 6, 2007).

126. *See* Amy Schein, *Craigslist, Inc., Information and Related Industry Information*, HOOVERS, http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=rtsjrkrtkffxhcy (last visited Nov. 6, 2007).

127. *See* Craigslist Factsheet, *supra* note 123.

128. *See id.*

The Chicago Lawyers' Committee for Civil Rights Under the Law ("CLC") filed suit under the FHA against Craigslist in 2006 seeking various forms of relief.[129] CLC is a nonprofit organization formed from an alliance of Chicago law firms committed to public interest pro bono community service.[130] The mission of the CLC is "to promote and protect civil rights . . . of poor, minority and disadvantaged people in order to facilitate their participation in the social, economic and political systems of our nation."[131] CLC filed suit in the Northern District of Illinois alleging that Craigslist was operating in violation of § 3604(c).[132]

The district court granted Craigslist's pretrial motion on the pleadings, holding that CLC's claim must fail as a matter of law.[133] The court began its analysis by discussing the relevant sections of both the FHA and the CDA. This included a brief laundry list of media to which § 3604(c) applies.[134]

The court then quickly moved on to § 230(c)(1) and the "near-unanimous case law."[135] It held that the plain language of § 230 gives federal immunity to any action making service providers liable for content originating from a third party.[136] The court was tedious in its insistence that its holding was narrower than that in *Zeran*. It explained that the protection from liability only extends to those causes of action "that would require treating an ICS as a publisher of third-party content."[137] The decision in *Craigslist* is not surprising because it is consistent with the body of CDA

129. Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc., v. Craigslist, Inc., 461 F. Supp. 2d 681 (N.D. Ill. 2006).

130. *See* Chicago Lawyers' Committee Home Page, http://www.clccrul.org/index.html (last visited Nov. 6, 2007).

131. *See* Chicago Lawyers' Committee Overview, http://www.clccrul.org/press_kit/overview.html (last visited Nov. 6, 2007).

132. *See Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc.*, 461 F. Supp. 2d at 682 ("CLC allege[d] that . . . Craiglist publishes notices, statements, or advertisements with respect to the sale or rental of dwellings that indicate (1) a preference, limitation, or discrimination on the basis of race, color, religion, sex, familial status, or national origin; and (2) an intention to make a preference, limitation, or discrimination on the basis of race, color, religion, sex, familial status, or national origin" in violation of 42 U.S.C. § 3604(c).).

133. *Id.*

134. *Id.* at 687.

135. *Id.* at 687-88.

136. *See id.* at 693.

137. *Id*.

jurisprudence. One lawyer observed, "It's very clear under these precedents that Craigslist shouldn't be held liable for ads provided by third parties."[138]

Similar to the civil rights plaintiff in *Noah*, CLC put forth the argument that § 230 immunity "does not apply to claims brought under federal civil rights statutes."[139] The court deferred to the language in the statute and the corresponding congressional intent. "[R]egardless of whether Congress chose Sectuib 230(c)(1)'s language with the FHA in mind, what is important here is that the plain meaning of the statute *is not at odds* with Congress' intent."[140]

B. Life After Craigslist

Craigslist's expansion of § 230 immunity to claims brought under the FHA has at least two important implications. The first is the creation of a congressional shield for operators of online housing advertisement and classified sections. The second, arising from, and a consequence of this shroud of immunity, is the emasculation of § 3604(c).

Section 230, in effect, gives Internet service providers a monopoly in the market for discriminatory housing advertisements. "In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted."[141] Immunity allows online classified forums to underprice their traditional newsprint rivals and increase their customer base by serving those who would have traditionally had no market—namely, those who want to advertise a prohibited preference.[142]

As an illustrative thought experiment, imagine a rental advertisement that expresses a preference for a "Clean Godly Christian Male."[143] The creator of the advertisement is clearly subject to sanctions under § 3604(c), but what is relevant is the difference in how potential publishers of that notice are treated. A newspaper could not publish such an advertisement

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138. Mike Hughlett, *Judge: Craigslist Not Liable for Ad Content*, CHI. TRIB., Nov. 16, 2006, at B1.

139. *Noah*, 261 F. Supp. 2d at 539

140. Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc., 461 F. Supp. 2d at 697 (emphasis in original).

141. Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998).

142. *Cf.* Doe v. GTE Corp., 347 F.3d 655, 660 (7th Cir. 2003) ("As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).").

143. *See Chicago Lawyers' Comm. for Civil Rights Under the Law, Inc.*, 461 F. Supp. 2d at 686 (one of the actual samples of allegedly objectionable statements within rental postings on Craigslist's Web site included in the CLC complaint).

because they would be subject to liability. As "publisher," they have to expend resources on screening such notices and ensuring compliance with fair housing law. Additionally, because they are turning away potential customers, they are subject to an additional expense.

On the other hand, an Internet service provider, such as Craigslist, would be immune from liability for that notice. As a result, they do not have to dedicate resources to compliance or screening. Immunity also removes the necessity for the provider to differentiate between customers. In other words, all are welcome. Under the law as it currently stands, the aforementioned advertisement can and will only be published in one location—on the Internet.

Besides the cost advantage and larger potential market, treating online advertisers differently than traditional print media will tend to result in wasteful litigation over the issue. Studies have shown that "[e]qual protection of a uniform law tends to reduce both sorts of unproductive conflict, and thereby increases . . . economic efficiency."[144] Newspapers and other forms of traditional print media depend on advertising to subsidize the cost of the rest of the paper.[145] A competitor has every incentive to attempt to challenge an issue as vital as "publisher immunity."[146] In this case, the industry lines were drawn. There were ten amici briefs filed in support of Craigslist by other service providers.[147] It is also not surprising that Craigslist was challenged in a district court in Illinois by a conglomerate of Chicago law firms. Chicago is home to one of the nation's largest newspaper companies, Tribune Company.[148]

Perhaps the more nebulous consequence of § 230 immunity is the undermining of the FHA in the Internet era. The Internet is now a prominent medium for classified advertisements.[149] The continued

144. Roger Congleton, Political Efficiency and Equal Protection of the Law, 50 KYKLOS 485, 496 (1997).

145. United States v. Hunter, 459 F.2d 205, 212 (4th Cir. 1972) ("[T]he revenue newspapers derive from advertising makes possible the publication of the rest of the paper.").

146. *See* Congleton, *supra* note 144, at 496 ("For every group that might try to advantage itself by influencing policy there is another which should attempt to prevent it. As the literature on rent-seeking points out, even peaceful conflict over fundamental law may be intense and wasteful").

147. See Chicago Lawyers' Committee for Civil Rights Under the Law, Inc., 461 F. Supp. 2d at 683.

148. *See* Tribune Company Web Guide, http://www.tribune.com/about/webguide/index.html (last visited Oct. 7, 2007).

149. *See* Online Advertising: Pay Per Sale, The Economist, Oct. 1, 2005, at 82.

expansion of the Internet is driven by consumers' shifting from traditional print to the Internet for news, from brochures to Web sites for information, and from classified ads to online forums for consumption needs.[150]

When the provisions of the FHA were first passed, the now traditional news services raised similar arguments concerning freedom of speech, freedom of press, and economic ramifications of liability for third party content.[151] However, at that time there were no suitable substitutes for publication forums. The courts then had no way of predicting the emergence of the Internet and consequently dismissed these claims.[152] Now content that was once subject to civil rights compliance, when shifted to the Internet, is content that is moved out of reach of the FHA.

Finally, the prohibition on publishing discriminatory advertisements is ancillary to the actual goal of preventing their creation. The permanence of publication in newsprint deters a third party from generating an advertisement in violation of § 3604(c) because of the probability he or she will be caught. "Since the Act also bars private publication of discriminatory advertisements, an advertiser has no incentive to abandon his regular use of newspapers to publicize his offer to sell or rent."[153] However, the Internet is different because it offers anonymity for private parties. Given the ease of removal and unlikelihood that the user will be traced, there is a small probability that a person may be caught. Consequently, the deterrent to the creation of such advertisements is softened.

The fact is that in the current Internet climate, private parties now have incentives to abandon the regular use of newspapers, contrary to the dicta in *Hunter*. It is important to remember that all those who decide to advertise on the Internet do not do so only because they are free to publish otherwise discriminatory advertising, although there may still be a minority for which this is the sole motive. The main reason for the transition to the Internet is that it is a low cost, vibrant source of information, and the advertisements on the Internet are exposed to millions daily. Given this changing tide, if the original purpose of the FHA is to be advanced in the Internet era, congressional action is required.

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150. *See* Craigslist Factsheet, *supra* note 123. There are now Craigslist sites in 450 cities across the United States. Additionally, Craigslist users publish 20 million new classified ads each month, and the site receives more than 8 billion page views per month.

151. *See* Ragin v. New York Times Co., 923 F.2d 995, 999 (2d Cir. 1991).

152. *See* United States v. Hunter, 459 F.2d 205, 212 (4th Cir. 1972) ("We therefore doubt that the Act will deprive a newspaper of any revenue.").

153. *Id.*

V. SUGGESTED CONGRESSIONAL RESPONSE

A Ninth Circuit opinion discussing § 230 immunity began, "[t]here is no reason inherent in the technological features of cyberspace why First Amendment and defamation law should apply differently in cyberspace than in the brick and mortar world."[154] However, because of the policy objectives included in the CDA, Congress has decided to treat providers of interactive computer services differently than other information providers such as newspapers, magazines, or television stations, all of which may be held liable for third-party content.

The plain language of § 230 demonstrates that Congress did not intend to include federal civil rights claims.[155] In fact, since only four classes of claims are excluded, the judicial treatment of § 230 is appropriate given the statutory construction. The apt question is whether this was purposeful or the result of oversight.

It is incontrovertible that if the provisions of the FHA are still of interest, Congress should add FHA compliance to what is already carved out from § 230 immunity. Adding a fifth exception is a fair and reasonable solution. The first result of such an action would be to eliminate the government-created competitive advantage over traditional print. Additionally it would be an essential step in ensuring that the FHA adapts to and survives in a climate of changing technology. Finally, the fifth exception would not require Congress to depart from the original goals of § 230.

The main argument against subjecting Internet service providers to liability for third-party content is that it would deter speech on the Internet. The concern is that providers would have a natural incentive to simply remove messages upon notification, whether the contents were offensive or not.[156] Taken in consideration of the FHA, this concern is countered by the need to combat discrimination in the housing market. Given the narrow focus of § 3604(c), treating Internet service providers as publishers with regard to third party advertisements should not have the general chilling effect on speech contemplated by Congress.[157] The only speech targeted by

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154. Batzel v. Smith, 333 F.3d 1018, 1020 (9th Cir. 2003).

155. *See* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 539 (E.D. Va. 2003).

156. Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

157. *See* United States v. Hunter, 459 F.2d 205, 212 (4th Cir. 1972) ("[I]t has been held that a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas.").

such a measure, the only speech that would be chilled, does not enjoy protected status.[158]

A second concern, as expressed in *Zeran*, is that liability would cause Internet providers to limit the scope and scale of their services. Holding Internet content providers liable for FHA violations, similar to their traditional print counterpart, should not have this effect. Web sites such as Craigslist already compartmentalize online forums and bulletin boards for ease of access and to increase the relevance of search.[159] The resources needed to monitor such areas and ensure compliance would be focused only on these already demarcated areas where potential violations could be posted. Furthermore, these Web sites are profitable. The additional cost imposed by publisher liability should not be expected to offset the ability of Internet service providers to offer services profitably. Congress must decide if the value of FHA protections outweighs the potential costs of restricting the supply of housing advertisement forums. In 1968 they answered this question in the affirmative.[160]

VI. CONCLUSION

The Internet is a source of new competition and challenges for traditional print media. Internet service providers should be forced to compete with traditional print media through innovation and not through congressional protection. The recent ruling in *Craigslist* signals a need to reconsider the CDA in light of the potential marginalization of the FHA.

When Congress passed the CDA, they intended to support and encourage the spread of words and ideas on the Internet. However, not all words and ideas are entitled to protection under the law. The FHA limits a form of commercial speech to protect the supply of housing for those who may otherwise be discriminated against. Congress should add the FHA to the current list of exceptions to § 230 immunity.

Enforcing § 3604(c) against service providers will not mean the end of the Internet. Internet service providers will adjust to the legislation the same way their traditional print predecessors did in the 1960's and 1970's. They will segment and monitor popular and profitable advertisement sections. With the advancement of Internet technology, applying FHA liability to Internet service providers is a necessary step in Congress's noble original goal of eliminating discrimination in the housing market.

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158. *See* Ragin v. New York Times Co., 923 F.2d 995, 1002-03 (2d Cir. 1991).

159. For example, the following link displays the housing forum for Bloomington, Indiana: Bloomington Housing Classifieds – Craigslist, http://bloomington.craigslist.org/forums/?forumID=6 (last visited Nov. 6, 2007).

160. *See generally* 42 U.S.C. §§ 3603, 3607 (2000).