

NOTES

DROP-DOWN LISTS AND THE COMMUNICATIONS DECENCY ACT: A CREATION CONUNDRUM

HATTIE HARMAN*

INTRODUCTION

The Internet is a vast medium for expressing ideas, expanding commerce, and exchanging information of all kinds. In addition to these socially beneficial activities, the Internet provides opportunities to achieve less desirable ends, such as defamation,¹ fraud,² and housing discrimination.³ Multiple parties may contribute to the wrong, including the individual computer user who “posted” the offensive online content and the Internet service provider whose website the individual used to accomplish his act.⁴ Determining legal responsibility for these acts has concerned courts and Congress since the early days of the Internet.⁵ In 1996, Congress amended the Telecommunications Act of 1996 with the Communications Decency Act, codified at § 230 of title 47 of the U.S. Code (“§ 230”), effectively eliminating websites’ liability for content they did not create or develop.⁶ More recently, courts have begun to face the issues presented by limited sets of pre-populated content, such as drop-down lists, that websites make

* J.D. Candidate, 2010, Indiana University School of Law—Indianapolis; B.A., 1990, M.A.T. 1992, Miami University, Oxford, Ohio. I would like to thank Professors Andrew R. Klein and R. George Wright for their guidance and insights during this project, and my husband, John, and son, Gordon, for their endless patience throughout my law school experience. This Note is dedicated to the memory of my mother, Jo Harman, who was and continues to be a source of absolute support and inspiration to me.

1. *See, e.g.,* *Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *5-6 (M.D. Fla. Feb. 15, 2008).

2. *See, e.g.,* *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1259, 1262 (N.D. Cal. 2006).

3. *See, e.g.,* *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1166 (9th Cir. 2008) (en banc).

4. *See, e.g.,* *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004).

5. *See* *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (determining liability for allegedly defamatory statements carried in a publication on CompuServe’s database).

6. 47 U.S.C. § 230 (2006).

available to their users.⁷ Pre-populated content differs from other types of user-generated Internet content because the website actually authors the list of options it provides; the user merely selects from that list.⁸ Therefore, the website arguably creates or develops the user's ultimate selection and cannot use § 230 to shield it from liability should a court ultimately find the resulting content to be unlawful.⁹ Conversely, because the website user unilaterally selects from the available options, he is conceivably the sole creator of the resulting content.

This Note examines whether drop-down lists and other pre-populated content restrict a user's available input, making the website a creator or developer of the user-selected content, and evaluates possible approaches courts might take to such a question. Part I of this Note traces the history of liability for Internet content. Part II explains relevant statutory definitions and their interpretations by courts. Part III examines recent cases dealing specifically with pre-populated content. Part IV analyzes the problems with courts' current applications of § 230 to pre-populated content. Part V assesses possible approaches to liability for pre-populated content and concludes with a set of standards courts can apply to judge website liability for pre-populated content.

I. HISTORY OF LIABILITY FOR INTERNET CONTENT

The ability of users to manipulate and provide Internet content has grown with the medium.¹⁰ Increased Internet speech naturally yields to more conflicts over that speech.¹¹ Because the common law evolved to deal with speech in print media, it has not been perfectly suited to application on the Internet.¹²

A. *Evolution of Internet Content*

Today's Internet differs substantially from the "walled garden" Internet world of the 1990s, where Internet service providers (ISPs) such as America

7. See, e.g., *Roommates.com*, 521 F.3d at 1165.

8. For the purposes of this Note, pre-populated content is information formulated by a website and provided as a choice or option to the user. Examples include drop-down lists, check boxes, and radio button selections.

9. See § 230(f)(3), (c)(1).

10. See Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 590 (2008).

11. See Brandy Jennifer Glad, Comment, *Determining What Constitutes Creation or Development of Content Under the Communications Decency Act*, 34 SW. U. L. REV. 247, 247-48 (2004) (discussing the expansion of Internet communication and the resultant struggle between free speech and traditional defamation rules).

12. See Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 145-46 (2008); see also *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (noting Congress's recognition that tort claims threatened freedom of speech on the Internet); Ziniti, *supra* note 10, at 584-85 (discussing the unfair result of the application of common law principles to an Internet defamation claim).

Online controlled the information and websites that users could access.¹³ During that era, a website provided information and advertising via static web pages, and users had no practical ability to add their own content to the sites.¹⁴ Due in part to increased competition in the dial-up access market and the proliferation of broadband access, the “walls” of the walled garden world began to crumble,¹⁵ and websites began to offer users the ability to interact with the content on their sites.¹⁶

The increase in user-website interaction was possible largely through the use of graphical user interfaces (GUIs), which permitted users to interact directly with the content on the screen, typically by using a mouse.¹⁷ GUIs include familiar items such as clickable icons, windows, and scrollbars.¹⁸ GUIs were a significant advance over traditional command line interfaces (CLIs) because GUIs allowed a user to execute a computer operation by selecting a graphic representation of the command, rather than forcing the user to type in a string of text, as CLIs required.¹⁹ In the mid-1970s, Xerox researchers developed the first GUIs,²⁰ but the most important GUI pioneer was Apple computer.²¹ In 1983 Apple released its short-lived “Lisa” computer, which incorporated the first GUI commonly known today as a drop-down list.²² GUIs are the norm in modern software applications²³ and have become particularly important in web browsing applications.²⁴ Drop-down interfaces in particular have gained widespread application in both traditional and Internet environments because they are easy for the average non-tech savvy computer user to manipulate, and they use relatively little screen space.²⁵

13. See Ciolli, *supra* note 12, at 166. The term “walled garden” refers to the idea that ISPs allowed users access to only a small area of the total online world. *Id.*

14. See *id.* at 168; Ziniti, *supra* note 10, at 590.

15. See Ciolli, *supra* note 12, at 172-73, 176.

16. See *id.* at 179; Ziniti, *supra* note 10, at 591-92.

17. The Linux Information Project, GUI Definition, <http://www.linfo.org/gui.html> (last visited Oct. 13, 2009).

18. ERIC STEVEN RAYMOND & ROB W. LANDLEY, THE ART OF UNIX USABILITY (2004), <http://www.catb.org/~esr/writings/taouu/html/ch02s05.html>.

19. See The Linux Information Project, Command Line Definition, http://www.linfo.org/command_line.html (last visited May 24, 2009).

20. RAYMOND & LANDLEY, *supra* note 18.

21. Jeremy Reimer, *A History of the GUI*, ARS TECHNICA, May 5, 2003, <http://arstechnica.com/old/content/2005/05/gui.ars/4>.

22. *Id.*; RAYMOND & LANDLEY, *supra* note 18.

23. See User Customizable Drop-Down Control List for GUI Software Applications, U.S. Patent Application No. 20090007009 (filed Jan. 1, 2009).

24. The Linux Information Project, GUI Definition, *supra* note 17.

25. *But see* Krishna Kumar, *Replacing the HTML Drop-Down Control*, THOUGHT CLUSTERS: SOFTWARE, DEVELOPMENT AND MGMT., Jan. 12, 2008, <http://www.thoughtclusters.com/2008/01replacing-the-drop-down-control> (describing the shortcomings of dropdown lists in addition to their benefits).

B. Applying the Law to Internet Content

Traditional print publication standards for defamation arose from the common law.²⁶ Under the common law of defamation as applied to print publications, courts treat publishers, and distributors differently.²⁷ Publishers, such as newspapers, are liable for defamatory material they publish, regardless of knowledge of the material's unlawful nature because they have editorial control over that material.²⁸ Distributors, such as booksellers, are liable only for distributing material they know or should know to be defamatory and may escape "republisher" liability if they remove defamatory material from distribution once they have knowledge of the material's defamatory nature.²⁹

In 1991, a federal district court in New York applied traditional print publication standards to find Internet service provider CompuServe not liable for alleged defamatory content posted on one of its forums.³⁰ In *Cubby, Inc. v. CompuServe, Inc.*,³¹ the district court held that CompuServe had no editorial control over the information at issue and, thus, was subject to liability only as a distributor of the content, that is, if it "knew or had reason to know of the allegedly defamatory" statements.³²

Four years later in *Stratton Oakmont, Inc. v. Prodigy Services Co.*,³³ a New York court held an ISP to the stricter "publisher" standard and found it liable for content posted on one of its online bulletin boards.³⁴ The court reasoned that the ISP was liable because it "held itself out to the public and its members as controlling the content of its computer bulletin boards," and it "actively utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste' . . . and such decisions constitute editorial control."³⁵

In 1996, largely in response to the holding in *Stratton Oakmont*,³⁶ Congress enacted § 509 of the Communications Decency Act, codified at § 230 of title 47 of the U.S. Code.³⁷ In passing § 230, Congress sought to limit *Stratton*

26. See Sewali K. Patel, Note, *Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go?*, 55 VAND. L. REV. 647, 654-57 (2002).

27. *Id.* at 656-58.

28. *See id.* at 656-57.

29. *See id.* at 657-58.

30. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 141 (S.D.N.Y. 1991).

31. *Id.*

32. *Id.* at 140-41.

33. No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 137 (1996).

34. *Id.* at *4-6.

35. *Id.* at *4.

36. *See Barrett v. Rosenthal*, 146 P.3d 510, 516 (Cal. 2006) (noting that "[§ 230's] legislative history indicates that [it] was enacted in response to [*Stratton Oakmont*]").

37. 47 U.S.C. § 230 (2006).

Oakmont's "backward" result of imposing stricter liability over those ISPs who "tried to exercise some control over offensive material."³⁸ As Congress noted at the time, "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."³⁹

Section 230 provides in pertinent part: "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."⁴⁰ The statute is designed to further several policies:

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) 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;
- (3) 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;
- (4) 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; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.⁴¹

In apparent recognition of § 230's potentially far reach, Congress included a section defining the statute's effect on other areas of the law.⁴² Specifically, Congress provided that § 230 have no effect on federal criminal statutes, intellectual property law, federal or state communications privacy law, or any state law "consistent with this section."⁴³ However, the statute specifically prohibits liability for ordinary state law claims, such as contract actions and defamation claims that do not fall within the specific exemptions.⁴⁴

Beginning with *Zeran v. America Online, Inc.*,⁴⁵ courts have interpreted §

38. 141 CONG. REC. H8460-01 (1995).

39. H.R. CONF. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10.

40. § 230(c)(1).

41. *Id.* § 230(b).

42. *Id.* § 230(e).

43. *Id.*

44. *Id.* § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

45. 129 F.3d 327 (4th Cir. 1997).

230 immunity expansively.⁴⁶ *Zeran* held that § 230 immunized “distributors” as well as “publishers” of third party Internet content.⁴⁷ Traditionally, publishers need not have knowledge of the existence of unlawful content in their publications in order to be liable for that content.⁴⁸ In contrast, distributors, such as news vendors or booksellers, must have actual knowledge of the unlawful nature of the content in order to be liable.⁴⁹ The *Zeran* court concluded § 230’s instruction that “[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider”⁵⁰ applied equally to distributors with notice of unlawful content.⁵¹ The court further noted that introducing tort liability to the Internet would chill speech in an arena where the right to speak freely is meant to be particularly robust.⁵² Post-*Zeran* courts “have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.”⁵³

II. WHO IS AN “INFORMATION CONTENT PROVIDER”?

Because § 230 provides immunity only for information provided by *another* information content provider,⁵⁴ a website can be liable when it is found to be the provider of content. The meaning of “information content provider” is paramount. The statute and case law help elucidate the meaning of the statutory language.⁵⁵

Section 230 provides definitions for some of its key terminology.⁵⁶ Under the statute, an “interactive computer service” is “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.” Courts have recognized the statutory

46. See *Barrett v. Rosenthal*, 146 P.3d 510, 518 (Cal. 2006) (discussing the broad acceptance in both federal and state courts of the *Zeran* holding).

47. *Zeran*, 129 F.3d at 334. Despite arguments that Internet service providers should be liable as contributors of content, see, e.g., *Patel*, *supra* note 26, at 653, *Zeran* and subsequent courts have found § 230 immunizes both distributors and publishers from liability for defamatory Internet content, see *Barrett*, 146 P.3d at 513; *Doe v. Am. Online Inc.*, 783 So. 2d 1010, 1017 (Fla. 2001).

48. *Zeran*, 129 F.3d at 331 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 113, at 810 (5th ed. 1984)).

49. *Id.* (citing KEETON ET AL., *supra* note 48, at 811).

50. 47 U.S.C. § 230(c)(1) (2006).

51. See *Zeran*, 129 F.3d at 333.

52. See *id.* at 331.

53. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008).

54. § 230(c)(1).

55. See, e.g., § 230(f)(3); *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1162-63 (9th Cir. 2008) (en banc).

56. See § 230(f).

definition of “interactive computer service” “includes a wide range of cyberspace services”⁵⁷ and “the most common . . . are websites.”⁵⁸

Section 230 further defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”⁵⁹ Although “content” is neither explicitly addressed by courts nor defined in the statute, courts have recognized e-mail listservs,⁶⁰ message boards,⁶¹ dating and other “matching” websites,⁶² and chat rooms⁶³ as generating the content at issue in § 230 cases. Additionally, courts have recognized the statutory immunity defense against claims including defamation,⁶⁴ negligence,⁶⁵ infringement of free speech,⁶⁶ intentional infliction of emotional distress,⁶⁷ violation of the Fair Housing Act,⁶⁸ violation of Title II of the Civil Rights Act,⁶⁹ fraud,⁷⁰ and breach of contract.⁷¹

57. *Batzel v. Smith*, 333 F.3d 1018, 1030 n.15 (9th Cir. 2003).

58. *Roommates.com*, 521 F.3d at 1162 n.6.

59. § 230(f)(3).

60. *Batzel*, 333 F.3d at 1018.

61. *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 234 (Ct. App. 2008).

62. *See Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008); *Roommates.com*, 521 F.3d at 1161-62; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

63. *See Green v. Am. Online*, 318 F.3d 465, 468-69 (3rd Cir. 2003).

64. *See, e.g., Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *2 (M.D. Fla. Feb. 15, 2008) (claiming website owner contributed to user-posted content defaming his business).

65. *See Doe v. MySpace, Inc.*, 528 F.3d 413, 416 (5th Cir. 2008) (claiming negligence against social networking website for failing to prevent thirteen-year-old girl from lying about her age, when the girl was sexually assaulted by alleged predator she met through the website).

66. *See e360Insight, L.L.C. v. Comcast Corp.*, 546 F. Supp. 2d 605, 606-07 (N.D. Ill. 2008) (claiming that internet service provider's blocking of mass e-mails to ISP's customers violated e-mailers First Amendment right to free speech).

67. *See Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 292-93 (D.N.H. 2008) (claiming for emotional distress against dating website for profile posted by unknown third party impersonating plaintiff).

68. *See Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (claiming that defendant's roommate-matching website violated provisions of 42 U.S.C. § 3604 prohibiting publication of discriminatory housing advertisements); *see also Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 668 (7th Cir. 2008).

69. *See Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 534 (E.D. Va. 2003) (claiming ISP failed to protect Muslim user from religion-based harassment by other users).

70. *See Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262 (N.D. Cal. 2006) (claiming dating website fraudulently used fake profiles to trick user into subscribing to the dating service).

71. *See id.* at 1260-61.

A. Creation or Development

The critical language when analyzing whether a website is an information content provider is “creation or development.”⁷² Section 230 does not specifically define “creation or development,” though courts have given the concept a variety of meanings.⁷³ Further, whether or not a website creates or develops content ultimately turns on whether it “is *responsible*, in whole or in part, for the creation or development of information.”⁷⁴

Courts have generally found that traditional editorial functions such as deleting inaccurate information⁷⁵ and making other “minor alterations”⁷⁶ do not constitute creation or development.⁷⁷ In *Batzel v. Smith*,⁷⁸ a listserv operator claimed § 230 immunity to successfully defeat a defamation claim.⁷⁹ The *Batzel* court found “[t]he ‘development of information’ therefore means something more substantial than merely editing portions of an e-mail and selecting material for publication.”⁸⁰ The *Batzel* dissent disagreed, finding that selecting a third party’s e-mail message for publication effectively alters its meaning, “adding to the message the unstated suggestion that [Defendant] deemed the message worthy of readers’ attention.”⁸¹ A similar view was advanced in *Anthony v. Yahoo! Inc.*,⁸² where a court found § 230 not applicable because the plaintiff claimed the defendant’s manner of presenting undisputedly third party information constituted development of that information.⁸³ Most courts reject this view.⁸⁴

B. Solicitation

When courts consider the context of the website receiving the information in addition to the website owner’s actions, the question of creation or development is often closer. In *Hy Cite Corp. v. Badbusinessbureau.com, L.L.C.*,⁸⁵ the court found a website soliciting reports of consumers’ negative

72. See 47 U.S.C. § 230(c)(1), (f)(3) (2006).

73. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005).

74. § 230(f)(3) (emphasis added).

75. *Ben Ezra*, 206 F.3d at 986 (finding that “[b]y deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect”).

76. *Batzel*, 333 F.3d at 1031.

77. See *id.*

78. See *id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1040 (Gould, J., dissenting in part).

82. 421 F. Supp. 2d 1257 (N.D. Cal. 2006).

83. *Id.* at 1263.

84. See, e.g., *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298 n.9 (D.N.H. 2008).

85. 418 F. Supp. 2d 1142 (D. Ariz. 2005).

experiences with businesses by offering compensation could “arguably” be found “responsible . . . for the creation or development of information” provided by consumers in response to the solicitation.⁸⁶

Some courts have compared soliciting a particular type of content to its development.⁸⁷ In *F.T.C. v. Accusearch, Inc.*,⁸⁸ the Tenth Circuit held that § 230 did not protect a website from a Federal Trade Commission claim that it engaged in unfair business practices by obtaining and marketing confidential phone records.⁸⁹ By making confidential telephone records available for public purchase, the court found Accusearch “developed” those records and therefore was an information content provider under § 230.⁹⁰

The court in *MCW, Inc v. Badbusinessbureau.com, L.L.C.*⁹¹ reached a similar result where a consumer-complaint website asked a disgruntled consumer to, among other things, take specific photographs of the offending company’s owner and post them on the website.⁹² The court opined, “[t]he defendants cannot disclaim responsibility for disparaging material that they actively solicit.”⁹³ The court further equated “actively encouraging and instructing a consumer to gather specific detailed information” to development of that information.⁹⁴

More recently, however, a court resolved a similar issue differently.⁹⁵ *Whitney Information Network, Inc. v. Xcentric Ventures, L.L.C.*⁹⁶ concerned the same defendant consumer-complaint website as in *MCW*.⁹⁷ The *Whitney* court found that despite the fact the website advised its users make their reports more interesting by using creativity,⁹⁸ it differed from the solicitation at issue in *MCW* because here the website had not solicited *specific* content.⁹⁹ It is notable, however, that the *Whitney* court made a point of mentioning the website’s

86. *Id.* at 1149 (quoting 47 U.S.C. § 230(f)(3) (2006)).

87. *See F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1199-1200 (10th Cir. 2009); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004). *But see Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10, *11 n.27 (M.D. Fla. Feb. 15, 2008) (finding that despite plaintiff’s assertions that defendants solicited user reports about companies that rip off consumers, defendant had not solicited *specific* material and therefore did not develop the content at issue).

88. 570 F.3d 1187.

89. *Id.* at 1201.

90. *Id.* at 1198.

91. 2004 WL 833595.

92. *Id.* at *10.

93. *Id.*

94. *Id.*

95. *See Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *12 (M.D. Fla. Feb. 15, 2008).

96. *Id.*

97. *Compare id.* at *1, with *MCW*, 2004 WL 833595, at *1.

98. *Whitney*, 2008 WL 450095, at *5.

99. *Id.* at *11 n.27.

requirement that the poster attest to the validity of his report,¹⁰⁰ contrasting this with a hypothetical non-immune website which invited postings based on fabrication.¹⁰¹

C. Links

Some courts have held that providing links to information on other websites does not constitute development of that information. In *Universal Communication Systems, Inc. v. Lycos, Inc.*,¹⁰² the First Circuit rejected the argument that an ISP “rendered culpable assistance” to a third party information content provider by providing a link to information that damaged the plaintiff.¹⁰³ The court held that defendant Lycos enjoyed § 230 immunity because the message board postings on the linked website remained the content of *another* information content provider, despite the fact that the “construct and operation” of Lycos’s site—the links—may have influenced the availability of the postings.¹⁰⁴ The court noted that making it “marginally easier for others to develop and disseminate misinformation” is “not enough to overcome Section 230 immunity.”¹⁰⁵

D. Free-form Text Entries

Free-form text prompts serve as “blank slates” which users may “develop” in any way they like.¹⁰⁶ Two federal courts of appeals have held that a website’s provision of free-form text boxes did not constitute creation or development of the content users post therein.¹⁰⁷ In *Fair Housing Council v. Roommates.com, L.L.C.*,¹⁰⁸ the Ninth Circuit found an “Additional Comments” section that provided an open text prompt where users could enter descriptions in their own words was not “creation” by the website.¹⁰⁹ The Seventh Circuit reached a similar result in *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,¹¹⁰ finding the website’s offering of an advertising forum did not cause the discriminatory content of the advertisement any more than “people

100. *Id.* at *5.

101. *Id.* at *10-11 (citing *Fair Hous. Council v. Roommates.com, L.L.C.*, 489 F.3d 921, 928 (9th Cir. 2007)). The *Whitney* court declined to use this *Roommates.com* panel decision as authority prior to the case’s rehearing by the Ninth Circuit en banc. *See id.* at *10 n.25.

102. 478 F.3d 413 (1st Cir. 2007).

103. *Id.* at 419-20.

104. *Id.* at 419.

105. *Id.* at 420.

106. Thanks to Professor Wright for this analogy.

107. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1173-74 (9th Cir. 2008) (en banc).

108. 521 F.3d 1157.

109. *Id.* at 1173-74.

110. 519 F.3d at 671.

who save money ‘cause’ bank robber[ies].”¹¹¹

E. Search Engine Results

Whether search engine results and sorting/matching mechanisms constitute creation or development is a subject of some debate.¹¹² In *Roommates.com*, the website allegedly violated the Fair Housing Act (FHA) by, among other things, employing prohibited characteristics such as sexual orientation and family status to sort and match users.¹¹³ The *Roommates.com* dissent argued, “there should be a high bar to liability for organizing and searching third-party information.”¹¹⁴ The majority appeared to agree: “The mere fact that an interactive computer service ‘classifies user characteristics . . . does not transform [it] into a “developer” of the “underlying misinformation.”’”¹¹⁵ To define “development” so broadly as to include the sorting of dating profiles according to the users’ relationship preferences would “sap section 230 of all meaning.”¹¹⁶ However, the majority found that Roommate’s¹¹⁷ development of the “discriminatory search mechanism is directly related to the alleged illegality of the site”¹¹⁸ and was, therefore, “sufficiently involved with the design and operation of [its] search and email systems . . . so as to forfeit any immunity to which it was otherwise entitled under section 230.”¹¹⁹ Though the *Roommates.com* court based its finding on the mechanism’s ultimately discriminatory result, commentators have warned that even stricter liability for search engines may be on the horizon.¹²⁰ Although § 230 generally protects “pure” search engines, “recommendations of content potentially become endorsements of that content’s message.”¹²¹ Further, when the search engine is part of a “creative community” or integrated with another application, the engine becomes identified with the content provider.¹²² Conceivably, then, a sorting and matching mechanism used in conjunction with a website’s commercial purpose could be considered creation or development of content.

111. *Id.*

112. See generally James Grimmelman, *Don’t Censor Search*, 117 YALE L.J. POCKET PART 48 (2007), <http://yalelawjournal.org/images/pdfs/582.pdf>.

113. *Roommates.com*, 521 F.3d at 1172.

114. *Id.* at 1177 (McKeown, J., dissenting).

115. *Id.* at 1172 (majority opinion) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)).

116. *Id.* (discussing *Carafano*, 339 F.3d at 1124).

117. As the court notes, “for unknown reasons, the company goes by the singular name ‘Roommate.com, L.L.C.’ but pluralizes its website’s URL, www.roommates.com.” *Id.* at 1161 n.2.

118. *Id.* at 1172.

119. *Id.* at 1170.

120. See, e.g., James Grimmelman, *The Structure of Search Engine Law*, 93 IOWA L. REV. 1, 36-37 (2007).

121. *Id.* at 37.

122. *Id.*

III. CASES INVOLVING PRE-POPULATED CONTENT

Recently, courts have confronted the application of § 230 to pre-populated content, particularly content selected by a user from choices provided by the website in a drop-down list.¹²³

A. Roommates.com

In 2008, the Ninth Circuit Court of Appeals narrowed the broad grant of immunity set forth in *Zeran*.¹²⁴ In *Roommates.com*, the court found that § 230 did not shield the defendant website owner when its website matching room-seekers with room-renters required users to answer a questionnaire disclosing their sex, sexual orientation, and familial status.¹²⁵ The court found Roommate performed three specific acts of content “development,” making it an information content provider and therefore not entitled to § 230 immunity.¹²⁶ First, Roommate authored the offensive questions.¹²⁷ Second, via drop-down lists, Roommate provided a limited choice of answers to those questions and required the user to answer the questions in order to use the service.¹²⁸ Third, Roommate used the answers in a search engine-like mechanism to sort and match users and create user profiles.¹²⁹

The court provided two rationales for its holding.¹³⁰ First, the website “forced” users to answer a questionnaire by choosing from a drop-down list Roommate created.¹³¹ Thus, “[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”¹³²

The court’s second rationale focused on the nature of the information at

123. See *Roommates.com*, 521 F.3d at 1166; *Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *9 (M.D. Fla. Feb. 15, 2008).

124. See *Roommates.com*, 521 F.3d at 1170.

125. *Id.* at 1169-70.

126. *Id.* at 1164.

127. *Id.*

128. *Id.* at 1165.

129. *Id.* at 1167; see *supra* Part II.E.

130. See *Roommates.com*, 521 F.3d at 1165 (“The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate’s own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them.”).

131. *Id.* at 1166. In characterizing how Roommate instructs its users, the majority’s opinion uses the words “force” and “require” or variations thereof at least twelve times. See, e.g., *id.* at 1166 n.19, 1167.

132. *Id.* at 1166.

issue.¹³³ The court held that “[§ 230] does not grant immunity for inducing third parties to express *illegal* preferences.”¹³⁴ In finding no immunity for the site’s profile and search mechanisms, the court stated that merely classifying user characteristics, as many websites do through their sorting and matching mechanisms, does not make a website a “developer” of information.¹³⁵ Rather, the court suggested that Roommate’s mechanism received no immunity because it used “discriminatory questions” and “discriminatory answers” to encourage housing discrimination.¹³⁶ It is also notable that the court likened solicitation of content to development under § 230 but seemed to specify that the solicitation itself must be unlawful in order to develop unlawful content.¹³⁷ The Ninth Circuit attempted to draw a line, however, when it held user entries in Roommate’s free-form text box were not “development” and, therefore, received § 230 immunity.¹³⁸

The *Roommates.com* court stated “weak encouragement,” such as requesting a descriptive entry in a free-form text box, “cannot strip a website of its section 230 immunity,”¹³⁹ but found § 230 does not protect a website that forces the expression of discriminatory preferences.¹⁴⁰ The court contrasted another website’s “neutral tools” for matching users based on their voluntary selections with Roommate’s website, which “is designed to force subscribers to divulge protected characteristics and discriminatory preferences” in order to match them based on characteristics prohibited by the FHA.¹⁴¹ The *Roommates.com* majority also considered the *Universal* opinion, and distinguished it on the basis that *Universal* did not involve the website’s “active participation” in developing the offensive content.¹⁴² The Ninth Circuit did not address, however, the opinions’ apparent differences as to making the offense “easier” to accomplish,¹⁴³ in light of the *Universal* court’s finding that making it “marginally easier for others to develop and disseminate misinformation” is “not enough to overcome Section 230 immunity.”¹⁴⁴

133. *Id.* at 1164. The court stated, “[W]e examine the scope of plaintiffs’ substantive claims only insofar as necessary to determine whether section 230 immunity applies.” *Id.* The court examined not whether the substantive claim was exempted from immunity under the statute, but rather whether the substantive claim had merit, in order to conclude § 230 immunity is inapplicable. *See id.*

134. *Id.* at 1165 (emphasis added).

135. *Id.* at 1172, 1174.

136. *See id.* at 1172.

137. *See id.* at 1166 (“Unlawful questions solicit (a.k.a. ‘develop’) unlawful answers.”).

138. *Id.* at 1173-74.

139. *Id.* at 1174.

140. *Id.* at 1172.

141. *Id.*

142. *Id.* at 1172 n.33.

143. *Compare id.* at 1172, with *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007).

144. *Lycos*, 478 F.3d at 420.

B. Whitney

The court in *Whitney Information Network, Inc. v. Xcentric Ventures, L.L.C.* saw the drop-down issue somewhat differently.¹⁴⁵ In *Whitney*, the defendant website provided a forum for consumers to post complaints and other information about their dealings with various companies.¹⁴⁶ The website provided consumers with pre-populated drop-down lists and other mechanisms to describe the companies.¹⁴⁷ The *Whitney* court found the plaintiff company's defamation claim barred by § 230 because, absent evidence that the defendants participated in selecting the categories,

the mere fact that [Defendant] provides categories from which a poster must make a selection in order to submit a report on the . . . website is not sufficient to treat Defendan[t] as [an] information content provider[] of the reports . . . that contain the "con artists", "corrupt companies", and "false TV advertisements" categories.¹⁴⁸

The menu at issue in *Whitney* differed substantially from that in *Roommates.com* because it provided hundreds of choices to the user, many of which were not negative or defamatory in nature.¹⁴⁹ The *Whitney* court accordingly found the site's provision of a limited number of categories from which the user must select was not sufficient to constitute development because there were hundreds of categories and many were not defamatory.¹⁵⁰

C. GW Equity

In *GW Equity, L.L.C. v. Xcentric Ventures, L.L.C.*,¹⁵¹ the plaintiff claimed the defendant's consumer complaint website published comments which, among other things, defamed the plaintiff's business and interfered with the plaintiff's business relationships.¹⁵² Whereas the *Whitney* court's opinion predated the Ninth Circuit's en banc holding in *Roommates.com*, the *GW Equity* court was able to consider the *Roommates.com* en banc decision.¹⁵³ The *GW Equity* court

145. See *Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10-11 (M.D. Fla. Feb. 15, 2008).

146. *Id.* at *5.

147. *Id.*

148. *Id.* at *10.

149. *Id.* At the time of the *Whitney* decision, *Roommates.com* awaited rehearing by the Ninth Circuit en banc; the panel decision therefore had no precedential value. For this reason (in addition to the factual differences between the cases), the *Whitney* court refused the plaintiff's entreaty that it rely on the Ninth Circuit panel decision in *Roommates.com*. See *id.* at *10 n.25.

150. *Id.* at *10.

151. No. 3:07-CV-976-O, 2009 WL 62173 (N.D. Tex. Jan. 9, 2009).

152. *Id.* at *1.

153. *Id.* at *5.

found *Roommates.com* distinguishable on two counts.¹⁵⁴ First, Xcentric provided a broader range of selections to the user than did *Roommate.com*.¹⁵⁵ Second, unlike *GW Equity*, *Roommates.com* involved a situation in which the website violated the law simply by posing the wrong question, rather than through the answers it provided.¹⁵⁶

D. Carafano

Content on the dating website Matchmaker.com was the subject of *Carafano v. Metrosplash.com, Inc.*¹⁵⁷ Matchmaker required date-seekers to complete a lengthy questionnaire.¹⁵⁸ Users selected answers to the questions from a series of drop-down menus listing between four and nineteen options, some of which were “innocuous” and some of which were “sexually suggestive.”¹⁵⁹ Users were also asked to answer additional questions in an “essay” section.¹⁶⁰ The district court found that because the website, through its drop-down menus, created the content at issue, it was not eligible for § 230 immunity.¹⁶¹ The Ninth Circuit reversed the district court’s holding, reasoning that although “the questionnaire facilitated the expression of” users’ information, “the selection of the content was left exclusively to the user.”¹⁶² Additionally, in contrasting the date-matching mechanism in *Carafano* with the roommate-matching mechanism in *Roommates.com*, the Ninth Circuit noted that the website-provided classifications in *Carafano* “did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier.”¹⁶³

E. Craigslist

The plaintiffs in *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,¹⁶⁴ brought a claim similar to that in *Roommates.com*, alleging that the defendant website was liable for violations of the FHA based on the housing-related postings of its users.¹⁶⁵ The content in *Craigslist* was not pre-populated, but it was like some of the *Roommates.com* and *Carafano* content in that it was formulated in response to “free-form” or essay prompts.¹⁶⁶ The court

154. *Id.*

155. *Id.*

156. *Id.*; see also *infra* text accompanying notes 184-86.

157. See, 339 F.3d 1119, 1121 (9th Cir. 2003).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1067-68 (C.D. Cal. 2002).

162. *Carafano*, 339 F.3d at 1124.

163. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc) (emphasis added).

164. 519 F.3d 666 (7th Cir. 2008).

165. *Id.* at 668.

166. See *id.*

found this was insufficient to make the website a creator or developer of the offending content.¹⁶⁷ The court added, “[c]ausation in a statute such as [the FHA] must refer to causing a particular statement to be made, or perhaps the discriminatory content of a statement.”¹⁶⁸ The court opined, “[n]othing in the service [C]raigslist offers induces anyone to post any particular listing or express a preference for discrimination.”¹⁶⁹ Though not dispositive in its decision, the court noted that the plaintiff had many other potential defendants from which to recover.¹⁷⁰

IV. DEFICIENCIES IN CURRENT JUDICIAL APPLICATIONS OF § 230

Courts have applied § 230 in website content cases in such a way as to create an amorphous and unworkable standard for judging creation or development of content. Such an ad hoc standard increases the risk that future decisions could erroneously reject a defendant’s § 230 immunity defense in cases where the defense is warranted. Pre-populated content presents special challenges for courts because the question of whether the website “created or developed” the content ultimately selected by the user is not easily resolved.¹⁷¹ When the website creates its drop-down interface, it authors every selection that appears in the list,¹⁷² but the user actually produces the ultimate content by selecting an option from the list. This dichotomy yields the courts’ dilemma. The problem is particularly notable after the *Roommates.com* decision that set an example for courts to look to the merits of the plaintiff’s claim whenever the court finds it advisable to protect social goals in conflict with the § 230 statutory language. Although some of these goals may be worthy of protection, the courts are not the proper venue for doing so.

A. *The Ambiguous Language of Creation or Development*

Website creation or development of content depends upon whether the website “is *responsible*, in whole or in part, for the creation or development of information.”¹⁷³ If courts could easily measure responsibility, defining creation

167. *Id.* at 672.

168. *Id.* at 671.

169. *Id.*

170. *Id.* at 672.

171. *See, e.g., Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157 (9th Cir. 2008) (en banc). In this case involving drop-down selections, the majority and dissent differed strongly on whether the user or the website “developed” the selected response. *Compare id.* at 1166 (“[B]y providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information.”), *with id.* at 1182 (McKeown, J., dissenting in part) (noting that “providing a drop-down menu does not constitute ‘creating’ or ‘developing’ information”).

172. *See, e.g., Webmonkey.com, Build an Ajax Dropdown Menu*, http://www.webmonkey.com/tutorial/Build_an_Ajax_Dropdown_Menu (last visited May 24, 2009).

173. 47 U.S.C. § 230(f)(3) (2006) (emphasis added).

or development would be a relatively simple task. Unfortunately, responsibility is a matter of degree as well as perspective, and courts have not always focused clearly on this requirement.¹⁷⁴

Courts have used multiple terms in discussing creation or development and have variously found that facilitating, weakly encouraging, classifying, and making development marginally easier do not constitute creation or development of content under § 230.¹⁷⁵ However, encouraging, actively encouraging, and instructing users to provide particular content may strip a website of immunity.¹⁷⁶ This confusion, apparent across decisions, is present even within decisions.¹⁷⁷ For example, in finding the defendant not protected by § 230, the *Roommates.com* court stated that the defendant did “much more than encourage . . . it forces users to answer certain questions.”¹⁷⁸ Oddly, the court later stated that § 230 was properly applied in *Carafano* because the website in *Carafano* “did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation or to make defamation easier.”¹⁷⁹ Thus, the analysis aligns “forcing” content choice with making the choice “easier,” and unfortunately, it does not provide much guidance as to what level of “encouragement” might be acceptable. The apparent explanation for this contradiction in the court’s reasoning lies in its emphasis on the ultimately discriminatory result of Roommate’s mechanism.¹⁸⁰

174. See *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 n.12 (N.D. Tex. Apr. 19, 2004) (noting that the statutory language only requires a finding that defendant was responsible for information created or developed by a third party and that “[s]ome courts have ignored this distinction”); see also *F.T.C. v. Accusearch, Inc.*, 570 F.3d 1187, 1198-99 (10th Cir. 2009) (conflating the concepts of responsibility and liability by stating, “one is not ‘responsible’ for the development of offensive content if one’s conduct was neutral with respect to the offensiveness of the content”).

175. See *Roommates.com*, 521 F.3d at 1174 (declaring that “weak encouragement cannot strip a website of its section 230 immunity”); *id.* at 1172 (quoting *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1124 (9th Cir. 2003)) (noting that mere classification of user-provided information does not constitute development of that information); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (finding that making it “marginally easier for others to develop and disseminate misinformation” still falls within the immunity provided by § 230); *Carafano*, 339 F.3d at 1124 (finding that an online questionnaire facilitating user expression did not run afoul of § 230).

176. See *Roommates.com*, 521 F.3d at 1171-72 (distinguishing non-immune website from another website that did nothing to encourage the defamatory nature of its content); *MCW, Inc. v. Badbusinessbureau.com, L.L.C.*, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595, at *10 (N.D. Tex. Apr. 19, 2004) (finding that “actively encouraging and instructing a consumer to gather specific detailed information is an activity that goes substantially beyond the traditional publisher’s editorial role”).

177. See, e.g., *Roommates.com*, 521 F.3d at 1172.

178. *Id.* at 1166 n.19.

179. *Id.* at 1172.

180. See *id.* at 1169 (“Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children.”).

The *Roommates.com* court did, however, clearly equate content development with solicitation when it posited, “Unlawful questions solicit (a.k.a. ‘develop’) unlawful answers.”¹⁸¹ Again, the court focused on the merits of the underlying discrimination claim by basing its finding on the ultimate illegality of the content at issue.¹⁸² Roommate was an information content provider with respect to the questions it authored and, as such, was barred from asserting immunity under § 230 as to the questions.¹⁸³ Unlike any other cases addressing the issue, the prompts, or the questions, were themselves arguably illegal.¹⁸⁴ The questions encouraged the nature of the answers in part because Roommate provided such limited selections in the drop-down boxes.¹⁸⁵ In that sense, then, the court’s reasoning that Roommate may have at least partially created the answers and cannot claim immunity for them¹⁸⁶ seems sound. It does not necessarily follow that an answer to an FHA-violating question is also a violation of the FHA. As a result, *Roommates.com* is the reverse of other cases where the prompt itself is not illegal, but the result it encourages is.

The *Roommates.com* majority made an effort to resolve the apparent ambiguities in its opinion when it explained its interpretation of “development” under § 230 as “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”¹⁸⁷ This statement leaves no doubt that the court looked beyond the website’s role as an information content provider and into the nature of the content itself when denying § 230 immunity. Whether in the context of fair housing, defamation, or any other possible website content claims, such an approach is ill-suited to a question of immunity.

B. Preserving the FHA’s Aims by Amending § 230

Much of the § 230 commentary following the *Roommates.com* and *Craigslist* decisions has focused on the conflict between the statute and the FHA.¹⁸⁸ By concentrating so heavily on the fair housing aspect of the dilemma, the discourse

181. *Id.* at 1166.

182. *Id.*

183. *Id.* at 1164 (“Roommate is undoubtedly the ‘information content provider’ as to the questions. . . .”); *accord id.* at 1177 n.5 (McKeown, J., dissenting).

184. *See id.* at 1164 (majority opinion).

185. *See id.* at 1165.

186. *Id.* at 1166.

187. *Id.* at 1167-68.

188. *See* Diane J. Klein & Charles Doskow, *Housingdiscrimination.com?: The Ninth Circuit (Mostly) Puts Out the Welcome Mat for Fair Housing Act Suits Against Roommate-Matching Websites*, 38 GOLDEN GATE U. L. REV. 329 (2008); Stephen Collins, Comment, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 NW. U. L. REV. 1471 (2008); J. Andrew Crosssett, Note, *Unfair Housing on the Internet: The Effect of the Communications Decency Act on the Fair Housing Act*, 73 MO. L. REV. 195 (2008); Kevin M. Wilemon, Note, *The Fair Housing Act, The Communications Decency Act, and the Right of Roommate Seekers to Discriminate Online*, 29 WASH. U. J.L. & POL’Y 375 (2009).

has lost sight of the importance of the issue in non-fair housing contexts. The FHA presents a unique conflict with § 230 and should be addressed independently of other § 230 issues.

The FHA makes it unlawful to discriminate in the sale or rental of dwellings on the basis of “race, color, religion, sex, familial status, or national origin.”¹⁸⁹ However, through what is known as the “Mrs. Murphy” exemption,¹⁹⁰ the statute allows landlords or current tenants who will occupy the dwelling with the prospective renter to discriminate in selecting tenants.¹⁹¹ Most people using websites like Roommates.com and Craigslist are in just this type of rental situation.¹⁹² Although the Mrs. Murphy exemption allows a roommate-seeker to choose a roommate on any basis she desires, it does not provide an exemption from the statutory mandate making it unlawful to make, print, or publish housing advertisements expressing preferences based on protected characteristics including race, sex, and familial status.¹⁹³ This mandate “expressly creates publisher liability for those who disseminate discriminatory advertisements,”¹⁹⁴ such as newspapers and similar media.

Although § 230 explicitly refuses website immunity for the violation of federal criminal statutes and intellectual property law,¹⁹⁵ in its present form, the statute provides immunity to those who would publish discriminatory housing advertisements.¹⁹⁶ The *Roommates.com* court justified finding no § 230 immunity for Roommate by implying Congress provided only a limited scope of immunity in the statute.¹⁹⁷ The court cautioned, “[w]e must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.”¹⁹⁸ The Ninth Circuit held that because racial screening is prohibited when practiced in person, Congress could not have wanted to make it lawful online.¹⁹⁹

By providing in § 230 that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,”²⁰⁰ Congress clearly intended to provide immunity to Internet businesses whose counterparts in the print world would be

189. 42 U.S.C. § 3604(a) (2006).

190. See Klein & Doskow, *supra* note 188, at 334 (citing 114 CONG. REC. 2495, 3345 (1968)).

191. § 3603(b)(2).

192. Klein & Doskow, *supra* note 188, at 341.

193. § 3604(c).

194. Klein & Doskow, *supra* note 188, at 335.

195. 47 U.S.C. § 230(e) (2006).

196. See *id.* § 230(c)(1).

197. See *Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164 & n.15 (9th Cir. 2008) (en banc) (noting that “[t]he Communications Decency Act was not meant to create a lawless no-man’s-land on the Internet”).

198. *Id.* at 1164 n.15.

199. *Id.* at 1167.

200. § 230(c)(1).

liable.²⁰¹ Publishers, such as newspapers, are subject to liability for unlawful content in the print world.²⁰² As the Seventh Circuit acknowledged in *Craigslist*, “nothing in § 230’s text or history suggests that Congress meant to immunize an ISP from liability under the Fair Housing Act. In fact, Congress did not even remotely contemplate discriminatory housing advertisements when it passed § 230.”²⁰³ Some have argued this was mere congressional oversight.²⁰⁴ Judge Easterbrook, however, saw it differently:

[T]he reason a legislature writes a general statute is to avoid any need to traipse through the United States Code and consider all potential sources of liability, one at a time. The question is not whether Congress gave any thought to the Fair Housing Act, but whether it excluded § 3604(c) from the reach of § 230(c)(1).²⁰⁵

The *Roommates.com* court argued that Congress could not have intended to exempt the Fair Housing Act from § 230’s scope.²⁰⁶ The court then implicitly acknowledged Congress’s stated purposes of promoting “the continued development of the Internet” and preserving “the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation.”²⁰⁷ The court felt it necessary to argue against these statutory objectives by stating, “[t]he 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.”²⁰⁸ The result was to subtly re-write § 230 from the bench, presumably to protect the civil rights objectives of the FHA. These objectives include educating the public about the FHA’s protections, eliminating “steering” of minorities away from housing in certain locations, and eliminating the exclusionary atmosphere created by discriminatory housing advertisements.²⁰⁹ Undoubtedly, these objectives are worthy of protection and amending the statute to make the FHA a specified exception to the reach of § 230 immunity is the best way to accomplish this end.²¹⁰ Congress, rather than the courts, must rewrite the

201. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997).

202. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974) (finding a magazine publisher liable for an author’s defamatory article).

203. *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008).

204. See Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 993 (2002).

205. *Craigslist*, 519 F.3d at 671.

206. *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

207. 47 U.S.C. § 230(b)(1)-(2) (2006).

208. *Roommates.com*, 521 F.3d at 1164 n.15.

209. See Klein & Doskow, *supra* note 188, at 340-48.

210. See Collins, *supra* note 188, at 1495; see also James D. Shanahan, Note, *Rethinking the*

law.²¹¹

Regardless of how the issue is resolved in the FHA arena, drop-down lists, checkboxes, and the like will continue to have definite implications under § 230 as “creation or development of information”²¹² in a variety of legal contexts, such as defamation, negligence, and freedom of speech.²¹³ Courts must have a mechanism to deal with creation or development of pre-populated content in these other contexts.

V. DEVISING A “CREATION OR DEVELOPMENT” STANDARD FOR PRE-POPULATED CONTENT

Although the broad, *Zeran*-based interpretation of § 230²¹⁴ may work well for most types of Internet content,²¹⁵ it falls short when applied to drop-down lists and other pre-populated content. In the case of pre-populated content, responsibility for creation or development of information is particularly difficult to discern because the website authored the choices available to the user. Website operators and courts alike need a reliable standard for assessing when a website providing pre-populated or otherwise limited content selections crosses the line into becoming an information content provider.

A. *Potential Methods to Determine Website Liability for Pre-populated Content*

Several possibilities exist for crafting a workable standard, ranging anywhere from absolute website immunity to strict liability for any pre-populated content a website offers. Each of these alternatives has both advantages and limitations.

1. *Broad Immunity*.—One liability scheme for pre-populated content would be to apply § 230 protection any time the third party user makes the ultimate content selection. This system would allow websites to “encourage” or “solicit” content without incurring liability, essentially eliminating liability for all content pre-populated by the website.

This solution has appeal because it reflects our physical, brick-and-mortar world sensibilities of individual responsibility and decisionmaking. For instance, taunting a person to jump into a water-filled trench does not make the taunter

Communications Decency Act: Eliminating Statutory Protections of Discriminatory Housing Advertisements on the Internet, 60 FED. COMM. L.J. 135, 154 (2007).

211. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

212. § 230(f)(3).

213. Amending § 230 to accommodate the FHA will have no effect on claims based on other causes of action such as defamation, negligence, or the violation of constitutional rights. *See, e.g., supra* notes 64-66.

214. *See supra* notes 45-53 and accompanying text.

215. *See generally*, Ziniti, *supra* note 10 (describing the more interactive nature of the modern Internet and discussing the problems with applying the current liability system to it).

liable for the person's drowning if the person does indeed jump.²¹⁶ Further, such a clear solution provides a brightline rule that would be easy for courts to apply, and it provides certainty for the interactive computer services Congress sought to protect through § 230.

Allowing complete immunity for all "encouragement," however, fails to recognize that encouragement is a matter of degree. When the user is left with no choices but those provided by the website, and none of them are satisfactory, it is difficult to claim his selection is solely her responsibility. Although taunting a person to jump off a cliff would not produce liability, pushing her off the cliff would, and putting her in a position where he has no real choice but to jump very well might produce liability.²¹⁷ The willingness of the user seems to be a key ingredient; even *Carafano*, a decision that could be characterized as a high-water mark of § 230 immunity, required that the "third party *willingly* provide[] the essential published content" for the website to receive full immunity.²¹⁸

Further, such sweeping immunity would leave many plaintiffs without recourse for their harms. The third party posters of information are often unknown to plaintiffs,²¹⁹ and those known are frequently judgment-proof.²²⁰ The Seventh Circuit acknowledged this consideration in the § 230 context when it noted that the *Craigslist* defendant had many other identifiable "targets" from which to seek damages.²²¹

In addition, immunity of this breadth does not square with the statutory language.²²² Section 230 provides that a computer service shall not be treated as the publisher of information "provided by *another* information content provider."²²³ The language defines a website as an "information content provider" if the site creates or develops the information it provides.²²⁴ Congress could have provided immunity for all website-created or developed information by either altering the definition of information content providers to exclude interactive computer services, or by providing that a computer service shall not be liable for information provided by *any* information content provider. If Congress had intended to immunize computer service providers in all instances, it would not have limited the content for which websites could claim immunity.

2. *Make a Determination on the Merits of the Underlying Claim.*—Before determining if § 230 immunity applies, the court could make a preliminary

216. See *Yania v. Bigan*, 155 A.2d 343, 345 (Pa. 1959).

217. See *id.* at 346 (noting that a defendant has no duty to rescue unless the defendant placed the victim in a "perilous position").

218. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) (emphasis added).

219. See *Patel*, *supra* note 26, at 691.

220. See, e.g., *Doe v. GTE Corp.*, 347 F.3d 655, 656-57 (7th Cir. 2003).

221. *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008).

222. See 47 U.S.C. § 230(c)(1) (2006).

223. *Id.* (emphasis added).

224. See *id.* § 230(f)(3).

examination of the merits of the plaintiff's claim, refusing immunity for content that appears to be unlawful. The *Roommates.com* court's repeated focus on the discriminatory nature of the content indicates just such an examination.²²⁵

Courts adjudicating defamation claims against anonymous speakers frequently employ this type of approach.²²⁶ Before subjecting an anonymous speaker to public exposure, courts require some preliminary demonstration, such as a *prima facie* showing, that the contested statement was defamatory.²²⁷ The approach works well in the anonymous speaker context because of the need to balance the First Amendment rights of the speaker with the rights of others to be protected from defamation.

Requiring a plaintiff to make a preliminary showing on the merits in § 230 cases would contravene the purpose of immunity. As the Supreme Court has recognized, immunity entitles the possessor to avoid the action entirely; it means "immunity from suit."²²⁸ Even the *Roommates.com* court acknowledged the aims of immunity include protecting defendants from both liability and from the expense of defending against claims.²²⁹ Moreover, forcing a preliminary examination of the merits would put additional issues before the court, unnecessarily consuming precious time in an already overburdened system.

In addition, requiring assessment of the merits would also defeat one of the core purposes of § 230, that of "promot[ing] the continued development of the Internet."²³⁰ As courts and others have recognized, even non-meritorious claims have the effect of chilling free expression.²³¹ A website forced to defend on the merits even before it can invoke statutory immunity is more likely to restrict the content options it offers users reducing the range of information on its site.²³² This scenario would be particularly troubling in the case of pre-populated content. As any casual Internet user can attest, drop-down boxes and similar interfaces have become ubiquitous online. It does not tax the imagination to conclude that these types of interfaces have been critical in the evolution of Internet commerce, as well as to the development of sorting and matching mechanisms, both of which comprise a large part of today's Internet

225. See *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1164-68 (9th Cir. 2008) (en banc).

226. See, e.g., *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 245 (Ct. App. 2008).

227. *Id.*

228. Cf. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499-500 (1989) (noting that court decisions against a defendant's immunity are immediately appealable under the collateral order doctrine).

229. *Roommates.com*, 521 F.3d at 1174-75 ("We must keep firmly in mind that this is an immunity statute we are expounding . . . [It] must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.").

230. See 47 U.S.C. § 230(b)(1) (2006).

231. See *Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006); see also Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 890 (2000).

232. Cf. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.").

functionality.²³³

3. *Strict Liability for Pre-populated Content.*—Another approach to the issue of responsibility for creation or development of content would be to construct a bright line rule, finding that all pre-populated content is the creation of the website, regardless of the user's selection process.

Finding the website strictly liable for pre-populated content has some intuitive appeal because the website is the author *in fact* of every selection it makes available in a drop-down list. It seems logical that if a website provides an array of choices, knowing the user must select one of them, the website is at least partly responsible for developing the final product. This approach makes more sense than basing immunity on ultimate lawfulness of the content because whether the ultimate selection is lawful or unlawful has nothing to do with the selection process itself. In determining whether a website is an information content provider and thus not protected by § 230, courts must examine the website's role in the creation or development of the content, not the content itself. To hold that the lawfulness of the content determines the website's role in its development is backwards.

Further, the congressional intent of § 230 arguably dovetails with a strict liability approach to pre-populated content. As the *Roommates.com* court correctly notes, a website need only develop the content "in part" to lose § 230 immunity.²³⁴ Also, interpreting the statute to provide immunity *only* to computer services that screen or remove offensive content²³⁵ means websites that do not screen risk nearly limitless liability, consistent with a strict liability approach.

Strict liability for pre-populated content has several pitfalls. First, it carries the risk of creating liability in cases where the situation clearly does not warrant it. For example, where a website asking a user for his date of birth provides a drop-down list of years and a minor user selects a year indicating he is an age of majority, the website could be liable for the fraudulent result. Strict liability could also result in unwarranted liability for dating websites like that in *Carafano*, where the user produced a defamatory result not because the drop-down options he selected were defamatory, but because he created a dating profile for a woman without her permission, and the profile completely

233. Cf. Janie J. Heiss, Droplets Platform Brings GUIs to the Internet, Aug. 15, 2002, <http://java.sun.com/features/2002/08/droplets.html> (asserting that prior to the development of Apple-style GUIs, web-based applications were substantially less productive); The Linux Information Project, GUI Definition, *supra* note 17 (discussing the importance of GUIs in the development of browsers).

234. *Roommates.com*, 521 F.3d at 1165-66; see also § 230(f)(3); Glad, *supra* note 11, at 259-60.

235. See *Roommates.com*, 521 F.3d at 1163-64; see also Rachel Kurth, Note, *Striking a Balance Between Protecting Civil Rights and Free Speech on the Internet: The Fair Housing Act vs. The Communications Decency Act*, 25 CARDOZO ARTS & ENT. L.J. 805, 835-36 (2007) (positing that § 230 should be read to provide immunity for internet housing services only when those services have made good faith screening or blocking efforts against FHA violations).

mischaracterized her.²³⁶ Even the *Roommates.com* court said *Carafano* reached the “unquestionably correct result” in holding defendant Matchmaker.com immune under § 230.²³⁷

Another difficulty with strict liability is that it eliminates the court’s ability to examine the nuances presented by a particular piece of content in context. This risk is particularly evident in cases of defamation, where the ultimate determination of liability depends upon the truth of the statement at issue and whether a reasonable person would have believed it or understood it as exaggeration or hyperbole.²³⁸ For instance, the term “prostitute” could be used to refer accurately to a person’s profession or to simply characterize a person negatively. In the first case, the use may be appropriate and would not subject the speaker to liability.²³⁹ In the second case, the characterization could easily be interpreted as defamatory.²⁴⁰

Further, Congress did not intend a strict liability approach to pre-populated content. Strict liability runs counter to the spirit of § 230, by creating liability for *restriction* of content. The statute expressly protects content-restrictive actions such as blocking and filtering.²⁴¹ For example, a website may employ drop-downs or check-boxes, as opposed to free-form text boxes, in order to keep the final product within the bounds of propriety. It hardly seems reasonable that such a website should be liable if the user manipulates the site’s restrictions into an unlawful result.

In addition, Congress’s inability to predict how the Internet would develop is precisely the reason to leave immunity intact; Congress explicitly designed § 230 “to promote the continued development of the Internet and other interactive computer services and other interactive media.”²⁴² Drop-down lists and the like have undoubtedly improved the efficiency and convenience of Internet use and have become essential to today’s Internet functionality. If courts apply strict liability to this technology, countless new and yet unseen developments may be stifled.

Lastly, the legislative history reveals that when Congress passed the Dot Kids

236. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121, 1124 (9th Cir. 2003).

237. *Roommates.com*, 521 F.3d at 1171. The court, however, expressly corrected its “unduly broad” suggestion in *Carafano* that the website “could never be liable because ‘no [dating] profile has any content until a user actively creates it.’” *Id.* (quoting *Carafano*, 339 F.3d at 1124 (brackets in original)).

238. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Batzel v. Smith*, 333 F.3d 1018, 1031 n.17 (9th Cir. 2003); *Lidsky*, *supra* note 231, at 874-75 (2000).

239. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (discussing the defense of truth and extending it, in the case of statements about public officials, to include false statements made without “actual malice”).

240. *Cf. Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (holding that department store salesmen had a valid cause of action for defamation against book authors who had characterized them as “fairies”).

241. 47 U.S.C. § 230(c) (2006).

242. *Id.* § 230(b)(1).

Implementation and Efficiency Act in 2002,²⁴³ it explicitly affirmed the broad, *Zeran*-based interpretation of § 230 by stating that “[t]he courts have correctly interpreted section 230(c)” to protect against claims like those presented in *Zeran*.²⁴⁴ If Congress has since changed its mind, it is more than capable of amending § 230 to narrow the scope of immunity. For instance, 2008 saw the introduction of legislation modifying the Fair Housing Act to allow the display of religious symbols, in an effort to nullify the effect of a Seventh Circuit decision upholding a condominium’s prohibition of religious symbol displays in residents’ doorways.²⁴⁵ In fact, it was just this sort of effort that provided the impetus behind § 230.²⁴⁶

4. “Active Inducement” Test.—Two courts that favored liability for “encouraging” content also briefly referred to the concept of “inducement.”²⁴⁷ *Craigslist* noted “[n]othing in the service [C]raigslist offers *induces* anyone to post any particular listing or express a preference for discrimination.”²⁴⁸ *Roommates.com* also fleetingly mentioned the concept: “The CDA does not grant immunity for *inducing* third parties to express illegal preferences.”²⁴⁹ Although these courts did not expound on the idea, the *Universal*²⁵⁰ court discussed whether “active inducement” of particular content might remove a website’s blanket of § 230 immunity.²⁵¹ Notably, the Supreme Court recently applied this concept, which originated in patent law,²⁵² in the Internet copyright violation case

243. Dot Kids Implementation and Efficiency Act of 2002, 47 U.S.C. § 941 (2006).

244. See H.R. REP. NO. 107-449, at 13 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1741, 1749 (“The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence . . .” (citations omitted)); see also *Barrett v. Rosenthal*, 146 P.3d 510, 523 (Cal. 2006); Collins, *supra* note 188, at 1489.

245. See Douglas Wertheimer, *Illinois, Then Florida, Is Texas Next?*, CHI. JEWISH STAR, Apr. 3, 2009, at 3, *available at* 2009 WLNR 7194045 (discussing, inter alia, the Freedom of Religious Expression in the Home Act of 2008, H.R. 6932, 110th Cong. (2008), that was designed in part to overturn *Bloch v. Frischholz*, 533 F.3d 562, 565 (7th Cir. 2008) (upholding dismissal of a condominium resident’s claim of religious discrimination based on condominium association’s rule prohibiting placement of any objects outside owners’ doors, which included plaintiff’s display of a mezuzah)).

246. See H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10 (“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 and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”).

247. See *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

248. *Craigslist*, 519 F.3d at 671 (emphasis added).

249. *Roommates.com*, 521 F.3d at 1165 (emphasis added).

250. *Universal Comm’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

251. See *id.* at 421.

252. See 35 U.S.C. § 271(b) (2006) (“Whoever actively induces infringement of a patent shall be liable as an infringer.”).

*MGM Studios, Inc. v. Grokster, Ltd.*²⁵³

In *Grokster*, the Court held a purveyor of online file-sharing software “who distributes [the software] with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”²⁵⁴ In examining the terminology, the Court noted that one induces infringement by enticing or persuading another to infringe.²⁵⁵ The infringer must possess an affirmative intent that the product be used to infringe, which can be demonstrated when he advertises the infringing use or provides instruction on it.²⁵⁶

The *Universal* court applied the *Grokster* copyright inducement standard in the Internet defamation context.²⁵⁷ The court found the defendant website, by providing a link to damaging information created by a third party, exhibited no “unlawful objective” in the construct of its website that would satisfy the requirement for inducement.²⁵⁸ However, the court based its ultimate holding for the defendant on other grounds, noting that it was not clear that a claim premised on active inducement could be consistent with § 230.²⁵⁹

At least one commentator has attempted to craft an active inducement test to replace § 230.²⁶⁰ Like the *Lycos* application of the concept, this version hews close to the original test, which asks whether the defendant induced the infringing or illegal use, by analyzing whether the website asked or induced the third party to provide unlawful content.²⁶¹

An inducement test may be useful in the context of website liability for Internet content, but courts would have to adapt it to coexist with § 230. If applied as suggested to date, such a test would automatically force examination of the merits of the underlying claim by focusing on the legality of the content at issue. This type of premature examination of the merits guts the meaning of “immunity” and essentially renders § 230 inoperative.²⁶²

Instead, an inducement test could be used to clarify the meaning of “creation or development”²⁶³ of content within the context of § 230. For instance, when assessing whether a website created particular content, a court could examine

253. See 545 U.S. 913 (2005).

254. *Id.* at 919.

255. *Id.* at 935 (quoting BLACK’S LAW DICTIONARY 790 (8th ed. 2004)).

256. *Id.* at 936.

257. See *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-21 (1st Cir. 2007).

258. *Id.* at 421.

259. *Id.*

260. See Zac Locke, Comment, *Asking for It: A Grokster-based Approach to Internet Sites that Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151 (2008); see also Ziniti, *supra* note 10, at 608 (exploring and rejecting an “affirmative steps” standard on the basis that it would excessively chill speech).

261. See Locke, *supra* note 260, at 170.

262. See *supra* Part V.A.2.

263. 47 U.S.C. § 230(f)(3) (2006).

whether the website advertised for, demonstrated the use of, or profited from²⁶⁴ that particular content, regardless of whether the content was lawful or not.

Inducement, with its established meaning in the patent and copyright contexts, would be a better test for whether a website created or developed content than *Roommates.com*'s nebulous "encouragement" standard.²⁶⁵ When applied to pre-populated content, however, the inducement standard falls short. Due to the very nature of pre-populated content, it is in essence "advertised" by the website that developed it as a possible, if not "recommended" selection by the user. In that sense, all user-selected pre-populated content is "induced" by the website, leaving no § 230 protection for any content of this type.

B. The Solution: A "Safe Harbor"-style Rebuttable Presumption

Instead of applying an ill-fitting standard designed for another purpose, or resorting to extremes of either pure immunity or strict liability, determining responsibility for creation or development of pre-populated content demands a unique approach. Courts should develop a new standard, incorporating facets of the above suggestions, to provide protection for websites offering pre-populated content.

A "safe harbor" is an "area or means of protection," typically a statutory or regulatory provision "that affords protection from liability."²⁶⁶ This proposal should not be confused with some commentators' proposed "notice-and-takedown" safe harbor modeled on the Digital Millennium Copyright Act (DMCA).²⁶⁷ The DMCA allows Internet service providers to escape liability for copyright-infringing material posted by third-party users if the website has neither actual knowledge of infringement nor awareness of facts that make infringement apparent, and the website expeditiously removes the content upon notification of claimed infringement.²⁶⁸ Notice-and-takedown liability, therefore, is quite similar to distributor liability.²⁶⁹ Courts and commentators alike have rejected both types of knowledge-based liability in the context of § 230.²⁷⁰

The "safe harbor" concept is appropriate for pre-populated content because

264. See *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005) (recognizing defendant's revenue increased based on use of the software at issue, and noting this as supporting evidence for an inference of defendant's intent to promote that use).

265. See *Fair Hous. Council v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1171-72 (9th Cir. 2008) (en banc).

266. BLACK'S LAW DICTIONARY 1363 (8th ed. 2004).

267. See 17 U.S.C. § 512 (2006); see also Ziniti, *supra* note 10, at 603 n.121.

268. See § 512(c)(1).

269. Cf. Ziniti, *supra* note 10, at 601-04 (comparing the common law "knowledge" standard for distributors with the DCMA "knowledge" standard).

270. See *Barrett v. Rosenthal*, 146 P.3d 510, 514, 520 (Cal. 2006); *Locke*, *supra* note 260, at 160; Ziniti, *supra* note 10, at 604-05. But see *Batzel v. Smith*, 333 F.3d 1018, 1031 n.19 (9th Cir. 2003) (suggesting notice-and-takedown liability as a solution to the problems posed by the broad immunity conferred on ISPs by § 230).

the website is the actual author of pre-populated selections it offers. Because it is illogical to conclude a website is not responsible for creating or developing its own pre-populated content, a presumption of no immunity is proper. Such a presumption should be rebuttable, however, if the defendant can demonstrate that he meets certain provisions allowing § 230 immunity to be extended to the pre-populated content at issue. This approach would most logically be a regulatory undertaking,²⁷¹ perhaps under the auspices of the FCC. Some proponents advanced a regulatory approach in the legislation that eventually became § 230, but Congress rejected it for fear it would not effectively address the problem, would impede the growth of technology, and “threaten the future of the Internet.”²⁷² Today, neither the FCC nor any other body comprehensively regulates the Internet.²⁷³ Absent any regulatory framework for such a safe harbor, courts must create their own guidelines. As guidelines, none of the factors below should be dispositive, but courts should consider them all when analyzing liability for pre-populated content.

1. *Number and Nature of Selections Available to the User.*—The number of selections the website provides, and the general tone of the selections, are important indicators of whether particular answers are “forced” or “encouraged.” The ultimate consideration here is the extent to which the user’s power of choice is restricted. A limited number of selections, as in *Roommates.com*,²⁷⁴ may indicate the user had little room to choose a suitable option, whereas a lengthy list of options, as in *Whitney*,²⁷⁵ provides the user substantially more freedom. The answer to this question should be considered in light of the type of response requested. For example, if the prompt asks for the user to select a color, a limited listing of selections may be entirely appropriate. If, on the other hand, the prompt asks for a more descriptive or opinion-based answer, such as a feeling or characterization, then more options might be necessary. In addition, the nature of the offered selections should be considered. Where the options provided are all of the same general type, the user’s power to choose is not as broad as it would be where a range of options is provided. For instance, if asked to characterize an experience, if the user is provided “positive” as well as “negative” selections, the options are less likely to “steer” the user to a particular outcome.

Another consideration in this context is precisely how the drop-down

271. Thanks to Professor Wright for this suggestion.

272. See Chang, *supra* note 204, at 989 (citing 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox)).

273. See generally JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD (2d ed. 2008) (Though no universal regulation exists, nations use a patchwork of mechanisms in an attempt to exercise varying degrees of control over Internet activities within their borders.). Whether comprehensive Internet regulation is desirable or even possible is a matter of great debate and is beyond the scope of this Note.

274. See *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

275. See *Whitney Info. Network, Inc. v. Xcentric Ventures, L.L.C.*, No. 2:04-cv-47-FtM-34SPC, 2008 WL 450095, at *10 (M.D. Fla. Feb. 15, 2008).

selections are populated. In a static drop-down list, the website designer pre-populates the selections available to the user. A dynamic drop-down list works differently, in that the selections the user ultimately sees are dependent upon some other input, such as the user's selection in a prior list.²⁷⁶ For instance, the first drop-down provides a list of states, and the second provides a list of the counties in the state selected from the first list. This type of configuration could weigh either for or against website responsibility for the content, depending on the situation. It might appear that if a user's selection results in a narrowing of her later selections, the user is more responsible for the later selections than the website is. However, when the website employs assumptions about user choices in configuring the second list, the reverse may be true. Imagine a web page where first box asks for a gender selection, and the second box, which asks for a color selection is designed by the website to list only pastels if the first selection is female and to list only bold colors if the first selection is male. In such an instance the website has narrowed the user's choices on the basis of a general sex-based assumption, and has undertaken a greater level of responsibility for the ultimate selection.

2. *User's Ability to Forgo Making a Selection.*—Whether a user can opt out of any particular selection may bear on the voluntariness of any selection she makes, particularly where the website provides a limited number of options to choose from. If the user must choose a response to every prompt, he may be forced to select a response with which he does not necessarily agree. Conversely, a mechanism such as an option of “no selection made” in a drop-down list, would allow a user to bypass a selection where he finds none of the website-provided options satisfactory. An alternative to allowing a user to make no selection may be for the website to provide an “other” category where the user is permitted to fill in a blank with her own language if none of the site-provided options is suitable.

When assessing the impact of whether the user can forgo making a selection, courts should consider how critical the particular prompt is to the overall purpose of the website. A website whose primary purpose is to match user profiles on the basis of sex is not likely to be useful to a user who refrains from specifying her sex. In this situation, the user who makes no sex selection is denied the very service he sought by using the website. In order to receive the value promised by the website, the user may be, in essence, forced to choose an unsatisfactory option. The same problem occurs if the user fills in her own response, if the website's sorting or matching mechanism is not capable of incorporating filled-in responses.

3. *Commercial Purpose of a Particular Selection.*—Where a website ties its revenue to users making particular choices, an inference that the website is responsible for those choices may be proper. If the user's selection of choice *A* over choice *B* has no bearing on the site's commercial success, the website has

276. See Plus2Net.com, Dynamic Populating the Drop Down List Based on the Selected Value of First List, http://www.plus2net.com/php_tutorial/php_drop_down_list.php (last visited Oct. 30, 2009).

no financial incentive to encourage any particular choice. If, on the other hand, a website derives more income when the user chooses *A* over *B*, it is logical to conclude the site has a stake in the outcome of the user's selection and therefore encourages it. Such a connection may be tenuous, and courts should consider it only where there is other evidence to support website responsibility for the content choice.

4. *No Conceivable Innocent Purpose.*—If the website knows or reasonably should know the user has no legitimate use for the selections it provides, liability should naturally follow. The website could be compared to “the seller of sugar to a bootlegger, [who] must have known that the customer had no legitimate use for the service.”²⁷⁷ This corresponds to the “contributory infringement” theory of liability in patent law.²⁷⁸ As with active inducement liability, the intent of the website should enter into the safe harbor analysis.²⁷⁹ *Roommates.com* provides an example of a situation in which intent could be considered in the context of pre-populated content.²⁸⁰ No conceivable innocent purpose might be demonstrated in a situation like that in *Roommates.com*, where the prospective landlord must disclose either “children present” or “children not present” when developing the rental listing.²⁸¹ When advertising rental housing, no innocent purpose exists for indicating familial status; the only conceivable purpose is to indicate a familial status-based preference or limitation in renting the dwelling, in violation of the FHA.²⁸²

5. *Existence of Cautionary Instructions or Disclaimer.*—A website that is serious about avoiding liability for unlawful content is likely to instruct its users on what type of content may be properly posted and will clearly indicate that all liability for violations resides with users. A website will strike a balance here between providing the proper cautions and keeping the website user-friendly. A lengthy and cumbersome process for user acceptance of the instructions is not preferable because users will be likely to abort the process. However, burying the cautions in fine print in the middle of a lengthy user agreement will likely not indicate a website's desire to reduce violations, and users will be inclined to simply click through the required screens without reading them. A short, non-exhaustive statement describing unlawful content and discussing liability,

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

278. *See* 35 U.S.C. § 271(d) (2006) (making a seller of a component of a patented machine liable for patent infringement if he knows the product is especially made for infringing use and is not capable of substantial noninfringing use); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439-40 (1984).

279. *See* Recent Cases, *Internet Law—Communications Decency Act—Federal District Court Denies § 230 Immunity to Website that Solicits Illicit Content.*—*FTC v. Accusearch, Inc.*, No. 06-cv-105, 2007 WL 4356786 (D. Wyo. Sept. 28, 2007), 121 HARV. L. REV. 2246 (2008) (arguing for a mens rea-based exception to § 230 immunity).

280. *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc).

281. *Id.*

282. 42 U.S.C. § 3604(c) (2006).

particularly if in bold font and requiring a separate acknowledgment, would serve the purpose without discouraging legitimate users.

Courts have contributed to the ambiguities surrounding creation or development of content under § 230, and courts have the capacity to clarify what they have wrought. The safe harbor-style rebuttable presumption provides courts with a practical mechanism to judge creation or development of pre-populated content, and provides guidance to websites in crafting their pre-populated content.

CONCLUSION

As the Internet has expanded, so have the content options available to websites and users. Because § 230 of the Communications Decency Act does not provide website immunity for content a website created or developed, pre-populated content poses particular problems for courts applying § 230. When a website provides a drop-down list of selections from which a user must choose, it is difficult to argue that the website did not create, at least in part, the ultimate content choice. To hold that websites are creators of pre-populated content, however, would strip them of § 230 immunity in situations where immunity is warranted. The unique nature of pre-populated content demands a novel approach by courts and requires consideration of multiple factors, many of which do not apply when considering other types of content. Only through crafting of such a multi-faceted approach will pre-populated content be offered the immunity Congress intended.