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**DOE V. SEXSEARCH.COM: PLACING REAL-LIFE LIABILITY BACK
WHERE IT BELONGS IN A VIRTUAL WORLD**

*Jon Burns*¹

This Recent Development examines the implications of Doe v. SexSearch.com, a case decided by the U.S. District Court for the Northern District of Ohio in August 2007, on jurisprudence surrounding website immunity from liability as provided by the Communications Decency Act of 1996. Specifically, this Recent Development compares the reasoning used in SexSearch.com with that used in Fair Housing Council v. Roommates.com, a May 2007 case decided by the Ninth Circuit Court of Appeals. The author asserts that the Roommates.com decision broke with the will of Congress as expressed in the Communications Decency Act and with federal court precedent, as it opened up a more narrow view of immunity under the Act. SexSearch.com is a step back towards clarity and a more equitable distribution of liability for user-supplied online content.

I. INTRODUCTION

While cruising SexSearch.com, an online dating site that encourages members to meet up and have sex,² John Doe came across the profile of a girl claiming to be eighteen years old. Doe chatted with the girl through the website and later met her to engage in consensual sexual relations.³ Shortly after this encounter, Doe was “arrested and charged with three separate counts of engaging in unlawful sexual conduct with a minor, all felonies of the third degree.”⁴ He now faces up to fifteen years in

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² Doe v. SexSearch.com, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

³ *Id.*

⁴ *Id.*

prison because the girl he believed to be a consenting adult was really a fourteen-year-old girl.⁵ These disturbing facts led to *Doe v. SexSearch.com*, a federal court case which examines the website's role in these events for the purpose of real-life liability.

Freedom of expression facilitated by the Internet, which now sustains more than one billion users,⁶ has led to a simplification of everyday life that is unparalleled in world history. With several clicks of the mouse, Web users can visit search engines and encyclopedias to find answers; online auctions, classifieds, and e-commerce websites to make purchases; blogs, video-sharing, and social networking sites to express themselves; and online dating services to find love, both next door and half the world away. Sites such as Google, Yahoo!, eBay, and Amazon.com have become household names, encouraging the exchange of ideas between users.⁷

User freedom, however, has also led to acts of horror and abuse.⁸ The dissemination of libelous, obscene, hateful, false, and morally reprehensible information is an everyday occurrence on the Internet, a place where everyone with access has a voice. As these signals whiz through cyberspace to appear on a user's computer screen, their consequences are very real and often lead to actual abuse, discrimination, identity theft, sexual assault, and exploitation.⁹ This double-edged nature of the free exchange of

⁵ *Id.*

⁶ Internet World Stats: Usage and Population Statistics, <http://www.internetworldstats.com/stats.htm> (last visited Nov. 17, 2007) (on file with the North Carolina Journal of Law & Technology).

⁷ MILLWARD BROWN OPTIMOR, 2007 BRANDZ: TOP 100 MOST POWERFUL BRANDS 10–13 (2007) <http://www.millwardbrown.com/Sites/optimor/Media/Pdfs/en/BrandZ/BrandZ-2007-RankingReport.pdf> (on file with the North Carolina Journal of Law & Technology).

⁸ According to the 2006 report from the FBI Internet Crime Complaint Center ("ICCC"), 86,279 complaints of Internet crime were referred to federal, state, and local law enforcements for further investigation in 2006. Cases involving financial fraud resulted in an aggregate loss of \$198.44 million. NAT'L WHITE COLLAR CRIME CTR. & FBI, 2006 INTERNET CRIME REPORT 3 (2006), http://www.ic3.gov/media/annualreport/2006_IC3Report.pdf (on file with the North Carolina Journal of Law & Technology).

⁹ Since May 8, 2000, the ICCC has received complaints involving online fraud, intellectual property rights matters, computer intrusions, economic

ideas on the Internet has presented Congress and the nation's courts with a difficult legal problem. In a world driven by benefits, our legislators and judges must decide who should be held accountable for the noted abuses.

As online intermediaries, many websites structure user input by building profiles with the information, and then deliver the user input using searching and sorting techniques to allow other users to access it. When the input turns out to be false or illegal, should liability lie with the website that structured and delivered the information or with the user that provided the harmful information in the first place? Congress provided an answer to this problem with the Communications Decency Act ("CDA") in 1996,¹⁰ legislation that limits the liability of online intermediaries in order to foster a freer exchange of ideas.¹¹ Since that time, it has been the job of the federal courts to interpret the statute and decide how far this limit on liability for online service providers extends. Despite its somewhat disturbing facts, *SexSearch.com* sends a signal that the courts are heading back in the right direction towards allowing the free exchange of ideas intended by the CDA.¹²

Immediately following passage of the CDA, case law was "near-unanimous"¹³ in holding that § 230(c) of the CDA gives an interactive computer service ("ICS")¹⁴ immunity in suits that are designed to hold it liable for third-party-provided content. Contrary to this precedent, in May of 2007 the Ninth Circuit Court of Appeals struck a rather considerable, if somewhat disjointed,

espionage, child pornography, international money laundering, identity theft, and more. *Id.* at 4.

¹⁰ 47 U.S.C. § 230 (2000).

¹¹ *See id.* § 230(b)(2) (stating policy goal "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").

¹² *See id.*

¹³ *See, e.g.,* Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006).

¹⁴ The Act defines an ICS as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service . . . that provides access to the Internet." 47 U.S.C. § 230(f)(2).

blow to the conventional immunity offered to Internet intermediaries by the CDA in *Fair Housing Council v. Roommates.com*.¹⁵ Thus, the importance of *SexSearch.com* is that, as one of the first rulings on § 230 following *Roommates.com*, it did not continue down the same path. That is to say, the court in *Sexsearch.com* did not recognize the broad exception to § 230's protection that was opened up by the Ninth Circuit in *Roommates.com*. *SexSearch.com* is a step back in the right direction, a move that will help restrict extraneous litigation and foster an open Internet where responsibility lies with the user.

This Recent Development examines how *SexSearch.com* clarifies the scope of immunity given to online service providers by the CDA, which has been brought into question by the recent *Roommates.com* ruling. Part II reviews the relevant background law, including the CDA and prior case law construing CDA provisions. Part III discusses the *SexSearch.com* case itself, and Part IV analyzes the different ways the court construed the CDA provision in both *SexSearch.com* and *Roommates.com*. This Recent Development concludes that the *SexSearch.com* court has correctly interpreted the CDA, returning to a line of reasoning that other courts should follow.

II. STATEMENT ON THE LAW

A. *The Communications Decency Act*

Congress addressed liability for online intermediaries with the CDA, which “granted most Internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party.”¹⁶ Congress also recognized that “the Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.”¹⁷ One of its expressed policy goals in the CDA was “to preserve the vibrant and competitive free

¹⁵ 489 F.3d 921 (9th Cir. 2007) (issuing an opinion with two concurrences and a partial dissent from a three-judge panel that limited the scope of immunity for an online intermediary pursuant to § 230 of the CDA).

¹⁶ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003).

¹⁷ 47 U.S.C. § 230(a)(4).

market that presently exists for the Internet and other interactive computer services, unfettered by state regulation.”¹⁸

Section 230(c) expressly states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁹ Accordingly, when a piece of information shows up on an Internet website or networking service and the ICS is not the producer, that service will not be held liable for the information because it is not considered the “publisher.”²⁰

In the Act’s definitions section, § 230(f), “interactive computer service” is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”²¹ Practically speaking, most websites and Internet service providers (“ISPs”) fit into this category and courts do not deliberate on this part of the test in their analyses.²² “Information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”²³

The central issue that courts confront when applying the CDA for purposes of immunity is the breadth of the definitions of “information content provider” and “publisher”²⁴ as two key terms

¹⁸ *Id.* § 230(b)(2).

¹⁹ *Id.* § 230(c).

²⁰ *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 724–27 (N.D. Ohio 2007).

²¹ 47 U.S.C. § 230(f)(2).

²² *See Universal Commc’n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (analyzing a challenge to § 230 immunity without addressing whether the defendant was an ICS under the Act); *see also* *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.* 339 F.3d 1119 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

²³ 47 U.S.C. § 230(f)(3).

²⁴ The term “publisher” is not defined within the Act, but the term simply relates to the type of offenses for which immunity under the Act applies—those resulting from publishing the information.

within the CDA.²⁵ The greater extent to which an interactive computer service—which could be an ISP such as America Online (“AOL”) or a website such as Craigslist—is seen to be merely a publisher of information from a third-party information content provider (“ICP”), the greater the immunity from liability.²⁶ A website that does nothing but allow users to input information that is displayed without any sorting or editing by the website would be completely protected under this statute because it cannot be said to be responsible either “in whole or in part” for the information, and is thus not the ICP.²⁷ Such a website would not be treated as the publisher and would not be liable for any injuries that result from the information.

The term “in whole or in part”²⁸ is a term which courts must clarify to determine the breadth of immunity that the statute provides. For purposes of application, there are two extremes in reading this part of the statute:

Reading #1: So long as the ICS is responsible in part (any part, even 0.1%) for the development of the content, then the ICS is an ICP and [immunity under] 230 isn’t available. This reading isn’t very useful because it would apply whenever an ICS edited any third party content, which is exactly what 230 routinely has been held to protect.

Reading #2: So long as any third party ICP was responsible in part for the content’s development (even 0.1%), the ICS isn’t liable for it. This means that the ICS could have a great deal of involvement in the content but still avoid liability. This is by far the dominant interpretation of the statute.²⁹

Where on the continuum between these extremes any given court chooses to read the statute is directed by its view of how far ICS immunity should be extended.

²⁵ *Fair Hous. Council v. Roommates.com, L.L.C.*, 489 F.3d 921, 925 (9th Cir. 2007).

²⁶ 47 U.S.C. § 230.

²⁷ *Id.*

²⁸ *Id.* § 230(f)(3).

²⁹ Eric Goldman, *Ninth Circuit Screws Up 47 U.S.C. 230—Fair Housing Council v. Roommates.com*, http://blog.ericgoldman.org/archives/2007/05/ninth_circuit_s.htm (last visited Sept. 28, 2007) (on file with the North Carolina Journal of Law & Technology).

B. Existing Case Law

Case law surrounding the CDA has generally been consistent since the first test of its authority shortly after the Act was passed.³⁰ In *Carafano v. Metrosplash.com, Inc.*,³¹ a Ninth Circuit case upon which both *SexSearch.com* and *Roommates.com* relied, the court stated that “courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of ‘interactive computer service’ and a relatively restrictive definition of ‘information content provider.’”³² The facts of *Carafano* involved a “cruel and sadistic identity theft” when an anonymous prankster posted a fake and sexually suggestive profile of an actress and revealed her phone number and home address on an online dating site.³³

The *Carafano* court held that § 230 immunity did apply to the ICS, concluding that “so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process.”³⁴ Though the website in *Carafano* provided a questionnaire with both multiple choice and essay questions to help the user build a profile, which could potentially make it partially responsible for producing the information and thus liable,³⁵ the court stated that “no profile has any content until the user actively creates it.”³⁶ It stressed that under § 230 “any information provided by another information content provider”³⁷ triggers immunity for an ICS.³⁸

Following *Carafano*, the Ninth Circuit issued a fractured ruling that narrowed the scope of § 230 immunity in the *Roommates.com* case. In this case, the Fair Housing Council of San Fernando Valley and San Diego sued an online roommate matching website,

³⁰ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (interpreting § 230 of the CDA for the first time since the Act was passed).

³¹ 339 F.3d 1119 (9th Cir. 2003).

³² *Id.* at 1123 (internal citations omitted).

³³ *Id.* at 1120–21.

³⁴ *Id.* at 1124.

³⁵ See 47 U.S.C. § 230(f)(3) (2000).

³⁶ *Carafano*, 339 F.3d at 1124.

³⁷ *Id.* at 1125 (emphasis in original) (quoting 47 U.S.C. § 230(c)).

³⁸ *Id.* at 1124.

Roommates.com (“Roommate”), for violations of the Fair Housing Act found in profiles of users seeking to rent out their homes.³⁹ While the majority briefly considered whether Roommate was an ICS and whether the claim brought by the plaintiffs pertained to Roommate’s role as a publisher, the bulk of the opinion analyzed whether Roommate was an ICP “responsible, in whole or in part, for the creation or development of [the] information”⁴⁰ on which the plaintiffs based their claims.⁴¹ The court admitted that an ICS does not automatically lose protection “if it merely exercises some control over the posting of information provided by others, such as enforcement of rules as to appropriate content or minor editing,”⁴² but the court took a more expansive view of what constitutes “creation or development” of information in considering the plaintiff’s claim.⁴³

The Fair Housing Council brought claims based on three types of violations: (1) questionnaires that users are required to fill out in order to use the service; (2) selective e-mail distribution of profiles; and (3) the posting of information filled out in an “Additional Comments” section of user profiles.⁴⁴ The questionnaires applied to people seeking a room as well as to those who could provide a room to rent, and included inquiries as to gender, the presence of children, and sexual orientation.⁴⁵ These questionnaires also included a roommate preference form comprised of questions similar to those that the person seeking a roommate completed;⁴⁶ each of these inquiries had the option of being left blank.⁴⁷ In its analysis of § 230 immunity, the court unanimously found Roommate “‘responsible’ for such questionnaires because it ‘creat[ed] or develop[ed]’ these forms

³⁹ Fair Hous. Council v. Roommates.com, L.L.C., 489 F.3d 921, 924 (9th Cir. 2007).

⁴⁰ *Id.* at 925 (quoting 47 U.S.C. § 230(c), (f)(3)).

⁴¹ *Id.*

⁴² *Id.* at 925 n.5.

⁴³ *Id.* at 925.

⁴⁴ *Id.* at 926.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

and answer choices.”⁴⁸ The court then held that Roommate was an ICP and was therefore not eligible for § 230 immunity.⁴⁹

The court then turned to the “more difficult”⁵⁰ question of § 230 immunity for publishing the profiles themselves. The plaintiffs contended that Roommate was generally responsible for both the profiles that were created using the questionnaires and the distribution via e-mail of select responses based on user-selected preferences.⁵¹ The court characterized these actions as more than “merely publish[ing],” seeing them as “channel[ing] the information based on members’ answers to various questions, as well as the answers of other members.”⁵² In other words, the site was suggesting compatible profiles to its members and excluding incompatible ones. The court reasoned that this process created an “additional layer of information that [Roommate] is ‘responsible’ at least ‘in part’ for creating or developing,”⁵³ thereby cementing its position as an ICP and preventing it from receiving § 230 immunity. The court distinguished its reading of § 230 from existing precedent based on the type of information the website solicited, although it made no official findings about whether the user profiles did in fact violate the Fair Housing Act.⁵⁴ The holding on this particular issue was joined by only two of the three judges; the third judge stated that this reading of ICP was too expansive.⁵⁵

Finally, the court considered the “Additional Comments” portion of the profile, holding that Roommate’s role in creating this portion did receive § 230 protection. Although this portion was equally part of the profiles distributed based on other searchable criteria—to which the “additional layer of information” was added—the court stated: “Roommate’s open-ended question

⁴⁸ *Id.* (quoting 47 U.S.C. § 230(c), (f)(3) (2000), and framing the issue with the specific, legally significant words).

⁴⁹ *Id.* at 929.

⁵⁰ *Id.* at 927.

⁵¹ *Id.* at 926.

⁵² *Id.* at 928.

⁵³ *Id.* at 929 (quoting 47 U.S.C. § 230(c), (f)(3)).

⁵⁴ *Id.* at 928.

⁵⁵ *Id.* at 933–35 (Ikuta, J., concurring in part).

suggests no particular information that is to be provided by members; Roommate certainly does not prompt, encourage or solicit any of the inflammatory information provided Nor does Roommate use the information in the ‘Additional Comments’ section to limit or channel access to listings.”⁵⁶ Again, only two judges signed on to this holding, while the third judge opined that, as part of the searchable profile, the “Additional Comments” section should also lose immunity.⁵⁷

III. *DOE V. SEXSEARCH.COM*

A. *The Scandal*

In October of 2005, John Doe registered as a gold member of SexSearch.com (“SexSearch”), a “website offering an online adult dating service which encourages its members to meet and engage in sexual encounters.”⁵⁸ The website permits members to create profiles by answering specific questions provided by the site and also gives them the option of uploading photos and video content to be seen by other members.⁵⁹ Shortly after he joined, Doe came across the user-created profile of Jane Roe, a fourteen-year-old girl who represented herself as an eighteen-year-old woman.⁶⁰ She used an actual photo of herself and said she was looking for a man “who could last for a long time.”⁶¹ On November 15, 2005, the two met at Roe’s house and engaged in consensual sexual relations.⁶² Later, on December 30, 2005, Doe was arrested and charged with three third-degree felony counts of unlawful sexual conduct with a minor.⁶³ Conviction would result in as much as fifteen years in prison and lifetime registration as a sex offender.⁶⁴

⁵⁶ *Id.* at 929 (majority opinion).

⁵⁷ *See id.* at 930 (Reinhardt, J., concurring in part and dissenting in part).

⁵⁸ *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Following his arrest, John Doe brought suit against SexSearch based on fourteen different claims that “essentially boil[ed] down to either (a) [d]efendants failed to discover Jane Roe lied about her age to join the website, or (b) the contract terms [were] unconscionable.”⁶⁵ The defendants asserted immunity from claims that “would render [an ICS] liable for content provided by third parties.”⁶⁶ They argued thus that “the CDA bars [Doe’s] claims based on the purported failure of the website to prevent Jane Roe from misrepresenting her age.”⁶⁷ Doe argued, however, that the website did not qualify for such protection because the site “reserve[d] the right, and [did] in fact, modify the content of profiles when they do not meet the profile guidelines and as such they [were] responsible in whole or part for the creation or development of the information.”⁶⁸

B. *The Opinion*

The United States District Court for the Northern District of Ohio held in *Doe v. SexSearch.com* that all claims related to SexSearch’s “failure to remove Jane Roe’s profile, or their failure to prevent John Doe from communicating with her,” fell within the scope of CDA § 230.⁶⁹ In other words, it found SexSearch immune to all these claims.

The court began by following the conventional § 230 analysis for ICS immunity for third-party information.⁷⁰ Specifically, the court relied on § 230(c)(1) in holding that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information

⁶⁵ *Id.* at 724.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 725.

⁶⁹ *Id.* at 728.

⁷⁰ See *Universal Commc’n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) (analyzing whether the defendant, an ICS, should also be considered the ICP of harmful information by asking whether the ICS was responsible in whole or in part for the information’s production); see also *Batzel v. Smith*, 333 F.3d 1018 (9th Cir.2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

content provider.”⁷¹ Therefore, the critical determination for the court was whether SexSearch was considered an ICP, qualifying for immunity under § 230(c)(1), rather than the publisher of the information. The court framed three requirements that had to be met for SexSearch to qualify for immunity as an ICP: “(1) SexSearch is a provider of an ‘interactive computer service’; (2) the claim is based on ‘information provided by another information content provider’; and (3) the claim would treat SexSearch ‘as publisher or speaker’ of that information.”⁷²

The court quickly found that SexSearch satisfied the first requirement, holding that SexSearch was in fact an ICS under the statute as it “function[ed] as an intermediary by providing a forum for the exchange of information between third party users.”⁷³ It elaborated on its reasoning in determining whether the last two requirements were met.⁷⁴

To support his argument that SexSearch should be considered an ICP of Jane Roe’s false profile, Doe cited *Anthony v. Yahoo!, Inc.*,⁷⁵ in which an ICS⁷⁶ was held not to qualify for immunity under the CDA because it “deliberately ‘create[d] false profiles.’”⁷⁷ The court in *SexSearch.com*, however, distinguished the case by noting that SexSearch would have to be the ICP with respect to the specific false information that Doe relied on in order to lose its immunity.⁷⁸ In other words, SexSearch would have had to proactively modify Jane Roe’s profile to be considered its ICP, something Doe did not allege.⁷⁹ Further, the court stated that “the mere fact SexSearch provided the questionnaire Jane Doe

⁷¹ 47 U.S.C. § 230(c)(1) (2000); *see also id.* § 230(f) (discussing definitions of ICS and ICP).

⁷² *SexSearch.com*, 502 F. Supp. 2d at 724.

⁷³ *Id.* at 725 (quoting *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007)).

⁷⁴ *Id.* at 725–27.

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

⁷⁶ *Id.* at 1261 (acknowledging that an online intermediary may be both an ICS and an ICP under the statute).

⁷⁷ *SexSearch.com*, 502 F. Supp. 2d at 725 (quoting *Anthony*, 421 F. Supp. 2d at 1262).

⁷⁸ *Id.* (quoting *Anthony*, 421 F. Supp. 2d at 1263).

⁷⁹ *Id.*

answered falsely is not enough to consider SexSearch the developer of the false profile.”⁸⁰ This statement directly calls into question the reasoning put forth in *Roommates.com*,⁸¹ in which the website’s questionnaire seeking a directed response was seen as a reason to consider the website an ICP with respect to the harmful information.⁸²

Finally, the court also considered Doe’s argument that the claims brought against SexSearch did not arise from its role “as a publisher.”⁸³ According to Doe, immunity provided by the CDA should apply only to a defamation claim, something that was not part of the *SexSearch.com* action.⁸⁴ The court did not find this argument persuasive, however, because the statute does not contain such constricting language, and federal appellate court precedents from other circuits⁸⁵ have not restricted immunity in such a manner.

IV. ANALYSIS

As one of the first CDA cases to be decided since the *Roommates.com* ruling, *Doe v. SexSearch.com* seems to have redirected interpretation of § 230 back towards the plain meaning of the statute, similar to the interpretation in the initial cases decided under the CDA.⁸⁶ While the *SexSearch.com* case was

⁸⁰ *Id.* at 725–26 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003)).

⁸¹ *See id.* at 721. Note that *SexSearch.com* does not mention *Roommates.com* in its analysis. *See id.*

⁸² *Fair Hous. Council v. Roommates.com, L.L.C.*, 489 F.3d 921, 928 (9th Cir. 2007); *see also id.* at 933–34 (Ikuta, J., concurring in part) (characterizing the majority opinion’s direction as “expansive” for exploring a possible interpretation of “information content provider” that includes “soliciting a particular type of information”).

⁸³ *SexSearch.com*, 502 F. Supp. 2d at 727–28.

⁸⁴ *Id.* at 726.

⁸⁵ *Id.*; *see Universal Commc’n Sys. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003); *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

⁸⁶ *See cases cited supra* note 85.

decided in a different circuit from the *Roommates.com* case, the district court in *SexSearch.com* could have adopted the Ninth Circuit's analysis of § 230 put forth in *Roommates.com*. It is especially significant that the *SexSearch.com* court chose not to follow the Ninth Circuit's reasoning in *Roommates.com* given the significant weight the court in *SexSearch.com* gave to *Carafano*, another Ninth Circuit decision. Although the plaintiff in *SexSearch.com* did not explore the avenues opened up by *Roommates.com* to the fullest, the district court took an important step in choosing not to follow the Ninth Circuit into a legally ambiguous reading of the CDA. The facts of *SexSearch.com* are substantially similar to those of *Roommates.com*, although the two opinions framed them in decidedly different ways.⁸⁷ Instead, *SexSearch.com* follows a *Carafano*-type analysis of the issue; both cases take the same view of what makes an online intermediary an ICP, especially with respect to the "essential published content,"⁸⁸ which is "the portion of the statement or publication at issue."⁸⁹

A. *Disagreement between SexSearch.com and Roommates.com*

Both the SexSearch and Roommate websites offer user-created profiles constructed with user-supplied answers to a questionnaire provided by the website which are then displayed in an organized manner.⁹⁰ While the type of information differs,⁹¹ the process by which the websites solicit, edit, and display the information is substantially similar. If *SexSearch.com* had been decided with the less restrictive view of an ICP that was used in *Roommates.com*, without regard to the actual type of information supplied by users, SexSearch's profile creation system and searchable user content would have created the "additional layer of information"⁹²

⁸⁷ See *SexSearch.com*, 502 F. Supp. 2d at 724; *Roommates.com*, 489 F.3d at 925.

⁸⁸ *Carafano*, 339 F.3d at 1124.

⁸⁹ *Id.* at 1123.

⁹⁰ See *SexSearch.com*, 502 F. Supp. 2d at 724; *Roommates.com*, 489 F.3d at 928.

⁹¹ *SexSearch.com* and *Carafano* deal with false information supplied by the user, while *Roommates.com* deals with potentially illegal information supplied by the user.

⁹² *Roommates.com*, 489 F.3d at 929.

sufficient to make it “ ‘responsible’ at least ‘in part’ for creating or developing”⁹³ the substantive profile and hence would have made it an information content provider liable for the false information.

While it may seem unfair to hold SexSearch legally accountable for user-generated false information for which it made no promise or warranty of accuracy,⁹⁴ applying the *Roommates.com* rationale would do just that. In creating a less restrictive view of what constitutes an ICP, the *Roommates.com* majority attempted to distinguish the facts of its own case from *Carafano*.⁹⁵ The court stated that in *Carafano*, the “information posted by [the] third party . . . was not, in any sense, created or developed by the website operator—indeed, that was provided *despite* the website’s rules and policies.”⁹⁶ It thus expressed doubt that “*Carafano* would control in a situation where defamatory, private or otherwise tortious or unlawful information was provided by users in direct response to questions and prompts from the operator from the website.”⁹⁷ The problem with this analysis of § 230 is that the CDA makes no reference to the *type* of information for which an ICS will or will not be considered the “publisher.” Instead, the CDA focuses on the level of involvement in producing the information for which it will or will not be considered the “publisher.”⁹⁸

The court in *Roommates.com* made an unsupported leap of interpretation in declaring that the information solicited in *Carafano* through the use of questionnaires and pre-prepared responses “merely ‘facilitated the expression of information by individual users,’ ”⁹⁹ while the information solicited in

⁹³ *Id.* (quoting 47 U.S.C. § 230(c), (f)(3) (2000)).

⁹⁴ *Sexsearch.com*, 502 F. Supp. 2d at 734. Indeed, SexSearch included a disclaimer against liability in its terms and conditions.

⁹⁵ *See id.*

⁹⁶ *Roommates.com*, 489 F.3d at 928.

⁹⁷ *Id.*

⁹⁸ When a site is responsible in whole or in part for producing the information—when it is an ICP—then it may be held liable as the publisher. *See* 47 U.S.C. § 230(c), (f)(3).

⁹⁹ *Roommates.com*, 489 F.3d at 927 (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1119 (9th Cir. 2003)).

Roommates.com in a similar fashion voided § 230 liability.¹⁰⁰ The court supported this conclusion by manipulating the statute's definition of ICP.¹⁰¹ It seems that websites that seek out unwanted information for the construction of profiles were seen to have contributed "in part" to the "creation or development" of such information, while websites that seek out accepted information for the construction of user profiles were seen not to have contributed at all—neither "in whole" nor "in part"—to the "creation or development" of that information.¹⁰² This interpretation reveals an attempt to hold sites liable for the types of questions they ask in the profile-creation process, and has nothing to do with the degree to which the sites ask questions in the profile-creation process, which is the relevant inquiry based on the statute.

The dangers of a rule that lacks clarity with respect to the scope of the immunity that § 230 provides are abundant. The court in *SexSearch.com* rightly addressed this issue by stating, "the mere fact SexSearch provided the questionnaire Jane Roe answered falsely is not enough to consider SexSearch the developer of the false profile."¹⁰³ The statement could just as easily be read into *Roommates.com* to say, "the mere fact Roommate provided the questionnaire that was answered *illegally* is not enough to consider Roommate the developer of the *illegal* profile."

B. Implications

Allowing the courts to analyze an ICS's liability based on the different types of information it solicits rather than on the level of involvement in the actual production of the information can lead to serious liability issues for all ICSs. It will also likely lead to an increase in expensive litigation until the boundaries become clearer. Legal implications would abound for all websites that require user profiles, not only for dating and room rental sites. Affected sites would include social networks such as MySpace, online auction sites such as eBay, online classifieds such as

¹⁰⁰ *Id.*

¹⁰¹ See 47 U.S.C. § 230(f)(3).

¹⁰² *Id.*

¹⁰³ *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 726 (N.D. Ohio 2007).

Craigslist, online critic sites such as Rotten Tomatoes, blog hosting servers such as LiveJournal, and, perhaps most of all, Internet service providers such as AOL. These intermediaries would have a confusing picture of their legal obligations as they manage their sites for millions of users each day. To add to the trouble, most of these intermediaries structure the content so that it is searchable with results that are sorted based on user input, designed as such to be a service to the user. Without a clear rule for § 230 liability, providing this service may add the “additional layer of information” discussed in *Roommates.com* to void § 230 immunity altogether in cases in which the court sees fit. Search engines are perhaps the most susceptible to this attack, as their main function is to sort and structure data based on the user input.

SexSearch.com follows Congress’s intent in passing the CDA, as outlined in § 230 itself. With the broad scope of immunity that *SexSearch.com* affords under § 230, the decision fosters free speech and requires a minimum of governmental regulation. The standard adopted in *Roommates.com*, on the other hand, is a step towards restricting free speech, as it restricts ICS immunity and lacks structured and defined parameters. For online intermediaries, *Roommates.com* provides unclear or nonexistent statutory protection from liability, leaving the intermediaries “essentially . . . two choices: (1) employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or (2) simply avoid such a massive headache and shut down these fora.”¹⁰⁴ Neither option gives effect to Congress’s desire to foster a free and open Internet.

V. CONCLUSION

Because information that is spread throughout the online world can have real-life consequences, both Congress and the courts have attempted to give clear guidance as to where liability should fall when damage results from online content. Section 230(c) of the CDA, a statute limiting the liability of online service providers for harmful information that their users create, has conventionally

¹⁰⁴ *Dimeo v. Max*, 433 F. Supp. 2d 523, 528 (E.D. Pa. 2006).

been interpreted to provide a broad and robust immunity for websites in order to facilitate free user expression. Such an interpretation is consistent both with the expressed will of Congress—to promote a healthy exchange of ideas with minimum government regulation¹⁰⁵—and with the realities of the Internet today, which now services over one billion people.¹⁰⁶

Though the Ninth Circuit limited the scope of this immunity in the May 2007 ruling *Fair Housing Council v. Roommates.com* through an interpretation of the statute that was inconsistent with prior case law, *Doe v. SexSearch.com* is a step back in the right direction. As one of the first federal CDA rulings since the *Roommates.com* decision, *SexSearch.com* refused to recognize the limit on ICS immunity that the earlier case provided. In so doing, *SexSearch.com* followed a standard more consistent with the intent of Congress. By ignoring the ruling in *Roommates.com* and instead following the pre-*Roommates.com* cases, the *Sexsearch.com* case gave clarity to the analysis of § 230 immunity for online content providers thereby restricting extraneous litigation and fostering an open Internet where responsibility lies with the user.

¹⁰⁵ See *supra* notes 17–18 and accompanying text.

¹⁰⁶ Internet World Stats, *supra* note 6.