
WHO'S RESPONSIBLE? WEBSITE IMMUNITY UNDER THE COMMUNICATIONS DECENCY ACT AND THE PARTIAL CREATION OR DEVELOPMENT OF ONLINE CONTENT

I. INTRODUCTION

Guilty pleasures. We all have them, right? For some, it may be an implacable appetite for reality television. For others, it could be a secret celebration of the newest hit song from a painfully uncool pop singer. Whatever it may be, a guilty pleasure sparks a battle between emotion and conscience. The “I Love You, I Hate You” section of *Philadelphia City Paper* (“*City Paper*”) is capable of triggering such inner strife. In this section of the alternative weekly newspaper, individuals anonymously submit messages addressed to equally anonymous recipients. As its title indicates, the section highlights opposite poles of the emotional spectrum. Although some messages are of the heartwarming “I Love You” variety, the vast majority constitute a public airing of dirty laundry ranging from amusing to alarming to downright horrifying. Voyeurism is a part of human nature, but the scandalous content of some of the *City Paper*'s “I Love You, I Hate You” messages could make some individuals reticent to admit that they read the section.¹

Submission of an “I Love You, I Hate You” message is simple for anyone with internet access. Upon navigating to the appropriate page of the *City Paper*'s website, an individual must fill in four required fields² and agree to the paper's Terms of Agreement.³ When the message is published in print or online, only the text and subject line of the message are printed. Thus, unless these portions of the message contain an identification of the addressor or addressee, anonymity is preserved.

Could the *City Paper* be held liable in a defamation action if a particularly vehement message published online contains the addressee's full name? The short

1. Apparently, the *City Paper* is not overly concerned that “I Love You, I Hate You” readers are bashful. The paper has plans to publish a collection of the section's most memorable messages in a book entitled “The Best of ‘I Love You, I Hate You.’” Philadelphia City Paper, I Love You, I Hate You, http://www.citypaper.net/lovehate/iluihu_submit.php (last visited Mar. 14, 2010).

2. In order to submit an “I Love You, I Hate You” message, an individual must provide his or her name, an email address, a subject for the message—the *City Paper* provides the default subject “I Love You, I Hate You”—and, of course, the message itself. *Id.*

3. The Terms of Agreement provide:

By checking the above box, I agree to give City Paper the right to re-publish my “I Love You, I Hate You” ad at the publisher's discretion. This includes re-purposing the ad for online publication, or for consideration for an upcoming book entitled, “The Best of ‘I Love You, I Hate You’”. In addition, I represent and warrant that I am the author of this submission, that I am over the age of 18, and that I have full authority to grant permission for publication.

Id.

answer is no.⁴ Federal law provides a special form of immunity to online publishers.⁵ Section 230(c) of the Communications Decency Act of 1996⁶ (“CDA”) immunizes website operators from claims arising out of content created by third parties.⁷ Specifically, the statute provides 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.”⁸ Thus, because the reader is “another information content provider” by virtue of composing the text of his or her “I Love You, I Hate You” message, the *City Paper*, an interactive computer service, may seek protection from liability arising out of that message under the CDA’s immunity provision.

More sophisticated internet interactivity, however, has blurred the line between interactive computer service and information content provider, and as a result, there is controversy over the reach of the CDA’s immunity provision. For example, suppose that the *City Paper*, seeking to increase its online presence, offered standardized “I Love You, I Hate You” messages for its less creative—or perhaps busier—readers. The process begins by asking the reader to select responses to a few questions from drop-down menus. These questions would determine who the addressee is in relation to the reader (friend, sibling, significant other, etc.) and how the reader feels about this person (love, hate, etc.). Based upon these responses, the *City Paper*’s website produces an “I Love You, I Hate You” form letter with a number of blank spaces in which the reader is urged to choose the perfect noun, adjective, or adverb for the situation from a drop-down menu. The instructions on this page tell the reader to “hold nothing back” and “really let this person know how you feel.” After making his or her selections, the reader can view the finished product and choose to publish it on the *City Paper*’s website to share with other readers. Does the *City Paper*’s role in the production of this message disqualify it from claiming § 230(c) immunity? The *City Paper* provided the reader with a template, word choices to complete his or her message, and the network infrastructure to publish the message online. The reader, on the other hand, initiated the process, selected the appropriate words from drop-down menus, and decided whether or not to publish the message online.

This Comment contends that, in light of increasingly interactive internet technologies, the traditional editorial functions⁹ and essential published content standards¹⁰ provide the appropriate methods for resolving questions of responsibility

4. The same ad appearing in the *City Paper*’s weekly print version could expose the paper to liability. See *infra* notes 15–17 and accompanying text for a discussion of traditional publisher liability.

5. The *City Paper*’s website also contains a statement designed to shield liability. The notice provides: “The opinions expressed in this section do not reflect those of the Philadelphia City Paper or its editorial staff and belong solely to the individual submitting the ad. City Paper reserves the right to edit submitted material, but assumes no responsibility for the opinions expressed herein.” Philadelphia City Paper, I Love You, I Hate You, <http://www.citypaper.net/lovehate/> (last visited Mar. 17, 2010).

6. Telecommunications Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat 56 (codified as amended in scattered sections of 47 U.S.C.).

7. Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2006).

8. *Id.* § 230(c)(1).

9. See *infra* Part III.A.1 for a discussion of the traditional editorial functions standard.

10. See *infra* Part III.A.2 for a discussion of the essential published content standard.

for the partial creation or development of disputed content in § 230(c) immunity determinations. This Comment further contends that reservations over the broad immunity provided by § 230(c) are addressed more appropriately by limiting the scope of the statute rather than unduly expanding the definition of information content provider.¹¹ Part II.A presents an overview of the foundation of the CDA's immunity provision. Part II.B examines the language of § 230(c) and the requirements of the statute's immunity provision. Part II.C defines the boundaries of § 230(c) immunity. Part II.C.1 examines § 230(c)'s provision of immunity for the exercise of traditional editorial functions, while Part II.C.2 discusses recognition of § 230(c) immunity where no action is taken with respect to disputed or offensive content. Part II.C.3 explores the point at which § 230(c) immunity becomes unavailable as a result of partial creation or development of disputed content. Part II.C.3.a defines what the majority of courts agree does not constitute partial creation or development of content and includes a discussion of the essential published content standard announced in *Carafano v. Metrosplash.com, Inc.*¹² Part II.C.3.b examines the notion of partial responsibility for disputed content arising from acts of inducement or contribution and discusses the material contribution standard of *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.¹³

Part III.A categorizes and evaluates the judicial methods currently employed in determining content creator identity: the traditional editorial functions, essential published content, and material contribution standards. Part III.A.3 examines the material contribution standard in-depth and argues that it threatens to render § 230(c) immunity virtually meaningless, contradicts the plain language of the statute, erroneously injects the issue of liability into content creator identity determinations, creates undue uncertainty for website operators, and directly contradicts the express policy rationales underlying the CDA. Finally, Part III.B contends that the traditional editorial functions and essential published content standards are best suited to the determination of content creator identity, and Part III.C argues that concerns over the breadth of the CDA's immunity provision are addressed best by altering its scope rather than the definition of content creation.

II. OVERVIEW

The inherently and increasingly interactive nature of web-based content raises questions regarding the partial creation or development of content by website operators. As a result, a website operator's ability to claim § 230(c) immunity is unclear under some circumstances. This section discusses pertinent case law leading up to the passage of § 230(c) and the congressional purpose behind the statute's enactment. This section also examines the text of § 230(c). Finally, this section discusses website operator actions that are clearly within the purview of § 230(c) immunity, those actions that

11. See *infra* Part III.C for a discussion of the incorporation of an inducement exception to § 230(c) immunity.

12. 339 F.3d 1119 (9th Cir. 2003).

13. 521 F.3d 1157 (9th Cir. 2008) (en banc). Despite the case's caption and the company's website address, the defendant's company name is Roommate.com. Therefore, the court refers to the defendant as such throughout its opinion. See *id.* at 1161 n.2 (noting this discrepancy).

clearly exceed the statute's reach, and actions over which courts disagree as to the proper application of § 230(c) immunity.

A. *The Roots of the Communications Decency Act*

Initial judicial attempts to determine the liability of emerging internet businesses for defamatory and libelous online content created by third parties were firmly rooted in and informed by common law principles.¹⁴ Under a traditional liability scheme, publishers, such as newspapers or magazines, can be held liable for defamatory or libelous content contained in their publications regardless of their knowledge of that content, while distributors, such as libraries or book stores, must have actual knowledge of the unlawful content to be held liable.¹⁵ The distinction between publishers and distributors under the common law recognizes that increased control over content begets increased exposure to liability.¹⁶ Distributors are considered passive conduits, whereas publishers exercise editorial control over their content.¹⁷ The emergence of the internet, however, presented rapidly evolving communication technologies and unprecedented access to forums for expression unparalleled by traditional publishers and distributors.¹⁸ As a result, it was quickly evident that a unique approach to liability would be necessary for this new medium of communication. This need was brought sharply into focus by *Stratton Oakmont, Inc. v. Prodigy Services Co.*¹⁹

Stratton Oakmont, Inc. arose out of allegedly libelous statements posted by an unknown third party to Prodigy's "Money Talk" online bulletin board.²⁰ The plaintiff brought a libel action against Prodigy, an internet service provider, alleging that Prodigy was the publisher of the statements and seeking to hold it liable under the same standard applied to traditional publishers.²¹ As the court defined it, the central question was not whether Prodigy should be subject to traditional liability standards, but whether Prodigy exercised sufficient editorial control to render it a publisher.²²

The court answered this question affirmatively. First, the court noted that Prodigy advertised itself as an organization committed to controlling the content that appeared on its network.²³ In addition to these advertisements, Prodigy exercised editorial control through the use of automatic screening software and the employment of persons

14. See, e.g., *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-41 (S.D.N.Y. 1991) (comparing common law standards of liability for publishers and distributors in libel action against internet service provider); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *8-14 (N.Y. Sup. Ct. May 24, 1995) (applying common law publisher liability standard in libel action against internet service provider).

15. RESTATEMENT (SECOND) OF TORTS §§ 578, 581 (1977).

16. *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229, at *7.

17. *Id.*

18. See *Blumenthal v. Drudge*, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998) (noting that internet offers extensive access to and control over information).

19. No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995).

20. *Stratton Oakmont, Inc.*, 1995 N.Y. Misc. LEXIS 229, at *1-3.

21. *Id.* at *2-4.

22. *Id.* at *7.

23. *Id.* at *10.

commissioned with enforcing Prodigy's policies and content standards.²⁴ As a result, the court concluded that Prodigy's choice to exercise editorial control rendered it a publisher of content appearing on its network and exposed it to liability arising from that content.²⁵

The potential problems created by *Stratton Oakmont, Inc.* were quickly apparent when read together with *Cubby, Inc. v. CompuServe Inc.*²⁶ In *Cubby, Inc.*, the plaintiff brought libel, business disparagement, and unfair competition claims against CompuServe, an internet service provider like Prodigy, for defamatory content appearing in an electronic newsletter produced by a third party and made available to users through CompuServe's network.²⁷ CompuServe contracted with a third party to manage the "Journalism Forum" where the newsletter appeared and did not review content uploaded to this area of its network.²⁸ CompuServe defended on the basis that it acted as a distributor, not a publisher, of the statements and contended that liability could attach only if it had notice of the defamatory statements.²⁹ The court found CompuServe's lack of substantial editorial control to be determinative, comparing its services to those offered by a library, and concluded that it should be subject to the lower standard of distributor liability.³⁰ Under *Cubby, Inc.* and *Stratton Oakmont, Inc.*, it appeared that internet businesses risked greater exposure to liability when policing content on their networks.³¹ Therefore, internet service providers and websites likely would refrain from seeking to remove offensive content from their networks for fear of risking increased exposure to liability.³²

B. *The Communications Decency Act*

Section 230(c) of the Communications Decency Act of 1996³³ is often cast as a legislative response to the *Stratton Oakmont, Inc.* case.³⁴ The short title of the statute,³⁵

24. *Id.*

25. *Id.* at *13.

26. 776 F. Supp. 135 (S.D.N.Y. 1991).

27. *Cubby, Inc.*, 776 F. Supp. at 137-38.

28. *Id.* at 137.

29. *Id.* at 138.

30. *Id.* at 140.

31. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331-32 (4th Cir. 1997) (noting changes § 230(c) brought about in reaction to *Cubby, Inc.* and *Stratton Oakmont, Inc.*).

32. *See id.* at 331 (noting that passage of Communications Decency Act was motivated in part by congressional fear "that the specter of liability would therefore deter service providers from blocking and screening offensive material").

33. Telecommunications Act of 1996, Pub. L. No. 104-104, Title V, 110 Stat. 56, 133 (codified as amended in scattered sections of 47 U.S.C.).

34. *See, e.g., Zeran*, 129 F.3d at 331 (noting that Congress enacted § 230 to remove disincentives to self-regulation created by *Stratton Oakmont, Inc.* decision). The *Stratton Oakmont, Inc.* court itself noted that its decision could be preempted by the CDA, which was pending at the time of the decision. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *14 (N.Y. Sup. Ct. May 24, 1995).

35. The short title of the statute is "The Communications Decency Act of 1996." Telecommunications Act of 1996, Pub. L. No. 104-104, § 501, 110 Stat 133 (emphasis added).

along with § 230's title,³⁶ support this proposition and make it clear that one of Congress's primary purposes was to encourage interactive computer services to police their networks for offensive and obscene content without fear of incurring liability.³⁷ Section 230(c) of the CDA creates an exception to the traditional treatment of publishers and distributors,³⁸ by providing, in relevant part, 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."³⁹ Thus, the plain language of § 230(c) of the CDA provides immunity so long as the following conditions are met: (1) the party seeking immunity is a "provider or user of an interactive computer service," (2) the claim treats the party seeking immunity "as the publisher or speaker" of the disputed content, and (3) the claim is based on content produced "by another information content provider."⁴⁰

The CDA defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."⁴¹ Courts broadly interpret the definition of an interactive computer service to include not only services that provide internet access, such as America Online, but also websites and other internet-related services.⁴² Designation as an interactive computer service, however, does not guarantee immunity under § 230(c).⁴³

Section 230(c) offers protection only where a plaintiff attempts to treat an interactive computer service as the publisher or speaker of the content at issue.⁴⁴ This requirement does not limit the application of § 230(c) immunity to the defamation and libel actions that precipitated the CDA's passage. Rather, any claim that seeks to assign

36. Section 230's title is "Protection for private blocking and screening of offensive material." 47 U.S.C. § 230 (2006).

37. See *Zeran*, 129 F.3d at 331 (noting that one primary purpose of § 230(c) was to remove disincentives to self-regulation).

38. Although the statute does not expressly exempt interactive computer services from distributor liability, most courts agree that Congress intended to collapse the categories and immunize internet businesses from both traditional distributor and publisher liability. See, e.g., *Zeran*, 129 F.3d at 333-34 (noting that distributor immunity furthers policies behind CDA, and that traditional definition of publisher encompasses distributors); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) (concluding that "Congress made no distinction between publishers and distributors in providing immunity from liability"). See *infra* Part II.C.2 for a discussion of the *Zeran* court's rejection of notice of disputed content as a bar to § 230(c) immunity.

39. 47 U.S.C. § 230(c)(1).

40. *Id.*

41. *Id.* § 230(f)(2).

42. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (concluding that website and listserv email newsletter sent by website's operator fall within definition of interactive computer service); *Zeran*, 129 F.3d at 330 n.2 (noting that America Online comes within definition of interactive computer service); *Carafano v. Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055, 1065-66 (C.D. Cal. 2002) (concluding that matchmaking and dating website is interactive computer service), *aff'd on other grounds*, 339 F.3d 1119 (9th Cir. 2003); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 715 n.7 (Ct. App. 2002) (noting that online auction website, eBay, qualifies as interactive computer service).

43. See *supra* note 40 and accompanying text for a discussion of § 230(c) immunity requirements.

44. 47 U.S.C. § 230(c).

liability to an interactive computer service by treating the disputed content as the service's own or as content for which the service must bear responsibility as a publisher is within the purview of § 230(c).⁴⁵ The CDA, however, expressly prohibits § 230(c) immunity from barring any criminal or intellectual property claim as well as claims brought under the Electronic Communications Privacy Act of 1986.⁴⁶

Parties claiming § 230(c) immunity must also demonstrate that the content at issue originated from a third-party information content provider.⁴⁷ The statute 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."⁴⁸ Section 230(c)'s reference to content produced by "another information content provider" demonstrates that an interactive computer service cannot claim immunity where an action arises out of content it alone produced.⁴⁹ Moreover, the inclusion of creation or development of content "in whole or in part" in the definition of information content provider indicates that Congress contemplated the possibility of joint liability.⁵⁰ As a result, courts have concluded that an interactive computer service may also be an information content provider of content that it is partially responsible for creating or developing and therefore subject to liability arising from such content.⁵¹

45. See generally *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc) (discussing Fair Housing Act and state housing discrimination law claims); *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008) (finding Fair Housing Act claim); *Green v. Am. Online*, 318 F.3d 465 (3d Cir. 2003) (discussing tort claims amounting to allegations of negligent failure to live up to contractual obligations); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980 (10th Cir. 2000) (discussing defamation and negligence claims); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006) (discussing fraud and negligent misrepresentation claims); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004) (finding tortious interference and state law consumer protection claims); *Carafano*, 207 F. Supp. 2d at 1055 (finding negligence, invasion of privacy, and misappropriation of right of publicity claims); *Gentry*, 121 Cal. Rptr. 2d at 703 (upholding negligent misrepresentation claim).

46. 47 U.S.C. § 230(e)(1), (2), (4). The statute also expressly provides that any cause of action brought under state law fails if it conflicts with § 230(c)'s provision of immunity. *Id.* § 230(e)(3); see also Electronic Communication Privacy Act of 1986 (ECPA), Pub. L. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.) (providing for causes of action for unauthorized electronic breaches of privacy).

47. See 47 U.S.C. § 230(c) (requiring that disputed content be provided by *another* information content provider).

48. *Id.* § 230(f)(3).

49. *Id.* § 230(c); see also *Anthony*, 421 F. Supp. 2d at 1262–63 (rejecting Yahoo's claim of § 230(c) immunity where it created false profiles on its dating website and emailed profiles of expired members to current members).

50. 47 U.S.C. § 230(f)(3) (emphasis added); see also *Blumenthal v. Drudge*, 992 F. Supp. 44, 50 (D.D.C. 1998) (noting that § 230(c) does not preclude joint liability for joint development of illegal content).

51. See, e.g., *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 n.4 (10th Cir. 2000) (noting that "an interactive computer service could also act as an information content provider by participating in the creation or development of information, and thus not qualify for § 230 immunity"). It can be argued that the statute's plain language does not support this proposition. Section 230 is silent on the issue of partial creation of disputed content by interactive computer services. Instead, the statute provides immunity to interactive computer services, regardless of their conduct, where disputed content originates from "another information content provider" that has created or developed that content "in whole or in part." 47 U.S.C.

C. *The Scope of § 230(c) Immunity*

Courts agree that three conclusions regarding the boundaries of § 230(c) immunity follow from the plain language of the statute: (1) § 230(c) immunizes an interactive computer service that exercises the traditional editorial functions of a publisher with respect to disputed content,⁵² (2) § 230(c) immunizes an interactive computer service that takes no action with respect to disputed content,⁵³ and (3) § 230(c) does not immunize an interactive computer service that entirely or partially creates or develops disputed content.⁵⁴

1. Traditional Editorial Functions

As discussed, § 230(c) provides immunity only where the claim attempts to treat an interactive computer service as the speaker or publisher of content.⁵⁵ As a result, all courts agree that § 230(c) bars lawsuits that attempt to place interactive computer services in the publisher's role by imputing liability for the exercise of traditional editorial functions: namely, decisions to publish, withdraw, postpone, or alter content.⁵⁶ Although § 230(c)'s applicability is limited as such, the majority of courts encountering the statute have given broad effect to its provision of immunity.⁵⁷ In *Blumenthal v. Drudge*,⁵⁸ for instance, America Online successfully claimed immunity under § 230(c) in a defamation suit even though it directly contracted with a third party to supply the allegedly defamatory content and retained extensive editorial rights under that contract.⁵⁹ In *Batzel v. Smith*,⁶⁰ the operator of a website collecting information on stolen artwork successfully claimed § 230(c) immunity in a defamation action arising from the unsubstantiated contents of an email sent by a third party that were published in an electronic newsletter edited by the operator.⁶¹

§ 230(c)(1), (f)(3). Under the plain language of the statute, then, an interactive computer service arguably qualifies for § 230(c) immunity even where it participates in the creation of disputed content so long as another information content provider also participates in its creation. No court has endorsed this interpretation.

52. See *infra* Part II.C.1 for a discussion of the immunization of traditional editorial functions under the plain language of § 230(c).

53. See *infra* Part II.C.2 for a discussion of the immunization of interactive computer services taking no action with respect to disputed content under the plain language of § 230(c).

54. See *infra* Part II.C.3 for a discussion of the treatment of interactive computer services wholly or partially responsible for disputed content under the plain language of § 230(c).

55. See *supra* Part II.B for a discussion of the elements of § 230(c) immunity.

56. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“[T]he exclusion of ‘publisher’ liability [under § 230(c)] necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message.”).

57. See *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that most reviewing courts have viewed § 230(c) immunity as “quite robust”).

58. 992 F. Supp. 44 (D.D.C. 1998).

59. *Blumenthal*, 992 F. Supp. at 51–53. In *Blumenthal*, AOL contracted to carry the Drudge Report, a gossip column authored by a third party, but retained the right to remove any content that it deemed to violate its terms of service. *Id.* at 47.

60. 333 F.3d 1018 (9th Cir. 2003).

61. *Batzel*, 333 F.3d at 1031–32. Moreover, the court applied § 230(c) immunity in spite of the original email sender's contention that “had [he] known his e-mail would be posted, he never would have sent it,”

In support of this broad interpretation of § 230(c) immunity, most courts point to Congress's desire to promote the continuing, robust development of the internet and to protect the unique communication possibilities it offers.⁶² In *Zeran v. America Online, Inc.*,⁶³ for example, the Fourth Circuit provided the first judicial interpretation of § 230(c) and contended that its purpose was not "difficult to discern."⁶⁴ The plaintiff in *Zeran* brought a defamation action against America Online after an unidentified third party posted offensive messages to an online bulletin board that resulted in harassing phone calls and death threats to the plaintiff.⁶⁵ America Online claimed immunity under § 230(c), and the court granted its immunity claim, noting that "[t]he specter of tort liability in an area of such prolific speech would have an obvious chilling effect."⁶⁶ The court also recognized that Congress enacted § 230(c) to calm interactive computer service's fears over liability arising from the removal of offensive content.⁶⁷ Therefore, the Fourth Circuit concluded that broad § 230(c) immunity, consistent with its statutory purposes, protects against adverse effects "on the vigor of Internet speech and on service provider self-regulation."⁶⁸

2. Interactive Computer Service Inaction

It is also well established that § 230(c) immunity extends to interactive computer services that refrain from taking any action with respect to offensive content.⁶⁹ In *Zeran*, for example, the plaintiff argued that America Online's failure to remove the offensive messages at issue after receiving notice of their existence disqualified it from claiming § 230(c) immunity.⁷⁰ The court, however, rejected this argument on the basis that liability predicated upon knowledge was incompatible with the text and purpose of § 230(c).⁷¹ The court commented that "once a computer service provider receives

concluding that immunity applies when "a third person or entity . . . furnishe[s] the content] . . . under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the internet or other 'interactive computer service.'" *Id.* at 1034 (quoting 47 U.S.C. § 230(c)(1) (2006)).

62. See 47 U.S.C. § 230(b)(1) ("It is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media . . ."); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (noting that Congress enacted § 230(c) to promote growth of internet and keep government regulation of internet at minimum); *Blumenthal*, 992 F. Supp. at 49 (noting that Congress decided to treat interactive computer services differently than traditional publishers because of speed and volume of informational exchange over internet and impossibility of regulating such information).

63. 129 F.3d 327 (4th Cir. 1997).

64. *Zeran*, 129 F.3d at 330.

65. *Id.* at 329.

66. *Id.* at 331.

67. *Id.*

68. *Id.* at 333.

69. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (noting "well established" view that notice of content does not make service provider liable for such content, and confirming that § 230(c) immunity extends "even after notice of the potentially unlawful nature of the third-party content").

70. *Zeran*, 129 F.3d at 333.

71. *Id.* at 331–33. The court's holding, therefore, confirmed that § 230(c) immunity extends to publishers and distributors alike. See *supra* note 38 for examples of courts supporting this contention. The majority of

notice of a potentially defamatory posting, it is thrust into the role of a traditional publisher” and “must decide whether to publish, edit, or withdraw the posting.”⁷² The court therefore concluded that such liability would defeat the purpose of § 230(c) immunity by “reinforc[ing] service providers’ incentives to restrict speech and abstain from self-regulation.”⁷³ This view has prevailed in spite of trepidation over § 230(c)’s seemingly incongruous results: namely, that a statute section entitled “[p]rotection for ‘[g]ood [s]amaritan’ blocking and screening of offensive material” immunizes parties who behave indifferently with respect to offensive content.⁷⁴ Recognition of § 230(c) immunity in spite of interactive computer service inaction reinforces the broad conception of publisher immunity endorsed by the majority of courts.

3. Information Content Provider Status and Partial Creation of Content

Given the broad immunity courts afford interactive computer services exercising a publisher’s traditional editorial functions,⁷⁵ most parties opposing a claim of § 230(c) immunity attempt to cast their opponent in the role of information content provider, responsible for the unlawful content at issue and therefore unable to claim protection under the CDA.⁷⁶ It is undisputed that § 230(c) immunity does not attach where an

courts have adopted this view of § 230(c) immunity. See *Universal Commc’n Sys., Inc.*, 478 F.3d at 420 (“It is, by now, well established that notice of the unlawful nature of the information provided is not enough to make it the service provider’s own speech.”); *Batzel v. Smith*, 333 F.3d 1018, 1027 n.10 (9th Cir. 2003) (noting that every court to have encountered issue of whether § 230(c) immunity encompasses distributor liability has decided that it does).

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

73. *Id.* at 333.

74. 47 U.S.C. § 230(c). Some courts that recognize the broad scope of § 230(c) immunity seem to have done so begrudgingly. See, e.g., *Batzel*, 333 F.3d at 1020 (noting that there is “no reason” why First Amendment and defamation law should apply differently in cyberspace, but recognizing Congress’s intent to provide immunity to interactive service providers when defamatory speech is posted by third party); *Blumenthal v. Drudge*, 992 F. Supp. 44, 51 (D.D.C. 1998) (indicating court would hold service provider liable for third-party speech “[i]f it were writing on a clean slate,” but noting Congress chose to provide immunity). In *Doe v. GTE Corp.*, the Seventh Circuit went so far as to question whether § 230(c) can even be read as a provision of immunity and argued that § 230(c) should be read instead as a definitional clause, thereby harmonizing the text of the statute with its title. 347 F.3d 655, 660 (7th Cir. 2003). The Court of Appeals for the Seventh Circuit is the only court to advocate this position, but at least one other circuit court has commented favorably upon *GTE Corp.* See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1163–64 (9th Cir. 2008) (en banc) (noting that Congress intended only to protect removal of offensive content with passage of § 230(c) and quoting *GTE Corp.* in support of this proposition).

75. See *supra* Part II.C.1 for a discussion of the scope of § 230(c) immunity granted by courts to interactive computer services that exercise traditional editorial functions.

76. E.g., *Roommates.com, LLC*, 521 F.3d at 1165–70 (addressing argument that use of information collected during mandatory registration process in construction of user profiles and searches constitutes development); *Universal Commc’n Sys., Inc.*, 478 F.3d at 420 (discussing argument that construct and operation of website encouraged production of disputed content); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–25 (9th Cir. 2003) (addressing assertion that soliciting user-responses to multiple choice and essay questions in registration process for dating website transforms site operator into information content provider); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 985–86 (10th Cir. 2000) (addressing argument that deleting stock and other information constitutes creation or development); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at *34–36 (M.D. Fla. Feb. 15, 2008) (discussing contention that website operator’s provision of category headings and

interactive computer service solely and unquestionably creates the content at issue.⁷⁷ Courts also agree that an interactive computer service could share liability for partial creation of disputed content.⁷⁸ The production of online content, however, often requires users to interact with information and tools provided by an interactive computer service. As a result, it is unclear what role an interactive computer service may play with respect to content while maintaining protection from liability under § 230(c).

a. What Partial Creation Is Not

At the outset, it is clear that an interactive computer service's provision of "neutral" tools does not invalidate a claim of § 230(c) immunity.⁷⁹ In *Gentry v. eBay, Inc.*,⁸⁰ for example, a group of plaintiffs who purchased sports memorabilia bearing forged autographs using eBay's auction website brought negligence, unfair business practice, and misrepresentation claims.⁸¹ eBay claimed § 230(c) immunity, and the plaintiffs attempted to defeat this claim by contending that eBay was an information content provider.⁸² The plaintiffs argued that eBay's provision of category listings to allow users to classify products, as well as color-coded star symbols and Power Seller ratings linked to customer feedback for the purpose of boosting user confidence in sellers, assisted the unscrupulous auctioneers in the sale of the forged memorabilia.⁸³ Therefore, the plaintiffs contended, eBay was an information content provider with respect to the content produced through the use of these tools.⁸⁴ The California Court of Appeal however, was not persuaded and concluded that eBay was immune under § 230(c).⁸⁵ In support of its decision, the court found that eBay could not be held

various other aspects of website qualify operator as information content provider); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1262–63 (N.D. Cal. 2006) (holding that creating and perpetuating false user profiles disqualifies website operator from claiming § 230(c) immunity); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (discussing assertion that website operator "shaped" content of online shop by providing tools for its creation (citation omitted) (internal quotation marks omitted)); *Blumenthal*, 992 F. Supp. at 51 (discussing argument that editorial rights conferred by contract thrust defendant into active role and disqualified it from claiming § 230(c) immunity); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 716 (Ct. App. 2002) (discussing argument that provision of product descriptions and customer rating symbols renders website provider of information). In this way, plaintiffs contend that, in some capacity, their opponent is the "speaker" of the disputed content. See *infra* Part III.A for a discussion of the methods used to determine information content provider status.

77. See, e.g., *Anthony*, 421 F. Supp. 2d at 1262–63 (holding that § 230(c) did not apply because Yahoo created false profiles on its dating website and emailed profiles of expired members to current members).

78. See *supra* notes 49–51 and accompanying text for a discussion of § 230(c)'s text and its requirement that the content at issue originate from another information content provider.

79. *Roommates.com, LLC*, 521 F.3d at 1174 n.37.

80. 121 Cal. Rptr. 2d 703 (Ct. App. 2002).

81. *Gentry*, 121 Cal. Rptr. 2d at 707–08.

82. *Id.* at 717.

83. *Id.*

84. *Id.*

85. *Id.* at 718–19.

responsible for unlawful content produced through third-party misuse of tools provided by eBay.⁸⁶

A related principle provides that an interactive computer service's marginal role in the production or dissemination of disputed content does not render it an information content provider of that content.⁸⁷ In *Carafano v. Metrosplash.com, Inc.*,⁸⁸ for example, an actor brought defamation and negligence claims against the operator of a dating website, Matchmaker.com ("Matchmaker"), after a third party created a fake profile that included sexually suggestive comments and listed her home address and an email address, which, when written to, automatically responded with a message containing the plaintiff's home address and telephone number.⁸⁹ In order to create a profile on Matchmaker's website, users had to answer sixty-two multiple-choice questions and at least one essay question, all of which were created, along with the potential responses to the multiple-choice questions, by Matchmaker.⁹⁰ The sexually suggestive comments at issue in *Carafano* appeared in response to both Matchmaker's multiple-choice and essay questions.⁹¹ Users also had the option of posting up to ten photographs to include as part of their profile.⁹² Matchmaker did not verify any of the information provided or prescreen the multiple-choice or essay answers, but it did review submitted photographs for offensive content.⁹³

In light of this registration process, the United States District Court for the Central District of California denied Matchmaker's claim of immunity under § 230(c).⁹⁴ The court concluded that Matchmaker was an information content provider, responsible in part for the development of the profile information in that it "contribute[d] to the content of the profiles by asking specific questions with multiple choice answers and specific essay questions."⁹⁵ Therefore, the court reasoned, because Matchmaker played an active part in the development of the disputed content rather than allowing users to post whatever they chose, it was not entitled to § 230(c) immunity.⁹⁶ The court's refusal to apply § 230(c) immunity, however, did not prove fatal to Matchmaker. The court concluded that the plaintiff's claims presented no genuine issues of fact and granted Matchmaker's motion for summary judgment.⁹⁷

86. *Id.* at 718.

87. See *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) (refusing to deem website operator to be information content provider where construct and operation of website made it "marginally easier for others to develop and disseminate misinformation"); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003) (holding that interactive computer service qualified for § 230(c) immunity despite creating online questionnaire because the service "did not play a significant role in creating, developing or transforming the relevant information" (internal quotation marks omitted)).

88. 207 F. Supp. 2d 1055 (C.D. Cal. 2002), *aff'd on other grounds*, 339 F.3d 1119 (9th Cir. 2003).

89. *Carafano*, 207 F. Supp. 2d at 1061.

90. *Id.* at 1059.

91. *Id.* at 1061.

92. *Id.*

93. *Id.* at 1060–61.

94. *Id.* at 1068.

95. *Id.* at 1067.

96. *Id.* at 1066–67.

97. *Id.* at 1077.

On appeal, the Ninth Circuit affirmed the district court's dismissal of the plaintiff's claims, but on the basis of § 230(c).⁹⁸ Noting the broad scope of § 230(c) immunity, the court concluded that "so long as a third party willingly provides the essential published content, [an interactive computer service] receives full immunity regardless of the specific editing or selection process."⁹⁹ Therefore, because the creation and selection of profile content remained solely at the discretion of the third-party user, the Ninth Circuit concluded that Matchmaker was not an information content provider and could claim immunity under § 230(c).¹⁰⁰ While noting that "some of the content was formulated in response to Matchmaker's questionnaire," the court found that Matchmaker played an insignificant contributing role, if any at all, with respect to the disputed content—the plaintiff's address and phone number, and the sexually suggestive essay comments.¹⁰¹ That information, the Ninth Circuit concluded, bore a tenuous relation at most to the questions asked by Matchmaker and was selected or supplied solely by the profile's creator.¹⁰²

Carafano's reasoning prevails even where an interactive computer service reuses or reposts content provided by another information content provider.¹⁰³ In *Corbis Corp. v. Amazon.com, Inc.*,¹⁰⁴ the holder of copyrights to numerous celebrity photographs alleged that Amazon.com's ("Amazon") display of certain images on its website and another site owned by Amazon constituted copyright infringement, trademark dilution, unfair competition, and tortious interference with business relations.¹⁰⁵ Vendors uploaded the images at issue using Amazon's zShops platform, which provided tools and forms allowing vendors to create online stores, post product descriptions, and upload images of products.¹⁰⁶ Some zShops vendors uploaded and sold images owned by the plaintiff.¹⁰⁷ In addition to having these images appear on its own website, Amazon used the uploaded images in banner advertisements it ran on The Internet

98. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124–25 (9th Cir. 2003).

99. *Id.* at 1124.

100. *Id.* at 1124 (noting that neither defendant's classification of characteristics nor its collection of answers to essay questions "transform[s] [defendant] into a 'developer' of the 'underlying misinformation'" (quoting *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 718 (Ct. App. 2002))). The Ninth Circuit also noted the technological impact of imposing liability in this case: "Without standardized, easily encoded answers, [defendant] might not be able to offer these services and certainly not to the same degree." *Id.* at 1125.

101. *Id.* at 1124–25. Although the sexually suggestive comments appeared as both multiple-choice and essay answers, the court noted that the most suggestive comments appeared in the essay section and bore little relation to the multiple-choice questions. *Id.* at 1125.

102. *Id.*

103. *E.g.*, *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 298 n.10 (D.N.H. 2008) (applying § 230(c) immunity where fraudulent profile was reproduced on websites run by interactive computer service and portions of profile were reproduced in advertisements running on unaffiliated websites); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (holding that Amazon's use of images provided by vendors in advertisements on independent site also owned by Amazon did not transform it into information content provider because images were originally provided by third parties).

104. 351 F. Supp. 2d 1090 (W.D. Wash. 2004).

105. *Corbis Corp.*, 351 F. Supp. 2d at 1093–96.

106. *Id.* at 1094.

107. *Id.* at 1096–97.

Movie Database (“IMDb”), an independent website owned by Amazon.¹⁰⁸ The plaintiff alleged that Amazon was an information content provider because it shaped content through the tools and forms offered by its zShops platform and because it used the images uploaded by zShops vendors for advertisements on IMDb.¹⁰⁹ The United States District Court for the Western District of Washington, however, rejected the plaintiff’s arguments and granted Amazon’s claim of immunity under § 230(c).¹¹⁰ As to Amazon’s use of the images on the IMDb website, the court concluded that because zShops vendors uploaded the images, Amazon “did not create or develop the images posted on IMDb.”¹¹¹ As to the allegation that Amazon facilitated the display of the images through its zShops platform, the court, relying upon *Carafano*, concluded that “[a]lthough Amazon may have encouraged third parties to use the zShops platform and provided tools to assist them, that does not disqualify it from immunity under § 230(c) because the zShops vendor ultimately decided what information to put on its site.”¹¹²

b. What Partial Creation May Be: Contributory Creation or Development of Content

In several recent § 230(c) determinations, plaintiffs have attempted to tie information content provider status to an interactive computer service’s encouragement of or contribution to the production of illegal content.¹¹³ These arguments draw on the reasoning underlying *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹¹⁴ In *Grokster*, music and film copyright holders brought an infringement action against the developer and distributor of peer-to-peer file sharing software.¹¹⁵ Because the CDA expressly prohibits § 230(c) immunity from defeating intellectual property claims,¹¹⁶ the question was not whether the defendant could claim immunity, but whether it could be liable for the infringement by individuals using its software.¹¹⁷ While upholding the

108. *Id.* at 1096.

109. *Id.* at 1118.

110. *Id.* at 1117–18. Amazon claimed, and the court granted, § 230(c) immunity with respect to the plaintiff’s unfair competition and tortious interference with business relations claims. *Id.* at 1118. Section 230(c) immunity does not preclude intellectual property claims, such as copyright infringement. *See* 47 U.S.C. § 230(e)(2) (2006) (stating that § 230(c) does not “limit or expand any law pertaining to intellectual property”).

111. *Corbis Corp.*, 351 F. Supp. 2d at 1118.

112. *Id.*

113. *See, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (en banc) (discussing whether housing website’s design “force[d] users to participate in its discriminatory process”); *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008) (discussing allegation that website operator “caused” discriminatory housing ads to be posted); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007) (discussing plaintiff’s allegation that “construct and operation” of defendant’s website constituted “culpable assistance,” thereby disqualifying it from claiming § 230(c) immunity).

114. 545 U.S. 913 (2005).

115. *Grokster*, 545 U.S. at 919–21. Peer-to-peer file sharing software allows computer users to connect with one another and download files directly from each user’s computer. *Id.*

116. 47 U.S.C. § 230(e)(2) (2006).

117. *Grokster*, 545 U.S. at 918–19.

principle that a manufacturer of a product capable of substantial legal use does not expose itself to liability because the product is also put to an infringing use by third parties, the Court distinguished this case and held that liability for copyright infringement could attach as a result of a party's active inducement of infringement.¹¹⁸ The Court concluded that the software developer actively induced infringement and therefore exposed itself to liability (1) by advertising its software to users as a means to illegally procure copyrighted material; (2) by failing to take any steps to reduce infringement by users; and (3) by structuring its profitability on user volume, the majority of which it knew to be driven by infringement.¹¹⁹

The existence of a similar inducement exception to § 230(c) is uncertain.¹²⁰ In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*,¹²¹ the Seventh Circuit implicitly recognized an inducement exception, commenting that *Grokster* was "incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party."¹²² The First Circuit, however, reached an opposite conclusion, noting that the *Grokster* decision had no bearing on § 230(c) determinations because intellectual property claims were expressly barred from its immunity provision.¹²³

As a result, in § 230(c) determinations, judicial treatment varies regarding allegations of inducement, contributory acts, or encouragement by an interactive computer service. As discussed, in *Corbis Corp.* the United States District Court for the Western District of Washington rejected a claim that Amazon's provision of forms and tools to create online stores shaped the resulting content, thereby transforming Amazon

118. *Id.* at 919 ("[O]ne who distributes a device 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.").

119. *Id.* at 939–40.

120. Compare *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 421 (1st Cir. 2007) (noting that ambiguous use of "culpable assistance" may have led to confusion regarding whether there is an exception to § 230 immunity), with *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (showing *Grokster* to be incompatible with finding that § 230(c)(1) grants comprehensive immunity).

121. 519 F.3d 666 (7th Cir. 2008).

122. *Chi. Lawyers' Comm.*, 519 F.3d at 670. In *Chicago Lawyers' Commission*, the Seventh Circuit again endorsed the limited interpretation of § 230(c) immunity that it proposed in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003). *Id.* at 670. See *supra* note 74 for a discussion of the limited interpretation of § 230(c) immunity proposed by the Seventh Circuit in *Doe*. In fact, the court's commentary on the effect of *Grokster* on § 230(c) immunity is directly preceded by a quotation of an entire page from the *Doe* opinion. *Id.* at 669–70. The narrow view of § 230(c) immunity proposed in *Doe*, along with the endorsement of the *Grokster* inducement exception in *Chicago Lawyers' Commission*, may be the reason why Cook County Sheriff Thomas J. Dart filed a federal lawsuit against Craigslist for erotic ads appearing on its network, which was subsequently dismissed on October 20, 2009. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967–69 (N.D. Ill. 2009) (rejecting Cook County sheriff's claim that Craigslist caused or induced its users to post unlawful ads and accepting Craigslist's § 230(c) defense); see also James Temple, *Federal Judge Rejects Suit over Adult Ads on Craigslist*, S.F. CHRON., Oct. 23, 2009, at C4 (reporting that U.S. District Court Judge John F. Grady dismissed Sheriff Dart's lawsuit because Sheriff Dart cannot sue Craigslist for conduct of its users). It appears that Sheriff Dart kept up on Seventh Circuit precedent. At the press conference announcing the suit, Sheriff Dart used inducement rhetoric, stating that Craigslist "catered their site so it facilitates [prostitution]." *Craigslist Sued over Erotic Ads*, L.A. TIMES, Mar. 6, 2009, at B2 (alteration in original).

123. *Universal Commc'n Sys., Inc.*, 478 F.3d at 421.

into an information content provider.¹²⁴ The First Circuit rejected a similar claim in *Universal Communication Systems, Inc. v. Lycos, Inc.*¹²⁵ Responding to the plaintiff's allegation that Lycos culpably assisted the production of disputed content through the "construct and operation" of its website, the First Circuit concluded that "[a]t best, . . . Lycos's conduct may have made it marginally easier for others to develop and disseminate misinformation."¹²⁶ The First Circuit also noted that the plaintiff's allegation was negated by the broad protection of publisher functions under § 230(c), commenting that "Lycos's decision not to reduce misinformation [in general] by changing its web site policies was as much an editorial decision with respect to that misinformation as a decision not to delete a particular posting."¹²⁷

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,¹²⁸ however, the Ninth Circuit endorsed an expanded definition of information content provider that accounted for contributory actions, holding that an interactive computer service cannot claim § 230(c) immunity where it "materially contribut[es] to [the] alleged unlawfulness" of disputed content.¹²⁹ In *Roommates.com*, the plaintiff brought allegations of Fair Housing Act¹³⁰ ("FHA") and state anti-housing discrimination law violations against Roommate.com, LLC ("Roommate"), a website operator providing matchmaking services for individuals seeking and offering housing.¹³¹ As part of Roommates.com's registration process, and in order to post or search listings, users were required to disclose their gender, sexual orientation, and whether or not children were part of their household.¹³² Users were also required to submit preferences as to these characteristics in a potential roommate.¹³³ Answers to the registration questions were selected by the user from drop-down menus pre-populated with responses created by Roommate, and all listings and profiles were searchable based upon the user-selected answers.¹³⁴ Finally, Roommates.com provided users with the option of completing an "Additional Comments" section to describe themselves and their desired

124. *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004). See *supra* notes 104–12 and accompanying text for a discussion of *Corbis Corp.*

125. 478 F.3d 413, 422 (1st Cir. 2007).

126. *Universal Comm'n Sys., Inc.*, 478 F.3d at 420.

127. *Id.* at 422. See *supra* Part II.C.2 for a discussion of judicial treatment of interactive computer service inaction with respect to disputed content.

128. 521 F.3d 1157 (9th Cir. 2008) (en banc).

129. *Roommates.com, LLC*, 521 F.3d at 1167–68.

130. 42 U.S.C. § 3601 (2006). The specific provision at issue was § 3604(c), which provides that it is unlawful

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

Id. § 3604(c).

131. *Roommates.com, LLC*, 521 F.3d at 1161–62.

132. *Id.* at 1161.

133. *Id.* See *infra* note 167 and accompanying text for a discussion of whether users of the Roommate.com site in fact were required to express preferences as to these characteristics.

134. *Roommates.com, LLC*, 521 F.3d at 1165, 1167.

living situation, and offered email notifications of housing opportunities or potential roommates that matched their preferences.¹³⁵

The plaintiff contended that Roommate violated federal and state anti-housing discrimination laws by (1) posing questions in its registration process and predicated use of its website upon user responses to those questions;¹³⁶ (2) displaying user responses to registration questions in online profiles and structuring its search and email notification systems upon these responses;¹³⁷ and (3) posting information provided by users in the “Additional Comments” section.¹³⁸ The District Court for the Central District of California granted Roommate’s claim of immunity under § 230(c), dismissed the plaintiff’s FHA claims, and declined to exercise supplemental jurisdiction over the state law claims.¹³⁹ In support of its conclusion, the district court relied upon *Carafano* for the proposition that an interactive computer service retains § 230(c) immunity where content is chosen or provided at the user’s discretion.¹⁴⁰

In an en banc opinion,¹⁴¹ the Ninth Circuit reversed the district court and denied Roommate’s claim of § 230(c) immunity,¹⁴² exposing it to liability for posing questions about gender, sexual orientation, and familial status,¹⁴³ for displaying the answers to these questions as part of member profiles,¹⁴⁴ and for filtering content based upon responses to the questions in email notifications and user-initiated searches.¹⁴⁵ The court first concluded that Roommate was undoubtedly the information content provider

135. *Id.* at 1161–62.

136. *Id.* at 1164.

137. *Id.* at 1165.

138. *Id.* at 1173.

139. *Id.* at 1162.

140. *Id.* Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488, at *3–4 (C.D. Cal. Sept. 30, 2004), *rev’d in part sub nom* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921 (9th Cir. 2007), *aff’d in part, rev’d in part, vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).

141. The preceding panel opinion, also authored by Chief Judge Kozinski, overturned the district court’s grant of § 230(c) immunity on the basis that Roommate was responsible, at least in part, for the development of all disputed content other than that submitted via the “Additional Comments” section. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 489 F.3d 921, 928–30 (9th Cir. 2007), *aff’d in part, rev’d in part, vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008). Although the panel and en banc decisions reach the same outcome, the panel opinion did not classify Roommate’s actions as materially contributing to the alleged illegality of the content at issue. Instead, the panel distinguished this case from *Carafano* and held Roommate to be an information content provider because it solicited the disputed information from users and filtered content available to users based on user responses to its solicitations. *Id.* at 928–29.

142. The court did approve Roommate’s claim of § 230(c) immunity in relation to the user-composed “Additional Comments” section of each member profile on the basis that Roommate did “not provide any specific guidance as to what the essay should contain, nor d[id] it urge [users] to input discriminatory preferences.” Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1173–74 (9th Cir. 2008) (en banc). As a result, the Ninth Circuit concluded that Roommate was not an information content provider of this content, “which c[ame] entirely from [users and was] passively displayed by Roommate.” *Id.* at 1174.

143. *Id.* at 1165.

144. *Id.* at 1167.

145. *Id.* at 1167–70.

of the questions posed and answer choices provided during the registration process.¹⁴⁶ As a result, the Ninth Circuit held that Roommate could not claim immunity because these acts were “entirely its doing.”¹⁴⁷ The court similarly found that conditioning use of its service upon user responses to registration questions also disqualified Roommate from claiming immunity for displaying the answers as part of user profile pages.¹⁴⁸ Because Roommate posed the questions and supplied the answer choices that would eventually be displayed on profile pages, the court reasoned, Roommate became “much more than a passive transmitter of information provided by others; it [became] the developer, at least in part, of that information.”¹⁴⁹ Finally, the Ninth Circuit denied Roommate § 230(c) immunity with respect to its filtering of content in email notifications and user-initiated searches because these functions “steer[ed] users based on the preferences and personal characteristics that Roommate itself force[d users] to disclose.”¹⁵⁰

The Ninth Circuit’s reasoning focused on the clear ties between Roommate’s mandatory registration process and the allegations of discrimination.¹⁵¹ As a result, the court held that an interactive computer service develops content, thereby becoming an information content provider and forfeiting § 230(c) immunity, where it “materially contribut[es] to [the] alleged unlawfulness” of that content.¹⁵² Under this interpretation of development, according to the court, Roommate materially contributed to the alleged unlawfulness of the content at issue because its registration process “force[d] users to express a preference and . . . to disclose the information that [could] form the basis of discrimination by others.”¹⁵³ The Ninth Circuit distinguished Roommate’s actions from those involving the provision of “neutral tools” that may serve both lawful and unlawful purposes.¹⁵⁴ The provision of neutral tools, the court noted, does not constitute development, which forfeits § 230(c) immunity.¹⁵⁵ The pertinent fact in this case was that Roommate *required* users to make discriminatory preferences and to disclose information that could be used by others to discriminate.¹⁵⁶

In *Roommates.com*, the Ninth Circuit also distinguished its own § 230(c) precedent. Significantly, the court characterized the language in *Carafano*, a case that seemed to at least indirectly contradict its present ruling,¹⁵⁷ as “unduly broad.”¹⁵⁸ While expressing approval for the application of § 230(c) immunity in *Carafano*, the Ninth

146. *Id.* at 1164.

147. *Id.* at 1165.

148. *Id.* at 1166–67.

149. *Id.* at 1166.

150. *Id.* at 1167.

151. See *supra* notes 147–51 and accompanying text for a discussion of the Ninth Circuit’s denial of § 230(c) immunity on the basis of Roommate.com’s registration process and its connection to information displayed in user profiles, email notifications, and user-initiated searches.

152. *Roommates.com, LLC*, 521 F.3d at 1167–68.

153. *Id.* at 1170 n.26.

154. *Id.* at 1169.

155. *Id.*

156. *Id.* at 1170 n.26.

157. See *supra* notes 88–102 and accompanying text for a discussion of the *Carafano* case.

158. *Roommates.com, LLC*, 521 F.3d at 1171.

Circuit noted that *Carafano* incorrectly posited that an interactive computer service could never contribute to the development of content where the user is left to choose from menu options at his or her own discretion.¹⁵⁹ The court concluded that “[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for ‘develop[ing]’ unlawful content ‘in whole or in part.’”¹⁶⁰ As a result, under *Roommates.com*, even though a third party provides the “essential published content,”¹⁶¹ an interactive computer service still may contribute to the illegality of that content and therefore be liable.¹⁶²

The Ninth Circuit also advanced policy rationales supporting its decision. Noting that the internet “is no longer a fragile new means of communication,” the court cautioned that “exceed[ing] the scope of the immunity provided by Congress [could] give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.”¹⁶³ The court acknowledged the internet as a “dominant . . . means through which commerce is conducted” that is no longer in need of coddling,¹⁶⁴ and at least indirectly questioned the relevancy of the findings and policy statements set forth by Congress in § 230.

The dissenting opinion in *Roommates.com* refuted a central factual premise of the majority opinion: that Roommate conditioned use of its service upon users expressing discriminatory preferences.¹⁶⁵ Although the dissent agreed that Roommate could not claim § 230(c) immunity for posing potentially unlawful questions, it contended that users voluntarily expressed desired characteristics in a potential living situation.¹⁶⁶ Moreover, the dissent reasoned that regardless of the mandatory nature of the registration questions, Roommate was not the information content provider of any responses ultimately chosen by the site’s users.¹⁶⁷ As a result, the dissent disapproved of denying Roommate § 230(c) immunity for displaying user answers to registration questions in member profiles and for filtering content based upon responses to the questions in email notifications and user-initiated searches.¹⁶⁸

The dissent criticized the majority’s analysis on three grounds, arguing that the majority (1) conflated the issues of § 230(c) immunity and substantive FHA liability; (2) rewrote the statute and substantially limited § 230(c) immunity with its revised

159. *Id.*

160. *Id.* (alteration in original) (quoting 47 U.S.C. § 230(f)(3) (2006)).

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

162. *See Roommates.com, LLC*, 521 F.3d at 1171 (suggesting that website operator may contribute to content’s illegality and be liable as a developer).

163. *Id.* at 1164 n.15.

164. *Id.* at 1164 n.15, 1175 n.39.

165. *Id.* at 1181–82 (McKeown, J., dissenting).

166. *Id.* at 1181. It is unclear which description of the registration process is correct. The majority opinion, however, did address the dissent’s point, noting that “[t]he dissent may be laboring under a misapprehension as to how the Roommate[.com] website is alleged to operate,” and contending that no claims in the suit, other than those concerning the additional comments section of the Roommate.com site, were based upon a voluntary portion of the site. *Id.* at 1166 n.19 (majority opinion).

167. *Id.* at 1181–82 (McKeown, J., dissenting). The dissent noted that provision of a drop-down menu does not constitute creation or development of information, and that the language of § 230(c) clearly embraces the sorting and categorizing functions performed by Roommate.com. *Id.* at 1182.

168. *Id.* at 1177.

definition of information content provider; and (3) undermined the underlying policy rationales of § 230(c), thereby implicating the future viability of the internet.¹⁶⁹ The dissent contended that the majority did not limit its analysis to the question at hand: the applicability of § 230(c) immunity.¹⁷⁰

Instead, the dissent argued, “[t]he majority condemn[ed] Roommate for soliciting illegal content, [even though there had] been no determination that Roommate’s questions or standardized answers [were] illegal.”¹⁷¹ The dissent noted that the text of § 230(c) makes no mention of illegality and argued that the majority’s definition of “development” as a material contribution to alleged unlawfulness, in addition to being “plucked” from an unknown source,¹⁷² was endemic of its conflation of immunity and substantive liability.¹⁷³ Under such a standard, the dissent argued, the character of the content, as opposed to the role a party played in its creation, determined information content provider status.¹⁷⁴ Thus, the dissent continued, as a result of the majority’s marriage of development and illegality, an interactive computer service could be the developer of one drop-down menu but not another nearly identical menu depending on the content of each.¹⁷⁵ The dissent recognized that under the majority’s standard, most interactive computer services were now information content providers in light of the prevalence of drop-down menus and other information-gathering internet tools.¹⁷⁶ Instead, the dissent argued, the essential published content standard set forth in *Carafano* is the appropriate method for determining information content provider status.¹⁷⁷ Finally, the dissent expressed concerns over the implications of the majority opinion, arguing that the robust nature of internet interactivity and communication was at risk in light of the uncertainty created by the majority’s rule.¹⁷⁸

III. DISCUSSION

Although it remains clear that an interactive computer service may claim § 230(c) immunity when exercising traditional editorial functions¹⁷⁹ and, conversely, that it cannot claim such immunity for content that it solely creates,¹⁸⁰ a grey area has developed in between these poles in conjunction with the growth of internet technologies offering increased user interactivity.¹⁸¹ As a result, one of the central

169. *Id.* at 1177–78.

170. *Id.* at 1178.

171. *Id.*

172. *Id.* at 1184 n.11.

173. *Id.* at 1182–83.

174. *Id.*

175. *Id.* at 1183.

176. *Id.*

177. *Id.* at 1187.

178. *Id.* at 1188–89.

179. See *supra* Part II.C.1 for a discussion of the traditional editorial functions protected by § 230(c) immunity.

180. See *supra* note 77 for an example of a case in which an interactive computer service was denied § 230(c) immunity with respect to content that it created.

181. See *supra* Parts II.C.3.a and II.C.3.b for differing interpretations over what actions transform an interactive computer service into an information content provider.

questions arising in the application of § 230(c) immunity concerns the point at which an interactive computer service shares joint responsibility for the partial creation or development of disputed content, thereby becoming an information content provider and forfeiting § 230(c) immunity. Courts employ three distinct methodologies to determine an interactive computer service's status as an information content provider in relation to disputed content: (1) the traditional editorial functions standard,¹⁸² (2) the essential published content standard,¹⁸³ and (3) the material contribution standard.¹⁸⁴

The essential published content standard articulated in *Carafano v. Metroplash.com, Inc.*,¹⁸⁵ in conjunction with the traditional editorial functions standard, provides the appropriate method by which courts should determine information content provider status. Both are supported by the plain language of the Communications Decency Act of 1996,¹⁸⁶ further the express rationales underlying the statute,¹⁸⁷ and are proven and workable standards.¹⁸⁸ Moreover, any reservations about the broad immunity provided by § 230(c) are addressed more appropriately by limiting the scope of § 230(c) rather than unduly expanding the definition of information content provider.¹⁸⁹

A. *Current Methods of Determining Information Content Provider Status*

As with any inquiry into the meaning of a statutory term, investigation must begin with the language of the statute itself.¹⁹⁰ The CDA defines an information content provider as “any person or entity . . . responsible, in whole or in part, for the creation or development of information.”¹⁹¹ The statute does not offer a definition of either “creation” or “development.” It is uncontroverted, however, that an interactive computer service's exercise of traditional editorial functions in relation to disputed content does not constitute partial creation or development of content.¹⁹²

182. See *infra* Part III.A.1 for a discussion of the traditional editorial functions standard.

183. See *infra* Part III.A.2 for a discussion of the essential published content standard.

184. See *infra* Part III.A.3 for a discussion of the material contribution standard.

185. 339 F.3d 1119, 1124 (9th Cir. 2003).

186. Communications Decency Act of 1996 § 509(c), 47 U.S.C. § 230(c) (2006). See *supra* Part II.C.1 for a discussion of the traditional editorial functions standard's support in the text of § 230(c). See *infra* Part III.A.2 for a discussion of the essential published content standard's support in the text of § 230(c).

187. See *infra* Part III.B for a discussion of the ways in which both standards further the rationales underlying § 230(c) immunity.

188. See *infra* Part III.B for a discussion of the stability each standard has brought to § 230(c) determinations.

189. See *infra* Part III.C for a discussion of the inducement exception to § 230(c) immunity.

190. *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

191. 47 U.S.C. § 230(f)(3).

192. See *supra* Part II.C.1 for instances where interactive computer services exercising traditional editorial functions were afforded § 230(c) immunity.

1. The Traditional Editorial Functions Standard

Taking its cue from the language and legislative history of the CDA,¹⁹³ the traditional editorial functions standard provides that an interactive computer service is entitled to § 230(c) immunity when exercising functions commonly attributed to publishers—namely, deciding whether to publish, withdraw, postpone, or alter content.¹⁹⁴ The traditional editorial functions standard recognizes that Congress sought to treat interactive computer services differently than traditional publishers and furthers § 230(c)'s dual underlying policy rationales of encouraging removal of offensive content and facilitating online speech.¹⁹⁵ As a result, a party cannot base a claim of partial creation or development of content on the exercise of traditional editorial functions by an interactive computer service.¹⁹⁶

Broad judicial interpretation of the traditional editorial functions standard affords interactive computer services expansive control over online content.¹⁹⁷ In addition to decisions to publish, alter, withdraw, or postpone content, courts have found that the standard embraces the provision of neutral tools to create content,¹⁹⁸ inaction with respect to disputed content,¹⁹⁹ and decisions regarding website design, construction, and policy.²⁰⁰ Consequently, these functions do not constitute partial creation or development of content. Given this broad interpretation, the essential published content standard is a natural outgrowth of and complement to the traditional editorial functions standard.²⁰¹

193. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (noting that plain language and legislative purpose of CDA forbid imposition of publisher liability on service provider for exercise of its traditional editorial functions).

194. *Id.* at 330.

195. *See Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (noting that central purpose of CDA was to protect those taking steps to edit posted material and concluding that development of information requires more than editing or selection of material).

196. *See supra* Part II.C.1 for instances where interactive computer services exercising traditional editorial functions were afforded § 230(c) immunity. *See supra* notes 125–27 and accompanying text for a discussion of *Universal Communication Systems, Inc.* and its application of § 230(c) immunity to decisions pertaining to the design and operation of a website.

197. *See supra* Part II.C.1 for a discussion of the actions that are immune under the traditional editorial functions standard.

198. *See supra* notes 80–86 and accompanying text for a discussion of *Gentry* and its application of § 230(c) immunity where eBay provided tools misused by third parties.

199. *Batzel*, 333 F.3d at 1032 (“The scope of [section 230(c)] immunity cannot turn on whether the publisher approaches the selection process as one of inclusion or removal, as the difference is one of method or degree, not substance.”).

200. *See supra* notes 125–27 and accompanying text for a discussion of *Universal Communication Systems, Inc.* and its application of § 230(c) immunity where the plaintiff alleged that the provider assisted production by the construction and operation of its website.

201. The traditional editorial functions and essential published content standards are closely related, and courts may speak of both in a single analysis. *See Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420, 422 (1st Cir. 2007) (drawing on *Carafano* to conclude that Lycos's failure to prevent multiple registrations by individuals and its provision of certain links did not disqualify it from § 230(c) immunity, and classifying decisions pertaining to construction, design, and operating policies of websites as traditional editorial functions protected under § 230(c)). Whether or not a court explicitly uses the language “essential published content,” it is clear that § 230(c) immunity may extend beyond the traditional editorial functions

2. The Essential Published Content Standard

When used in conjunction with the traditional editorial functions standard, the essential published content standard provides a holistic information content provider analysis that looks to the actions of both the interactive computer service and the third party interacting with that service. The language “essential published content” first appeared in *Carafano v. Metrosplash.com, Inc.*,²⁰² where the Ninth Circuit concluded 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.”²⁰³ The essential published content standard, therefore, has three elements: the content must be (1) “essential,” (2) provided willingly, and (3) by a third party.²⁰⁴

In spite of the essential published content standard’s wide application,²⁰⁵ courts have done little to parse its requirements. The willingness element requires that the user alone make the decision to select or provide content.²⁰⁶ The fact that an interactive computer service predicates use of its services upon the completion of a registration process containing mandatory questions, however, does not render the information collected during that process unwillingly provided.²⁰⁷ Using the example in the

commonly attributed to “real-world” publishers and distributors to include more interactive functions which allow service providers to extensively categorize and solicit information. *See, e.g.*, *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 717–18 (Ct. App. 2002) (granting § 230(c) immunity, but not using “essential published content” language, where auction website provided interactive tools to users selling memorabilia with forged autographs).

202. *See supra* notes 88–102 and accompanying text for a discussion of the facts and reasoning underlying the *Carafano* decision.

203. 339 F.3d 1119, 1124 (9th Cir. 2003).

204. *Id.*

205. *See, e.g.*, *Universal Commc’n Sys., Inc.*, 478 F.3d at 420 (applying § 230(c) immunity and noting that although website may have made it marginally easier to spread misinformation, it could not be considered responsible, even in part, for its creation or development); *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294–95 (D.N.H. 2008) (recognizing § 230(c) immunity where unidentified third party created sexually suggestive profile which was reposted and used in advertisements by interactive computer service); *Whitney Info. Network, Inc. v. Xcentric Ventures, LLC*, No. 2:04-cv-47-FtM-34SPC, 2008 U.S. Dist. LEXIS 11632, at *36–37 (M.D. Fla. Feb. 15, 2008) (granting § 230(c) immunity in spite of contention that website’s provision of user-chosen category headings qualified site as information content provider); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (refusing to deny § 230(c) immunity where website encouraged users to use its online shop platform and provided tools for creation of such shops). Prior § 230(c) precedent also supported the Ninth Circuit’s “essential published content” formulation. *See, e.g.*, *Gentry*, 121 Cal. Rptr. 2d at 718 (recognizing that denying § 230(c) immunity would impute liability to website for compiling false information provided or selected by another party).

206. *See Carafano*, 339 F.3d at 1124 (noting that selection of dating profile content “was left *exclusively* to the user” (emphasis added)).

207. *See Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1181–87 (9th Cir. 2008) (en banc) (McKeown, J., dissenting) (advocating application of essential published content standard and noting that under that standard, interactive computer service could claim § 230(c) immunity with respect to responses provided by users, profiles generated from responses, and searches based upon responses); *Carafano*, 339 F.3d at 1124 (noting that fact that some content was formulated in response to interactive computer service’s mandatory registration questions did not alter conclusion that third-party user provided essential published content).

introduction to this Comment,²⁰⁸ for instance, the *City Paper*'s "I Love You, I Hate You" site fulfills the willingness requirement because selection of the information to generate the form letter along with selection of the letter's contents is made exclusively at the user's discretion. Practical considerations require such a result. If mandatory registration processes disqualified interactive computer services under the essential published content standard, website operators would be unable to gather information about their users and their users' needs without risking liability.

Webster's New World College Dictionary defines "essential" as "of or constituting the intrinsic, fundamental nature of something; basic; inherent," "absolutely necessary; indispensable," and "something necessary or fundamental."²⁰⁹ The essential published content standard, therefore, requires that the user-selected content be a fundamental, indispensable, and basic part of the disputed content.²¹⁰ Once again, practicality requires such a result. The essential published content standard recognizes that the pertinent inquiry is who has inputted or selected information or used the tools of the interactive computer service, as opposed to how the user has been enabled to create content. In other words, under the essential published content standard, § 230(c) "immunity depends on the source of the *information* in the allegedly [unlawful] statement, not on the source of the statement itself."²¹¹ Moreover, although the traditional editorial functions standard allows an interactive computer service expansive control over user-provided content, the essential published content standard assures immunity even where a service provides standardized responses for the user to select.²¹² As a result, interactive computer services are afforded further control over content and may offer more efficient and robust services.²¹³ The *City Paper* example also satisfies the essential prong of the essential published content standard. In that example, the user selects the type of message he or she wants to compose and the descriptive words giving the message its meaning and relation to the circumstances of that user. Thus, the user provides and chooses information that is fundamental and essential to the creation of the resulting content.

208. See *supra* Part I for a hypothetical adapted from the "I Love You, I Hate You" section of the *City Paper* that presents a website assisting users in the creation of love and hate messages.

209. WEBSTER'S NEW WORLD COLLEGE DICTIONARY 464 (Victoria Neufeldt & David B. Guralnik eds., 3d ed. 1997).

210. See *Carafano*, 339 F.3d at 1124 (noting that sexually suggestive dating profile at issue consisted of options chosen by and additional essay answers provided by user).

211. *Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 295 (D.N.H. 2008); accord *Carafano*, 339 F.3d at 1124 (noting that an interactive computer service cannot be "responsible, even in part, for associating certain multiple choice responses" with identifying information provided by user, because user created content of profile).

212. See *Carafano*, 339 F.3d at 1124 (noting that classification of user responses into discrete categories does not transform interactive computer service into developer of responses).

213. See *id.* at 1125 (noting that standardized answer choices allow dating site to offer extensive personalized features).

3. The Material Contribution Standard

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,²¹⁴ the Ninth Circuit eschewed its own essential published content standard.²¹⁵ In doing so, the court offered an unprecedented interpretation of the definition of information content provider, concluding that development refers “not merely to augmenting . . . content generally, but to materially contributing to its alleged unlawfulness.”²¹⁶ Thus, according to the Ninth Circuit, an information content provider is now any person or entity materially contributing, in whole or in part, to the alleged unlawfulness of disputed content.²¹⁷

a. The Origin and Meaning of Material Contribution

At the outset, it is unclear what constitutes material contribution to alleged unlawfulness.²¹⁸ The Ninth Circuit cites no authority in support of the standard, but, like other courts, appears to divine inspiration from copyright law.²¹⁹ The material contribution standard’s connection to copyright law is palpable. Copyright doctrine is at the heart of many well-publicized cases considering website operator liability for the infringement of others, and as a result, it offers a well-developed legal framework to analyze the vicarious liability of website operators.²²⁰ In addition, courts have already considered the introduction of an inducement exception to § 230(c) immunity borrowed from *Grokster*, a copyright infringement case.²²¹ Copyright law, therefore, was a probable starting point for the Ninth Circuit’s determination of the boundaries of legally acceptable actions of website operators in relation to illegal action by others.

Specifically, the material contribution standard can be analogized to the common law theory of contributory copyright infringement. The doctrine of contributory infringement provides that liability arises where an individual “with knowledge of the infringing activity, induces, causes or *materially contributes* to the infringing conduct

214. 521 F.3d 1157 (9th Cir. 2008) (en banc).

215. *Roommates.com, LLC*, 521 F.3d at 1165–66.

216. *Id.* at 1167–68.

217. *Id.*

218. The *Roommates.com* majority offers examples to illustrate its standard. *Id.* at 1169. Unfortunately, these examples go more toward what material contribution is not, than what it actually is. In fact, the only example posited by the majority that illustrates material contribution to illegality—that of an editor removing a third party’s words to alter their intended meaning—would also transform an interactive computer service into an information content provider under both the essential published content and traditional editorial functions standards.

219. See *supra* notes 120–23 and accompanying text for a discussion of the debate surrounding an active inducement exception to § 230(c) immunity borrowed from copyright law.

220. See generally *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (determining liability of peer-to-peer file sharing software developer for copyright infringement of software users in suit brought by holders of movie and music copyrights); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (determining liability of operators of Napster.com, a music sharing website, for copyright infringement by website users in action brought by nine major record labels).

221. See *supra* notes 120–23 and accompanying text for a discussion of the debate surrounding an active inducement exception to § 230(c) immunity borrowed from copyright law.

of another.”²²² Contributory infringement, therefore, has three elements: (1) knowledge of the infringement; (2) acts that induce, cause, or materially contribute to another’s infringement; and (3) direct infringement by a third party.²²³ A claim of contributory infringement may be based upon actual or constructive knowledge.²²⁴ Constructive knowledge of infringement may be presumed where a product serves no legitimate purpose other than to infringe.²²⁵ Such a presumption, on the other hand, does not attach where a product is capable of substantial noninfringing use, even if it is put to infringing use by some users.²²⁶ Distribution of a product with substantial lawful capabilities does not, however, preclude a finding of contributory infringement by its distributor. Under an inducement theory of liability, where there is evidence that a distributor releases a product and takes purposeful, affirmative steps to promote its unlawful uses or to foster infringement, liability attaches as a result of that active inducement.²²⁷ In the context of the internet, “sufficient knowledge exists to impose contributory [infringement] liability when linked to demonstrated infringing use” of an interactive computer service.²²⁸ In conjunction with such knowledge, a website operator materially contributes to infringement where it provides the site and facilities for direct infringement and fails to take steps to prevent that infringement.²²⁹ Thus, using the doctrine of contributory copyright infringement to parse the meaning of the Ninth Circuit’s material contribution standard, it appears that an interactive computer service materially contributes to the illegality of content, thereby forfeiting § 230(c) immunity, when it provides the site and facilities for the creation or development of disputed content, has knowledge in general of the website’s role in the creation of disputed content, and takes no steps to prevent the production of that content.

b. The Material Contribution Standard Is Problematic

The Ninth Circuit’s startling about-face on the meaning of development—and, consequently, information content provider—demonstrates a flawed understanding of the terms and presents far-reaching implications for the future of interactive computer service liability. With the introduction of the material contribution standard, the Ninth

222. *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (emphasis added) (footnote omitted).

223. *Id.*

224. *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 845–46 (11th Cir. 1990).

225. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439–42 (1984) (noting that allegation of contributory copyright infringement required proof of constructive knowledge and that such knowledge could not be imputed where allegedly infringing device was capable of significant noninfringing use).

226. *Id.* at 442. The *Roommates.com* majority adopts a similar approach, stating that the provision of “neutral tools” does not defeat § 230(c) immunity despite third-party misuse of such tools. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc).

227. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 935–37 (2005). *See supra* notes 114–19 and accompanying text for a discussion of the *Grokster* case.

228. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1021 (9th Cir. 2001).

229. *Id.* at 1022.

Circuit parts ways not only with its own precedent²³⁰ and that of all other circuits to have addressed the issue of § 230(c) immunity,²³¹ but also with the plain language of the statute.²³² The phrase “material contribution to alleged unlawfulness” does not appear in § 230.²³³ Nor can the Ninth Circuit’s newfound definition of “development” be supported by any precept of statutory interpretation. Where a statutory term is not defined, it should be construed in accordance with its ordinary or natural meaning.²³⁴ Although the Ninth Circuit devotes a portion of its discussion to the dictionary and “context-appropriate” meanings of “development” and “web content development,”²³⁵ the court fails to explain how either definition supports its conclusion that “development” somehow refers to material contribution to alleged unlawfulness.²³⁶ As a result, the material contribution standard threatens to swallow § 230(c) immunity whole,²³⁷ erroneously injects the issue of liability into § 230(c) immunity determinations,²³⁸ creates undue uncertainty for interactive computer services,²³⁹ and directly contradicts the express policy rationales underlying the CDA.²⁴⁰

When viewed as an analogue to the doctrine of contributory infringement, the material contribution standard renders § 230(c) immunity virtually meaningless. As discussed, under a theory of contributory copyright infringement, material contribution in an internet context constitutes nothing more than providing the site and facilities for infringement and, after learning of infringing activity by others, failing to take steps against it.²⁴¹ Applied in a § 230(c) determination, such a definition of material contribution directly contradicts the language of the statute by exposing interactive computer services to liability for actions commonly attributed to publishers.²⁴² The majority of courts agree that the traditional editorial functions standard immunizes an interactive computer service from liability arising from its decisions to—or not to—publish, withdraw, postpone, or alter content, regardless of notice or knowledge of the content at issue.²⁴³ The material contribution standard, when viewed through the lens of contributory copyright infringement doctrine, obliterates this broad interpretation of § 230(c) immunity and constricts the statute’s protection to two instances: (1) where an

230. See *supra* notes 88–102 and accompanying text for a discussion of *Carafano* and the essential published content standard.

231. See *Roommates.com, LLC*, 521 F.3d at 1179–80 (McKeown, J., dissenting) (collecting circuit, district, and state court decisions embracing broad view of § 230(c) immunity).

232. See *id.* at 1182 (noting that no portion of CDA requires consideration of legality of content).

233. See generally 47 U.S.C. § 230 (2006).

234. *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006).

235. *Roommates.com, LLC*, 521 F.3d at 1168–70 (majority opinion).

236. *Id.* at 1184 n.11 (McKeown, J., dissenting).

237. *Id.* at 1188–89.

238. *Id.* at 1177–78.

239. *Id.* at 1188–89.

240. *Id.* at 1177–78.

241. See *supra* note 229 and accompanying text for a discussion of contributory copyright infringement in online environments.

242. See *supra* Part II.C for a discussion of the interactive computer service actions immunized under the plain language of § 230(c).

243. See *supra* Part III.A.1 for a discussion of the scope of § 230(c) immunity under the traditional editorial functions standard.

interactive computer service has insufficient knowledge of disputed content on its network; or (2) where an interactive computer service takes steps against disputed content.²⁴⁴ In *Zeran v. America Online, Inc.*,²⁴⁵ the Fourth Circuit warned of the likely result under such an interpretation of § 230(c) immunity, noting that exposure to liability predicated upon notice or knowledge of unlawful content creates a “natural incentive simply to remove messages upon notification, whether the contents [are unlawful] or not.”²⁴⁶

The *City Paper* hypothetical illustrates the significant change that the material contribution standard brings to § 230(c) immunity determinations. Under the traditional editorial functions and essential published content standards, the *City Paper*, regardless of notice or knowledge of disputed content, can claim § 230(c) immunity against an action arising out of an allegedly defamatory message created using its “I Love You, I Hate You” site.²⁴⁷ Material contribution, as defined by contributory copyright infringement doctrine, dictates a different result. The *City Paper* materially contributes by providing the site and facilities used to create the disputed content.²⁴⁸ As a result, the *City Paper* is a joint information content provider of the defamatory message unless it can show that it had no knowledge of the disputed content or that it took steps to remove the content.²⁴⁹ A claim of insufficient knowledge would be virtually impossible for the *City Paper* to prove given that sufficient knowledge need not be predicated upon actual knowledge of the specific content at issue, but can be based upon actual knowledge of demonstrated illegal use of its system in general.²⁵⁰ Therefore, once the *City Paper* has notice that users are constructing defamatory messages through the “I Love You, I Hate You” site, it is imputed with knowledge of all defamatory content appearing on the site. The *City Paper* is left with the choice either to reduce the interactivity of the “I Love You, I Hate You” site, or to employ extensive content-monitoring procedures to delete all potentially defamatory messages. This result

244. Only the Seventh Circuit, in *Doe v. GTE Corp.*, has discussed such a limited interpretation of § 230(c) immunity. 347 F.3d 655, 658–60 (7th Cir. 2003).

245. 129 F.3d 327 (4th Cir. 1997).

246. *Zeran*, 129 F.3d at 333.

247. See *supra* Part III.A.1 for a discussion of the traditional editorial functions standard and Part III.A.2 for an application of the *City Paper* example to the essential published content standard.

248. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001) (holding that Napster materially contributed by providing site and facilities for music downloads).

249. See *supra* Part III.A.3.a for a discussion of material contribution and the other elements of contributory copyright infringement. This example assumes that the material contribution standard incorporates the knowledge requirement of the doctrine of contributory copyright infringement. If the material contribution standard only incorporates the action element of contributory copyright infringement, then an interactive computer service forfeits § 230(c) immunity under the material contribution standard where it merely provides the site and facilities used to create the disputed content. Under such an interpretation, any website offering interactive services to users would forfeit § 230(c) immunity. This would destroy completely § 230(c) immunity, and even the Ninth Circuit did not contemplate such an outrageous result. See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc) (noting that provision of neutral tools does not constitute material contribution to alleged unlawfulness of disputed content).

250. See *A&M Records, Inc.*, 239 F.3d at 1021–22 (noting that Napster had sufficient knowledge to contributorily infringe copyrighted material because it knew that infringing material was available on its system).

contradicts the very purpose of § 230(c) immunity: to treat internet businesses differently from traditional publishers and distributors by immunizing them from certain forms of vicarious liability to which their real-world counterparts are subject.²⁵¹

The material contribution standard further extracts the teeth of § 230(c) immunity by collapsing the issues of immunity and substantive liability. Although the Ninth Circuit attempts to cloak the material contribution standard in the language of conjecture—material contribution to *alleged* unlawfulness—the effect is clear: an interactive computer service’s ability to successfully claim § 230(c) immunity is now inextricably linked with the legality of user conduct.²⁵² To support this proposition one need not look past the analysis presented in *Roommates.com*, where the court repeatedly characterized the registration questions posed by Roommates.com as discriminatory throughout its discussion of § 230(c) immunity even though the merits of the FHA claims had yet to be reached.²⁵³

By denying § 230(c) immunity where an interactive computer service materially contributes to allegedly unlawful content, the material contribution standard contradicts the basic concept underlying any provision of immunity: to offer protection from a potentially valid claim.²⁵⁴ *Black’s Law Dictionary* defines “immunity” as “[a] doctrine providing a complete defense to a tort action” and further provides that “[u]nlike a privilege, immunity does not negate the tort.”²⁵⁵ In other words, the doctrine of immunity, recognizing that a wrong has been committed, provides a defense in spite of that wrong. A party’s material contribution to content and the unlawfulness of that content are considerations informing the issue of substantive liability, not immunity.²⁵⁶ As a result, the material contribution standard merely pays lip service to the language of § 230(c) before introducing liability considerations under the guise of inquiry into information content provider status.²⁵⁷ So long as § 230(c)’s requirements are met, its provision of immunity should apply regardless of the character of the disputed content and regardless of an interactive computer service’s alleged contribution to that content.²⁵⁸

251. The Ninth Circuit contends that the material contribution standard does not impute vicarious liability to interactive computer services for the acts of their users, but merely requires that interactive computer services’ own actions comply with general laws of applicability. *Roommates.com, LLC*, 521 F.3d at 1169 n.24. If the material contribution standard does not impute vicarious liability, however, then it is redundant because § 230(c) only immunizes interactive computer services from liability for content created by “another” information content provider. 47 U.S.C. § 230(c)(1) (2006).

252. *Roommates.com, LLC*, 521 F.3d at 1176–77 (McKeown, J., dissenting).

253. *Id.* at 1166–67 (majority opinion); *see also id.* at 1177–78 (McKeown, J., dissenting) (suggesting majority should have confined decision to applicability of § 230(c) immunity).

254. *Id.* at 1182 (McKeown, J., dissenting) (“Immunity has meaning only when there is something to be immune from It would be nonsense to claim to be immune only from the innocuous.”).

255. BLACK’S LAW DICTIONARY 340 (3d Pocket ed. 2006).

256. *Roommates.com, LLC*, 521 F.3d at 1183 (McKeown, J., dissenting) (“Whether the information at issue is unlawful and whether the webhost has contributed to its unlawfulness are issues analytically independent of the determination of immunity.”).

257. *Id.* at 1182–83.

258. *See id.* at 1183 (noting that before issues of substantive liability can be considered, court must first determine issue of immunity).

Under the material contribution standard, interactive computer services are also left with little guidance to gauge potential liability.²⁵⁹ Because information content provider status is linked to the alleged unlawfulness of disputed content under the material contribution standard, the scope of § 230(c) immunity now depends upon the type of claim being brought. In fact, the majority in *Roommates.com* noted that the allegedly discriminatory questions and answer choices in that case would not preclude recognition of § 230(c) immunity in a non-FHA suit.²⁶⁰ The result is that interactive computer services must now anticipate every potential claim to avoid liability.²⁶¹

Furthermore, any claim that alleges some contribution to allegedly unlawful content is likely to be litigated given the scant immunity afforded under the material contribution standard.²⁶² Turning again to the *City Paper* hypothetical, the *City Paper* would be able to assert a successful claim of § 230(c) immunity under the traditional editorial functions and essential published content standards early in the litigation process.²⁶³ The material contribution standard, however, certainly would bar such a claim, and the action would proceed through discovery and possibly on to litigation.²⁶⁴ The *City Paper* ultimately could prevail by showing, for instance, that the allegedly defamed person already had a poor reputation.²⁶⁵ Regardless of the outcome, however, the *City Paper* is saddled with the additional cost of protracted litigation and courts are unnecessarily crowded with more claims.²⁶⁶

259. See *supra* Part III.A.3.a for commentary on the meaning of material contribution to unlawful content.

260. See *Roommates.com, LLC*, 521 F.3d at 1169 (noting that dating website could not be denied § 230(c) immunity for posing questions about users' gender and race).

261. Such planning may be relatively simple for a website directed toward a single purpose, but the problems increase exponentially with a multiservice website like Yahoo.com. In such an environment, users may create a single profile which gives them access to multiple services, such as online classifieds, personal ads, housing ads, etc. See Yahoo! Help, How do I register?, http://help.yahoo.com/l/us/yahoo/edit/registration/edit-01.html;_ylt=AmS.Cpn6OJYjZ97CtJPIAyunkiN4 (last visited Mar. 31, 2010) (noting that single Yahoo.com user ID and password may be used to access all of Yahoo's services). If, for instance, the initial registration process in one of these service areas requires the user to provide his or her gender, does § 230(c) immunity detach when that user then utilizes Yahoo.com's roommate finding service?

262. See *supra* notes 252–58 and accompanying text for a discussion of the introduction of liability into the determination of information content provider status and its probable effect upon § 230(c) immunity.

263. A claim of § 230(c) immunity is an affirmative defense and likely would precede discovery, probably in the form of a FED R. CIV. P. 12(b)(6) motion for failure to state a claim.

264. See *supra* notes 152–57 and accompanying text for a summary of the material contribution standard and its application in the *Roommates.com* case.

265. See RESTATEMENT (SECOND) OF TORTS § 559 cmt. d (1977) (stating that challenged communication may be defamatory but would not give rise to damages in certain cases where reputation of person alleging defamation was already so bad or so good that no communication could cause harm).

266. It is true that the sword cuts both ways—i.e., that a plaintiff with a merit-worthy claim may be denied recovery where an interactive computer service successfully claims § 230(c) immunity. The difference in such a case, however, is that Congress has balanced competing interests and made the policy choice to deny recovery in favor of promoting the evolution of the internet and encouraging self-regulation by website operators. See *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (noting that legislatures often enact legislation for express purpose of balancing conflicting values).

c. *Policy Implications & Real-World Ramifications of the Material Contribution Standard*

Finally, the material contribution standard undermines the express policy rationales of the CDA²⁶⁷ and poses serious danger to the “continued development of the Internet and other interactive computer services.”²⁶⁸ The first two paragraphs of § 230 set forth congressional findings and policy rationales supporting the statute.²⁶⁹ It is therefore clear that Congress wanted to make the impetus behind § 230’s passage readily apparent.²⁷⁰

A dominant theme running throughout these findings and policies is congressional recognition of the internet as a valuable communication tool and congressional intent to promote the internet’s development.²⁷¹ The material contribution standard, however, is incompatible with this theme. In fact, the *Roommates.com* majority tacitly acknowledged the contradiction, noting that “the Internet has outgrown its swaddling clothes and no longer needs to be so gently coddled.”²⁷² The most troubling aspect of the Ninth Circuit’s contention is that it blatantly rejects the broad immunity granted by the plain language of the statute and afforded by courts since its passage in favor of the court’s own determination that interactive computer services are now mature enough to handle increased liability.²⁷³

The material contribution standard also poses dangers unique to interactive computer services. The control and categorization of information is a central function of these services,²⁷⁴ and their continued success depends upon the development of technologies allowing more sophisticated regulation of information.²⁷⁵ Under the

267. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1177–78 (9th Cir. 2008) (en banc) (McKeown, J., dissenting).

268. 47 U.S.C. § 230(b)(1) (2006).

269. *Id.* § 230(a)–(b).

270. *See Roommates.com, LLC*, 521 F.3d at 1179 (McKeown, J., dissenting) (noting legislative history and background leading to passage of statute are not substitutes for language of statute itself).

271. *See* 47 U.S.C. § 230(a)(1)–(a)(3), (b)(1) (noting that interactive computer services offer “an extraordinary advance in the availability of educational and informational resources[;] . . . a great degree of control over . . . information[; and] . . . a forum for a true diversity of political discourse,” and stating that it is U.S. policy “to promote the continued development of the Internet”).

272. *Roommates.com, LLC*, 521 F.3d at 1175 n.39 (majority opinion).

273. The Ninth Circuit goes so far as to contend that it “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.” *Id.* at 1164 n.15. This reasoning ignores the fact that the very purpose of § 230(c) immunity is to immunize interactive computer services from certain forms of liability which can be imputed to their real-world counterparts. *Compare* *Blumenthal v. Drudge*, 992 F. Supp. 44, 49 (D.D.C. 1998) (concluding argument that traditional publisher could be held liable for similar behavior is irrelevant in § 230(c) immunity determination), *with Roommates.com, LLC*, 521 F.3d at 1167 (denying § 230(c) immunity for search and email functions utilizing user-submitted information about race, gender, and familial status, and noting that “[i]f such screening is prohibited when practiced in person or by telephone, we see no reason why Congress would have wanted to make it lawful to profit from it online”).

274. *See Roommates.com, LLC*, 521 F.3d at 1188 (McKeown, J., dissenting) (noting that numerous websites provide services based upon user-provided information organized into standardized formats).

275. *See* 47 U.S.C. § 230(a)(2) (noting that interactive computer services offer extensive user control of information); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (noting that without

material contribution standard, however, solicitation, use, and control of information bars immunity if such information, although provided or selected by another, is allegedly illegal.²⁷⁶ As a result, any website that poses a question and provides answer choices via a drop-down menu now risks liability for any service relating back to the initial solicitation.²⁷⁷ The material contribution standard does more than merely slow the “continued development of the Internet and other interactive computer services,”²⁷⁸ it stonewalls progress altogether.²⁷⁹

B. The Traditional Editorial Functions and Essential Published Content Standards Are Best Suited to Determining Information Content Provider Status

The traditional editorial functions and essential published content standards provide the most appropriate methods to resolve questions of information content provider status arising from the partial creation or development of content. Both standards are supported by the plain language of the CDA.²⁸⁰ All courts recognize that the plain language of § 230(c) immunizes an interactive computer service exercising traditional editorial functions.²⁸¹ Moreover, the essential published content standard acknowledges that the statutory definition of information content provider requires an inquiry into the identity of the person responsible for the disputed content, as opposed to an inquiry into any contribution to alleged unlawfulness.²⁸² When viewed as complements to one another, the traditional editorial functions and essential published content standards provide a complete analysis of joint responsibility for the creation of content that is in concert with the broad interpretation of § 230(c) immunity endorsed by a majority of courts.²⁸³

ability to classify and control user-provided information, dating website may not be able to provide same level of services, if at all).

276. See *Roommates.com, LLC*, 521 F.3d at 1166 (concluding that requiring users to answer questions with pre-populated drop-down menus amounts to development, at least in part, of information selected by user).

277. See *supra* notes 260–67 and accompanying text for a discussion of the uncertainty created by the material contribution standard. See also *Roommates.com, LLC*, 521 F.3d at 1183 (McKeown, J., dissenting) (noting that almost every interactive computer service would be responsible for development of disputed content under material contribution standard).

278. *Roommates.com, LLC*, 521 F.3d at 1188 (quoting 47 U.S.C. § 230(b)(1)).

279. See *id.* (arguing that material contribution standard’s effect upon interactive computer service control of information stifles core of their services and “guts” heart of § 230(c)).

280. See *supra* Parts III.A.1 and III.A.2 for a discussion of the traditional editorial functions and essential published content standards and their support in the text of § 230(c).

281. The majority of courts give broad effect to § 230(c)’s provision of immunity under the traditional editorial functions standard. See *supra* notes 198–200 and accompanying text for examples of the diverse interactive computer service actions accorded such protection. Other courts, however, take issue with the scope of § 230(c) immunity provided under the traditional functions standard. See *supra* note 74 for a discussion of the Seventh Circuit’s endorsement of an approach reading § 230(c) as a definitional clause rather than a provision of immunity.

282. See 47 U.S.C. § 230(f)(3) (defining information content provider as “any person . . . that is responsible . . . for the creation or development of information provided though the Internet or any other interactive computer service”).

283. See, e.g., *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418–22 (1st Cir. 2007) (noting broad interpretation of § 230(c) immunity by other courts and applying traditional editorial functions

The traditional editorial functions and essential published content standards also offer proven, workable, and stable standards that presided over a time period in which the internet grew and developed into an increasingly interactive and sophisticated medium.²⁸⁴ Thus, both standards buttress Congress's finding that the internet has "flourished, to the benefit of all Americans, with a *minimum* of government regulation,"²⁸⁵ and support congressional policy "to preserve the vibrant and competitive free market that presently exists for the Internet . . . *unfettered by Federal or State regulation.*"²⁸⁶

C. Incorporation of an Inducement Exception Is the Appropriate Method to Address Concerns Over Broad § 230(c) Immunity

Although some courts have expressed reservations about the broad immunity granted under § 230(c),²⁸⁷ such concerns are better addressed by limiting the scope of § 230(c) rather than unduly expanding the definition of information content provider. One possible solution is the introduction of an inducement exception to § 230(c) immunity similar to that articulated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*²⁸⁸ With the incorporation of an inducement exception, an interactive computer service could not claim § 230(c) immunity where its "purposeful, culpable expression and conduct" induced a third party to create or develop disputed content.²⁸⁹ Mere knowledge of disputed content, however, along with ordinary acts incident to the interactive computer service's normal operation would not disqualify a claim of § 230(c) immunity.²⁹⁰ Instead, the inducement exception would require a showing of "clear expression or other affirmative steps taken to foster" the creation or development of the content at issue.²⁹¹

The *City Paper* example used throughout this Comment illustrates the two-step § 230(c) immunity determination incorporating an inducement exception. The first step

and essential published content standards). See also *supra* Part II.C.1 for a discussion of the broad interpretation of § 230(c) immunity endorsed by the majority of courts.

284. Most statistics place the growth of internet usage in the United States at close to thirty percentage points over the past eight years alone. See, e.g., Internet World Stats: Usage and Population Statistics, <http://www.internetworldstats.com/am/us.htm> (last visited Mar. 15, 2010) (placing proportion of Americans using internet at 44.1% in 2000 and 72.5% in 2008).

285. 47 U.S.C. § 230(a)(4) (emphasis added).

286. *Id.* § 230(b)(2) (emphasis added).

287. See *supra* note 74 for examples of courts that have questioned the scope of § 230(c) immunity.

288. 545 U.S. 913, 936–37 (2005). See *supra* notes 120–23 and accompanying text for a discussion of the current state of such an exception to § 230(c) immunity.

289. *Grokster*, 545 U.S. at 937 (premising software provider's liability for software users' acts of infringement on provider's acts inducing and encouraging that infringement).

290. See *id.* at 937 (noting that neither knowledge of infringing activity nor ordinary acts incident to product distribution constitutes inducement imputing liability). See *supra* Part III.A.3 for a discussion of the relationship between the material contribution standard and the doctrine of contributory copyright infringement. Compare how an interactive computer service's knowledge of disputed content impacts its § 230(c) immunity pursuant to that relationship.

291. *Grokster*, 545 U.S. at 936–37 (holding that one who distributes product and promotes its infringing uses, as evidenced by clear actions aimed at promoting and encouraging infringing use, is liable for copyright infringement of users under inducement theory of copyright infringement).

of the process is to determine compliance with § 230(c)'s statutory requirements.²⁹² The *City Paper* is an interactive computer service,²⁹³ and a defamation claim arising from the "I Love You, I Hate You" site attempts to treat the *City Paper* as the publisher or speaker of the disputed content.²⁹⁴ The pertinent question, then, is whether another information content provider solely created the disputed content. Put another way, has the *City Paper* partially created or developed the content at issue, thereby exposing it to liability as a joint information content provider? Under the essential published content standard, the *City Paper* could not be considered an information content provider with respect to content chosen solely at the discretion of third-party users.²⁹⁵ The *City Paper*, therefore, qualifies for § 230(c) immunity unless the inducement exception applies.

The second step of a § 230(c) immunity determination incorporating the inducement exception requires a showing of active steps to promote or encourage the creation or development of disputed content to defeat immunity.²⁹⁶ This is a question of fact. Here, the *City Paper*'s statements to "hold nothing back" and "really let this person know how you feel" likely are insufficient to constitute affirmative acts designed to induce the creation of defamatory content.²⁹⁷ If, for example, the *City Paper* created an "I Hate You" site solely dedicated to the production of scornful messages, inducement may be more easily established.

The crucial distinction under this two-step § 230(c) immunity determination is that the analysis of information content provider status remains separate from an inducement investigation.²⁹⁸ This provides clear standards for courts to apply and offers guidelines to interactive computer services seeking to design better services without incurring liability.

IV. CONCLUSION

The internet is a pervasive method of modern communication and commerce. To ensure its continuing, robust development, a clear and stable standard is necessary as the interactive nature of internet technology raises questions over content-creator identity. The traditional editorial functions and essential published content standards are the proper methods of determining information content provider status under claims

292. See *supra* Part II.B for a discussion of the statutory requirements of § 230(c) immunity.

293. See *supra* notes 41–43 and accompanying text for a discussion of the definition of an interactive computer service.

294. See *supra* notes 44–46 and accompanying text for a discussion of § 230(c)'s requirement that the claim treat the interactive computer service as the speaker or publisher of the content at issue.

295. See *supra* Part III.A.2 for a discussion of the essential published content standard and its basic application.

296. See *supra* notes 288–91 and accompanying text for a discussion of the application of an inducement exception to § 230(c) immunity.

297. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 937–38 (2005) (holding that software provider's advertisements portraying software as means to obtain copyrighted material and assistance of customers in locating copyrighted material constituted affirmative steps taken to induce infringement).

298. See *supra* Part III.A.3.b for a discussion of the material contribution standard and its conflation of immunity and substantive liability.

of § 230(c) immunity.²⁹⁹ These standards complement the broad view of § 230(c) immunity endorsed by a majority of courts.³⁰⁰ These courts agree that the plain language of § 230(c) immunizes interactive computer services from liability for content created by third parties while allowing expansive control over content.³⁰¹ The essential published content standard, therefore, rightly focuses upon the identity of the party supplying the disputed content, and the traditional editorial functions standard immunizes interactive computer services for the exercise of a broad range of functions.³⁰² Both standards further the underlying policy rationales of § 230(c) immunity by allowing interactive computer services the freedom to police their networks while also promoting robust internet development and communication.³⁰³

Concerns over § 230(c)'s broad provision of immunity are addressed more appropriately by limiting the scope of § 230(c) rather than unduly expanding the definition of information content provider.³⁰⁴ The material contribution standard alters the statutory definition of information content provider to include consideration of actions allegedly contributing to the illegality of disputed content.³⁰⁵ The definition of information content provider is clear.³⁰⁶ Neither the nature of the content, nor the identity of the party enabling production of the content have a place in a determination of information content provider status.³⁰⁷ The material contribution standard risks swallowing § 230(c) immunity and creates uncertainty where stability is paramount.³⁰⁸ In addition, it contradicts the underlying policy rationales of § 230(c) immunity, most significantly by increasing interactive computer service exposure to liability.³⁰⁹ Finally, the implications of the material contribution standard are startling.³¹⁰ The traditional editorial functions and essential published content standards, in conjunction with an inducement exception,³¹¹ provide a clear § 230(c) analysis that balances concerns over

299. See *supra* Parts III.A.1 and III.A.2 for a discussion of the traditional editorial functions and essential published content standards.

300. See *supra* Part II.C for a discussion of the scope of § 230(c) immunity.

301. See *supra* Parts II.C.1–3.a for a discussion of interactive computer service actions courts recognize as being immune under § 230(c).

302. See *supra* Parts III.A.1 and III.A.2 for a discussion of the traditional editorial functions and essential published content standards.

303. See *supra* Part III.B for a discussion of the traditional editorial functions and essential published content standards' furtherance of § 230(c)'s underlying policy rationales.

304. See *supra* Part III.C for a discussion of the incorporation of an inducement exception to § 230(c) immunity.

305. See *supra* Part III.A.3 for a discussion of the material contribution standard.

306. See *supra* notes 47–51 and accompanying text for a discussion of the definition of information content provider.

307. See *supra* Part III.A.3.b for a discussion of the material contribution standard's erroneous consideration of these factors in the determination of information content provider status.

308. See *supra* Part III.A.3.b for a discussion of the way in which the material contribution standard renders § 230(c) immunity virtually meaningless and increases uncertainty in § 230(c) determinations.

309. See *supra* Part III.A.3.c for a discussion of the material contribution standard's disregard for the underlying policy rationales of § 230(c).

310. See *supra* Part III.A.3.c for a discussion of the material contribution standard's real-world ramifications.

311. See *supra* Part III.C for a discussion of the incorporation of an inducement exception to § 230(c) immunity.

unduly broad interactive computer service immunity with the statute's underlying purpose to promote internet speech and to encourage website self-regulation.

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