

If you are the proprietor of a website that allows your visitors to contribute content, one of the laws that may have insulated you from liability relating to this type of content has been somewhat eroded. In a recent decision by the federal court of appeals that covers California, the Communications Decency Act, which had been viewed by many as a shield against this type of liability, was found not to apply when a website proprietor assumes a more active role in soliciting and obtaining unlawful content from a third party.

The California case involved the website proprietor Roommates.com, which operates a website for people with apartments who are looking for roommates. To use the service, subscribers had to fill out a form that listed preferences about roommates. The form had questions about sex, sexual orientation, and whether the roommate has children, with multiple-choice answers appearing on drop-down menus. Roommates.com used this information to identify (and eliminate) potential roommates.

Roommates.com was sued on the ground that its information collection practices violated the Fair Housing Act, which prohibits discrimination in housing based on race, religion, national origin, sex, handicap and family status. In response, Roommates.com asserted that it was not liable because the Communications Decency Act immunizes internet service providers from liability for unlawful content in third party postings. The Act, however, does not grant immunity to internet service providers who create their own content or are responsible for the creation of content.

The appeals court held that Roommates.com lost its immunity because its subscriber forms had the prohibited categories and answers on drop-down menus. By requiring subscribers to fill out the form and by using that information to identify (or eliminate) potential roommates, Roommates.com went beyond merely displaying third party postings.

The line between lawful and unlawful conduct is illustrated by the Court's additional holding that Roommates.com was not liable for unlawful content placed by subscribers in a completely empty text box called "Additional Comments." Even if the "Additional Comments" contained offensive content, Roommates.com would not be responsible because those postings would be completely user-generated.

This case is important beyond the discrimination context because the Communications Decency Act immunity protects websites from many kinds of liability, such as defamation. Participating in the creation of content that is unlawful in any way, rather than simply providing an on-line forum for third parties, could expose a website to liability for a wide range of misconduct from which it would otherwise be immune.

Website proprietors should review the methods by which they allow third-party content postings. The decision in Roommates.com dictates that a more passive approach be taken.

If you need more information on this Act or any other legal matters, please contact **Eric P. Bergner** at **212.554.7855/ebergner@mosessinger.com**, **David Rabinowitz** at **212.554.7815/drabinowitz@mosessinger.com**, or your regular contact at Moses & Singer.

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