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Court-Side Seats? The Communications Decency Act and the Potential Threat to StubHub and Peer-to Peer Marketplaces

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COURT-SIDE SEATS? THE COMMUNICATIONS DECENCY ACT AND THE POTENTIAL THREAT TO STUBHUB AND PEER-TO-PEER MARKETPLACES

Abstract: In 1996, Congress passed section 230 of the Communications Decency Act, which provides broad immunity to websites from vicarious liability for the content produced by its users. Despite this broad immunity, a website will be liable for its user’s content when it is deemed to be an “information content provider” itself. In 2008, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the Ninth Circuit Court of Appeals held that a website is an information content provider and thus loses immunity when it “materially contributes to the alleged unlawfulness” of the content. Although most courts have followed this “material contribution test,” the test has led to diverging opinions as to immunity for peer-to-peer marketplace websites, such as StubHub. This Note proposes a new test in line with Congress’s intent to provide broad immunity under section 230 of the Communications Decency Act.

INTRODUCTION

Walking around Yawkey Way near Fenway Park, an observer will hear “buying tickets, selling tickets?” along with the cries of the sausage and game-day program vendors.¹ In open disregard for rarely enforced anti-scalping laws, brokers resell tickets, creating a secondary market that is now a five billion dollar industry.² Traditionally, brokers meander through the crowds attempting to profit off the economics of supply and demand.³ Increasingly, however, these on-site brokers are struggling to compete with the lower information costs and absence of geographic constraints on the Internet.⁴

¹ See Robert Mays, *Losses Are Piling Up for Scalpers*, BOS. GLOBE (Aug. 17, 2010), http://www.boston.com/sports/baseball/redsox/articles/2010/08/17/losses_piling_up_lately_for_areas_scalpers_at_fenway_park/ [perma.cc/XQX9-LN8Z] (describing the scene around Fenway Park on game day); Darren Rovell, *Inflation in Red Sox Nation*, ESPN (Oct. 11, 2003), <http://espn.go.com/page2/s/rovell/031013.html> [perma.cc/V7SB-PHX4] (describing the task of scalping Red Sox tickets on game day).

² Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS L. 1, 26 (2012); Rovell, *supra* note 1.

³ See Mays, *supra* note 1; Rovell, *supra* note 1.

⁴ See John George, *That’s the Ticket*, PHILA. BUS. J. (Dec. 20, 2013), <http://www.bizjournals.com/philadelphia/print-edition/2013/12/20/thats-the-ticket.html> [perma.cc/ZTT3-SDBY] (describing the effect of the Internet on the offline marketplace); Joe Nocera, *Scalpers Are Arbitragers of the Arena*, N.Y. TIMES (Jan. 18, 2008), <http://www.nytimes.com/2008/01/18/business/worldbusiness/>

Through peer-to-peer marketplaces, such as StubHub, buyers and sellers now have access to the secondary ticket market without having to leave their living rooms.⁵ StubHub does not buy or sell tickets itself but simply connects buyers and sellers, charging a service fee.⁶ As the leader in the online secondary ticket market, StubHub generated \$500 million in revenue in 2013, with \$3 billion worth of tickets sold on its site.⁷ By providing tools like historical pricing data, virtual seating maps, and seamless payment, StubHub offers an experience that is unlike the traditional on-site marketplace.⁸

With no maximum or minimum price restraints, StubHub lets the economics of supply and demand run their course.⁹ For high-profile events, like the Super Bowl, demand greatly exceeds supply, resulting in ticket prices on the secondary market more than ten times their face value.¹⁰ The imbalance of supply and demand can be affected by a number of factors, including the weather, the opponent, or the potential for a record-breaking moment.¹¹ Con-

18iht-wbjoel9.html?pagewanted=all [perma.cc/UGQ3-5VNL] (detailing the boom of the secondary ticket market).

⁵ Benny Evangelista, *StubHub App Lets Fans Skip Scalping for Giants Tickets*, SFGATE (Aug. 26, 2011), <http://www.sfgate.com/business/article/StubHub-app-lets-fans-skip-scalpers-for-Giants-2333231.php> [perma.cc/NJ8Y-26D2] (highlighting new technologies that allow customers to buy tickets entirely on their mobile devices); Neal Karlinsky, *StubHub, Revolutionizing the Modern-Day Ticket Scalper*, ABC NEWS (Feb. 6, 2013), <http://abcnews.go.com/Business/stubhub-revolutionizing-modern-day-ticket-scalper/story?id=18421695> [perma.cc/UVX3-6XZW] (referencing StubHub as the “ultimate middleman” in the marketplace today).

⁶ See Sean Cassidy, *How StubHub Works—Processes and User Interface*, <http://project4.wiki.usfca.edu/How+StubHub+Works+-+Processes+and+User+Interface> [https://perma.cc/J3KN-QKHM]; Darren Rovell, *Talking the Future of Sports Tickets with StubHub’s CEO*, CNBC (Apr. 26, 2011, 3:46 PM), <http://www.cnbc.com/id/42767788#> [perma.cc/H5VN-ZR68] (discussing StubHub’s business model).

⁷ Adam Satariano, *The Case of the Stubbed Hub*, BLOOMBERG (Feb. 19, 2015, 6:48 PM), <http://www.bloomberg.com/news/articles/2015-02-19/stubhub-faces-pressure-from-ticketmaster-and-ebay-its-own-parent> [perma.cc/CA3Z-X5P6].

⁸ See Cassidy, *supra* note 6 (describing StubHub’s interface and processes); Satariano, *supra* note 7.

⁹ See Schroeder, *supra* note 2, at 26 (explaining the basic economic tenets of supply and demand); Rovell, *supra* note 6 (discussing dynamic pricing with the CEO of StubHub).

¹⁰ See Schroeder, *supra* note 2, at 26; Jesse Lawrence, *Welcome to the Subprime Super Bowl Ticket Crisis*, DAILY BEAST (Jan. 29, 2015), <http://www.thedailybeast.com/articles/2015/01/29/the-same-thing-that-ruined-the-housing-market-is-now-ruining-the-super-bowl.html> [perma.cc/FU8U-5UDU] (detailing the events that led to the most expensive Super Bowl in history); Rovell, *supra* note 1; Darren Rovell, *SB XLIX Tickets Priciest in History*, ESPN (Feb. 1, 2015, 5:02 PM), http://espn.go.com/nfl/playoffs/2014/story/_/id/12263047/super-bowl-xlix-tickets-most-expensive-game-history [perma.cc/SW39-K2HC] (explaining StubHub’s role in the Super Bowl with the highest priced tickets ever seen).

¹¹ See Brandon Formby, *Novelty of First College Football Playoff Championship Isn’t Driving Ticket Demand*, DALL. MORNING NEWS (Jan. 7, 2015), <http://sportsday.dallasnews.com/college-sports/collegesheadlines/2015/01/06/novelty-of-first-college-football-playoff-championship-isn-t-driving-ticket-demand> [perma.cc/MX5B-JPFE] (describing the influence of factors like travel and in-state interest on ticket prices); Rovell, *supra* note 6 (discussing the impact of supply and demand on the secondary ticket market). For example, shortly after Derek Jeter announced he would be retiring at

versely, when the supply of tickets greatly exceeds the demand, StubHub is home to ticket prices that are far below face value.¹²

Despite the increasing popularity of websites like StubHub, most states still have anti-scalping laws.¹³ These laws usually focus on physical scalping around a stadium, or reselling over a specified price above face value.¹⁴ These tactics and other regulatory measures are harder to enforce online, where identity and physical presence are masked.¹⁵

The rise of the online peer-to-peer marketplaces creates new issues of legal liability.¹⁶ The core issue is whether the host of a peer-to-peer marketplace could be vicariously liable for the actions of its users.¹⁷ Plaintiffs have attempted to hold StubHub liable for scalping violations, unfair trade practices, or tortious interference with contractual relations.¹⁸ Websites generally succeed in

the end of the 2014 season the average ticket price for his last home game jumped from \$139 to \$500. Brad Tuttle, *As Jeter Farewell Tour Wraps Up, Ticket Sellers Cash In*, TIME (July 30, 2014), <http://time.com/money/3052954/derek-jeter-yankees-farewell-tour-ticket-prices/> [perma.cc/37NV-BLJG].

¹² Adam Rubin, *Study Compares Mets, StubHub Prices*, ESPN (Feb. 25, 2013, 11:23 AM), http://espn.go.com/blog/new-york/mets/post/_id/61415/study-compares-mets-stubhub-prices [perma.cc/GQ9P-4CHB] (finding StubHub prices to be cheaper on average than the primary market for New York Mets tickets). Even for the popular New York Yankees, ticket prices on StubHub are consistently lower on average than the face value. Garrett Sloane, *Yanks' New Ticket Exchange Service Battles StubHub*, N.Y. POST, (Feb. 25, 2013), <http://nypost.com/2013/02/19/yanks-new-ticket-exchange-service-battles-stubhub/> [perma.cc/ZQ8K-HQC4].

¹³ See Schroeder, *supra* note 2, at 26. State scalping laws are becoming increasingly less strict as legislators recognize the economic benefits of allowing the booming secondary ticket market go unregulated. See Max Lewontin, *Massachusetts Lawmakers Eye Changing Law On Reselling Sports, Concert Tickets*, SUN CHRON. (Feb. 18, 2014), http://www.thesunchronicle.com/news/local_news/massachusetts-lawmakers-eye-changing-laws-on-reselling-sports-concert-tickets/article_7582c7b8-2b11-53a3-933f-134cddd296bd.html [perma.cc/2KTN-79M3].

¹⁴ See Schroeder, *supra* note 2, at 26; Myles Kaufman, *The Curious Case of US Ticket Resale Laws*, SEATGEEK (Sept. 10, 2014), <https://seatgeek.com/tba/articles/ticket-resale-laws/> [perma.cc/MVR4-K4Y3] (providing an overview of state anti-scalping law).

¹⁵ See Kaufman, *supra* note 14 (explaining how anti-scalping laws are outdated); Nocera, *supra* note 4 (describing a new era of online scalpers).

¹⁶ See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 554 (N.C. Ct. App. 2012) (holding that StubHub is immune from anti-scalping law violations); Jeffrey R. Doty, Note, *Inducement or Solicitation? Competing Interpretations of the "Underlying Illegality" Test in the Wake of Roommates.com*, 6 WASH. J. L. TECH. & ARTS 125, 126 (2010) (exploring the inconsistent application of the CDA); Ryan J.P. Dyer, Note, *The Communications Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption*, 37 SEATTLE U. L. REV. 837, 845–46 (2014) (describing the uncertainty about how immunity is applied); Eric Weslander, Comment, *Murky "Development": How the Ninth Circuit Exposed Ambiguity Within the Communications Decency Act, and Why Internet Publishers Should Worry*, 48 WASHBURN L.J. 267, 277–79 (2008) (explaining how immunity is applied under the CDA).

¹⁷ See *Hill*, 727 S.E.2d at 551–57; Doty, *supra* note 16, at 126; Weslander, *supra* note 16, at 177–79.

¹⁸ See, e.g., *Weinstein v. eBay, Inc.*, 819 F. Supp. 2d 219, 226 (S.D.N.Y. 2011) (rejecting a deceptive business practice claim); *Hill*, 727 S.E.2d at 551–57 (holding that StubHub is immune from anti-scalping law violations); *NPS, LLC v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 485 (Super. Ct. 2009) (holding StubHub secondarily liable for an unfair trade practices violation).

defending claims for vicarious liability under the Communications Decency Act (“CDA” or “the Act”), but there has been uncertainty as it pertains to StubHub.¹⁹

The CDA gives a website immunity from vicarious liability for the actions of its users, unless the website is responsible “in whole or in part, for the creation or development” of the information that is the focus of the lawsuit.²⁰ Courts have split on how to define “development.”²¹ In 2008, the Ninth Circuit Court of Appeals proposed a now popular definition, which denies a website immunity if it “materially contributes to the alleged unlawfulness” of the information.²² When this test has been applied to StubHub, however, courts have reached different conclusions as to StubHub’s liability for its users’ actions.²³

This Note argues that a new test is needed to eliminate the ambiguity in applying CDA immunity, in line with Congress’s test.²⁴ Part I discusses the CDA, the courts’ diverging interpretations of its key terms, and StubHub’s reliance on immunity.²⁵ Part II examines the conflicting opinions on StubHub’s liability and the threat to other peer-to-peer marketplaces.²⁶ Part III argues that a new test is needed and proposes a clearer test for CDA immunity.²⁷

I. SECTION 230 OF THE CDA AND ITS IMPORTANCE TO STUBHUB

To understand the effect of section 230 of the CDA on StubHub, this Part explains the Act’s purpose, statutory text, and the courts’ application of its key terms.²⁸ Section A of this Part discusses the undesirable outcome that results from applying offline notions of third-party liability to the Internet, prompting

¹⁹ See *Hill*, 727 S.E.2d at 554 (holding that StubHub is not liable vicariously for the anti-scalping law violations of its users); Doty, *supra* note 16 at 126 (noting that most courts have found for broad immunity for websites). *But see NPS*, 25 Mass.L.Rptr. at 485 (holding StubHub liable for unfair trade practices violations).

²⁰ Communications Decency Act, 47 U.S.C. § 230(c), (f) (2012); Doty, *supra* note 16, at 128.

²¹ See *Shiamilli v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1017 (N.Y. 2011) (stating that “no consensus has emerged” as to what “development” means); Doty, *supra* note 16 at 126–27, 130–31, 136 (explaining the diverging treatments of CDA immunity); Dyer, *supra* note 16, at 845–46.

²² See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1667–68 (9th Cir. 2008) (interpreting development to mean “materially contributing to its alleged unlawfulness,” such as contributing to the defamation).

²³ Compare *Hill*, 727 S.E.2d at 554 (holding StubHub immune from anti-scalping law violations), with *NPS*, 25 Mass.L.Rptr. at 485 (holding StubHub liable under the CDA for its “knowing participation” in unfair trade practices).

²⁴ See *infra* notes 239–256 and accompanying text.

²⁵ See *infra* notes 28–123 and accompanying text.

²⁶ See *infra* notes 124–170 and accompanying text.

²⁷ See *infra* notes 171–256 and accompanying text.

²⁸ See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–34 (4th Cir. 1997) (discussing Congress’s clear purpose in enacting the CDA); *Hill*, 727 S.E.2d at 551–57; Doty, *supra* note 16, at 127–28 (outlining the application of the CDA); Weslander, *supra* note 16, at 279.

the need for section 230 of the CDA.²⁹ Section A then explores the statutory text of the CDA and its litigated terms.³⁰ Section B introduces the *Roommates.com* “material contribution” test and summarizes the two different approaches courts have taken when applying this test, leading to ambiguity affecting StubHub.³¹ Section C explains StubHub’s business and reliance on CDA immunity.³²

A. A Fix Is Needed: A Threat to Online Actors Prompting the Birth of the CDA, and the Lingering Question of When a Website Is Deemed to Be an “Information Content Provider”

Prior to the CDA, liability for Internet service providers of third-party content depended on offline notions of publishers versus distributors.³³ Under this distinction, publishers, such as newspapers, were liable for any defamatory comments they published and over which they had control.³⁴ In contrast, distributors, such as bookstores, were immune from liability if they had no knowledge of the defamatory material they circulated.³⁵ Thus, if a website or Internet forum exhibited control or knew of alleged defamatory statements, it became liable for those statements as a publisher.³⁶

The offline analogy of publishers and distributors encouraged online companies to refrain from monitoring the content their users posted.³⁷ For ex-

²⁹ See *infra* notes 33–58 and accompanying text.

³⁰ See *infra* notes 33–58 and accompanying text.

³¹ See *infra* notes 59–109 and accompanying text. If a website “materially contributes” to a content’s unlawfulness, it will lose immunity under the CDA under the test announced in *Roommates.com*. *Roommates.com*, 521 F.3d at 1667–68; see Doty, *supra* note 16, at 129–30 (describing the court’s holding in *Roommates.com*); Dyer, *supra* note 16, at 845–46; Weslander, *supra* note 16, at 269 (detailing the court’s holding in *Roommates.com*). The point at which an interactive computer service also becomes an information content provider is the point at which the interactive community service loses immunity under the CDA. See *Roommates.com*, 521 F.3d at 1667–68; Doty, *supra* note 16, at 127–28; Weslander, *supra* note 16, at 279.

³² See *infra* notes 110–123 and accompanying text.

³³ See *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) (noting that publishers become distributors if they have knowledge or reason to know of defamatory content).

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.* at 139–41; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (holding Prodigy liable for the defamatory statements of its user because it exhibited control over the content).

³⁷ See *Shiamilli*, 952 N.E.2d at 1016 (explaining the downside that existed if a website monitored its users’ content); Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 211–13 (2002) (describing the outcome of the *Stratton Oakmont* case). In 1991, in *Cubby, Inc. v. CompuServe, Inc.*, the U.S. District Court for the Southern District of New York held that a host of an online journalism forum, CompuServe, was immune from liability because it acted as a distributor. See 776 F. Supp. at 141. The journalism forum hosted a specific publication called “Rumorville” over which it exercised no control. See *id.* at 137. CompuServe allowed users to contribute their own unedited content and did not have knowledge of the alleged defamatory statements posted by a user. See *id.* at 137–38. The district court noted that CompuServe lacked control over the content before being disseminated, and that imposing liability otherwise would result in

ample, in 1995, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Supreme Court held that a host of an online bulletin board was liable for the defamatory statements of its user because it exercised editorial control.³⁸ Prodigy hosted a network of two million subscribers communicating over various topic-specific forums.³⁹ Prodigy marketed itself as a family-friendly service due to its editorial control, which was accomplished through automatic screening software and board leaders overseeing the content.⁴⁰ The court held that these actions made Prodigy a publisher and thus liable for the content its users post.⁴¹ In this way, Prodigy's good faith efforts to monitor its bulletin boards resulted in liability.⁴²

In a response to the *Stratton Oakmont* decision, Congress passed section 230 of the Communications Decency Act.⁴³ Congress provided protection for websites in § 230 by unequivocally declaring them immune from civil liability for the content of a user as long as the website is not "responsible, in whole or in part, for the creation or development" of that information.⁴⁴ The Act further grants immunity to any website that attempts to monitor and filter the content of its users.⁴⁵ This includes "any action voluntarily taken in good faith to re-

exorbitant monitoring costs. *See id.* at 139–41 (noting that imposing liability would impede the free flow of information at a low cost, a major benefit of online communications).

³⁸ *Stratton Oakmont*, 1995 WL 323710, at *5.

³⁹ *See id.* at *1.

⁴⁰ *Id.* at *2.

⁴¹ *See id.* at *5.

⁴² *See id.*; *see also Shiamilli*, 952 N.E.2d at 1016; Joshua Dubnow, Note, *Ensuring Innovation as the Internet Matures: Competing Interpretations of the Intellectual Property Exception to the Communications Decency Act Immunity*, 9 NW. J. TECH. & INTELL. PROP. 297, 299 (2010) (noting that imposing liability upon good faith efforts to monitor has the potential to chill both laudatory business decisions and user speech on the Internet).

⁴³ *See* 47 U.S.C. § 230; *Zeran*, 129 F.3d at 331 (noting that Congress passed section 230 of the CDA to correct the disincentives to monitoring); *Shiamilli*, 952 N.E.2d at 1016 (explaining the perverse incentives that *Stratton Oakmont* created and Congress's response); Schruers, *supra* note 37, at 211–13. Congress made a bargain with interactive service providers to provide a broad immunity for third-party content in exchange for strict limits on speech related to child indecency content and pornography. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (noting the agreement between Congress and service providers); PATRICIA L. BELLIA ET AL., *CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE* 426 (Thomson Reuters, ed., 4th ed. 2010) (explaining the congressional objectives to provide broad third-party immunity while imposing strict limits on child indecency content); Mary Kay Finn et al., *Policies Underlying Congressional Approval of Criminal and Civil Immunity for Interactive Computer Service Providers Under Provisions of the Communications Decency Act of 1996—Should E-Buyers Beware?*, 31 U. TOL. L. REV. 347, 354–55 (2000) (describing the debate in Congress leading up to the enactment of the CDA).

⁴⁴ 47 U.S.C. § 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

⁴⁵ *Id.* CDA immunity is not confined to defamation claims; rather, the immunity also applies to all civil claims. *See, e.g., Schneider v. Amazon.com, Inc.*, 31 P.3d 38, 41–42 (Wash. Ct. App. 2001) (interpreting the applicability of the CDA to contract claims). The CDA also provides explicit exceptions as to criminal and intellectual property law. 47 U.S.C. § 230(e)(1)–(2).

strict access to or availability of” objectionable material.⁴⁶ Section 230 of the CDA does not encourage websites to monitor, but simply removes the legal downside of monitoring.⁴⁷

Section 230 of the CDA distinguishes between “interactive computer services” and “information content providers,” providing civil liability immunity to computer services, but not to information providers.⁴⁸ An interactive computer service means any host that enables computer access by multiple users to a computer server, like a website.⁴⁹ The term “interactive computer service” also incorporates the term “access software providers,” which includes any website that offers functions that “filter, screen, allow, or disallow content . . . pick, choose, analyze, or digest content; or transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.”⁵⁰ On the other hand, an “information content provider” is any person or entity that is “responsible, in whole or in part, for the creation or development of information.”⁵¹

The focus of litigation involving section 230 of the CDA is when an interactive computer service is simultaneously an information content provider, thus causing it to lose the immunity that the CDA provides.⁵² Although it is clear when a website engages in the “creation” of information, defining what constitutes a website’s “development” of information has been far more difficult.⁵³

Congress explained its findings and the policy reasons behind the CDA in the statutory text.⁵⁴ Congress intended to preserve the Internet as a robust medium for communication and to remove the disincentives for hosts to self-

⁴⁶ 47 U.S.C. § 230(c)(2)(B).

⁴⁷ See *id.* § 230(b)(4), (c)(2)(B); *Roommates.com*, 521 F.3d at 1163 (“In other words, Congress sought to immunize the *removal* of user-generated content, not the *creation* of content . . .”); *Zeran*, 129 F.3d at 331 (explaining that in response to *Stratton Oakmont*, the CDA removes the disincentives to monitoring).

⁴⁸ 47 U.S.C. § 230(c), (f)(2)–(3).

⁴⁹ *Id.* § 230(f)(2).

⁵⁰ *Id.* § 230(f)(4).

⁵¹ *Id.* § 230(f)(3). Litigants argue that although a website is an interactive computer service, it is also an information content provider when it contributes to the information in part, thus losing CDA immunity. See *Roommates.com*, 521 F.3d at 1165–66.

⁵² See *Roommates.com*, 521 F.3d at 1165–66; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (explaining the relationship between interactive computer services and information content providers); Doty, *supra* note 16, at 128 (describing the application of CDA immunity); Weslander, *supra* note 16, at 279.

⁵³ See *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011) (“While an overt act of creation of content is easy to identify, determining what makes a party responsible for the ‘development’ of content under § 230(f)(3) is unclear.”); *Shiamilli*, 952 N.E.2d at 1017 (stating “no consensus has emerged concerning what conduct constitutes ‘development’”).

⁵⁴ 47 U.S.C. § 230(a)–(b). Specifically, the Act has two goals: “to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.” *Carafano*, 339 F.3d at 1122. The CDA has also been interpreted to specially overrule *Stratton Oakmont*. *Zeran*, 129 F.3d at 331; see *Stratton Oakmont*, 1995 WL 323710, at *5.

regulate.⁵⁵ Congress chose to promote the development of the Internet by removing the potential for a host to be liable for the content of its users.⁵⁶ At the motion to dismiss stage, websites can seek CDA immunity from civil liability, preventing expensive discovery costs.⁵⁷ Originally applied predominantly to defamation cases, CDA immunity has been interpreted to apply to any civil suit claiming vicarious liability for websites.⁵⁸

B. Ambiguity from Adjudication: The Roommates.com Definition of “Development of Information” and the Resulting Uncertainty as to When a Website Is Also an “Information Content Provider”

This section discusses the seminal case law that resulted from the enactment of section 230 of the CDA.⁵⁹ It first explains the initial response of courts to provide broad immunity to websites, followed by a major holding that limits this immunity.⁶⁰ This section then explains two approaches that courts have taken in determining when an interactive computer service loses immunity.⁶¹

1. Initial Attempts at Interpreting “Development of Information” and the *Roommates.com* “Material Contribution” Test

Recognizing Congress’s intent and explicit policy towards website immunity, most courts initially interpreted “information content provider” very narrowly, making it hard to find a website contributorily liable for its users’ content.⁶² Some courts held that websites profiting from illegal content could

⁵⁵ 47 U.S.C. § 230(a)–(b); *Zeran*, 129 F.3d at 330–31.

⁵⁶ See 47 U.S.C. § 230(c); *Carafano*, 339 F.3d 1122–23; *Zeran*, 129 F.3d at 330.

⁵⁷ Andrew Bluebond, *When the Customer Is Wrong: Defamation, Interactive Websites, and Immunity*, 33 REV. LITIG. 679, 689–90 (2014) (explaining that CDA immunity provides grounds for a motion to dismiss, a time at which there has been little opportunity for pertinent facts to be discovered).

⁵⁸ See *Schneider*, 31 P.3d at 41–42 (holding that the CDA extends beyond defamation to any civil claim besides the exceptions enumerated in the statutory text); Zac Locke, Comment, *Asking for It: A Grokster-Based Approach to Internet Sites That Distribute Offensive Content*, 18 SETON HALL J. SPORTS & ENT. L. 151, 159 (2008) (noting the expansion of CDA applicability beyond defamation law). The CDA, however, does not provide immunity from criminal and intellectual property claims. 47 U.S.C. § 230(e)(1)–(2).

⁵⁹ See *infra* notes 59–109 and accompanying text.

⁶⁰ See *infra* notes 62–83 and accompanying text.

⁶¹ See *infra* notes 84–109 and accompanying text.

⁶² See *Carafano*, 339 F.3d at 1123 (explaining that CDA immunity has been applied broadly). In 1997, in *Zeran v. American Online, Inc.*, the U.S. Court of Appeals for the Fourth Circuit held that America Online (“AOL”) was not the information content provider of alleged defamatory comments on an AOL bulletin board and thus immune from liability for the comments. 129 F.3d at 332–34. An unidentified user posted insensitive t-shirts for sale relating to the Oklahoma City bombing, with *Zeran*’s information as the point of contact as a prank. See *id.* at 329. *Zeran* contacted AOL, who agreed to take the post down but would not post a retraction. See *id.* After AOL took down the information, it was immediately reposted, snowballing into harassment, death threats, and public humiliation for

still receive CDA immunity.⁶³ Courts also rejected assigning liability even if a website received notice of alleged defamation because it would impose monitoring costs and burden websites, contrary to Congress's intent.⁶⁴ These courts took a hardline approach in protecting CDA immunity, noting that Congress chose to immunize an "active, even aggressive" role for interactive computer services.⁶⁵

In contrast to these broad views of CDA immunity, other courts applied a strict textual interpretation of the language "responsible . . . in part, for the . . . development" of the information and thereby limited CDA immunity.⁶⁶ In 2008, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the U.S. Court of Appeals for the Ninth Circuit held that Roommates.com was not immune from liability under the CDA.⁶⁷ Roommates.com connected people looking for roommates with those seeking vacancies.⁶⁸ Users were required to fill out a questionnaire asking their preferences as to a roommate's sex, sexual orientation, and renting to those with children.⁶⁹ Roommates.com then displayed these preferences and comments in the form of a user's profile page and provided a search function based on these preferences.⁷⁰ Plaintiffs sued Roommates.com for violating the Fair Housing Act

Zeran. *See id.* The Fourth Circuit reasoned that by removing content, AOL performed a traditional publisher function, now protected under the CDA. *See id.* at 332–34

⁶³ *Drudge*, 992 F. Supp. at 51–52; *Hill*, 727 S.E.2d at 557. Courts also held that a website's knowledge of illegal content did not foreclose CDA immunity. *See Drudge*, 992 F. Supp. at 51–52; *Hill*, 727 S.E.2d at 557.

⁶⁴ *See Zeran*, 129 F.3d at 333 (noting that if an interactive computer service provider is dealt with a multitude of take-down notices, it will simply remove the content in question without examining the legality of the content because there is no liability for removing content, and in doing so will avoid monitoring costs). Requiring websites to monitor its users' content stifles the free flow of information. *See Zeran*, 129 F.3d at 333.

⁶⁵ *Drudge*, 992 F. Supp. at 51–52 ("If it were writing on a clean slate, this Court would agree with plaintiffs. . . . But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others."). In 1998, in *Blumenthal v. Drudge*, the U.S. District Court for the District of Columbia held AOL immune from the defamatory comments written by Matthew Drudge on a popular gossip website called the "Drudge Report." *Id.* at 50–52. Drudge licensed the "Drudge Report" to AOL for \$3000 per month. *See id.* at 51. Under the agreement, Drudge e-mailed AOL his articles, which AOL subsequently posted. *See id.* at 47. AOL reserved the right to remove and request changes to certain content that it deemed necessary. *See id.* AOL also advertised the availability of the Drudge Report as a draw for customers to sign up with AOL. *See id.* at 51.

⁶⁶ 47 U.S.C. § 230(f)(3); *Roommates.com*, 521 F.3d at 1167–69 (interpreting "development" to mean "materially contributing" to the alleged unlawfulness of the information).

⁶⁷ *See Roommates.com*, 521 F.3d at 1168–69, 75; Doty, *supra* note 16, at 129–31. The point at which an interactive computer service also becomes an information content provider is the point at which the service loses immunity under the CDA. *See Doty*, *supra* note 16, at 127–28 (explaining the applicability of the CDA); Weslander *supra* note 16, at 279.

⁶⁸ *Roommates.com*, 521 F.3d at 1161.

⁶⁹ *Id.*

⁷⁰ *Id.* at 1161–62, 67.

(“FHA”), which makes it illegal to rent housing or refuse to rent housing on the basis of race, gender, and familial status.⁷¹ The Ninth Circuit held that Roommates.com could be liable for its display of user preferences and their use of a search function based on those preferences because these actions constituted “development,” in part, of information.⁷²

The Ninth Circuit announced a test for determining when an interactive computer service is also an information content provider, interpreting “development” of information to mean “materially contributing to its unlawfulness.”⁷³ In adopting this test, the court looked towards Wikipedia for the definition of “web development,” which included “gathering, organizing and editing information” in its definition.⁷⁴

The dissent criticized the majority for formulating a test related to the underlying claim of illegality because the issue of illegality is decided only after a website is deemed to be an information content provider.⁷⁵ The dissent argued that immunity should be determined by the degree to which the website contributed to the information, regardless of whether the information itself is illegal.⁷⁶

Moreover, the dissent expressed frustration with the majority’s inconsistent and ambiguous language in its test for determining whether a website “materially contributed to the alleged unlawfulness” of the content.⁷⁷ The dis-

⁷¹ *Id.* at 1162. The Fair Housing Act prohibits discriminatory or preferential rentals, or sales based on protected categories. 42 U.S.C. § 3604 (2012).

⁷² *Roommates.com*, 521 F.3d at 1166–67, 1175. The Ninth Circuit also held that Roommates.com could be liable for the questions it poses because it is providing that information. *Id.* at 1164. Roommates.com also provided a comments box for users to write additional information. *Id.* at 1161. The Ninth Circuit held that Roommates.com is immune from liability for the additional comments section because it merely provided an open space for users. *Id.* at 1173–74. At this stage the Court only discarded CDA immunity, remanding for further consideration as to whether the content violated the FHA. *Id.* at 1175.

⁷³ *Id.* at 1167–68 (interpreting development to mean “materially contributing to its alleged unlawfulness,” such as contributing to the defamation); *see* Doty, *supra* note 16, at 129–31 (explaining the requirement test as a “solicitation” standard and the encouragement test as an “inducement” standard); Dyer *supra* note 16, at 845–46.

⁷⁴ *See Roommates.com*, 521 F.3d at 1168–69. The functions of gathering, organizing, and editing information are similar to the traditional publisher duties protected by the CDA. *See* 47 U.S.C. § 230(f)(4); *Roommates.com*, 521 F.3d at 1180 (McKeown, J., dissenting) (opining that the majority’s definition of “web development” includes terms explicitly protected under the statute); *see also Zeran*, 129 F.3d at 330 (stating that claims that attempt to hold websites liable for traditional publisher functions are meritless).

⁷⁵ *See Roommates.com*, 521 F.3d at 1182–83 (McKeown, J., dissenting) (noting that there is no reference to unlawfulness in the text of the CDA and thus the majority is conflating an issue of immunity with an issue of substantive liability).

⁷⁶ *See id.* (noting that websites could be information content providers of harmless information, and the determination of illegality is made after the CDA analysis).

⁷⁷ *See Roommates.com*, 521 F.3d at 1175 (stating that a website loses immunity for encouraging or requiring illegal content). In Judge McKeown’s dissent he criticizes the majority for leaving websites “wondering where immunity ends and liability begins.” *Id.* at 1176–77 (McKeown, J., dissent-)

sent observed how although the majority seemed to emphasize that Roommates.com required users to answer unlawful questions as a condition of service, throughout the opinion, the majority substituted “requirement” for words like “collaborate,” “force,” “design,” “induce,” “encourage,” “elicit” and “urge.”⁷⁸ To the dissent, the majority was ironically at its most ambiguous when it attempted to be the most clear, for the majority opinion stated: “the message to website operators is clear: if you don’t *encourage* illegal content, or design your website to *require users* to input illegal content, you will be immune.”⁷⁹

The Ninth Circuit’s expansive definition of “information content provider” was novel, for a website’s design could now make a company responsible in part for the development of its users’ content.⁸⁰ Most courts have accepted the *Roommates.com* “material contribution” test for determining when a website “develops” information “in part.”⁸¹ Some have criticized the decision, however, arguing that it conflicts with Congress’s broad grant of immunity.⁸² Moreover, when determining CDA immunity under this framework, it is unclear whether encouragement or requirement is the standard.⁸³

2. Different Standards for Determining Immunity Under Section 230 of the CDA: The Encouragement Test and the Requirement Test

Under the umbrella of the “materially contributing to its unlawfulness” test from *Roommates.com*, courts have adopted two different approaches to

ing). The majority stated that by “requiring” answers to its questions it loses CDA immunity as to that information. *See id.* at 1165 (majority opinion). The majority then uses words like “urge” and “encourage” to describe when the website loses immunity. *See id.* at 1173–74 (finding *Roommates.com* immune for the open-ended writing space of its users); Doty, *supra* note 16, at 130–31 (explaining the vagueness of the majority’s holding in *Roommates.com*); Weslander, *supra* note 16, at 269.

⁷⁸ *See Roommates.com*, 521 F.3d at 1167, 1172–73; Doty, *supra* note 16, at 130–31; Weslander, *supra* note 16, at 269. Additionally, the majority emphasizes that *Roommates.com* “makes aggressive use” of the content in conducting its business. *See Roommates.com*, 521 F.3d at 1172.

⁷⁹ *See Roommates.com*, 521 F.3d at 1175 (emphasis added). In Judge McKeown’s dissenting opinion he emphasized that websites are “left scratching their heads and wondering where immunity ends and liability begins.” *See id.* at 1176 (McKeown, J., dissenting).

⁸⁰ *See* Doty, *supra* note 16, at 129–31 (explaining the *Roommates.com* test and various approaches courts have taken since the decision); Dyer *supra* note 16, at 845–46.

⁸¹ *See* Jones v. Dirty World Entm’t Recordings LLC, 755 F.3d 398, 412 (6th Cir. 2014) (noting the *Roommates.com* test has been widely adopted); Doty, *supra* note 16, at 126–31 (explaining the different routes courts have gone in interpreting the *Roommates.com* test); Dyer *supra* note 16, at 845–46.

⁸² Doty, *supra* note 16, at 126–27, 130–31, 136 (“Some language suggests that a Web site loses immunity by simply encouraging an illegal aspect of its user-generated content.” (footnote omitted)); Dyer *supra* note 16, at 845–46. Apart from the outliers, a large majority of courts applying the CDA have granted immunity. *Hill*, 727 S.E.2d at 558 (noting only a “handful” of three-hundred reported decisions in federal and state courts have not granted immunity).

⁸³ *See* 521 F.3d at 1176–77 (McKeown, J., dissenting) (characterizing the majority’s opinion as a slippery slope); Dyer, *supra* note 16, at 844.

determining when a website materially contributes to the information in question.⁸⁴ Some courts have held that if a website encourages users to produce illegal content, then it materially contributes to the illegal act, whereas other courts have applied a heightened standard that a website must require the information at issue in order to be held liable for its illegality.⁸⁵

Under the encouragement test, a website that encourages or induces illegal content, rather than employs “neutral tools,” is considered a developer, in part, of that content.⁸⁶ Thus, if the website specifically encourages allegedly unlawful content, it is deemed an information content provider and loses immunity under § 230.⁸⁷ In 2009, in *FTC v. Accusearch Inc.*, the U.S. Court of Appeals for the Tenth Circuit adopted this interpretation of the material contribution test.⁸⁸ There, the FTC brought an unfair trade practice claim against Accusearch, Inc. for selling confidential phone records.⁸⁹ Accusearch paid researchers to collect personal phone record information and advertised access to these confidential records.⁹⁰ The Tenth Circuit held that because Accusearch specifically encouraged requests for protected information and paid researchers to obtain the information, it materially contributed to the unlawfulness of that information and was therefore liable for it.⁹¹

Under the encouragement test, a website will be responsible for the development of information if it has an “active role” and instructs users to post certain content.⁹² In 2004, in *MCW, Inc. v. Badbusinessbureau.com, LLC*, the

⁸⁴ See *Shiamilli*, 952 N.E.2d at 1017 (stating “no consensus has emerged concerning what conduct constitutes ‘development’”); Doty, *supra* note 16, at 126–27, 130–31, 136; Dyer, *supra* note 16, at 845–46.

⁸⁵ See Doty, *supra* note 16, at 126–27, 130–31, 136 (explaining the requirement test as a “solicitation” standard and the encouragement test as an “inducement” standard); Dyer, *supra* note 16, at 845–46. The holding in *Roommates.com* leaves open the possibility for two different interpretations. See 521 F.3d at 1175 (“The message to website operators is clear: if you don’t encourage illegal content, or design your website to require users to input illegal content, you will be immune.”); Doty, *supra* note 16, at 126–27, 130–31, 136 (noting that the *Roommates.com* majority used different terms and descriptors in describing the conduct); Dyer, *supra* note 16, at 845–46.

⁸⁶ See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1198–99 (10th Cir. 2009) (explaining the use of neutral tools); *Massachusetts ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1051 (E.D. Mo. 2011) (quoting *Accusearch*, 570 F.3d at 1199) (explaining that a website is liable for its users’ content when it specifically encourages the content); *MCW, Inc. v. Badbusinessbureau.com, LLC*, No. 3:02-CV-2727-G, 2004 WL 833595, at *8–10 (N.D. Tex. Apr. 19, 2004) (interpreting development to mean “active role”); Doty, *supra* note 16, at 126, 130–31, 136. Tools are neutral “so long as users ultimately decide what content to post, such that the tool merely provides ‘a framework that could be utilized for proper or improper purposes.’” *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197–98 (N.D. Cal. 2009) (quoting *Roommates.com*, 521 F.3d at 1172).

⁸⁷ *Accusearch*, 570 F.3d at 1199.

⁸⁸ *Id.*

⁸⁹ *Id.* at 1190.

⁹⁰ *Id.* at 1191–92, 1201.

⁹¹ *Id.* at 1200–01 (noting that Accusearch went further when it “affirmatively solicited” the content).

⁹² *MCW*, 2004 WL 833595, at *8.

U.S. District Court for the Northern District of Texas held that Badbusinesssbureau.com was liable for the allegedly defamatory statements of its users.⁹³ Badbusinesssbureau.com hosted a consumer complaint forum that enabled customers to get revenge for unsatisfactory experiences through public web-posts and class action lawsuits.⁹⁴ Additionally, an operator of Badbusinesssbureau.com emailed users, directing them to gather photos and collect detailed information.⁹⁵ This encouragement was enough for the district court to hold that Badbusinesssbureau.com was a developer of the content and thus not immune under the CDA.⁹⁶

Other courts have held that encouragement is not enough to find that a website operator materially contributed to the alleged unlawfulness of information and is thus responsible for the development of it.⁹⁷ These courts narrowly interpret the *Roommates.com* “materially contributing to its unlawfulness” test, emphasizing that the requirement of the questionnaire as a condition of service was essential to that holding.⁹⁸ Compared to the encouragement test, the requirement test is more likely to lead to immunity under section 230 of the CDA.⁹⁹ These courts rely heavily on Congress’s explicit policy choice in section 230 of the CDA to provide robust immunity to websites, regardless of ethical considerations.¹⁰⁰

Under this test, a website will lose its CDA immunity and be responsible for allegedly illegal content only if it requires users to post that content.¹⁰¹ In

⁹³ *Id.* at *10. Although decided before the *Roommates.com* case, the court’s interpretation in *Badbusinesssbureau.com* is an example of the encouragement test, focusing on the website’s influence of third-party content. *See id.* at *8; Doty, *supra* note 16, at 141 (characterizing this test as an “inducement” standard); Dyer, *supra* note 16, at 845–46.

⁹⁴ *MCW*, 2004 WL 833595, at *1–2.

⁹⁵ *Id.* at *10.

⁹⁶ *Id.*

⁹⁷ *See Dirty World*, 755 F.3d at 414–16 (discarding the encouragement test); *Carafano*, 339 F.3d at 1123 (holding that a website is immune so long as the third party willingly provides the content); *Ascentive*, 842 F. Supp. 2d at 476 (holding that encouragement is not enough to make a website liable as an information content provider); *Global Royalties, Ltd. v. Xcentric Ventures, LLC*, 544 F. Supp. 2d 929, 931–33 (D. Ariz. 2008); *Hill*, 727 S.E.2d at 554 (holding that a website must control or ensure the creation of the content to lose immunity).

⁹⁸ *See Dirty World*, 755 F.3d at 416 (finding for immunity for the website); *Roommates.com*, 521 F.3d at 1167–69 (interpreting “development” to mean “materially contributing” to the alleged unlawfulness of the information); *Carafano*, 339 F.3d at 1124 (holding in favor of CDA immunity); *Godard*, 640 F. Supp. 2d at 1998 (finding no “control” or “collaboration” on behalf of Google).

⁹⁹ *See Dirty World*, 755 F.3d at 414–15 (explaining that under an encouragement test, websites would lose immunity easily, conflicting with the CDA).

¹⁰⁰ *See id.*; *Carafano*, 339 F.3d at 1123 (explaining Congress’s intent in enacting the CDA); *Ascentive*, 842 F. Supp. 2d at 476 (quoting *Global Royalties*, 544 F. Supp. 2d at 933).

¹⁰¹ *See Dirty World*, 755 F.3d at 414–17. Imposing liability only when a website requires content is based on a narrow interpretation of the holding in *Roommates.com*, focusing on the requirement aspect as key to the Ninth Circuit’s holding. *See id.* at 416. Other courts discard immunity only when the website changes the nature of the content. *See Ascentive*, 842 F. Supp. 2d at 476 (citing *Global Royalties*, 544 F. Supp. 2d at 933). In such cases, the court will look to the “totality of the circum-

2014, in *Jones v. Dirty World Entertainment Recordings LLC*, the U.S. Court of Appeals for the Sixth Circuit held that encouragement is not enough to make a website an information content provider.¹⁰² TheDirty.Com enabled users to post gossip-related content by asking them to provide the “who, what, when, where, why.”¹⁰³ The website operator then added one line of his own commentary to supplement the user’s post.¹⁰⁴ In holding TheDirty.Com immune from a defamation suit, the Sixth Circuit noted that the tools provided were neutral and did not require users to publish illegal content.¹⁰⁵ Further, the Sixth Circuit held that even the website’s additional commentary did not materially contribute to the alleged unlawfulness because it was published after the user’s original defamatory statements.¹⁰⁶

Opting for broad CDA immunity is met by critics, who argue the CDA goes too far in protecting those who harbor others violating the law.¹⁰⁷ They

stances.” See *id.* at 474. Another court has said the website must “control” or “ensure the creation of” unlawful content. See *Hill*, 727 S.E.2d at 554.

¹⁰² See *Dirty World*, 755 F.3d at 414–17.

¹⁰³ *Id.* at 402–03.

¹⁰⁴ *Id.* at 403.

¹⁰⁵ *Id.* at 415–17.

¹⁰⁶ *Id.* Despite this court’s holding, the CDA is clear that websites are information content providers with respect to the content it directly writes, like the questions in *Roommates.com*. See 47 U.S.C. § 230 (a)–(c); *Roommates.com*, 521 F.3d at 1164. But the fact that the plaintiff did not allege the website’s own comments to be defamatory may have been the deciding factor. See *Dirty World*, 755 F.3d at 416. Under the requirement test, if a website does not require illegal content, it will be immune from third-party liability as long as the user ultimately provides the content in question. See *Roommates.com*, 521 F.3d at 1171, 1175 (clarifying the holding in *Carafano*); *Carafano*, 339 F.3d at 1124 (holding the website immune “so long as the third party willingly provides the essential published content”). Many courts have explicitly followed the *Carafano* court’s test. See, e.g., *Ascentive*, 842 F. Supp. 2d at 474; *Goddard*, 640 F. Supp. 2d at 1198; *Global Royalties*, 544 F. Supp. 2d at 933. In 2003, in *Carafano v. Metrospalsh.com, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that an online dating website’s questionnaire and display of profile did not make it an information content provider. 339 F.3d at 1124–25. The plaintiff attempted to hold the dating website liable for another user’s fake profile of the plaintiff, a famous actress. *Id.* at 1121–22. Unlike in *Roommates.com*, the dating website’s questionnaire did not require illegal content; rather, the user ultimately provided the illegal content. Compare *Roommates.com*, 521 F.3d at 1169 (requiring content that violated the Fair Housing Act), with *Carafano*, 339 F.3d 1123–26 (requiring general information, to which the user entered defamatory statements). See *Goddard*, 640 F. Supp. 2d at 1197–98 (explaining that tools are neutral “so long as users ultimately decide what content to post, such that the tool merely provides ‘a framework that could be utilized for proper or improper purposes’” (quoting *Roommates.com*, 521 F.3d at 1172)). Although both *Roommates.com* and *Carafano* dealt with websites that contained questionnaires and displays of preferences, the Ninth Circuit in *Carafano* ruled for a broad grant of immunity. See *Roommates.com*, 521 F.3d at 1171–72 (clarifying the holding in *Carafano*); *Carafano*, 339 F.3d at 1125.

¹⁰⁷ See Mary Anne Franks, *The Lawless Internet Myths and Misconceptions About CDA Section 230*, HUFFINGTON POST (Dec. 18, 2013), http://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html [perma.cc/W82P-TQ86] (arguing the CDA should not be a protection for online abuse); Brett Logiurato, *This Is the One Law Airbnb’s Opponents Desperately Want to Change*, BUS. INSIDER (Apr. 22, 2014), <http://www.businessinsider.com/airbnb-illegal-law-case-2014-4> [perma.cc/7X34-BEBX] (noting how Airbnb relies on CDA immunity to run its e-

propose that stricter limitations on retaining CDA immunity will provide fairer legal remedies for victims of cyber harassment and revenge pornography, among other civil violations.¹⁰⁸ Some alternate tests include accepting an encouragement or inducement standard for determining contributory liability, or demanding the content to be removed upon request.¹⁰⁹

C. Modern Marketplaces: StubHub and Its Reliance on the CDA

Capturing the inefficiency of supply and demand pricing on the primary ticket market, StubHub allows consumers to buy or resell tickets on the secondary market.¹¹⁰ For a sold-out event, a customer can go to the secondary market and pay a premium price over face value.¹¹¹ Conversely, for an event in which the primary vendor's price exceeds demand, a lower price can be found on the secondary market.¹¹²

StubHub provides an easy interface for sellers to list tickets to an event.¹¹³ The service allows sellers to upload tickets and input detailed information regarding the quantity, section, row, seat number, and various other features or

commerce service). The concerns are primarily ones of privacy and harassment, but extend to any civil claim. See Bluebond, *supra* note 57, at 689–90 (arguing for a “specific encouragement” standard for CDA immunity); Locke, *supra* note 58, at 159 (arguing for a *Grokster* “inducement” approach, similar to the court in *NPS*); Andrew Bolson, *The Internet Has Grown Up, Why Hasn't the Law? Reexamining Section 230 of the Communications Decency Act*, PRIVACY ADVISOR (Aug. 27, 2013), <https://privacyassociation.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the/> [perma.cc/N6AV-HHJA] (arguing that the CDA is a threat to online privacy); Joe Mullin, *Revenge Porn Is “Just Entertainment,” Says Owner of IsAnybodyDown*, ARS TECHNICA (Feb. 4, 2013, 9:30 PM), <http://arstechnica.com/tech-policy/2013/02/revenge-porn-is-just-entertainment-says-owner-of-isanybodydown/> [perma.cc/A86G-AVVU] (noting the over-protective tendencies of the CDA).

¹⁰⁸ See Bluebond, *supra* note 57, at 689–90; Locke, *supra* note 58, at 159 (calling for a stricter standard when applying CDA immunity); Logiurato, *supra* note 107 (detailing New York's struggle to regulate Airbnb because of the protection that the CDA provides); Bolson, *supra* note 107 (arguing that changes are needed to the CDA because the Internet has grown in ways Congress did not originally foresee).

¹⁰⁹ Bluebond, *supra* note 57, at 689–90 (arguing for a “specific encouragement” standard for CDA immunity); Locke *supra* note 58, at 159 (arguing for an inducement standard); Bolson, *supra* note 107 (arguing for a notice and take-down process).

¹¹⁰ See Rovell, *supra* note 6; Cassidy, *supra* note 6 (explaining how StubHub works).

¹¹¹ See *NPS*, 25 Mass. L. Rptr. at 479 (discussing how the majority of New England Patriots tickets sold on StubHub are in excess of their face value); Schroeder, *supra* note 2, at 26.

¹¹² See Rubin, *supra* note 12 (finding StubHub prices to be cheaper on average than tickets on the primary market for New York Mets tickets); Sloane, *supra* note 12 (noting the availability of Yankees tickets on StubHub below face value); Brad Tuttle, *Does Anybody Pay Face Value for Sports Tickets Nowadays?*, TIME (June 12, 2012), <http://business.time.com/2012/06/12/does-anybody-pay-face-value-for-sports-tickets-nowadays/> [perma.cc/PD73-398U].

¹¹³ See *Seller FAQ*, STUBHUB, <https://sell.stubhub.com/sfr/sell/faqView> [https://perma.cc/Z5WM-PXH8]; see also Cassidy, *supra* note 6.

disclosures.¹¹⁴ StubHub's seller interface provides data for how much other tickets are selling for in a section, including the lowest, median, and highest prices.¹¹⁵ StubHub also conducts a "LargeSellers" program where it offers fee discounts for high-volume sellers.¹¹⁶ The LargeSellers program also gives the high-volume sellers an exclusive opportunity to buy underpriced tickets, and a chance to resell them at a higher price.¹¹⁷

In its user agreement, StubHub makes it clear that it does not own or control user data.¹¹⁸ The agreement places the responsibility of listing tickets on the seller and requires any listing to be in accordance with the law.¹¹⁹ According to the agreement, the user owns any content submitted, granting StubHub the right to use it freely.¹²⁰

Although originally applied to defamation suits, CDA immunity applies to all civil liability.¹²¹ Faced with anti-scalping law claims and business torts, StubHub and other peer-to-peer online marketplaces depend on § 230 immunity to shield their business models from liability.¹²² In the absence of § 230,

¹¹⁴ See *Seller FAQ*, *supra* note 113; see also Cassidy, *supra* note 6. The features or disclosures allow the user to indicate if the seat is an aisle, handicap accessible, or with an obstructed view. See Cassidy, *supra* note 6.

¹¹⁵ See Cassidy, *supra* note 6. These statistics will often produce prices that are above face value. See *NPS*, 25 Mass. L. Rptr. at 480; Schroeder, *supra* note 2, at 26; Rovell, *supra* note 6 (discussing dynamic pricing).

¹¹⁶ See *NPS*, 25 Mass. L. Rptr. at 480, 485. StubHub also provides an online payment method, and discloses the fees it retains. See *id.* at 480; Cassidy, *supra* note 6.

¹¹⁷ See *NPS*, 25 Mass. L. Rptr. at 480, 485.

¹¹⁸ See *id.* at 484 (discrediting StubHub user agreement); see also Hill, 727 S.E.2d at 561 (upholding StubHub user agreement). See generally *User Agreement*, STUBHUB (last updated June 1, 2015), http://www.stubhub.com/user_agreement/ [<https://perma.cc/D2GF-MC2G>]. StubHub opens its user agreement by stating "because sellers set ticket prices, they may be higher than face value." *User Agreement*, *supra*.

¹¹⁹ See *User Agreement*, *supra* note 118.

¹²⁰ See *id.* In 2013, StubHub added an arbitration clause, which users can opt-out from by giving notice within thirty days of their initial use. Chris Morran, *Now You Can No Longer File Class-Action Suits Against StubHub; Here's How to Opt Out*, CONSUMERIST (Feb. 22, 2013), <http://consumerist.com/2013/02/22/now-you-can-no-longer-file-class-action-suits-against-stubhub-heres-how-to-opt-out/> [perma.cc/BGS3-ANHJ]. See generally *User Agreement*, *supra* note 118.

¹²¹ See 47 U.S.C. § 230(c)(2), (e)(3) (stating that CDA immunity applies to all civil liability and is not limited to tort claims); *Schneider*, 31 P.3d at 41–42 (holding that the CDA extends beyond defamation to any civil claim besides the exceptions enumerated in the statutory text).

¹²² See *NPS*, 25 Mass. L. Rptr. at 485 (defending a claim for tortious interference with advantageous relations based on liability for a seller's violation of anti-scalping law while using the website); see also Hill, 727 S.E.2d at 553 (defending a claim for unfair or deceptive trade practices based on liability for a seller's violation of anti-scalping law while using the website). Although the practice of ticket scalping, especially online, is trending largely towards deregulation, there are still state laws in place that prohibit the resale of tickets above face value. See Schroeder, *supra* note 2, at 26. Massachusetts legislators are proposing bills to repeal their anti-scalping laws. See Lewontin, *supra* note 13 (noting that repealing current anti-scalping law would harmonize the law with the current state of the secondary ticket market).

marketplaces would likely face endless claims attempting to hold them liable for their users' peer-to-peer communications.¹²³

II. SOLD OUT: CONFLICTING INTERPRETATIONS OF CDA IMMUNITY THREATEN THE INNOVATION OF STUBHUB AND PEER-TO-PEER MARKETPLACES

Diverging court opinions on whether the CDA grants StubHub immunity creates uncertainty as to the legality of StubHub's practices and potentially chills innovation.¹²⁴ Section A of this Part discusses the diverging opinions in the 2012 Court of Appeals of North Carolina decision in *Hill v. StubHub, Inc.*, and in the 2009 Superior Court of Massachusetts decision in *NPS v. StubHub, Inc.*¹²⁵ Section B of this Part analyzes the conflicting decisions, focusing on knowledge and willful blindness.¹²⁶ Section C of this Part discusses how this uncertainty affects the business practices of StubHub and other peer-to-peer marketplaces going forward.¹²⁷

A. The StubHub Split: Conflicting Applications of the CDA Cause Uncertainty About Immunity for StubHub

StubHub's first attempt at claiming immunity under the CDA was exceptionally disastrous.¹²⁸ In 2009, in *NPS v. StubHub, Inc.*, a Superior Court of Massachusetts held that StubHub was not immune under the CDA for a tortious interference claim.¹²⁹ The New England Patriots sought an injunction against StubHub enjoining resale of Patriots tickets on StubHub's website.¹³⁰ The Patriots alleged that StubHub interfered with their agreement with season ticket holders, which included a non-transferability clause.¹³¹ To show that StubHub interfered with its agreement by "improper means," a necessary ele-

¹²³ See *Roommates.com*, 521 F.3d at 1171–72 (noting that, in close cases, websites should be granted immunity in line with Congress's intent, or else websites will face "death by ten thousand duck-bites"); *Hill*, 727 S.E.2d at 553 (defending a claim for unfair or deceptive trade practices based on liability for a seller's violation of anti-scalping law while using the website).

¹²⁴ See *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1176 (9th Cir. 2008) (McKeown, J., dissenting) (noting that websites are "left scratching their heads and wondering where immunity ends and liability begins"); Eric Goldman, *Eric's Blog*, 16 No. 5 CYBERSPACE LAW, 20 (2011) (explaining that all marketplaces attempt to drive the market to equilibrium prices, and if this is viewed as "encouraging" content, all marketplaces are at risk); Doty, *supra* note 16, at 126 (describing StubHub's lack of immunity under the CDA).

¹²⁵ See *infra* notes 128–144 and accompanying text.

¹²⁶ See *infra* notes 145–159 and accompanying text.

¹²⁷ See *infra* notes 160–170 and accompanying text.

¹²⁸ See *NPS, LLC v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 485–86 (Super. Ct. 2009) (holding StubHub liable under the CDA for its "knowing participation" in its users' ticket scalping).

¹²⁹ *Id.*

¹³⁰ *Id.* at 478–79.

¹³¹ *Id.* at 478–80.

ment of a tortious interference claim, the Patriots claimed StubHub contributed to their users' violation of anti-scalping law.¹³²

Adopting a variation of the encouragement test, the Superior Court of Massachusetts in *NPS* held that StubHub materially contributed to ticket scalping because it induced others to violate the law.¹³³ In denying summary judgment, the court discussed how StubHub's pricing structure indicated it profited from above face value tickets and failed to disclose the face value of tickets.¹³⁴ StubHub's handbook encouraged "LargeSellers" to buy underpriced tickets, implying they could resell them for a higher price.¹³⁵ In addition, StubHub provided the option for LargeSellers to "mask" their exact ticket location, making it hard for the Patriots to determine which season ticket holders are selling on StubHub.¹³⁶ According to the court, this inducement or "knowing participation" amounted to material contribution towards illegal ticket-scalping, enough to lose immunity under the test announced in 2008, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, by the U.S. Court of Appeals for the Ninth Circuit.¹³⁷

In contrast, in 2012, in *Hill v. StubHub, Inc.*, the Court of Appeals of North Carolina held that StubHub was immune from similar anti-scalping law violations under the CDA.¹³⁸ In that case, a buyer used StubHub to purchase Hannah Montana concert tickets that exceeded the face value price by roughly three times.¹³⁹ The buyer then brought suit alleging that StubHub was responsible for the development of the ticket price, violating North Carolina's anti-scalping law.¹⁴⁰

¹³² *Id.* at 485. Massachusetts scalping law prohibits the reselling of tickets at more than two dollars above face value, not including reasonable service fees. *Id.* at 479.

¹³³ *See id.* at 483, 485. The court perhaps went even further in holding that liability could be shown for profiting from illegal conduct while "declining to stop or limit it." *See id.* at 483 (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)); *see also* *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (noting that the CDA does not create immunity at all, but just determines who is a publisher or not), *certifying questions to* 979 N.E.2d 844 (2011).

¹³⁴ *See NPS*, 25 Mass. L. Rptr. at 483. Because StubHub is not the seller of the tickets itself, it is not subject to anti-scalping laws. *See* Schroeder, *supra* note 2, at 26 (noting that the Massachusetts scalping statute only applies to ticket resellers). *See generally* *User Agreement*, *supra* note 118 (explaining that StubHub is not a seller of tickets, but it simply a marketplace for sellers).

¹³⁵ *See NPS*, 25 Mass. L. Rptr. at 480, 483. "LargeSellers" is a category of high-volume sellers to which StubHub grants special benefits. *See id.*

¹³⁶ *See id.* at 480, 482.

¹³⁷ *See id.* at 485. The Patriots wanted the names of the season ticket holders to see who violated their contract. *See* Bruce Mohl, *Patriots Get StubHub Users' Names*, BOSTON.COM (Oct. 19, 2007), http://www.boston.com/sports/football/patriots/articles/2007/10/19/patriots_get_stubhub_users_names/ [perma.cc/U7X8-RF4M].

¹³⁸ *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 552 (N.C. Ct. App. 2012) (upholding CDA immunity for StubHub).

¹³⁹ *Id.* at 552–53.

¹⁴⁰ *Id.* at 554.

Adopting the heightened standard that encouragement of illegal content is not enough to lose immunity, the Court of Appeals of North Carolina held that a website must “effectively control” the content or “ensure the creation” of it to be liable.¹⁴¹ Explicitly declining to follow the test set forth in *NPS*, the court interpreted the CDA and relevant case law to provide a broad grant of immunity.¹⁴² Faced with similar facts as in *NPS*, the court held that encouragement or inducement of market-based prices above face value does not constitute development of actual price information.¹⁴³ Also, unlike the court in *NPS*, the court held that knowledge of illegal content does not automatically remove a website’s CDA immunity.¹⁴⁴

B. Determining StubHub’s CDA Immunity Based on Knowledge of, or Willful Blindness Towards, Ticket-Scalping

A major difference in the holdings in *NPS* and *Hill* is the importance of knowledge as a factor for determining a website’s CDA immunity.¹⁴⁵ In *NPS*, the Superior Court of Massachusetts considered StubHub’s increased profit from above face value ticket prices and fee waivers for LargeSellers to resell underpriced tickets at a higher price.¹⁴⁶ According to the court, StubHub knowingly induced illegal conduct.¹⁴⁷ The court held that knowledge or willful blindness of illegal conduct constitutes “materially contributing to its unlawfulness.”¹⁴⁸ Directly counter to the holding in *NPS*, the court in *Hill* held that StubHub is not an information content provider and retains immunity even if it knows of unlawful conduct by its users.¹⁴⁹

Factual differences in *NPS* and *Hill* may have led the *NPS* court to put more weight on StubHub’s knowledge as a factor for immunity.¹⁵⁰ In *Hill*, a

¹⁴¹ *Id.* at 561 (interpreting the material contribution test from *Roommates.com*, focusing on the requirement of users to post unlawful content).

¹⁴² *See id.* at 558; *see also* *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1126–27 (N.J. Super. Ct. Ch. Div. 2010) (declining to follow *NPS* for similar reasons).

¹⁴³ *See Hill*, 727 S.E.2d at 551–54. The Court of Appeals of North Carolina overturned the decision of the Superior Court of North Carolina, which had held that StubHub’s tools and incentives encouraging users to reach market prices constituted the “development” of pricing, making StubHub at least willfully blind to the fact that its users’ prices were unlawfully above face value. *See Hill v. StubHub, Inc.*, No. 07-CVS-11310, 2011 WL 1675043, at *13 (N.C. Super. Ct. Feb. 28, 2011), *rev’d*, 727 S.E.2d 550.

¹⁴⁴ *See Hill*, 727 S.E.2d at 559.

¹⁴⁵ *Compare id.* at 557 (discarding knowledge as a factor for CDA immunity), *with NPS*, 25 Mass. L. Rptr. at 485 (holding StubHub liable under the CDA for its “knowing participation”).

¹⁴⁶ *NPS*, 25 Mass. L. Rptr. at 483.

¹⁴⁷ *Id.* at 485.

¹⁴⁸ *See id.* at 482, 485 (applying an “inducement” standard, taken from a contributory liability analysis for copyright infringement).

¹⁴⁹ *See Hill*, 727 S.E.2d at 560.

¹⁵⁰ *See NPS*, 25 Mass. L. Rptr. at 480; *see also Hill*, 727 S.E.2d at 562. Although in *Hill* a buyer filed suit against his seller and StubHub, in *NPS* the Patriots filed a larger-scale injunction to limit the

one-time buyer filed a complaint against his seller and StubHub.¹⁵¹ In this transaction only StubHub's basic middleman services were in question, including its guarantee, fees, and shipping services.¹⁵² Conversely, in *NPS*, the New England Patriots sought an injunction against StubHub prohibiting any resale of Patriots tickets.¹⁵³ This larger scale assault on StubHub's practices detailed its incentive program for "LargeSellers" and "masking" tool, limiting the Patriots' ability to identify season ticket resellers.¹⁵⁴ These features painted a picture of StubHub's willful blindness towards its users' conduct.¹⁵⁵

The holding in *NPS*, that knowledge is sufficient to "materially contribute" to illegal conduct, is unprecedented.¹⁵⁶ Although the opinion in *Roommates.com* may be unclear as to what exactly constitutes "material contribution" to illegal content, there is no reference to knowledge in the Ninth Circuit's holding or dicta.¹⁵⁷ In fact, the Superior Court of Massachusetts in *NPS* borrows its knowledge analysis from the U.S. Supreme Court's 2005 decision in *Metro-Goldwin-Mayer Studios, Inc. v. Grokster*, a case that does not involve CDA immunity.¹⁵⁸ Nonetheless, ambiguity in the *Roommates.com* decision

resale of Patriots tickets on StubHub. See *NPS*, 25 Mass. L. Rptr. at 480; see also *Hill*, 727 S.E.2d at 552.

¹⁵¹ See *Hill*, 727 S.E.2d at 554–55.

¹⁵² See *id.* at 562. The facts also involved the StubHub recommended pricing tool, available to all sellers. *Id.*

¹⁵³ *NPS*, 25 Mass. L. Rptr. at 478–79.

¹⁵⁴ See *id.* at 480. The court held that the masking ability was not sufficient to succeed on a common law misrepresentation claim because the seller did not mask any information from the buyer, just the Patriots. See *id.* at 482.

¹⁵⁵ See *id.* at 482–85 (holding that willful blindness is not compatible with CDA immunity).

¹⁵⁶ See *Hill*, 727 S.E.2d at 561; Doty, *supra* note 16, at 136, 138 (explaining that the ruling in *NPS* was a departure from other interpretations of the material contribution test). The decision in *Hill* is more harmonious with the policy of section 230 of the CDA because Congress enacted the CDA in part to remove liability for knowledge of illegal conduct. See Communications Decency Act, 47 U.S.C. § 230 (a)–(c) (2012); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1016 (N.Y. 2011); Schruers, *supra* note 37, at 212–13.

¹⁵⁷ See *Roommates.com*, 521 F.3d at 1164–70 (not considering knowledge as a factor for immunity). Liability upon notice or knowledge contradicts the CDA's purpose. *Zeran*, 129 F.3d at 333 (describing the negative effects that notice liability would have on interactive service providers).

¹⁵⁸ See *Grokster*, 545 U.S. at 930; *NPS*, 25 Mass. L. Rptr. at 482–83; Doty, *supra* note 16, at 137–38 (noting that the inducement test from *Grokster* influenced the *NPS* decision). Even if knowledge is relevant for liability, StubHub simply knows the market prices, driven by the forces of supply and demand. See *Hill*, 727 S.E.2d at 561; Goldman, *supra* note 124 (explaining that StubHub is simply concerned with market price); Schroeder, *supra* note 2, at 26 (explaining the basic concept of supply and demand). Imputing liability from StubHub's price-dependent revenue model expands liability to new levels for CDA jurisprudence and potentially puts e-commerce websites at risk. See *NPS*, 25 Mass. L. Rptr. at 482–83 (holding StubHub liable for inducing the price in question); Doty, *supra* note 16, at 138–39 (describing the inducement test as a departure from previously narrow rulings). The court used the "inducement" standard, taken from contributory liability for copyright infringement in the *Grokster* case. See *NPS*, 25 Mass. L. Rptr. at 482–83; Doty, *supra* note 16, at 137–38. *But see* Locke, *supra* note 58, at 168 (arguing for an "inducement" test derived from *Grokster*).

leaves the door open for rogue decisions like *NPS* and results in uncertainty for StubHub.¹⁵⁹

C. CDA Uncertainty Threatens the Growth of StubHub and Other Peer-to-Peer Marketplaces

If StubHub is uncertain as to whether it will receive immunity, it may tailor its practices towards a less interactive experience, stunting growth.¹⁶⁰ Congress enacted the CDA, in part, to give websites peace of mind with immunity.¹⁶¹ As a result of these split decisions, StubHub's uncertainty as to its immunity is tantamount to having no immunity at all.¹⁶² In addition, rising legal fees for potential liability could stunt growth, contrary to Congress's goals.¹⁶³ The CDA serves as a procedural device at the motion to dismiss stage, allowing websites to stave off discovery costs if granted immunity.¹⁶⁴

Potential liability for facilitating peer-to-peer transactions threatens not only StubHub, but all online marketplaces that rely on CDA immunity for innovation.¹⁶⁵ Companies such as Uber and Airbnb provide ancillary services, acting as the middlemen connecting drivers and riders, and homeowners and travelers.¹⁶⁶ The users of these online marketplaces are increasingly looking for

¹⁵⁹ See *Roommates.com*, 521 F.3d at 1176–77 (McKeown, J., dissenting) (explaining that through the majority's decision almost any function can put a website at risk); Doty, *supra* note 16, at 130–31.

¹⁶⁰ See *Zeran*, 129 F.3d at 330–31 (explaining congressional intent to protect the growth of the Internet and free speech on the Internet); Brief for Appellant at 19, *Hill*, 727 S.E.2d 550 (arguing that a broad encouragement test would stunt e-commerce growth).

¹⁶¹ See 47 U.S.C. § 230 (a)–(b) (stating Congress's findings); *Zeran*, 129 F.3d at 330–31; *Hill*, 727 S.E.2d at 555 (noting the CDA has been interpreted to give websites broad immunity).

¹⁶² See *Roommates.com*, 521 F.3d at 1176–77 (McKeown, J., dissenting) (noting websites are “left scratching their heads and wondering where immunity ends and liability begins”). If websites are unsure if their practices will be protected, they do not receive the peace of mind that comes with certain immunity. See Goldman, *supra* note 124 (explaining that the *NPS* decision could put every marketplace at risk); Doty, *supra* note 16, at 138, 141 (describing two standards of interpreting the *Roommates.com* test); Dyer, *supra* note 16, at 845–46.

¹⁶³ See 47 U.S.C. § 230(a)–(b); *Roommates.com*, 521 F.3d at 1174; *Zeran*, 129 F.3d at 330 (explaining Congress's intent in enacting the CDA); *Hill*, 727 S.E.2d at 555 (noting that the CDA has been interpreted to give websites broad immunity).

¹⁶⁴ See Bluebond, *supra* note 57, at 689–90 (explaining the use of the CDA as a procedural device).

¹⁶⁵ See *Roommates.com*, 521 F.3d at 1183 (McKeown, J., dissenting) (explaining that the majority's definition puts all websites at risk); Goldman, *supra* note 124 (describing how under an encouragement test, all marketplaces that drive prices to equilibrium supply and demand are at risk); Doty, *supra* note 16, at 138, 141 (explaining the two different approaches courts have taken in interpreting the material contribution test); Dyer, *supra* note 16, at 845–46; Claire Cian Miller, *When Uber and Airbnb Meet the Real World*, N.Y. TIMES: UPSHOT (Oct. 17, 2014), http://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html?_r=0&abt=0002&abg=1 [perma.cc/44H3-3L2U] (detailing attempts to regulate Uber and Airbnb).

¹⁶⁶ See Lucas E. Buckley et al., *The Intersection of Innovation and the Law: How Crowdfunding and the On-Demand Economy Are Changing the Legal Field*, WYO. LAW., Aug. 2015, at 36, 38 (explaining how Uber and Airbnb are disrupting traditional markets through simplification); Molly Co-

more data-driven and interactive user experiences and are moving away from a Craigslist.org white-pages approach.¹⁶⁷ But, when courts impose liability on these interactive marketplaces, they encourage the services to be more like a barebones Craigslist.¹⁶⁸ If legal liability outweighs the revenue benefits from interactive peer-to-peer tools, the growth of marketplaces like StubHub could be halted, depriving consumers of new e-commerce.¹⁶⁹ This likely conflicts with Congress's policy to limit government intervention and promote the growth of the Internet.¹⁷⁰

III. RESELLING THE CDA: FORMULATING A NEW TEST FOR "INFORMATION CONTENT PROVIDERS" AND SECTION 230 IMMUNITY

This Part articulates a new test for CDA immunity, arguing that websites should only lose immunity when they take a clear act guaranteeing the production of the content.¹⁷¹ Section A focuses on a textual analysis of the CDA, including the findings, policies, and definitions that support a new test.¹⁷² Section B revisits the "material contribution" test, established in the 2008 U.S.

hen & Corey Zehngbot, *What's Old Becomes New: Regulating the Sharing Economy*, BOSTON B.J. (Apr. 1, 2014), <http://bostonbarjournal.com/2014/04/01/whats-old-becomes-new-regulating-the-sharing-economy/> [perma.cc/7BG7-THUN] (explaining the growth of the sharing economy).

¹⁶⁷ Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/> [perma.cc/G7PT-YE4K] (noting the growth with evolution of Airbnb features); Josh Hanna, *Craigslist Has Been Disrupted, It's Just Not Obvious Yet*, BUS. INSIDER (Apr. 3, 2011), <http://www.businessinsider.com/craigslist-has-been-disrupted-its-just-not-obvious-yet-2011-4> [perma.cc/5DDW-F676] (detailing how Craigslist is losing ground to competitors who offer more innovative services); Adriane Jeffries, *Craigslist Losing Revenue from Housing Ads as Competition Heats Up*, THE VERGE (Nov. 5, 2012, 11:30 AM), <http://www.theverge.com/2012/11/5/3592628/craigslist-housing-revenue-decrease-aim-group> [perma.cc/TJX9-DPN5] (describing decline in revenues from real estate listings). Craigslist uses a simple approach to allow sellers to post listings, and has not updated the simple interface as technology has evolved. See Hanna, *supra*.

¹⁶⁸ See *Zeran*, 129 F.3d at 330–33 (describing Congress's intent in enacting the CDA and the negative effects on interactive service providers if Congress's goals are not upheld); *Hill*, 727 S.E.2d at 559 (noting that the pricing tools and features are neutral tools). Notably, Craigslist has had definitive success under the CDA. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 969 (N.D. Ill. 2009) (holding that the plaintiffs could pursue a public nuisance claim against Craigslist users who solicited prostitution, but not against Craigslist itself).

¹⁶⁹ See Geron, *supra* note 167 (explaining that despite facing regulatory challenges, the sharing economy generated approximately \$3.5 billion in revenue in 2013); Hanna, *supra* note 167; Logiurato, *supra* note 107 (noting Airbnb's reliance on the CDA immunity for the offering its e-commerce service); Miller, *supra* note 165 (describing CDA immunity as one of the foundational principles to the middleman economy); Jeffries, *supra* note 167.

¹⁷⁰ See 47 U.S.C. § 230(a)–(b) (enumerating Congress's findings and policy in enacting the CDA); *Zeran*, 129 F.3d at 330 (explaining that Congress was clear in its intention to nurture the Internet by limiting government interference); *Massachusetts ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1047 (E.D. Mo. 2011) (noting that Congress left no doubt in the policy behind CDA immunity).

¹⁷¹ See *infra* notes 171–256 and accompanying text.

¹⁷² See *infra* notes 176–203 and accompanying text.

Court of Appeals for the Ninth Circuit decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, argues that courts should use a requirement test if they are to use this framework, and then applies this test to StubHub's practices.¹⁷³ Section C explains why the *Roommates.com* test should be abandoned.¹⁷⁴ Section D proposes a new, clearer test and applies it to StubHub's practices.¹⁷⁵

A. The Plain Language of Section 230 of the CDA Supports Broad Immunity

In its findings and policy in the text of the CDA, Congress explicitly recognized the Internet's increasingly important role in our society.¹⁷⁶ The Internet increases the flow of information between its users and has allowed people to create communicative forums with user control.¹⁷⁷ In order to promote and preserve these benefits, Congress called for minimum government regulation.¹⁷⁸ Otherwise, when faced with liability and high monitoring costs, websites would simply limit user content at the outset, chilling speech.¹⁷⁹ Therefore, Congress severely limited website liability for its users' content.¹⁸⁰ CDA immunity is not, however, absolute.¹⁸¹ A website will not be immune when it is actually an "information content provider" itself, meaning that it is responsible for "in whole or

¹⁷³ See *infra* notes 204–225 and accompanying text.

¹⁷⁴ See *infra* notes 226–238 and accompanying text.

¹⁷⁵ See *infra* notes 239–256 and accompanying text.

¹⁷⁶ See Communications Decency Act, 47 U.S.C. § 230(a)–(b) (2012) (explaining Congress's findings and policy behind § 230); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31, 334 (4th Cir. 1997) (explaining when congressional policy is explicitly stated in text of statute, a court must follow it); *Massachusetts ex rel. P.K. v. Village Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1047 (E.D. Mo. 2011) (noting that Congress left no doubt in the policy behind CDA immunity).

¹⁷⁷ See 47 U.S.C. § 230(a).

¹⁷⁸ See *id.* Section 230(a) states:

The Congress finds the following: (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens. (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

Id.

¹⁷⁹ See *Zeran*, 129 F.3d at 330–31 (explaining that websites would not inquire into the merit of take-down notices, and simply remove content upon request, thus chilling speech).

¹⁸⁰ See 47 U.S.C. § 230(a)–(c); *Zeran*, 129 F.3d at 330–31. The CDA has been interpreted to apply beyond just defamation cases. See *Schneider v. Amazon.com, Inc.*, 31 P.3d 38, 41, 42 (2001) (holding that CDA immunity is not limited to tort claims and finding the defendant immune from a breach of contract claim).

¹⁸¹ See 47 U.S.C. § 230(c), (f); *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008) (holding that an interactive computer service loses immunity if it "materially contributes to the alleged unlawfulness" of the content).

in part . . . the creation or development” of information.¹⁸² Since the CDA’s enactment, courts have struggled to determine what the term “development means in this context.¹⁸³ On the one hand it can mean “to make something new,” or more broadly it can mean “to make something available.”¹⁸⁴ In *Roommates.com*, the Ninth Circuit looked towards Wikipedia for the definition of “web development,” finding it most relevant to the context of the CDA.¹⁸⁵ But, courts should not rely on this definition of web development because this definition encompasses traditional publisher duties that are explicitly protected by the CDA, such as “gathering, organizing and editing information.”¹⁸⁶

Because “development” can be stretched in different ways, the term should be interpreted in accordance with legislative intent.¹⁸⁷ The statute’s explicit findings and policy clearly show that Congress intended to immunize websites from liability.¹⁸⁸ Strictly interpreting the term “development” in line with Congress’s intent leads to website immunity unless the website actually

¹⁸² See 47 U.S.C. § 230(c), (f); *Roommates.com*, 521 F.3d at 1162–63 (explaining how a website operator can be both a service provider and a content provider).

¹⁸³ See *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 558–60 (N.C. Ct. App. 2012) (explaining that the vast majority of courts interpreting the CDA have held in favor of immunity); Doty, *supra* note 16, at 128 (noting that the majority of litigation around CDA immunity is about when an interactive computer service is also an information content provider so as to be responsible for the information). Unlike the clear findings and policy of Congress, the definition of “information content provider” is vague. See *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 952 N.E.2d 1011, 1017 (N.Y. 2011); Doty *supra* note 16, at 126 (noting that the bulk of litigation concerns what constitutes “development” of information by an interactive computer service). In tackling the definition of “development” in part, some courts have looked towards the dictionary definition. See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1197–99 (10th Cir. 2009); *Roommates.com*, 521 F.3d at 1168–69 (looking to Wikipedia for the definition of “web development”). Yet the dictionary does not provide a consensus because “development” has many meanings. See *Accusearch*, 570 F.3d at 1197–98 (construing two dictionary definitions of “develop”); *Roommates.com*, 521 F.3d at 1168–69 (disagreeing with the dissent on the correct definition for “develop”).

¹⁸⁴ See *Roommates.com*, 521 F.3d at 1168–69.

¹⁸⁵ See *id.*

¹⁸⁶ *Id.*; see 47 U.S.C. § 230(f)(4); *Roommates.com*, 521 F.3d at 1180, 1186 (McKeown, J., dissenting) (explaining that the majority’s definition of “web development” encompasses the type of functions that are explicitly associated with interactive computer services and protected under the statute); see also *Zeran*, 129 F.3d at 330 (stating that claims attempting to hold websites liable for traditional publisher functions are meritless). These traditional publisher functions include analyzing, reorganizing, and filtering data. See 47 U.S.C. § 230(f)(4); *Roommates.com*, 521 F.3d at 1168–69; *id.* at 1180, 1186 (McKeown, J., dissenting).

¹⁸⁷ 47 U.S.C. § 230(a)–(b); *Roommates.com*, 521 F.3d at 1174; *id.* at 1882, 1186 (McKeown, J., dissenting) (opining the majority’s definition is inventive and without relation to the statute); *Village Voice*, 809 F. Supp. 2d at 1047 (noting that Congress left no doubt in the policy behind CDA immunity).

¹⁸⁸ See 47 U.S.C. § 230(a)–(b) (explaining Congress’s policy to preserve and promote the growth of the Internet); *Zeran*, 129 F.3d at 330–32 (describing the congressional intent behind the CDA); *Village Voice*, 809 F. Supp. 2d at 1047 (following Congress’s explicit policy goals set forth in the CDA).

provides the content itself.¹⁸⁹ But because the statute also included the terms “responsible” for, and “creation,” it would be redundant to interpret “development” to mean “to make something new.”¹⁹⁰ Therefore, courts should interpret “development” to mean “require,” for such a definition ensures that the term “create” retains meaning while also providing broad immunity and protecting e-commerce growth.¹⁹¹

Largely overlooked, the plain language of the CDA provides further insight into what types of activities should be immunized.¹⁹² The CDA definition of “interactive computer service” incorporates the term “access software provider.”¹⁹³ The term “access software provider” is separately defined and includes any website that utilizes tools that “filter . . . analyze . . . digest . . . [or] reorganize” content.¹⁹⁴ These actions are thus functions of an interactive computer service and are protected by the CDA.¹⁹⁵ Under the plain language of the CDA, any attempt to assign liability for filtering or reorganizing data is misplaced.¹⁹⁶

As the central function of marketplaces is to reorganize user data, CDA immunity should extend to StubHub, Uber, Airbnb, and all marketplaces in line with a proper interpretation of the Act’s plain language.¹⁹⁷ StubHub’s pric-

¹⁸⁹ See *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 414–15 (6th Cir. 2014) (noting that an encouragement test would too harshly cut at the immunity Congress established); *Roommates.com*, 521 F.3d at 1174; *id.* at 1185 (McKeown, J., dissenting) (noting that close cases must be resolved in favor of immunity).

¹⁹⁰ See *Accusearch*, 570 F.3d at 1197–99 (interpreting the definitions of “development” as well as “responsible”); *Roommates.com*, 521 F.3d at 1168 (noting that the correct definition must give weight to the words “responsible” and “creation” or else “development” would have no meaning within the statute).

¹⁹¹ *Roommates.com*, 521 F.3d at 1880, 1182–83 (McKeown, J., dissenting) (opining that the majority’s definition puts every website at risk for liability); Brief for Appellant, *supra* note 160, at 23–25 (emphasizing the danger of a too plaintiff-friendly standard for CDA immunity).

¹⁹² See 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (explaining that the actions of *Roommates.com* are explicitly protected under the CDA).

¹⁹³ 47 U.S.C. § 230(f)(2), (f)(4) (defining “access software provider”).

¹⁹⁴ *Id.*

¹⁹⁵ See *id.*; *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (describing the functions that are protected under the CDA).

¹⁹⁶ See 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (explaining that these actions are explicitly within the domain of information content provider and are thus protected).

¹⁹⁷ See 47 U.S.C. § 230(a)–(c), (f)(2), (f)(4) (stating Congress’s policy to promote the growth of the Internet); *Dirty World*, 755 F.3d at 414–15 (noting that an encouragement test incorrectly illustrates what was at issue for *Roommates.com*); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (distinguishing *Consumeraffairs.com* from *Roommates.com* because *Consumeraffairs.com* did not require information to be posted); *Roommates.com*, 521 F.3d at 1183–86 (McKeown, J., dissenting) (opining that the majority’s definition puts every website at risk for liability); *Hill*, 727 S.E.2d at 261 (holding that a website loses immunity when they “ensure the creation” of the content); Brief for Appellant, *supra* note 160, at 24 (emphasizing the danger of a too plaintiff-friendly standard for CDA immunity); Goldman, *supra* note 124 (noting the risk of lack of immunity to all e-commerce marketplaces). StubHub reorganizes its user data, representing the market

ing recommendation tool compiles historical sales data, showing the low, average, and high prices for similar tickets.¹⁹⁸ According to the CDA, reorganizing user data is not “developing” the information in part, but rather a protected action of an “interactive computer service”.¹⁹⁹

Finally, in order to further Congress’s policy goals, StubHub and other peer-to-peer marketplaces should be protected under the CDA.²⁰⁰ Congress sought to encourage the growth of the Internet through unfettered speech and limited liability.²⁰¹ Placing liability on these marketplaces imposes exorbitant monitoring costs and defeats the purpose of an interactive middleman service.²⁰² Without CDA immunity, flourishing companies that offer tremendous value to customers and the economy may not exist as they currently do.²⁰³

B. Moving On: Deconstructing the Roommates.com Test to Eliminate Ambiguity

Despite the shortcomings of the *Roommates.com* “material contribution” test, many courts rely on it to determine when a website “develops” infor-

in terms of supply and demand, explicitly protected by the CDA. *See* 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1180, 1183 (McKeown, J., dissenting) (explaining that the actions taken by Roommates.com are explicitly protected under the CDA); Brief for Appellant, *supra* note 160, at 28 (arguing that StubHub simply reorganizes user data for its pricing tool).

¹⁹⁸ *See* Brief for Appellant, *supra* note 160, at 28 (arguing StubHub compiles information but the ultimate price is left for the user to input); Cassidy, *supra* note 6 (describing the StubHub selling interface).

¹⁹⁹ *See* 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1183, 1186 (McKeown, J., dissenting) (opining that the function of reorganizing is explicitly protected under the CDA); Brief for Appellant, *supra* note 160, at 28 (describing StubHub’s actions as harmless).

²⁰⁰ *See* 47 U.S.C. § 230(a)–(b) (stating Congress’s policy to promote the growth of the Internet); *Hill*, 727 S.E.2d at 561 (holding StubHub immune under the CDA); Brief for Appellant, *supra* note 160, at 2–3.

²⁰¹ *See* 47 U.S.C. § 230(a)–(b) (stating Congress’s policy to promote the growth of the Internet); *Zeran*, 129 F.3d at 330–31 (explaining Congress’s purpose in enacting the CDA).

²⁰² *See Zeran*, 129 F.3d at 331, 333 (describing the negative impact that imposing notice liability would have on interactive computer services); *Hill*, 727 S.E.2d at 559 (quoting *Zeran*, 129 F.3d at 333); Brief for Appellant, *supra* note 160, at 4 (arguing that placing liability on StubHub would have a harmful chilling effect on e-commerce). Congress has determined that liability should be confined to the user, rather than imposing monitoring costs on the websites. *See* 47 U.S.C. § 230(a)–(c) (stating policy to promote the growth of the Internet); *Zeran*, 129 F.3d at 331, 333 (explaining Congress’s purpose in enacting the CDA).

²⁰³ *See* Brief for Appellant, *supra* note 160, at 23–25 (arguing that an encouragement test chills e-commerce growth); Goldman, *supra* note 124 (noting the threat of lack of immunity to eBay); Geron, *supra* note 167 (noting the extreme growth of the sharing economy); Logiurato, *supra* note 107 (showing legislators’ attempts to remove CDA immunity for Airbnb); Miller, *supra* note 165 (noting the dependence of Uber and Airbnb on CDA immunity); *see also* Justin Hughes, *The Internet and the Persistence of Law*, 44 B.C. L. REV. 359, 384–85 (2003) (explaining how imposing third-party liability of websites can stunt the innovation and growth of the Internet).

mation “in part,” losing immunity.²⁰⁴ Courts diverge, however, as to whether encouragement of information or requirement of information precludes immunity.²⁰⁵ In order to provide predictability for websites going forward, courts must reach consistent judgments on CDA immunity.²⁰⁶ This section argues that if courts are to use the *Roommates.com* “material contribution” test, they should use a requirement approach.²⁰⁷ This section then applies this approach to StubHub’s practices.²⁰⁸

The *Roommates.com* “material contribution” test should be interpreted to mean that a website loses immunity if it requires unlawful content as opposed to encouraging or having knowledge of content.²⁰⁹ Despite its sporadic references to a broader standard, the majority in *Roommates.com* based its holding on the fact that Roommates.com required unlawful content as a condition of service.²¹⁰ The holding was a direct response to the thrust of the Fair Housing Council’s claims, that Roommates.com is not immune for requiring its users to violate the law.²¹¹

If courts continue to use the *Roommates.com* test, they should discard immunity only when a website requires content because this approach strikes the right balance between protecting innovation and limiting CDA immunity when the website is truly responsible for the content.²¹² Although the CDA should not overly protect invasive and abusive uses of the Internet, such as revenge pornography and cyberbullying, there are other laws in place that pro-

²⁰⁴ See *Dirty World*, 755 F.3d at 412–14 (explaining that the district court’s encouragement would be more broad than any previous decision); Doty, *supra* note 16, at 131, 136 (explaining the different routes courts have gone in interpreting the *Roommates.com* test); Dyer, *supra* note 16, at 845–46.

²⁰⁵ *Roommates.com*, 521 F.3d at 1176–78 (McKeown, J., dissenting) (stating that websites will be unsure of whether their actions are protected by the CDA); Doty, *supra* note 16, at 126–27 (describing how courts have taken different approaches in interpreting the *Roommates.com* test); Dyer, *supra* note 16, at 845–46.

²⁰⁶ See *Roommates.com*, 521 F.3d at 1176–78 (McKeown, J., dissenting) (noting the unpredictability left as to whether an interactive service provider is immune under the CDA or not); Goldman, *supra* note 124 (noting the undesirable effect of split decisions on immunity); Doty, *supra* note 16, at 126, 30–31 (detailing two ways to interpret the *Roommates.com* test); Dyer, *supra* note 16, at 845–46.

²⁰⁷ See *infra* notes 209–219 and accompanying text.

²⁰⁸ See *infra* notes 220–225 and accompanying text.

²⁰⁹ See *Dirty World*, 755 F.3d at 414–15 (noting that a requirement test correctly illustrates what was at issue for Roommates.com); *Nemet*, 591 F.3d at 257 (distinguishing the *Roommates.com* case because the website did not require information to be posted); *Hill*, 727 S.E.2d at 559, 561 (holding a website loses immunity when they “ensure the creation” of the content).

²¹⁰ See *Roommates.com*, 521 F.3d at 1165 (agreeing with the plaintiff’s claim that requiring users to disclose sexual orientation makes Roommates.com an information content provider).

²¹¹ See *id.*

²¹² See *Dirty World*, 755 F.3d at 414–15 (relying on the fact that Roommates.com required responses to its questionnaire as central to the court’s holding); *Nemet*, 591 F.3d at 257 (distinguishing *Consumersaffairs.com* from *Roommates.com* because *Consumersaffairs.com* did not require information to be posted); *Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting); *Hill*, 727 S.E.2d at 261 (quoting *Shiamilli*, 952 N.E.2d at 1019).

vide legal remedies to such victims.²¹³ Moreover, because the CDA exempts from its reach any criminal law claim or intellectual property claim, a website cannot assert the CDA as an affirmative defense when met with claims of these types.²¹⁴ Additionally, CDA immunity is strictly about vicarious liability; the victim still has the opportunity to seek recourse against the user who violated the law.²¹⁵ If a website requires illegal conduct, it will be responsible through vicarious liability, but any more relaxed standard potentially chills innovation and free speech.²¹⁶

An encouragement or inducement standard can always be manipulated to impose liability on a website for having some influence on a user's content.²¹⁷ This "but-for" analysis will cause websites and their users to be "joined at the hip" for legal liability.²¹⁸ Instead, courts should discard CDA immunity only if the website requires the content.²¹⁹

Applying this interpretation of the *Roommates.com* holding, StubHub should retain immunity under the CDA because it does not require users to post illegal content.²²⁰ StubHub's LargeSellers program involving fee waivers

²¹³ See 47 U.S.C. § 230(e) (excluding criminal and copyright law from the CDA's coverage); Franks, *supra* note 107 (noting the availability of criminal law and copyright law); Mullin, *supra* note 107 (noting the availability of copyright law).

²¹⁴ See 47 U.S.C. § 230(e) (exempting from the Act's coverage criminal and copyright law); Franks, *supra* note 107 (describing how plaintiffs can pursue claims through criminal and copyright law); Mullin, *supra* note 107 (noting the possibility of pursuing a copyright law claim).

²¹⁵ See 47 U.S.C. § 230(c) (providing no immunity for an information content provider); Franks, *supra* note 107 (explaining that the CDA provides no immunity for an information content provider).

²¹⁶ See *Dirty World*, 755 F.3d at 414–15 (noting that an encouragement test incorrectly illustrates what was at issue for *Roommates.com*); *Nemet*, 591 F.3d at 257 (discussing how the fact that the *Roommates.com* questionnaire was a required condition of service was essential to *Roommates.com* being found liable); *Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52–53 (D.D.C. 1998) (explaining Congress's choice to provide broad immunity); *Hill*, 727 S.E.2d at 561 (quoting *Shiamilli*, 952 N.E.2d at 1019); Brief for Appellant, *supra* note 160, at 23–25 (arguing that an encouragement test chills e-commerce growth).

²¹⁷ See *Roommates.com*, 521 F.3d at 1174 (noting that close cases must be resolved in favor of immunity because a clever lawyer could argue that just about anything encouraged illegal conduct); *id.* at 1183 (McKeown, J., dissenting) ("The majority's definition of 'development' would transform every interactive site into an information content provider and the result would render illusory any immunity under § 230(c).").

²¹⁸ *Id.* at 1176–77 (McKeown, J., dissenting) (arguing that an encouragement test is similar to a "but-for" analysis because a lawyer could always argue that something the website did influenced the third-party content).

²¹⁹ See *Dirty World*, 755 F.3d at 414–15 (noting that an encouragement test incorrectly illustrates what was at issue for *Roommates.com*); *Nemet*, 591 F.3d at 257 (holding that *ConsumerAffairs.com* did not require information, and is thus immune under the CDA); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (discarding CDA immunity because defendant took clear act in establishing contract with third-party); *Hill*, 727 S.E.2d at 561 (holding a website loses immunity when they "ensure the creation" of the content); Doty, *supra* note 16, at 141 (noting most courts only discard immunity when the website explicitly requests the content in question).

²²⁰ See *Hill*, 727 S.E.2d at 558. Additionally, the court in *NPS* held that the masking ability given to LargeSellers was not sufficient to succeed on a common law misrepresentation claim because the

and location masking is not a requirement as a condition of service.²²¹ Whereas the Roommates.com discriminatory questionnaire and answers automatically violated the FHA, StubHub's users can still price their tickets under face value if they choose.²²² StubHub's suggested pricing tool is based on market prices, not face value prices, and ultimately allows sellers to enter any price they wish.²²³ Additionally, the CDA definition of a protected "interactive computer service" includes any tools that "filter . . . analyze . . . [or] organize" content.²²⁴ Thus, StubHub's display of its user data into a market-based pricing tool is explicitly protected.²²⁵

C. Ejected: Why the Roommates.com "Material Contribution" Test Should Be Abandoned

The *Roommates.com* test may be the most commonly used approach to determining CDA immunity, but it is fundamentally flawed and should be abandoned.²²⁶ Focusing on the alleged unlawfulness when determining CDA

seller did not mask any information from the buyer, just the Patriots. *NPS, LLC v. StubHub, Inc.*, 25 Mass. L. Rptr. 478, 482 (Super. Ct. 2009).

²²¹ See *NPS*, 25 Mass. L. Rptr. at 483 (holding that StubHub simply encourages LargeSellers to buy tickets with fee waivers).

²²² See *Hill*, 727 S.E.2d at 558, 560 (distinguishing the facts from *Roommates.com* because *Roommates.com* required certain content); Brief for Appellant, *supra* note 160, at 4–5 (noting that StubHub simply aggregates market prices based on supply and demand).

²²³ See *Hill*, 727 S.E.2d at 558, 560 (noting that StubHub does not require users to input certain content, whereas *Roommates.com* does); Brief for Appellant, *supra* note 160, at 4–5 (noting that StubHub just compiles data, leaving the user the choice of which price to enter).

²²⁴ See 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (opining that the actions taken by *Roommates.com* are explicitly protected under the CDA).

²²⁵ See 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (explaining that the CDA's definition of "access software provider" explicitly protects the actions for which *Roommates.com* was held liable); Brief for Appellant, *supra* note 160, at 28 (noting that StubHub only reorganizes user data). Even against a broader encouragement or inducement test, StubHub's practices simply encourage market-based pricing, not necessarily in violation of scalping laws. See *Hill*, 727 S.E.2d at 244; Brief for Appellant, *supra* note 160, at 4–5 (arguing that even applying an encouragement test, StubHub simply encourages market prices); Rovell, *supra* note 6; Rubin, *supra* note 12; Sloane, *supra* note 12 (noting the availability of Yankees tickets on StubHub below face value). For many markets, StubHub's market-based pricing offers prices far below face value and thus not in violation of scalping laws. See Rovell, *supra* note 6; Rubin, *supra* note 12; Sloane, *supra* note 12; Tuttle, *supra* note 112 (noting that Miami Marlins tickets on StubHub sell for far less than from the team). Although StubHub's omission of face value price and price-dependent revenue model could indicate willful blindness, Congress enacted the CDA to provide immunity stemming from even actual knowledge of unlawful content. See *Zeran*, 129 F.3d at 332–33 (rejecting liability upon notice because of the exorbitant monitoring costs Congress intended to remove); Doty, *supra* note 16, at 137–38 (explaining that holding interactive service providers liable for willful blindness is a departure from previous holdings).

²²⁶ See 47 U.S.C. § 230(a)–(b) (stating Congress's policy to promote the growth of the internet and limit government intervention); *Roommates.com*, 521 F.3d at 1174 (holding "close cases . . . must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or en-

immunity is the wrong inquiry.²²⁷ Determining whether a website has “materially contributed to the alleged unlawfulness” requires an analysis into the cause of action.²²⁸ Yet, the CDA simply focuses on information and whether that information can be attributed to the website, regardless of its alleged unlawfulness.²²⁹ Determining immunity by whether a website has “materially contributed” to the unlawfulness collapses two distinct questions of information development and substantive liability.²³⁰ At the motion to dismiss stage, unlawfulness has not yet been determined.²³¹

A new test for immunity should focus solely on how a website contributes to the information of a third party, regardless of the content’s alleged unlawfulness.²³² The CDA says nothing about alleged unlawfulness, but simply focuses on whether the information in question can be attributed to the website.²³³ The ineffectiveness of the *Roommates.com* test’s focus on alleged unlawfulness can be highlighted by a simple example.²³⁴ If a website requires a user to post harmless information, like what the weather is like outside, it is immune.²³⁵ But, if a website requires a user to answer discriminatory questions

couraged—or at least tacitly assented to—the illegality of third parties”); Doty, *supra* note 16, at 126–27 (explaining the different approaches courts have taken in applying the *Roommates.com* test). There is no reference to unlawfulness in the text of the CDA and thus the *Roommates.com* majority is conflating an issue of immunity with an issue of substantive liability. *See* 47 U.S.C. § 230; *Roommates.com*, 521 F.3d at 1182–83 (McKeown, J., dissenting).

²²⁷ *See Roommates.com*, 521 F.3d at 1177–78, 1182–83 (McKeown, J., dissenting) (opining that the majority combines the immunity analysis with substantive legal analysis).

²²⁸ *See id.*

²²⁹ *See* 47 U.S.C. § 230(a)–(b), (f) (lacking any discussion of alleged unlawfulness); *Roommates.com*, 521 F.3d at 1177–78, 1182–83 (McKeown, J., dissenting) (noting the CDA says nothing about alleged unlawfulness).

²³⁰ *See Roommates.com*, 521 F.3d at 1183 (McKeown, J., dissenting) (describing these two questions as “analytically independent”); *see also Zeran*, 129 F.3d at 330 (explaining that the CDA prohibits courts from welcoming claims that attempt to place liability on an interactive service provider for traditional publisher functions).

²³¹ *See Roommates.com*, 521 F.3d at 1177–78, 1182–83 (McKeown, J., dissenting) (explaining that the issue of immunity for content and substantive liability for that content are two separate issues).

²³² *See id.* (explaining that there is no basis for focusing on the illegality of the content when determining whether an interactive computer service has contributed to that information in part); *see also Dirty World*, 755 F.3d at 416 (holding that although the plaintiff is responsible for the content he writes or requires, that content is not alleged to be defamatory).

²³³ *See* 47 U.S.C. § 230(a)–(b), (f) (lacking any discussion of alleged unlawfulness); *Roommates.com*, 521 F.3d at 1177–78, 1182–83 (McKeown, J., dissenting) (opining that whether the information in question is illegal bears no influence in CDA analysis).

²³⁴ *See infra* notes 235–238 and accompanying text.

²³⁵ *See Dirty World*, 755 F.3d at 414 (noting than an encouragement test incorrectly illustrates what was at issue for *Roommates.com*); *Nemet*, 591 F.3d at 257 (interpreting *Roommates.com* as holding the website liable because it required unlawful content); *Roommates.com*, 521 F.3d at 1167–68 (holding that a website loses immunity if it materially contributes to the content’s alleged unlawfulness).

violating the FHA, it is not immune.²³⁶ In either scenario, the website has “developed” the information “in part” by requiring that information and thus fits the definition of an “information content provider,” but only one of the websites is immune.²³⁷ CDA immunity should not depend on the alleged unlawfulness of the information, but should instead be based on whether the website is an “information content provider,” as the statute clearly sets out.²³⁸

D. A Clear Act Guaranteeing the Production of the Content

A new test is needed to eliminate the ambiguity left by the *Roommates.com* “material contribution” test.²³⁹ A website should lose CDA immunity only when it takes a clear act guaranteeing the production of the content.²⁴⁰ This proposed test cements Congress’s policy to protect free-flowing information and Internet growth while also discarding website immunity when the website is truly responsible for the content.²⁴¹ If a website writes the content

²³⁶ See *Roommates.com*, 521 F.3d at 1169–70 (holding *Roommates.com* liable for requiring users to answer discriminatory questions in violation of the FHA); see also *Nemet*, 591 F.3d at 257 (explaining the holding of *Roommates.com* and noting that the website was not immune because it required users to input illegal information).

²³⁷ See *Dirty World*, 755 F.3d at 410 (arguing that the fact that *Roommates.com* required information was most fatal in its losing immunity); *Nemet*, 591 F.3d at 257–58 (interpreting *Roommates.com* as holding the website liable because it required unlawful content); *Roommates.com*, 521 F.3d at 1167–68 (holding that a website loses immunity if it materially contributes to the content’s alleged unlawfulness).

²³⁸ See 47 U.S.C. § 230(a)–(b), (f) (omitting any consideration of unlawfulness in Congress’s framework for immunity); *Roommates.com*, 521 F.3d at 1177–78, 1182–83 (McKeown, J., dissenting) (arguing that immunity should depend solely on the degree of contribution to the information, regardless of its alleged unlawfulness).

²³⁹ See 47 U.S.C. § 230(a)–(b) (stating the policy of Congress to promote the growth of the Internet); *Roommates.com*, 521 F.3d at 1176–78 (McKeown, J., dissenting) (stating “interactive service providers are left scratching their heads and wondering where immunity ends and liability begins”); Goldman, *supra* note 124 (noting the risk that a lack of immunity poses for e-commerce); Doty, *supra* note 16, at 126, 30–31 (stating that “the case law seems to reflect two different approaches to defining culpable behavior”); Dyer, *supra* note 16, at 845–46; Weslander, *supra* note 16, at 291–95.

²⁴⁰ See *Dirty World*, 755 F.3d at 414–15 (noting that an encouragement test incorrectly illustrates what was at issue for *Roommates.com*); *Nemet*, 591 F.3d at 257 (distinguishing the case at hand from the *Roommates.com* case because *ConsumerAffairs.com* did not require information to be posted); *Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting); *Drudge*, 992 F. Supp. at 52–53 (explaining Congress’s choice to provide broad immunity); *Hill*, 727 S.E.2d at 561 (quoting *Shiamilli*, 952 N.E.2d at 1019); Brief for Appellant, *supra* note 160, at 23–25 (arguing that an encouragement test chills e-commerce growth).

²⁴¹ See 47 U.S.C. § 230(a)–(b) (stating Congress’s policy to minimize government intervention); *Dirty World*, 755 F.3d at 414–15 (noting that a requirement test correctly illustrates what was at issue for *Roommates.com*); *Nemet*, 591 F.3d at 257 (holding that *ConsumerAffairs.com* is immune under the *Roommates.com* test); *Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting); *Drudge*, 992 F. Supp. at 52–53 (explaining Congress’s choice to provide broad immunity); *Hill*, 727 S.E.2d at 561 (quoting *Shiamilli*, 952 N.E.2d at 1019); Brief for Appellant, *supra* note 160, at 23–25 (asserting that an encouragement test threatens innovation in e-commerce).

itself, it is responsible for the “creation” of that content.²⁴² If a website takes some other clear act guaranteeing the production of content, it directly causes that content and is responsible for the “development” of that content.²⁴³

Interpreting “development” to mean “a clear act guaranteeing its production” more clearly delineates between immunity and liability.²⁴⁴ Examples of clear acts guaranteeing the production of content include requiring content, but also sponsoring it, paying for it, or mandating it through a user agreement.²⁴⁵ When a website commits a clear act of this kind it loses its immunity because Congress enacted the CDA to protect websites from third-party liability, not from a website’s own conduct.²⁴⁶ By discarding CDA immunity for certain acts beyond just requiring content, this test strikes a balance for those concerned with privacy and harassment.²⁴⁷ Conversely, this test protects the plain language definition of “access software provider” because filtering or reorganizing data does not guarantee the creation of user content.²⁴⁸ Finally, this test

²⁴² See *Roommates.com*, 521 F.3d at 1164 (holding *Roommates.com* liable for the content of its questions because it undoubtedly created the content); *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450, 474 (E.D.N.Y. 2011) (“While an overt act of creation of content is easy to identify, determining what makes a party responsible for the ‘development’ of content under § 230(f)(3) is unclear.”).

²⁴³ See 47 U.S.C. § 230(c), (f); *Dirty World*, 755 F.3d at 414–15 (refusing to adopt an encouragement standard); *Nemet*, 591 F.3d at 257 (upholding CDA immunity); *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (opining that *Accusearch* should simply be held liable for its conduct); *Roommates.com*, 521 F.3d at 1185 (McKeown, J., dissenting); *Hill*, 727 S.E.2d at 561 (holding a website is responsible for information if it “control[s]” or “ensure[s]” the creation of content).

²⁴⁴ See *Roommates.com*, 521 F.3d at 1187 (McKeown, J., dissenting) (noting the vagueness of the majority’s test for immunity).

²⁴⁵ See *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (opining that *Accusearch* should simply be held liable for its conduct in acquiring the information at hand); *Barnes*, 570 F.3d at 1107 (holding defendant liable as a promisor); *Roommates.com*, 521 F.3d at 1164 (holding *Roommates.com* liable for requiring unlawful answers). For example, under this proposed test, AOL would be responsible for the content in the “Drudge Report” because of its act of directly paying for the content. See *Drudge*, 992 F. Supp. at 47, 51. Imposing liability for directly paying for content helps achieve a balance between free speech and being overprotective of speech that raises privacy concerns. See Franks, *supra* note 107 (voicing concerns about overprotection of CDA immunity for online abuse); Bolson, *supra* note 107 (voicing concerns about overprotection of CDA immunity for privacy).

²⁴⁶ See *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (distinguishing between the acts that the website took from their development of the content); *Barnes*, 570 F.3d at 1107 (holding defendant liable as a promisor); *Roommates.com*, 521 F.3d at 1164 (holding *Roommates.com* liable for requiring unlawful answers).

²⁴⁷ See *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (arguing that *Accusearch* should simply be held liable for its conduct); *Barnes*, 570 F.3d at 1107 (holding defendant liable in its actions as promisor, distinct from its development of content under traditional CDA analysis); *Roommates.com*, 521 F.3d at 1664 (holding *Roommates.com* liable for information that it required its users to provide as a condition of service).

²⁴⁸ See 47 U.S.C. § 230(f)(2), (f)(4) (including “access software provider” within the definition of “information content provider”); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (explaining that these actions are explicitly within the domain of information content provider and thus

continues to disregard knowledge as a factor because the CDA was intended to remove the monitoring costs stemming from liability upon knowledge.²⁴⁹

Under this test, a marketplace like StubHub will unambiguously be protected under the CDA because it does not commit a clear act guaranteeing the production of the content.²⁵⁰ StubHub does not require the price to be above face value or pay users to post prices above face value, nor does it mandate it through its user agreement.²⁵¹ StubHub's LargeSellers program involving fee waivers and location masking is optional, and does not guarantee a user will price above face value.²⁵² StubHub's reorganization of its users' data is explicitly protected under the CDA.²⁵³ Any knowledge of a user's scalping violation is irrelevant under CDA analysis because it imposes exorbitant monitoring costs, contrary to Congress's intent.²⁵⁴

This test strikes the right balance between protecting innovation and limiting CDA immunity when the website is truly responsible for the content.²⁵⁵ CDA jurisprudence is predictable for most interactive computer services, yet it must be predictable for peer-to-peer marketplaces as well to protect growth and innovation.²⁵⁶

protected); Brief for Appellant, *supra* note 160, at 28 (arguing that StubHub simply aggregates market prices based on supply and demand).

²⁴⁹ See *Zeran*, 129 F.3d at 333; *Hill*, 727 S.E.2d at 558 (quoting *Zeran*, 129 F.3d at 333).

²⁵⁰ See *Hill*, 727 S.E.2d at 561 (holding that StubHub did not direct the price of the ticket listing in question); Brief for Appellant, *supra* note 160, at 27, 31 (noting that StubHub simply aggregates market prices based on supply and demand). Additionally, the court in *NPS* held that the masking ability given to LargeSellers was not enough to bring a common law misrepresentation claim because the seller did not mask any information from the buyer, just the Patriots. *NPS*, 25 Mass. L. Rptr. at 482.

²⁵¹ See *Weinstein v. eBay, Inc.*, 819 F. Supp. 2d 219, 229 (S.D.N.Y. 2011) (rejecting deceptive business practice claim because StubHub simply follows the forces of supply and demand); *Hill*, 727 S.E.2d at 562 (disagreeing with the trial court's holding that StubHub's "controlled" the transaction); Brief for Appellant, *supra* note 160, at 27, 31 (noting that StubHub simply aggregates market prices based on supply and demand).

²⁵² See *NPS*, 25 Mass. L. Rptr. at 483 (noting StubHub was willfully blind to the existence of above face value tickets on its website, but never required LargeSellers to list above face value); see also *Hill*, 727 S.E.2d at 562 (describing StubHub's actions as simply reorganizing market data, while the seller ultimately having control over the price input).

²⁵³ See 47 U.S.C. § 230(f)(2), (f)(4); *Roommates.com*, 521 F.3d at 1186 (McKeown, J., dissenting) (explaining that these actions are explicitly those of an "access software provider" and thus within the domain of a protected information content provider).

²⁵⁴ See *Zeran*, 129 F.3d at 333 (rejecting liability upon notice); *Hill*, 727 S.E.2d at 558 (quoting *Zeran*, 129 F.3d at 333).

²⁵⁵ See *Accusearch*, 570 F.3d at 1204 (Tymkovich, J., concurring) (explaining that Accusearch should be liable for its conduct, outside of the scope of CDA analysis, rather than its development of the content); *Barnes*, 570 F.3d at 1107 (holding defendant liable for its role a promisor, not as a developer of information); *Roommates.com*, 521 F.3d at 1664 (holding Roommates.com liable for requiring unlawful answers).

²⁵⁶ See 47 U.S.C. § 230(a)–(b) (describing Congress's policy to promote growth of the Internet and minimize government intervention); *Roommates.com*, 521 F.3d at 1183, 87 (McKeown, J., dissenting) (expressing concern about the scope of the majority's opinion); Jonathan Band & Matthew

CONCLUSION

Immunity under the Communications Decency Act should be applied broadly, supporting Congress's intent to limit government intervention and foster the growth of the Internet. Although this generally has been the case, the vagueness of the *Roommates.com* holding leaves the door open for rogue decisions and a denial of immunity for StubHub and other peer-to-peer marketplaces. In the least, courts should interpret *Roommates.com* to mean a website loses immunity when it requires the content in question. To eliminate this ambiguity, Courts should adopt a new test that a website only loses CDA immunity when it takes a clear act guaranteeing the production of the content. Like the requirement test, this test provides predictability for websites claiming CDA immunity. Conversely, this test does not protect websites who pay for content or take other clear acts guaranteeing content, and thus strikes a balance for those concerned with the potential reach of CDA immunity. An unambiguous test that grants broad immunity is necessary for the growth of StubHub and other peer-to-peer marketplaces.

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Schruers, Symposium, *Safe Harbors Against the Liability Hurricane: The Communications Decency Act and the Digital Millennium Copyright Act*, 20 CARDOZO ARTS & ENT. L.J. 295, 301 (2002) (noting the general predictability of CDA application). Despite the general predictability for most websites, there is still uncertainty on its application to marketplaces. See Brief for Appellant, *supra* note 160, at 23–25 (arguing that an encouragement test chills e-commerce growth); Goldman, *supra* note 124 (opining that all marketplaces who encourage equilibrium market places could be liable under the NPS encouragement test); Geron, *supra* note 167 (describing the extreme growth of the sharing economy); Miller, *supra* note 165 (detailing the dependence of Uber and Airbnb on CDA immunity).