Consolidated Case Nos. 04-56916 and 04-57173

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FAIR HOUSING COUNCIL OF SAN FERNANDO VALLEY, THE FAIR HOUSING COUNSEL OF SAN DIEGO, individually and on behalf of the GENERAL PUBLIC,
Plaintiffs, Appellants, and Appellees,
v.
ROOMMATE.COM, LLC,
Defendant, Appellee, and Appellant.

Appeals from the United States District Court
for the Central District of California
The Honorable Percy Anderson, United States District Judge, Presiding
Case No. CV-03-09386-PA (RZx)

AMICI CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION, LYCOS INC., AND PROFESSOR ERIC GOLDMAN IN SUPPORT OF PETITION FOR REHEARING *EN BANC*

Date of Decision: May 15, 2007
Judges: Reinhardt, Kozinski and Ikuta

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Pursuant to FRAP 26.1, amicus Electronic Frontier Foundation ("EFF"), a 501(c)(3) non-profit corporation incorporated in the State of Massachusetts makes the following disclosure:

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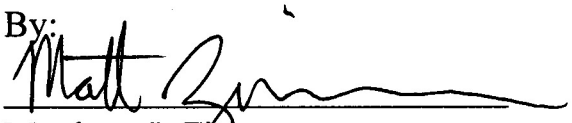
4. Amicus LYCOS, Inc. is a wholly owned subsidiary of Daum Communications Corp., a Korean company traded on the KOSDAQ under the listing number 035720.

Dated: July 13, 2007

By: 

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STATEMENT OF AMICI CURIAE

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization that works to protect rights in the digital world. EFF encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society.

Amicus Eric Goldman is an assistant professor of law and Director of the High Tech Law Institute at Santa Clara University School of Law. He has taught and researched cyberlaw for a dozen years and has represented numerous user-generated content websites.

Amicus LYCOS, Inc. is an Internet service provider which operates search and technology websites that foster online communities. Lycos has a direct interest in this case due to its provision of Internet services to millions of users and its hosting of content generated by such users, including chat, personal webpages, email, and more.

Collectively, Amici agree with Congress that laws and regulations should avoid stifling free expression on the Internet. We are submitting this brief because we believe that the panel's decision contravenes this objective. Whatever the underlying merits of the Fair Housing Act, opening the door to

liability for information intermediaries is not the solution any problem before this Court.

ARGUMENT

I. BACKGROUND.

A majority of the panel held that Petitioner Roommate.com ("Roommate") was ineligible for statutory immunity under Section 230 of the Communications Decency Act (47 USC § 230) ("CDA 230") as a result of publishing its members' answers to form questionnaires. First, the majority found that Roommate "suggested, encouraged, or solicited" the content that the plaintiffs assert violates the Fair Housing Act. *See* Opinion at pp.5720-21. The majority ultimately did not determine whether engaging in such behavior alone would result in a loss of CDA 230 immunity, although in dicta strongly implied that it would: "We are not convinced that *Carafano* would control in a situation where defamatory, private or otherwise tortious or unlawful information was provided by users in direct response to questions and prompts from the operator of the website." Opinion at p.5720. Second, the majority also found that "by categorizing, channeling and limiting the distribution of users' profiles, Roommate provides an additional layer of information that it is 'responsible' at least 'in

part' for creating or developing" and therefore is ineligible for immunity." Opinion at p.5722.

II. THE PANEL'S HOLDING CONFLICTS WITH THE STATUTE'S PLAIN LANGUAGE AND EXTENSIVE UNIFORM PRECEDENT.

At its core, the panel's majority ruling of May 15, 2007 ("Opinion") communicates a policy disagreement with Congress, not an application of the law. As the statutory language and legislative history makes clear, CDA 230 was explicitly passed to immunize interactive computer services from liability for exercising the type of editorial control that publishers ordinarily make. Far from an attempt to retain liability for hosts of Internet-based information, CDA 230 was intended to codify a broad-based anti-regulatory approach that would encourage the development of innovative technologies online.

The statutory language is unequivocal: "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." 47 USC § 230(c)(1). It does not condition immunity on how the information is displayed, selected, or channeled. And it does not trigger partial responsibility for third party content when the service provider prompts the substance of that content.

This Congressional decision was a deliberate effort to encourage service providers to find innovative ways to channel and even limit speech to better protect the public. CDA 230 itself provides: "[i]t is the policy of the United States [...] to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 USC § 230(b)(2), (3). As Representative Christopher Cox noted in support of the future statute, CDA 230 would "protect [online service providers] from taking on liability ... that they should not face ... for helping us solve this problem" as well as establish a federal policy of nonregulation to "encourage what is right now the most energetic technological revolution that any of us has ever witnessed." 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995).

Courts across the country have uniformly interpreted CDA 230 expansively, in jarring contrast to the holding of the *Roommate.com* panel. Contrary to the panel's anomalous viewpoint, the vast majority of courts – including the Ninth Circuit – have held that "suggesting," "encouraging," or otherwise "soliciting" content does not render service providers ineligible

for statutory immunity. *See, e.g., Carafano v. Metrosplash.com. Inc.*, 339 F.3d 1119 (9th Cir. 2003) (dating site with pre-prepared responses not an information content provider as "the selection of the content was left exclusively to the user.").[1] Indeed, the panel's attempts to distinguish *Carafano* based on the absence in that case of some sort of encouragement or inducement on the part of the website operator finds no support in the statute, the legislative history, or subsequent judicial decisions.

Similarly, the panel's second critical factor – the "categorizing, channeling and limiting the distribution of users' profiles" – is wholly unsupported. In fact, the panel's new metric rejects the analysis of a wide range of courts that have found CDA 230 immunity applicable even in light of the facilitation of access to or customization of online information created by third parties.[2]

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[1] *See also, e.g., Batzel v. Smith*, 333 F.3d 1118, 1032 (9th Cir. 2003) (rejecting liability based on the service's conscious selection of third-party content); *Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007) (rejecting liability based on the theory that the service induced unlawful postings); *Donato v. Moldow*, 865 A.2d 711 (N.J. Super. Ct. App. Div. Jan. 31, 2005) (rejecting liability where message board provider encouraged users to submit complaints about public officials).

[2] *See, e.g., Zeran v. America Online, Inc*., 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) (CDA 230 bars claims stemming from the "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone, or alter content — are barred."); *Batzel*, 333 F.3d at 1021 (operator of listserv "exercises some editorial discretion in

III. THE DECISION UNDERMINES EXPLICIT CONGRESSIONAL PREFERENCES FOR CERTAINTY AND AGAINST THE REGULATION OF INFORMATION INTERMEDIARIES.

A. IF ALLOWED TO STAND, THE DECISION WOULD LEAVE INFORMATION SERVICE PROVIDERS WITHOUT A CLEAR PATH TO AVOID LIABILITY.

If left untouched, the decision would profoundly undermine Congress' goals of securing legal certainty and predictability for interactive computer services and encouraging innovation to better serve the public. The Ninth Circuit's clear holding in *Carafano* – that "content [] formulated in response to [an interactive computer service's] questionnaire" did not undermine the service's entitlement to statutory immunity because "selection of the content was left exclusively to the user" – was rejected by the panel without a single reference to an authoritative source. *See* Opinion at p.5720-21.

Though clearly dicta, the panel's discussion of sites that post users' selections of pre-prepared responses to questionnaires leaves developers to grapple with the consequences of this departure from binding. Indeed, the panel's dicta is particularly harmful as it provides little guidance as to how and to what extent the Court's approach to CDA 230 has changed, although it clearly has: "While mapping the outer limits of *Carafano's* protection of

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choosing which of the e-mails he receives are included in the listserv mailing, omitting e-mails unrelated to stolen art and eliminating other material that he decides does not merit distribution to his subscribers").

websites that solicit and post users' responses is an interesting and difficult task, we need not undertake it today[.]" Opinion at p.5721.

In addition to its dicta indicating the likelihood that "soliciting" content could result in a loss of CDA 230 immunity, the panel also held that "do[ing] more" than soliciting content by "channeling and limiting the distribution" of material and thus adding an "additional layer of information" threatens immunity as well. Opinion at p.5722. It is by no means clear, however, how these various factors operate in practice. The decision seems to indicate that the existence of the two factors together results in a loss of immunity for the *Roommate.com* defendant. However, the Opinion repeatedly implies that either factor alone could lead to a finding that the defendant was "'responsible' at least 'in part' for creating or developing" some of the material in question. *See* Opinion at p.5721-23.

B. CURRENT AND FUTURE INNOVATION WOULD BE STIFFLED UNDER THE RESTRICTIONS IMPOSED BY THE PANEL.

If left intact, the panel's finding that Roommate.com is an information content provider will lead to results that directly conflict with Congress' goal in enacting CDA 230. First, the ruling will inhibit technological developments because providers and users of interactive computer services will be discouraged from investing in creating important Internet features if

they face the constant threat of litigation for customizing and facilitating access to third-party content. Second, service providers concerned about their liability will be deterred from facilitating open and robust communication between users.

As examples of how difficult it is to determine the implications of the panel's Opinion, consider some of the technological innovations that may be endangered as a consequence of the panel's holdings:

- *"Ordinary" search functionality*. Search engines "categorize," "channel," and "limit the distribution" of third-party content. By definition, search engines aggregate and organize large amounts of third-party information, and users expect them to structure search results to deliver a relevant subset of an otherwise unwieldy mass of material. Given this basic structure of search engines, it appears inevitable that providers of such services would conflict with CDA 230 under the Court's reimagining. This Opinion appears to expose all search engines to enormous liability for republishing any tortious third party content in their databases.

- *Visitor rating and feedback features*. Many websites (such as Movies.com, Amazon.com, Gamespot.com, Epinions.com, Consumerreview.com, and eBay.com) solicit users to provide "ratings" and "feedback" about marketplace goods and services or people with whom

users have interacted. Among other benefits, this type of subjective user data is beneficial to the functioning of an efficient marketplace as it holds companies and individuals accountable for their choices. Yet according to this Opinion, soliciting sortable user ratings or feedback appears to trigger a loss of immunity under the panel's new test. Consequently, this Opinion may discourage websites from soliciting and republishing consumer reviews and feedback about marketplace offerings to the detriment of all consumers.

- *Tagging*. The success of media-sharing sites such as Flickr.com (photographs) and YouTube.com (video clips) can partly be attributed to their respective providers giving users the ability to "tag" or associate user-selected labels with content for easy search and retrieval. More tagged content generally facilitates more accurate customized searches and provides a better user experience, so website operators frequently "encourage" or "solicit" the use of them. For predictable reasons, these features potentially run afoul of both factors identified by the *Roommate.com* panel. In addition to facilitating the "categorizing" and "limiting" the distribution of content, user tags can potentially be tortious. As a result, it is likely that providers of interactive computer services will curtail users' abilities to categorize content, reducing providers' ability to

learn more about user preferences and correspondingly improve the quality of their sites.

These and other examples demonstrate the popularity and utility of information technologies that allow Internet users to customize both the content available online as well as the means by which users sort and access information that is meaningful to them. Not coincidentally, this is precisely the goal that Congress had in mind when it passed CDA 230. And under the statute, courts simply do not have the discretion to second-guess this policy directive.

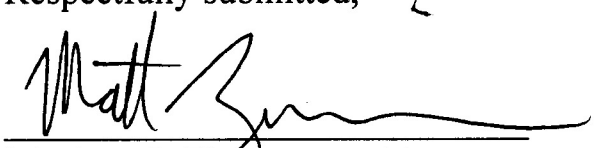
IV. CONCLUSION.

In *Barrett v. Rosenthal*, the California Supreme Court recognized that Congress implemented its policy preferences by "not by maintaining the common law distinction between 'publishers' and 'distributors,' but by broadly shielding all providers from liability for 'publishing' information received from third parties." *Barrett*, 40 Cal. 4th at 69. Specifically, noted the Court, "Congress contemplated self-regulation, rather than regulation compelled at the sword point of tort liability." *Id.* at 69-70. The panel's majority decision in *Roommate.com* would return online innovators to that environment of unnecessary risk and liability that was banished with the

passage of CDA 230. For these reasons, Amici respectfully ask that the Court of Appeals reconsider its opinion and rehear this issue *en banc*.

Dated: July 13, 2007

Respectfully submitted,



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Dated: July 13, 2007

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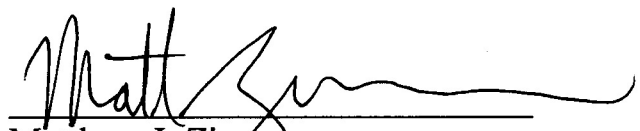

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