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Is There Any Decency in the Communications Decency Act?

Vianca B. Canet¹

I. INTRODUCTION

As technology advances with the rise of the Internet,² there has been a “shift towards networks and platform-based social and economic models.”³ The sharing economy allows people to offer their products or services to others “through online marketplaces that facilitate the transaction”⁴ during the strain of a global financial crisis. The sharing economy has decreased the “fixation on ownership and capital, and offers easier access to anything from accommodation to entertainment.”⁵ Founded in August 2008,⁶ “Airbnb is a[n] . . . online marketplace for short-term rentals.”⁷ Listings may be obtainable on a nightly or monthly basis.⁸

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² 47 U.S.C. § 230 (1996) (stating that the term “Internet” means the international computer network of both Federal and non-Federal interoperable packet switched data networks).

³ WORLD ECON. FORUM, GLOB. AGENDA COUNCIL ON THE FUTURE OF SOFTWARE & SOC’Y, *Deep Shift: Technology Tipping Points and Societal Impact*, Survey Report (Sept. 2015), http://www3.weforum.org/docs/WEF_GAC15_Technological_Tipping_Points_report_2015.pdf.

⁴ See Carmen Nobel, *Uncovering Racial Discrimination in the ‘Sharing Economy’*, HARVARD BUS. SCH. WORKING KNOWLEDGE (last visited Apr. 23, 2017) <http://hbswk.hbs.edu/item/uncovering-racial-discrimination-in-the-sharing-economy>; see also Carmen Nobel, *Racial Discrimination In The Sharing Economy*, FORBES (Feb. 24, 2014 10:24 AM), <http://www.forbes.com/sites/hbsworkingknowledge/2014/02/24/racial-discrimination-in-the-sharing-economy/>.

⁵ WORLD ECON. FORUM, *supra* note 3, at 34.

⁶ *About Us*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Apr. 23, 2017).

⁷ Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com*, HARVARD BUS. SCH. (Working Paper No. 14-054, 2014), http://www.hbs.edu/faculty/Publication%20Files/Airbnb_92dd6086-6e46-4eaf-9cea-60fe5ba3c596.pdf.

⁸ *Sublets*, AIRBNB, <https://www.airbnb.com/about/about-us> (last visited Apr. 23, 2017).

Airbnb has made it more accessible for people, who are more concerned with necessities rather than luxury amenities, to travel for a lower price,⁹ whether it be a loft in New York City overlooking bustling Time Square or a spare bedroom in Des Moines, Iowa. Airbnb provides a place to stay when hotels do not have rooms available.¹⁰ Furthermore, Airbnb offers users the ability to make a supplemental income.¹¹ Proponents of the sharing economy argue that Airbnb quickly generates income for residents.¹² A Nashville couple happily stated, “renting their three-bedroom home to more than fifty visitors during the past two years has helped them with their mortgage.”¹³

Despite the praise and rise in business for Airbnb, there is one problem that is affecting its reputation: virtually unregulated discrimination. However, the sharing economy is the future of our society, and websites like Airbnb, HomeAway,¹⁴ and VRBO,¹⁵ will likely become permanent fixtures.¹⁶ Currently, Airbnb provides more lodging than Hilton Worldwide and Marriot.¹⁷ Airbnb is projected to continue expanding over the coming years.

This article focuses on discrimination in the sharing economy. Part II addresses Airbnb’s efforts to combat discrimination, public response to Airbnb’s discrimination policy. Part III

⁹ Julie Weed, *Airbnb Grows to a Million Rooms, and Hotel Rivals Are Quiet, for Now*, N.Y. TIMES (May 11, 2015), http://www.nytimes.com/2015/05/12/business/airbnb-grows-to-a-million-rooms-and-hotel-rivals-are-quiet-for-now.html?partner=rss&emc=rss&_r=0.

¹⁰ Julie Weed, *supra* note 9. The author would like to note that Airbnb operates domestically as well as internationally. While this paper applies a domestic analysis, at a minimum, parties will need to determine how to complete international service of process.

¹¹ Verena Dobnik, *New York City, Airbnb Battles Over Data, Short-Term Rentals*, NBC 4 NEW YORK (Oct. 15, 2013 4:17 AM), <http://www.nbcnewyork.com/news/local/Airbnb-NYC-Data-Battle-227773671.html>.

¹² See generally Chris Butler, *Lawsuit Challenges Nashville’s Rules on Airbnb.com*, TN. WATCHDOG (Aug. 26, 2015), <http://watchdog.org/235580/nashville/>.

¹³ *Id.*

¹⁴ *Main Page*, HOMEAWAY, https://www.homeaway.com/?k_clickid=ae5712b4-dc98-4b04-96ad-61cc0f09ec4f&gclid=CJWFw6DEgckCFdgWgQodnTAApA (last visited Apr. 23, 2017).

¹⁵ *Main Page*, VRBO, https://www.vrbo.com/?k_clickid=ae5712b4-dc98-4b04-96ad (last visited Apr. 23, 2017).

¹⁶ Lyndsey Gilpin, *We-Commerce: The Sharing Economy’s Uncertain Path to Changing the World*, TECH REPUBLIC, <http://www.techrepublic.com/article/we-commerce-the-sharing-economys-uncertain-path-to-changing-the-world/> (last visited Apr. 23, 2017).

¹⁷ Julie Weed, *supra* note 9.

focuses on the extent that sharing economy businesses perform the same functions as traditional public accommodations, yet escape existing laws and suggestions for how the regulatory structure should be amended. Part IV addresses the legal realities that practitioners may face.

II. BACKGROUND

A. Airbnb's Business Model

Airbnb's website provides an anti-discrimination policy stating:

Airbnb is an open marketplace. Through their experiences on Airbnb, we hope that our guests and hosts build meaningful connections with people from all over the globe. To that end, we prohibit content that promotes discrimination, bigotry, racism, hatred, harassment or harm against any individual or group, and we require all users to comply with local laws and regulations.¹⁸

However, discrimination is inventible under Airbnb's current user procedure.¹⁹ Airbnb users create online profiles as hosts or guests.²⁰ Subsequently, Airbnb requires users to have verified ID's and public reviews.²¹ Further, "[h]aving a [v]erified ID indicates that users have completed a specific set of verifications—offline ID, online ID, profile photo, email address, and phone number."²² Airbnb intends for "hosts and guests to build trust and cultivate their reputations by writing reviews about their experiences after each trip."²³ Thereafter, a guest seeking to rent

¹⁸Alice & Jeff, *Declining an Inquiry Based on Gender?*, COMMUNITY, <https://community.airbnb.com/t5/Hosts/Declining-an-Inquiry-based-on-gender/td-p/100049> (last visited Apr. 23, 2017) (quoting *Anti-Discrimination Policy*, AIRBNB, <https://www.airbnb.com/help/article/483/anti-discrimination-policy> (last visited Apr. 23, 2017)). Citation provided is to a cached version of website, exact phrasing has been altered without a change to meaning. The original posting is no longer accessible. The modified text reads as follows: "This commitment rests on two foundational principles that apply both to Airbnb's hosts and guests: *inclusion and respect*. Our shared commitment to these principles enables every member of our community to feel welcome on the Airbnb platform no matter who they are, where they come from, how they worship, or whom they love. Airbnb recognizes that some jurisdictions permit, or require, distinctions among individuals based on factors such as national origin, gender, marital status or sexual orientation, and it does not require hosts to violate local laws or take actions that may subject them to legal liability. Airbnb will provide additional guidance and adjust this nondiscrimination policy to reflect such permissions and requirements in the jurisdictions where they exist."

¹⁹ *How It Works: Airbnb Help Center*, AIRBNB, <https://www.airbnb.com/help/getting-started/how-it-works> (last visited Apr. 23, 2017).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

on Airbnb can select their destination, travel dates, and number of guests,²⁴ then narrow their search by adding filters such as room type, price, size, instant book, social connections, neighborhoods, amenities and property type.²⁵ Further, Airbnb charges guests when the reservation is confirmed and then releases payouts to hosts twenty-four hours after the guest checks in.²⁶

B. Impacts of Implicit Bias

Although pictures have the ability to “facilitate trust”²⁷ within the online rental community, they also have the ability to enable discrimination by implicit bias, “the unconscious, automatic assumption that people make about others based on their perceived racial identity.”²⁸ A host’s photo can easily convey race, color, religion, sex, national origin, ethnicity, disability,²⁹ age, and

²⁴ *How do I search for listings?*, AIRBNB, <https://www.airbnb.com/help/article/252/how-do-i-search-for-listings> (last visited Apr. 23, 2017).

²⁵ *How do I use search filters?*, AIRBNB, <https://www.airbnb.com/help/article/479/how-do-i-use-search-filters> (last visited Apr. 23, 2017).

²⁶ *When am I charged for a reservation?*, AIRBNB, <https://www.airbnb.com/help/article/92/when-am-i-charged-for-a-reservation> (last visited Apr. 23, 2017).

²⁷ Edelman & Luca, *supra* note 7.

²⁸ Jamilah King, *Airbnb Challenges Harvard Racial Discrimination Study*, RACE FORWARD (Jan. 24, 2014, 11:13 AM), <https://www.colorlines.com/articles/airbnb-challenges-harvard-racial-discrimination-study>.

²⁹ The Americans with Disabilities Act of 1990 (ADA) defines the term “disability” as having “a physical or mental impairment that substantially limits a major life activity; a record of such an impairment; or being regarded as having an impairment.” 42 U.S.C. § 12102(1) (2000); *see also* 29 C.F.R. § 1630.2(g) (1996).

disability creating substantial bias against minorities. A host's name provides an opportunity for the user to infer sex,³⁰ religion,³¹ national origin,³² race and ethnicity.³³

1. Case Studies on Discrimination

Scholars Marianne Bertrand and Sendhil Mullainathan, conducted a study titled “Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” which revealed that having an African-American-sounding name, as opposed to a white-sounding name, minimized one's chances of receiving a job interview considerably, irrespective of profession.³⁴ This field experiment involved sending fictitious, identical résumés with common African American-sounding name, such as “Lakisha Washington” or “Jamal Jones,” and common white-sounding name, such as “Emily Walsh” or “Greg Baker,” to the same employers in Boston and Chicago.³⁵ The study revealed that résumés with white-sounding names received “[fifty] percent more callbacks for interviews”³⁶ and higher quality résumés receive

³⁰ See Angela Onwuachi-Willig and Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, And Why Title VII Should Apply Even If Lakisha And Jamal Are White*, 2005 Wis. L. Rev 1283, 1301 (2005) (stating that “...decisions based upon the sound of a name alone are not acting solely on the basis of race, but instead may also be drawing inferences about a number of the applicant's traits”). For example, making a decision based on name can result in making a decision based on gender.

³¹ See generally K.M. Sharma, *What's In a Name: Law, Religion, and Islamic Names*, 26 DENV. J. INT'L L. & POL'Y 151, 153 (1998) (determining that “the vast majority of Muslim given names carry signifiers of Islamic heritage and are traditionally culled from that religion's holiest book, the Qur'an”); Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. Bjy, Inc. and Title VII Liability for Race Discrimination Based on an Employee's Name*, 16 TEMP. POL. & CIV. RTS. L. REV. 283, 293 (2006).

³² 29 C.F.R. § 1606(1) (2006) (determining that “the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group” and extends to discrimination founded on the view that “an individual's name or spouse's name is associated with a national origin group”).

³³ “Names are often a proxy for race and ethnicity.” See *El-Hakem v. BJY Inc.*, 415 F.3d 1068, 1073 (9th Cir. 2005) (citing *Orhorhaghe v. I.N.S.*, 38 F.3d 503 (9th Cir. 1994) (noting that “[l]ike one's appearance, one's name is frequently correlated with one's racial or ethnic background, and in both instances the racial or ethnic background which results in adverse action by immigration officers almost always is that of people of color”).

³⁴ Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 THE AMERICAN ECONOMIC REVIEW 4, 991–1013 (Sep. 2004), https://www.fsb.miamioh.edu/lij14/420_paper_experiment_Bertrand04.pdf.

³⁵ *Id.*

³⁶ *Id.* at 1, 3, 10.

“[thirty] percent more callbacks” in comparison to those with African American-sounding names.³⁷

Table 1 shown below illustrates the mean callback rate by racial association of names:

TABLE 1—MEAN CALLBACK RATES BY RACIAL SOUNDINGNESS OF NAMES

	Percent callback for White names	Percent callback for African-American names	Ratio	Percent difference (<i>p</i> -value)
Sample:				
All sent resumes	9.65 [2,435]	6.45 [2,435]	1.50	3.20 (0.0000)
Chicago	8.06 [1,352]	5.40 [1,352]	1.49	2.66 (0.0057)
Boston	11.63 [1,083]	7.76 [1,083]	1.50	4.05 (0.0023)
Females	9.89 [1,860]	6.63 [1,886]	1.49	3.26 (0.0003)
Females in administrative jobs	10.46 [1,358]	6.55 [1,359]	1.60	3.91 (0.0003)
Females in sales jobs	8.37 [502]	6.83 [527]	1.22	1.54 (0.3523)
Males	8.87 [575]	5.83 [549]	1.52	3.04 (0.0513)

Notes: The table reports, for the entire sample and different subsamples of sent resumes, the callback rates for applicants with a White-sounding name (column 1) an an African-American-sounding name (column 2), as well as the ratio (column 3) and difference (column 4) of these callback rates. In brackets in each cell is the number of resumes sent in that cell. Column 4 also reports the *p*-value for a test of proportion testing the null hypothesis that the callback rates are equal across racial groups.

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Moreover, a recent Harvard Business School (“HBS”) study pooled data on Airbnb rentals from July 2012 in New York City and found a substantial bias against minority Airbnb hosts, which could ultimately present a bias against minority guests.³⁹ The HBS researchers, together with workers from Amazon Mechanical Turk (“AMT”), rated photos of each listing on a seven-point scale ranging from “[t]his is a terrible apartment. I would not stay here at any price” to “[t]his is an extremely nice apartment. I would stay here even if it were a lot more

³⁷ *Id.* at 1, 12.

³⁸ See Bertrand & Mullainathan, *supra* note 34.

³⁹ See Edelman & Luca, *supra* note 7.

expensive than a nice hotel room.”⁴⁰ HBS compiled all the publicly available profile pictures of New York City hosts in order to determine race, and other AMT employees coded the races into “White, Black, Hispanic, Asian, Unclear but Non-white, Multiple Races, Not Applicable (no people in picture), or Unclear/Uncertain.”⁴¹

The HBS study discovered that black hosts receive twelve percent less per similar listing than non-black hosts.⁴² The study also states, “[B]lack hosts receive a larger price penalty for having a poor location score relative to non-black hosts.”⁴³ These differences highlight the risk of discrimination in online marketplaces, suggesting an important unintended consequence of a seemingly-routine mechanism for building trust.”⁴⁴ Airbnb released a statement declaring, “We are committed to making Airbnb the most open, trusted, diverse, transparent community in the world” and “[o]ur Terms of Service prohibit content that discriminates.”⁴⁵ However, Airbnb refutes the HBS studies claims arguing that the data is “two-years old” and is simply one of thousands of cities Airbnb serves.⁴⁶

2. Public Response

Despite Airbnb’s refutations, individuals are publicly attacking Airbnb’s lack of compliance with housing regulations. YouTube personality, Tommy Sotomayor, claims he was rejected from a rental unit because of his skin color through a video uploaded to YouTube on October 2013, which has since been removed.⁴⁷ Sotomayor states, “I got declined twice by the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Edelman & Luca, *supra* note 7.

⁴⁵ Alexandra Sifferlin, *Harvard Study Suggests Racial Bias Among Some Airbnb Renters*, TIME (Jan. 27, 2014), <http://time.com/2345/harvard-study-suggests-racial-bias-among-some-airbnb-renters/>.

⁴⁶ *Id.*

⁴⁷ Jorge Rivas, *Airbnb Racism: Neither Unique nor Surprising*, FUSION (Jan. 23, 2014), <http://fusion.net/story/4689/airbnb-racism-neither-unique-nor-surprising>.

same person trying to rent a place and if you look at their history they only rent to white people . . .⁴⁸ He claims he paid for his rental and was subsequently rejected after the host found out he is black.⁴⁹ Furthermore, Sotomayor stated that the host was still listing the apartment space as vacant on the dates he requested.⁵⁰

In response to discrimination case studies, user complaints, and class action lawsuits, two rival room-sharing services, Innclusive⁵¹ and Noirbnb⁵², are marketing themselves as short-term rental services that are non-discriminatory and safe. Ironically, Noirbnb began as a result of Airbnb's discrimination practices.⁵³ On June 3rd, 2016, Noirbnb was created to serve the community and be "The Future of Black Travel."⁵⁴ Airbnb's continued success will be dependent on whether minorities feel welcomed to utilize the website in the same nondiscriminatory way that they are welcomed at hotels.⁵⁵

C. Airbnb's Latest Response to Discrimination

On September 8, 2016, Laura W. Murphy, President of Laura Murphy and Associates released "Airbnb's Work to Fight Discrimination and Build Inclusion A Report Submitted to Airbnb."⁵⁶ This report demonstrates the overall need for Airbnb to change its policy to reflect discrimination. Instead of removing mandatory profile photos that led to guests being instantly refused service because of their appearance, Airbnb intends on experimenting "with reducing the

⁴⁸ Rivas, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Home Page*, INNCLUSIVE, <https://www.innclusive.com/> (last visited Apr. 23, 2017).

⁵² *Welcome Home*, NOIRBNB, <http://noirbnb.com/> (last visited Apr. 23, 2017).

⁵³ *Story*, NOIRBNB, <http://noirbnb.com/story> (last visited Apr. 23, 2017).

⁵⁴ *Id.*

⁵⁵ See Katie Benner, *Airbnb Vows to Fight Racism, but Its Users Can't Sue to Prompt Fairness*, THE N.Y. TIMES (June 19, 2016), <https://www.nytimes.com/2016/06/20/technology/airbnb-vows-to-fight-racism-but-its-users-cant-sue-to-prompt-fairness.html>.

⁵⁶ Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Building Inclusion A Report Submitted to Airbnb*, AIRBNB (Sept. 8, 2016), http://blog.airbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf?3c10be.

prominence of guest photos in the booking process and enhancing other parts of host and guest profiles with objective information.”⁵⁷ In addition, November 1, 2016, marks the first day that Airbnb users will have to agree to uphold a Community Commitment, which states:

We believe that no matter who you are, where you are from, or where you travel, you should be able to belong in the Airbnb community. By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias.⁵⁸

Airbnb has “trained specialist” to target and combat discrimination and route concerns.⁵⁹ Furthermore, Airbnb will offer new training to help people learn how to fight bias and will eventually highlight hosts who have completed this training.⁶⁰ Airbnb will implement the Diversity Rule, “a new Airbnb policy that will mandate that all candidate pools for senior-level positions include women and candidates from underrepresented backgrounds.”⁶¹ Airbnb will also expand efforts to bring economic opportunities to minority-owned business.⁶²

Airbnb’s updated non-discrimination policy states, in relevant part, what a guest can do if they have been turned down by a host:

If a particular listing contains language contrary to this nondiscrimination policy, the host will be asked to remove the language and affirm his or her understanding and intent to comply with this policy and its underlying principles. Airbnb may also, in its discretion, take steps up to and including suspending the host from the Airbnb platform. If the host improperly rejects guests on the basis of protected class, or uses language demonstrating that his or her actions were motivated by factors prohibited by this policy, Airbnb will take steps to enforce this policy, up to and including suspending the host from the platform. As the Airbnb community grows, we will continue to ensure that Airbnb’s policies and practices align with our most important goal: To ensure that guests and hosts feel welcome and

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 10.

⁵⁹ *Id.*, at 11, 20.

⁶⁰ *Id.* at 12.

⁶¹ *Murphy*, *supra* note 55, at 12.

⁶² *Id.*

respected in all of their interactions using the Airbnb platform. The public, our community, and we ourselves, expect no less than this.⁶³

Airbnb acknowledges that despite making these changes, discrimination is still likely to occur on its platform.⁶⁴ In order to accommodate those guests who have been discriminated against, Airbnb will begin instituting Open Doors.⁶⁵ The Open Doors policy ensures an Airbnb user a place to stay if the user is discriminated against and is unable to stay at a particular listing.⁶⁶ Already in effect and a favorite among users, Airbnb's Instant Book is a feature, which does not require prior-approval from a user.⁶⁷ Airbnb's goal is to make one million listings bookable via Instant Book by January 2017.⁶⁸ Ultimately, Airbnb has made minimal changes in the arena of discrimination and is simply designing its platform to absolve itself of liability.

III. LEGAL UNCERTAINTY

Of the many categories of complaint data for housing discrimination, “four million acts of discrimination are estimated to occur in the rental market,”⁶⁹ “but Americans only report a fraction of these acts in the form of complaints to private, nonprofit fair housing groups, and federal and local government agencies.”⁷⁰ The environment of legal uncertainty has created exponential development for Airbnb, yet has also opened it to attacks by its many critics. State and local

⁶³ *Airbnb's Nondiscrimination Policy: Our Commitment to Inclusion and Respect*, AIRBNB, <https://www.airbnb.com/help/article/1405/airbnb-s-nondiscrimination-policy--our-commitment-to-inclusion-and-respect?topic=533> (last visited Apr. 23, 2017).

⁶⁴ Murphy, *supra* note 55, at 21.

⁶⁵ *Id.* at 11, 21.

⁶⁶ Murphy, *supra* note 55, at 11, 21.

⁶⁷ See Elaine Glusac, *As Airbnb Grows, So Do Claims of Discrimination*, THE N.Y. TIMES (June 21, 2016), <http://www.nytimes.com/2016/06/26/travel/airbnb-discrimination-lawsuit.html>; see also *What is Instant Book?*, AIRBNB, <https://www.airbnb.com/help/article/523/what-is-instant-book> (last visited Apr. 22, 2017) (defining Instant Book as listings [that] don't require approval from the host before they can be booked. Instead, guests can just choose their travel dates, book, and discuss check-in plans with the host).

⁶⁸ Murphy, *supra* note 55, at 11.

⁶⁹ NAT'L FAIR HOUSING ALLIANCE, *Where You Live Matters 2015 Fair Housing Trends Report* (2015) <http://www.nationalfairhousing.org/Portals/33/2015-04-30%20NFHA%20Trends%20Report%202015.pdf> (citing the U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *The State of Fair Housing: FY2006 Annual Report on Fair Housing* (2006), <http://www.hud.gov/offices/fheo/fy2006rpt.pdf>).

⁷⁰ *Id.*

government have attempted to make changes in order to regulate Airbnb and ensure compliance with housing regulations.

Airbnb's website now has an overview of local housing laws and regulations throughout the forty-seven cities in the United States.⁷¹ Hosts may, but are not required, to view these regulations before making a listing.⁷² Airbnb also urges users to check their "HOA or Co-Op Board regulations to make sure there is no prohibition against subletting--or any other restriction against hosting."⁷³ Furthermore, many critics have attacked federal laws that undermine the legal framework and grant Internet platforms, such as Airbnb, immunity.

A. The Communications Decency Act of 1996

Airbnb is not liable for discrimination occurring on their platform because they are immune under Section 230 (c) of the Communications Decency Act of 1996 ("CDA").⁷⁴ The CDA was enacted into law as a section of the Telecommunications Act of 1996, P.L. 104-104.⁷⁵ Subsection (c) of the CDA, known as the "Good Samaritan" provision states:

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. No provider or user of an interactive computer service shall be held liable on account of—any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).⁷⁶

⁷¹ See generally *Responsible Hosting in the United States*, AIRBNB, <https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states> (last visited Apr. 22, 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 47 U.S.C. § 230(c) (1996).

⁷⁵ 47 U.S.C. § 230 (attempting to modernize the outdated Telecommunications Act of 1934).

⁷⁶ 47 U.S.C. § 230(b).

Courts have interpreted Section 230 of the CDA **broadly**⁷⁷ to grant immunity to websites that normally would be liable under “vicarious liability”⁷⁸ from liability for user-generated content.⁷⁹ However, subsection (e) of the CDA outlines exceptions.⁸⁰ The CDA has no effect on criminal law or on intellectual property law.⁸¹ Subsection (e) of the CDA also states, “Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.”⁸² Further, “no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.”⁸³ Section 230 has been construed to preempt inconsistent state law claims.⁸⁴ Moreover, this section does not limit the Electronic Communications Privacy Act of 1986, or any amendments to the Act including comparable State law.⁸⁵

In 1997, the United States Supreme Court determined in *Reno v. Am. Civ. Liberties Union* that sections of the CDA focusing on liability for indecent materials were unconstitutional under the First Amendment.⁸⁶ *Reno* emphasized that the Internet has experienced “extraordinary growth” and “the content is as diverse as human thought.”⁸⁷ Furthermore, *Reno* stressed the

⁷⁷ See Matthew G. Jeweler, *The Communications Decency Act of 1996: Why § 230 is Outdated and Publisher Liability for Defamation Should be Reinstated Against Internet Service Providers*, 8 U. PITT. J. TECH. L. & POL'Y 3 (2007).

⁷⁸ *Vicarious Liability*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining “vicarious liability” as an “[o]bligation rising from parties’ relationship with each other”).

⁷⁹ See Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL'Y 863, 880 (2010).

⁸⁰ 47 U.S.C. § 230(e) (2012).

⁸¹ *Id.*

⁸² 47 U.S.C. §§ 230(e)(1)–(2).

⁸³ 47 U.S.C. § 230(e)(3).

⁸⁴ See Samuel J. Morley, *How Broad Is Web Publisher Immunity Under S230 of the Communications Decency Act of 1996?*, 84 FLA. B.J. 8 (2010).

⁸⁵ 47 U.S.C. § 230(e)(4).

⁸⁶ *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (holding that § 223(a)(1)(B), § 223(a)(2), § 223(d) of the CDA are unconstitutional because they limit freedom of speech guaranteed by the First Amendment and are substantially overbroad, except for cases of obscenity or child pornography); see also *Roth v. United States*, 354 U.S. 476 (1957) (determining that “[o]bscene material is not within the area of constitutionally protected speech or press”).

⁸⁷ *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (stating that “‘the Internet is an international network of interconnected computers,’ currently used by approximately 40 million people worldwide”) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 849 (1997)).

importance of retaining first amendment rights in the light of new legislation governing the rise of the Internet.⁸⁸

The original purpose of Section 230 of the CDA was to restrict free speech on the Internet, yet the CDA's effects have been counterintuitive resulting in free speech and expression on the Internet.⁸⁹ Section 230 states:

[I]t is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services and other interactive media; (2) 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; (3) 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; (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.⁹⁰

The CDA distinguishes between interactive computer services and internet content providers, for whom the statute does not provide immunity.⁹¹ Interactive computer services are “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”⁹² Internet content providers are defined in the statute as “any person or

⁸⁸ *Reno*, 521 U.S. at 882.

⁸⁹ *CDA 230 The Most Important Law Protecting Internet Speech*, ELECTRONIC FRONTIER FOUNDATION DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD, <https://www.eff.org/issues/cda230> (last visited Apr. 22, 2017).

⁹⁰ 47 U.S.C. §§ 230 (b)(1)–(b)(5).

⁹¹ See 47 U.S.C. §§ 230(f)(2), (f)(3); see also *Kuersteiner v. Schrader*, 2008 NY Slip Op 33614(U), ¶¶ 6–7 (Sup. Ct.).

⁹² 47 U.S.C. § 230(f)(2).

entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."⁹³

Three elements are required for Section 230 immunity to apply.⁹⁴ First, “the defendant must be a provider or user of an interactive computer service.”⁹⁵ Internet service providers, such as America Online⁹⁶ and Amazon,⁹⁷ are recognized as § 230 providers of interactive computer services. Second, “the asserted claims must treat the defendant as a publisher or speaker of information.”⁹⁸ Lastly, “the information must be provided by another interactive computer service and not the interactive computer service itself.”⁹⁹

1. Judicial Interpretation of Section 230 of the CDA

Many scholars believe that, “Airbnb is a company that evolved in a relatively sparse and outdated regulatory environment.”¹⁰⁰ No amendments have occurred to the act since 1997,

⁹³ See 47 U.S.C. §§ 230(f)(2), (f)(3); see also Chicago Lawyers’ Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc., 461 F. Supp. 2d 681,688 (ND Illinois 2006) (citing, Zeran v. Am. Online, Inc., 129 F.3d 327).

⁹⁴ Schneider v. Amazon.com, Inc., 31 P.3d 37, 39 (Wash. Ct. App. 2001) (holding that Amazon had immunity under statute as the publisher of content provided by others).

⁹⁵ See 47 U.S.C. § 230(f)(2); see also Schneider, 31 P.3d at 39.

⁹⁶ Zeran, 129 F.3d at 327.

⁹⁷ Schneider, 31 P.3d at 40.

⁹⁸ *Id.* at 39.

⁹⁹ *Id.* (determining that an ISP will not be liable if the defamatory material is provided solely by a third party, but if the ISP takes any part in the creation of the material it could be liable).

¹⁰⁰ See Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLO. TECH. L.J. 160 (2015) (stating that “Airbnb is a company that evolved in a relatively sparse and outdated regulatory environment”); see generally Jeweler, *supra* note 73, at 1 (explaining that the CDA is outdated and unfair); see David Lukmire, *Can the Courts Tame the Communications Decency Act?: The Reverberations of Zeran v. America Online*, 66 N.Y.U. ANN. SURV. AM. L. 371, 410 (2010) (stating that the internet has flourished with a minimum amount of government regulation); see also Lisa Marie Ross, *Cyberspace: The New Frontier for Housing Discrimination-an Analysis of the Conflict Between the Communications Decency Act and the Fair Housing Act*, 44 VAL. U. L. REV. 329, 330 (2009) (arguing for modernization of the CDA); see also Stephen Collins, *Saving Fair Housing on the Internet: The Case for Amending the Communications Decency Act*, 102 N.W. U. L. REV. 1471, 1491 (2008) (explaining that Congress passed the CDA to promote decency on the internet); see also Amanda L. Cecil, *Taking Back the Internet: Imposing Civil Liability on Interactive Computer Services in an Attempt to Provide an Adequate Remedy to Victims of Nonconsensual Pornography*, 71 WASH. & LEE L. REV. 2513, 2540 (2014) (explaining that the CDA provides broad immunity to internet providers and needs to be reformed for the modern day internet).

although the Internet is substantially different than it was at its creation.¹⁰¹ Further, Airbnb should not fall under the blanket of Section 230 (c) of the CDA.¹⁰²

Decided a year after the CDA was passed, the leading decision is *Zeran v. Am. Online, Inc.*¹⁰³ In this case, Kenneth Zeran brought suit against America Online, Inc. (“AOL”), “arguing that AOL unreasonably delayed in removing defamatory messages posted by an unidentified third party, refused to post retractions of those messages, and failed to screen for similar postings thereafter.”¹⁰⁴ The district court determined that AOL had the affirmative defense of immunity under Section 230 of CDA.¹⁰⁵ The United States Court of Appeals affirmed the district courts determination holding that Section 230 inoculates computer service providers like AOL from liability for information that originates with third parties.¹⁰⁶ Therefore, lawsuits that hold an interactive computer service liable for publishing typical editor functions “such as deciding whether to publish, postpone or alter content are barred.”¹⁰⁷ Conversely, some courts have chosen to stray from the broad, *Zeran* interpretation.¹⁰⁸ “We share the concerns of those who have expressed reservations about the *Zeran* court's broad interpretation of section 230 immunity.”¹⁰⁹

¹⁰¹ *Reno*, 521 U.S. at 886 (holding that § 223(a)(1)(B), § 223(a)(2), and § 223(d) of the CDA are unconstitutional because they limit freedom of speech guaranteed by the First Amendment and are substantially overbroad, except for cases of obscenity or child pornography).

¹⁰² 47 U.S.C. § 230(c).

¹⁰³ See generally *Zeran v. Am. Online*, 129 F.3d 327 (4th Cir. 1997).

¹⁰⁴ *Id.* at 328.

¹⁰⁵ *Id.* (affirming district court’s ruling that computer service providers like AOL are not liable for information that originates with third parties under §230 of the CDA).

¹⁰⁶ *Id.* at 330–31 (defining a “computer service provider” as “[o]ne of the many means by which individuals access the Internet is through an interactive computer service. These services offer not only a connection to the Internet as a whole, but also allow their subscribers to access information communicated and stored only on each computer service’s individual proprietary network.”) (quoting *Reno v. ACLU*, 521 U.S. 874 (1997)).

¹⁰⁷ See *id.* at 330 (barring lawsuits against service providers for performing traditional editorial functions such as deciding whether to publish, withdraw, or postpone content); see also *Kuersteiner v. Schrader*, No. 33614, slip op. at 4–5 (N.Y.S. Ct. Oct. 14, 2008) (stating that “section 230 of the CDA precludes courts from entertaining claims that would put a computer service provider in a publisher’s role”).

¹⁰⁸ See *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006) (concluding that “the prospect of blanket immunity for those who intentionally redistribute defamatory statements on the Internet has disturbing implications”).

¹⁰⁹ *Barrett*, 146 P.3d at 529.

In the case of *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the court held that the CDA barred causes of action that would require treating interactive computer services as publisher of third-party content.¹¹⁰

The issue becomes more convoluted when a website offers a mix of content created by a user and interactive computer service. At what point does an interactive computer service cross the line between being a facilitator of third-party content to being a co-creator of that content? In *Carafano v. Metrosplash.com, Inc.*, an unknown prankster impersonating actress Christianne Carafano, created a profile for her on an online dating site.¹¹¹ The profile included Carafano's home address.¹¹² Carafano received threatening phone calls and subsequently sued the dating site for publishing the unauthorized profile.¹¹³

¹¹⁰ *Chi. Lawyers' Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008).

¹¹¹ *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003).

¹¹² *Carafano*, 339 F.3d at 1121.

¹¹³ *Carafano*, 339 F.3d at 1122.