Internet Dating Websites: A Refuge for Internet Fraud

*Trenton E. Gray**

I. Introduction

As individuals are constantly trying to meet new people and find love, Internet dating has begun to replace bars and nightclubs as a legitimate means to find someone.[1] Seeing that the expanse of Internet dating cannot be ignored, Wall Street found that over $2.4 billion was spent on Internet dating in 2008.[2] Unfortunately, Internet dating websites are becoming a refuge for scammers and frauds who try to live a life of fiction.[3] False and misrepresented profiles created by users bring the potential for criminal charges, such as having sexual relations with a minor when one lies about his or her age.[4] Many dangerous people use these sites as a way to lure potential victims.[5] Also, individual subscribers are likely to suffer personal harm, often in the form of damage to their reputation.[6]

Although false and misrepresented profiles are becoming a huge problem on Internet dating websites, consumers are not being protected by the government from these problems. Since most individuals do not have the funds to compensate for their wrongs, the honest person has no possibility to recover damages unless they go after the false subscriber

---

* Trenton E. Gray, Candidate for Juris Doctor, May 2011, Florida Coastal School of Law; B.B.A. in Finance, Texas Tech University. I would like to thank my family for their support and Professor Lucille Ponte for her inspiration and guidance in writing this Article as a student in her Law of Information Technology class.

1 Sarah Goldman, *Internet Dating from the Comfort of Your Own Home*, Pattaya Daily News, Mar. 31, 2010, http://www.pattayadailynews.com/en/2010/03/31/internet-dating-from-the-comfort-of-your-own-home/.

2 Internet Dating Directory, http://www.internetdating.net (last visited Feb. 23, 2011).

3 *See id.*

4 *See, e.g.*, Doe v. SexSearch.com, 551 F.3d 412, 415 (6th Cir. 2008).

5 *See, e.g.*, *id.*

6 *See, e.g.*, Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120 (9th Cir. 2003).

personally which can be difficult.[7] This difficulty in locating the subscriber who originally published the profile may be eliminated if a registration process confirming identity is used.[8] Therefore, this liability should fall on the Internet dating sites, as well as the subscriber who misleads people into believing something that is not real.[9] The dating websites should not be immune under the Communications Decency Act (CDA) as an interactive computer service, and the federal government should pass legislation protecting the consumer.[10]

This Article begins with a broad overview of Internet dating and its emergence as a vast and lucrative industry.[11] Part III of this Article discusses the trend moving through the court system of upholding the broad immunity of Internet websites under the CDA, while placing all liability on the subscriber for his actions resulting from the interaction with the website.[12] This Article argues that the federal government should take into consideration adding a clause to the CDA to prohibit the immunity of Internet dating websites for any false or misrepresented information that results in physical harm to a third party, unless courts act to deny this immunity.[13] This action is only necessary if courts continue to uphold the broad immunity being given to Internet dating services.[14] Insisting on changes would lead to greater protection for honest subscribers who are put at the mercy of the court system because of a false or misrepresented profile.[15]

---

[7] *See* KrisAnn Norby-Jahner, Comment, *"Minor" Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability*, 32 HAMLINE L. REV. 207, 245 (2009) ("The anonymity of Internet interaction is a prominent feature that is unlikely to change. Therefore, many harassers and parents will remain unidentified.").

[8] *See infra* Part X.

[9] *See infra* Part III.

[10] *See infra* Part III.

[11] *See infra* Part II.

[12] *See infra* Part III; *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) (examining the purpose of the CDA in providing immunity to online service providers as compared to subscribers).

[13] *See infra* Part III.B.

[14] *See infra* Part IV.A-D.

[15] *See generally* Doe v. SexSearch.com, 551 F.3d 412, 415-16 (6th Cir. 2008) (discussing a man who was put at the mercy of the criminal court system even though he was not the person who created the false profile).

Part IV of this Article discusses the relevant legal treatment of Internet dating service liability after the CDA was enacted.[16] Next, Parts V and VI explain the theories of liability dating website operators should be liable for under a revised interpretation of the CDA and possible defenses they may have.[17] Although people should be careful and use the utmost caution when dating on the Internet, websites should not be exempt from liability for their own negligence.[18] Part VII of this Article discusses the concerns legal scholars have with reinterpreting immunity.[19]

Furthermore, Part VIII looks at how states have begun to enact statutes protecting users of dating services.[20] Parts IX and X reveal potential legislation modifications that could protect third parties who are harmed by fraudulent profiles.[21] Many methods are readily available to Internet website operators, such as Match.com and eHarmony, that could filter out the fraudulent posts where people lie about their age, sex, or even their entire profile.[22] However, some courts have refused to uphold common law theories of liability such as breach of contract, fraud, and negligence.[23] Consumers need either new legislation or a new interpretation of the CDA to hold Internet dating sites accountable for failing to protect customers.[24] Specifically, courts should impose breach of contract, negligence, and fraud liability on the Internet dating websites when a subscriber misrepresents himself or creates a fake profile.[25]

II. Overview of Internet Dating Services

When two people with similar interests find each other and then begin to see each other romantically, society recognizes this as dating.

---

16 *See infra* Part IV.
17 *See infra* Parts V, VI.
18 *See infra* Part V.
19 *See infra* Part VII.
20 *See infra* Part VIII.
21 *See infra* Parts IX, X.
22 *See infra* Part X.
23 Jay M. Zitter, Annotation, *Civil Liability of Internet Dating Services*, 48 A.L.R.6th 351, 360-62 (2009).
24 *See infra* Part VII.
25 *See infra* Part V.

With the enormous potential of the Internet to bring people together, Internet dating services began to emerge almost as soon as the Internet was invented.[26] Using technology to bring two people together is not something new. People have attempted to meet others on the Internet since the invention of computers with email, chat rooms, and instant messengers.[27] Most Internet dating websites allow users to create a profile by either applying for a free trial membership or a fee paying membership.[28] Members create profiles by answering questionnaires, as well as posting pictures, videos, and additional comments about the user.[29] In the past, providers of Internet dating websites did little to monitor or to match members.[30] Newer versions of Internet dating websites involve a more scientific approach to matching members.[31] After using the members' psychological and personality analyses from tests and questionnaires, providers of Internet dating websites then attempt to match members on a "very deep and powerful level."[32] Sophisticated websites, such as eHarmony, utilize the newer scientific approach and claim to be responsible for five percent of new marriages in the United States.[33] The burgeoning online dating scene is becoming more and more scientific, drawing many people who seek love and affection.

In recent years, another use of the Internet has emerged that matches adults who wish to experience only sexual encounters with their matches.[34] These sites claim to be "swinger" and "hook up" sites that people use to find someone with whom they can engage in sexual

---

[26] *See* INTERNET DATING DIRECTORY, *supra* note 2.

[27] Zitter, *supra* note 23, at 360.

[28] *Id.*

[29] *Id.*; *see also* INTERNET DATING DIRECTORY, *supra* note 2.

[30] *See* INTERNET DATING DIRECTORY, *supra* note 2. ("In the early days of online dating, you'd sign on, head over to the profiles section, then start browsing for someone who caught your eye.").

[31] *See id.* (referring to newer "relationship sites," which use science to match people with one another instead of the older methods).

[32] *Id.*

[33] EHARMONY, http://www.eharmony.com (last visited Feb. 23, 2011) (citing statistic based on a survey performed in 2009 by Harris Interactive for eHarmony).

[34] *See, e.g.*, Swingers, Free Sex Chat & Adult Dating Personals, ADULT FRIEND FINDER, http://www.adultfriendfinder.com (last visited Feb. 23, 2011).

relations.[35] By signing up and joining as a member, the user gains access to the site where the focus shifts to visual images rather than descriptions of the person.[36] Adult sexual-partner-matching websites should, under all circumstances, be considered Internet dating services.[37] For the purpose of this Article, any reference to Internet dating websites shall include adult Internet "hook up" sites because there are no substantial differences in their monitoring roles.[38] Thus, the law should treat them equally when determining liability under the CDA.

III. Regulating the Internet

A. Pre-CDA Liability

In the early years of the Internet boom, the laws governing cyberspace were much different than the case law and statutory law in 2011. When the Internet was still new, the services offered were limited and much different. The prevailing common law doctrines divided liability into two groups: distributor and publisher.[39] In *Cubby, Inc. v. CompuServe, Inc.*, the plaintiff brought a defamation action against an Internet service claiming statements by a publication forum, which the Internet service made available, were defamatory.[40] The court analogized the defendant, CompuServe, with traditional distributors, such as libraries, newsstands, or book stores, and it determined that once Com-

---

35 *See, e.g.*, *id.*; *see also* Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 291 (D.N.H. 2008) (describing websites that serve as online sex and swinger communities).

36 Zitter, *supra* note 23, at 360-61.

37 *See id.* (expressing no differentiation between relationship-centered dating services and sexually-based dating services).

38 *See infra* Part IV.E (discussing the active versus passive development in these websites' matchmaking functions).

39 *Compare* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (holding computer service company that provided news to subscribers was a distributor of information), *with* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56, 133, 137-39 (codified as amended at 47 U.S.C. § 230 (2006)) (finding that the owner of a computer bulletin board was a publisher of user's posted statements). *See also* Annemarie Pantazis, Note, Zeran v. America Online, Inc.*: Insulating Internet Service Providers from Defamation Liability*, 34 Wake Forest L. Rev. 531, 536-46 (1999).

40 *Cubby*, 776 F. Supp. at 137.

puServe decided to make a publication available, it would have no editorial control over the contents.[41] The court reasoned that the First Amendment had always protected distributors of publications and holding a mass distributor liable for not monitoring each publication would create a harsh burden on the First Amendment.[42] Therefore, CompuServe was not liable under a defamation claim as a distributor, unless it either knew or had reason to know of the defamatory statements.[43] However, the court left open the issue of whether a distributor could be liable under alternative theories of liability.[44]

The second common law doctrine holds an Internet service liable for publication if the Internet service is found to be a publisher of information.[45] In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the plaintiff filed a suit for defamation based on a comment by a subscriber posted to the defendant, Prodigy's, bulletin board, which allegedly defamed the plaintiff.[46] Based on Prodigy's marketing and articles, the plaintiff argued that Prodigy portrayed itself as an Internet service that managed, edited, and controlled the types of messages and content on their bulletin boards.[47] The editing was done to protect those Ameri-

---

[41] *Id.* at 140; *see also* Pantazis, *supra* note 39, at 543 (stating that generally, distributor liability "does not apply to entities such as news vendors, bookstores, and libraries if they 'neither know nor have reason to know of the defamation'" (quoting *Cubby*, 776 F. Supp. at 139)).

[42] *Cubby*, 776 F. Supp. at 139-41; *see also* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1104-05 (9th Cir. 2009) (explaining the different categories of publishers discussed in *Cubby*).

[43] *Cubby*, 776 F. Supp. at 141.

[44] *See id.*

[45] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56, 133, 137-39 (codified as amended at 47 U.S.C. § 230 (2006)), *as recognized in* Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997); *see also* FTC v. Accusearch Inc., 570 F.3d 1187, 1195 (10th Cir. 2009) ("The *Stratton Oakmont* court ruled that the administrator of the board became a 'publisher' when it deleted some distasteful third-party postings, and thus was subject to publisher's liability for the defamatory postings it failed to remove.").

[46] *Stratton*, 1995 WL 323710, at *1.

[47] *Id.* at *2.

cans who pursue family values and filter objectionable content.[48] By analogizing the function of this bulletin board service to a newspaper that exercises editorial control, the court determined there was increased liability and rendered Prodigy a publisher of content.[49] Through the defendant's own choice to make screening and filtering content a policy for their company, the defendant exercised editorial control over content which triggered increased liability.[50] Based on the court's decision, plaintiffs are now capable of recovering damages from Internet providers that are liable for common law and state law torts.[51]

Although courts still recognize differences between distributors and publishers in defamation claims, courts are now inclined to follow the language of federal legislation.[52] However, the cases show an important distinction between a passive conduit and an Internet provider that exercises editorial control over content on a website.[53] Defamation claims often arise online due to users' expectations that they are simply speaking their mind and no harm will flow from their statements.[54] Similarly, when someone posts a false or fake profile on Internet dating or social networking websites, they may not know the extent of damage that could flow from their actions.[55] Congress realized that legislation was needed to curtail the potential chilling effects on free speech, which would likely flow from imposing liability on websites editing and

---

48 *See id.* at *2 ("We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate.").

49 *Id.* at *3.

50 *See id.* at *5 ("It is Prodigy's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.").

51 *See generally* Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 221 (2002) (discussing the courts' previous unwillingness to find Internet providers liable in similar situations).

52 *See infra* notes 58-81 and accompanying text.

53 *See infra* notes 147-62 and accompanying text (describing the new analysis of active development versus passive display).

54 *See generally* Zeran v. Am. Online, Inc., 129 F.3d 327, 329 (4th Cir. 1997) (arguing that a third party allegedly defamed Zeran when he posted an advertisement for offensive t-shirts intending it to be a mere prank).

55 *See, e.g.*, Scott Michels, *MySpace Suicide Hoax Mom Says Messages Not Hers*, ABC NEWS, Dec. 7, 2007, http://abcnews.go.com/thelaw/story?id=3970339&page=1 (discussing the online harassment and subsequent suicide of Megan Meier).

screening objectionable content on the web.[56] While the court was deciding *Stratton*, a nightmare was being created which would leave plaintiffs without a way to claim relief from Internet dating websites.

B. The Communications Decency Act

The prevailing line of cases and judicial decisions setting forth the liability of Internet dating websites based their reasoning on the CDA. Congress enacted the CDA in 1996 based on findings that the Internet and interactive computer services "represent an extraordinary advance in the availability of educational and informational resources" and have "flourished, to the benefit of all Americans, with a minimum of government regulation."[57] In addition, Congress determined "[i]t is the policy of the United States—to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet."[58] Congress recognized there should not be a disincentive for the blocking and filtering of information, especially when it is done to restrict material that is objectionable and inappropriate to minors.[59]

The CDA established Good Samaritan laws creating a shield from almost all liability for Internet service providers.[60] Specifically, the CDA 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."[61] Under the Good Samaritan provision, Internet dating sites are not liable for any good faith actions voluntarily taken to restrict access to, or the availability of, obscene or otherwise objectionable material "whether or not such material is constitutionally protected."[62]

---

[56] *See Zeran*, 129 F.3d at 330 ("The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.").
[57] 47 U.S.C. § 230(a)(1), (4) (2006).
[58] *Id.* § 230(b)(1), (2).
[59] *Id.* § 230(b)(4).
[60] *Id.* § 230(c).
[61] *Id.* § 230(c)(1).
[62] *Id.* § 230(c)(2)(A).

The CDA distinguishes between an interactive computer service and an information content provider.[63] An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[64] Conversely, an interactive computer service is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[65] If the website is only acting as an interactive computer service, the website is not liable for any action of a third party.[66] However, if a website becomes an information content provider, it is not immune from liability under the CDA.[67] Therefore, an injured party can only bring a common law tort or contract cause of action if the Internet dating website is viewed as an information content provider.[68]

Viewing Internet dating and matchmaking websites as untouchable information content providers and enabling the protections of the CDA from tort and contract claims is unfounded. Congress initially passed the CDA in order to thwart holding website operators liable for defamatory material created by third parties.[69] Critics of the CDA agree the focus was on defamation and not on other theories of liability, such as negligence, breach of contract, and fraud.[70] In addition, Internet dating websites are failing to self-regulate their content as shown by the fact that people are signing up under fake profiles.[71] People are being swindled into believing the websites offer services to real people rather than fake or made up persons.[72] The immunity likely encourages people to make up false identities and disguise who they truly are. Almost

---

63 *Id.* § 230(f).

64 *Id.* § 230(f)(3).

65 *Id.* § 230(f)(2).

66 *See id.* § 230(c)(2).

67 *See id.* § 230(c).

68 *See id.*

69 Skyler McDonald, Note, *Defamation in the Internet Age: Why* Roommates.com *Isn't Enough to Change the Rules for Anonymous Gossip Websites*, 62 FLA. L. REV. 259, 265 (2010).

70 *See* Norby-Jahner, *supra* note 7, at 249-50.

71 *See id.* ("When ISPs are immune from liability the online hostile environments that house sexual harassment remain undeterred, unblocked, and unpunished.").

72 *See* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120 (9th Cir. 2003).

fifteen years ago, Congress chose to weigh the public policy interests of protecting the Internet higher than protecting individuals; however, the lawmakers doubtfully could have foreseen what the Internet has become today.[73] Before the Internet boom, it was likely unforeseeable that using the Internet as a way to date and find someone to love would later become a practice that scammers and frauds exploited.

With the intention that § 230 was to give broad immunity to those true Internet service providers, such as NetZero, the courts have gradually increased the breadth of the CDA.[74] As a result of § 230 expanding, many cyberspace activities now fit the definition of an "interactive computer service" receiving immunity.[75] This immunity rests on the statute's broad definitions of "interactive computer service" and "information content provider."[76] Traditionally, websites such as America Online, which provide computer access to millions of users, were considered interactive computer services.[77] Conversely, under the post-CDA precedent, the original writer of a sports blog would likely qualify as an information content provider.[78]

As one scholar points out, § 230 fails to define the phrase "publisher or speaker" in the statute.[79] The level of participation the publisher shares with the content creator should determine whether the website or individual is a publisher.[80] While it is true that some Internet dating sites have very little or no participation, others should not be held

---

[73] *See* Walter Stillwell, Note, Carafano v. Metrosplash.com*: An Expansion of Tort Immunity for Web Service Providers Under 47 U.S.C. § 230, Even When They Take a Greater Editorial Role in Publishing Material from Third Parties*, 6 TUL. J. TECH. & INTELL. PROP. 307, 317 (2004) ("Finally, the noted case, along with other recent decisions, indicates the extent to which § 230 immunity is now applied in ways that are inconsistent with their original Congressional intent.").

[74] *See id.* at 310-11.

[75] *See* Batzel v. Smith, 333 F.3d 1018, 1030 (9th Cir. 2003).

[76] Jeffrey M. Sussman, Student Article, *Cyberspace: An Emerging Safe Haven for Housing Discrimination*, 19 LOY. CONSUMER L. REV. 194, 201 (2007).

[77] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[78] *See generally id.* (supplying the definition of who qualifies as an information content provider).

[79] Jennifer C. Chang, Note, *In Search of Fair Housing in Cyberspace: The Implications of the Communications Decency Act for Fair Housing on the Internet*, 55 STAN. L. REV. 969, 984 (2002).

[80] *Id.*

to a lower level of liability when they do more than assist the distribution of messages.[81] Consequently, courts should interpret the CDA to include Internet dating services as information content providers, or Congress should rewrite the statute to eliminate the exemption for these websites in cases involving false profiles and online materials that injure others.[82]

IV. Post-CDA Liability

Due to the changes in the law, § 230 now provides federal immunity to Internet service providers for any cause of action when the information originates with a third party.[83] Congress saw the need to act after the holding in *Stratton*, so it made a policy choice to remove the potential for liability from screening and filtering material.[84] Now, broad immunity "forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."[85] The need to distinguish between a distributor and publisher of content is no longer necessary, except in defamation law, because the two categories are only different standards in a larger publisher category.[86] Distributors are considered publishers for purposes of defamation law since everyone who participates in the publication is a publisher.[87] Notwithstanding the fact that distributors are publishers, the distinction is significant in defamation law because distributors are held to a different standard of liability because they must have knowledge as a prerequisite to liability.[88] Therefore, § 230 forecloses both publisher and distributor liability and allows courts to focus only on whether the Internet website is a service provider or content provider.[89]

---

81 *See id.* (arguing websites that do no more than distribute messages would be held to lower levels of liability).

82 *See* Jeffrey Lipschutz, Note, *Internet Dating . . . Not Much Protection Provided by the Communications Decency Act of 1996 Based on* Carafano v. Metrosplash.com, *339 F.3d 1119 (9th Cir. 2003)*, 23 Temp. Envtl. L. & Tech. J. 225, 241 (2004).

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

84 *Id.* at 331.

85 *Id.*

86 *Id.* at 332.

87 *Id.*

88 *Id.* at 332-33.

89 *Id.*

A. Internet Dating Website Held Immune

Case law has developed since the enactment of the CDA and now provides no recourse to injured third parties as a result of false profile postings on Internet dating websites. The Ninth Circuit Court of Appeals considered whether an Internet matchmaking service could be held legally responsible for a profile containing false content when the person who created the profile posed as someone else.[90] In *Carafano v. Metrosplash.com, Inc.*, an unknown person created a personal profile on Matchmaker.com pretending to be the plaintiff, Christianne Carafano, without Carafano's knowledge or consent.[91] The profile included lewd and sexual references indicating that Carafano "was looking for a 'hard and dominant' man with 'a strong sexual appetite' and that she 'liked sort of [being] controlled by a man, in and out of bed.'"[92] Also, an email automatically responded to any message sent through the profile that provided Carafano's home address and telephone number.[93] At first glance, it appeared that Matchmaker.com was merely passively matching Carafano's profile with others, but by sending emails, it was actively managing the profiles.[94] Carafano received numerous threatening and sexually explicit messages as a result of the profile.[95] Carafano then filed a complaint against Matchmaker.com bringing causes of action for negligence, invasion of privacy, misappropriation of the right of publicity, and defamation.[96] The court considered the issue of whether the CDA barred Carafano's claims and determined that the defendants were statutorily immune from liability.[97] It interpreted the statute broadly, determining the website should receive immunity when third parties primarily provided published content.[98] Since Matchmaker.com "did not play a significant role in creating, developing, or 'transforming' the relevant information," the court concluded it should be afforded immunity.[99] The court wrongfully chose to ignore the fact that Match-

---

90 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120 (9th Cir. 2003).
91 *Id.* at 1121.
92 *Id.*
93 *Id.*
94 *See infra* Part IV.E (analyzing passive display versus active development).
95 *Carafano*, 339 F.3d at 1121-22.
96 *Id.* at 1122.
97 *Id.*
98 *Id.* at 1121-23.
99 *Id.* at 1125.

maker's own system sent the emails responsible for a large part of the damages Carafano suffered. This alone should have given rise to liability, but, without more, courts will likely find that Internet dating sites like Matchmaker.com are passively displaying content—not actively managing it.[100]

B. A "Fair" Interpretation of § 230 Immunity

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, the council brought a lawsuit against the operator of a website for violations of the Fair Housing Act, claiming these violations were effectively discriminating against potential roommates.[101] Roommates.com, LLC is the owner of the domain name www.roommates.com, a website that enables users to search for a desired roommate who meets their needs.[102] When a subscriber sets up their account with Roommates.com, they are required to provide their gender, sexual orientation, and number of children in the household.[103] The district court found that § 230 of the CDA provided immunity to Roommates.com and dismissed the federal claims.[104] On appeal, the Ninth Circuit determined that a website operator can be a service provider, an information content provider, or both.[105] Thus, when the website operator is entirely responsible or only partly responsible for the creation of the content, it is subject to liability.[106]

1. The Questionnaire

The first argument the council posed was that Roommates.com violated the Fair Housing Act because the required questionnaire indi-

---

[100] *See infra* Part IV.E.

[101] Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

[102] *Id.* at 1161 & n.2; *see* Sussman, *supra* note 76, at 208.

[103] *Roommates.com*, 521 F.3d at 1161.

[104] *Id.* at 1162.

[105] *See id.* ("If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider.").

[106] *Id.* at 1162-63.

cated the intent to discriminate against the subscribers.[107] The fact that Roommates.com was the creator of the questionnaire and the potential answers rendered it an information content provider.[108] Thus, Roommates.com could not claim immunity under § 230 as an affirmative defense for forcing subscribers to answer the questions.[109]

Additionally, the second claim was concerned with the display of discriminatory matter in the profiles of Roommates.com subscribers.[110] Through the registration process, drop-down menus required a subscriber to select an answer from a preset list.[111] Although the subscribers were viewed as information content providers by selecting from the preset list of options, nothing precluded Roommates.com "from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles."[112] In its holding, the court stressed that the website became a developer—not a mere passive conduit—when it required, as a precondition to access, information that must be selected from a limited drop-down menu that it created.[113] A "collaborative effort" existed between the website and the user that showed Roommates.com was at least somewhat responsible for the content.[114] Thus, Roommates.com could not escape liability by claiming immunity under the CDA.[115]

2. Search Function and Email Notifications

The Ninth Circuit also determined that Roommates.com was not entitled to § 230 immunity for the operation of its search system and

---

107 *Id.* at 1164.

108 *Id.*

109 *Id.* at 1165.

110 *Id.*

111 *See id.* Roommates.com requires users to specify, using drop-down menus, whether they are male or female, straight or gay, willing to live with straight or gay males and females, and whether or not there will be children present. *Id.*

112 *Id.* (stating that "the party responsible for putting information online may be subject to liability, even if the information originated with a user" (citing Batzel v. Smith, 333 F.3d 1018, 1033 (9th Cir. 2003))).

113 *Id.* at 1166.

114 *Id.* at 1167.

115 *Id.* at 1175.

email notification system.[116] By designing the search system and email notification system to direct users based on the preferences it created and forced subscribers to answer, there was no possibility for Roommates.com to have immunity.[117] The court stressed the unlawfulness of the questions determining that the website became a codeveloper when it helped to develop the unlawful content and contributed materially to the illegal nature of the content.[118] The court paid close attention to the word "development" in the statute and gave a thorough explanation of its meaning and why it was not given the same connotation as the term "creation" in the statute.[119]

C. Scaling Back CDA Immunity

While *Carafano* essentially broadened the immunity under the CDA, the Ninth Circuit recently took measures in *Roommates.com* to limit its scope.[120] Seeing that both of these cases came out of the Ninth Circuit, one can infer that the court created overly broad immunity in the earlier case, *Carafano*. By arguably creating a legal presumption that Internet service providers are statutorily immune, unless third parties do not provide the content willingly, the *Carafano* court went above and beyond the § 230 immunity previously given to Internet websites.[121] Although the Ninth Circuit did not overrule *Carafano*, it believed it had the correct analysis under *Roommates.com*, and the court admitted it was incorrect in its interpretation in *Carafano*.[122] Determining that immunity applied in all circumstances where content is obtained from third parties would practically eliminate the phrasing "in

---

116 *Id.* at 1167.

117 *Id.*

118 *Id.* at 1167-68 ("We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.").

119 *Id.* (disagreeing with the dissent's interpretation of the word "development" because it would fit in the definition of "creation" rendering "development" superfluous). *See generally* 47 U.S.C. § 230(f)(3) (2006) (using the words "development" and "creation" within the context of the statute being challenged).

120 *See Roommates.com*, 521 F.3d at 1171 (explaining that the language in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003) was unduly broad).

121 Stillwell, *supra* note 73, at 316.

122 *Roommates.com*, 521 F.3d at 1171-72.

part" from § 230, leaving only liability when content is developed "in whole" by the website operator.[123] The view taken that the website operator could play a part in the illegality of content when a third party actively created it, effectively narrowed the immunity of § 230.[124] When a website creates a questionnaire by designing registration around the questions or uses drop-down menus with preselected answers, the website becomes partly responsible for creating the illegal profiles.[125] This moves the website away from the protections given to an Internet service provider and into the classification of information content provider.[126] Thus, creating and developing the online system that third parties may use brings the possibility of legal claims against the Internet website.[127]

The dissent reiterated the argument that holding Internet websites liable would create a chilling effect on the development of the Internet.[128] The dissenters' concerns laid in the scope of the majority's holding and how it will affect all interactive service providers.[129] However, a provision holding Internet dating sites exclusively liable for harms that flow from the fraudulent profiles of subscribers would alleviate the dissenters' concern.[130]

D. The Wrong Turn: Interpreting the CDA Immunity

In contrast to the opinion of the Ninth Circuit in *Roommates.com*, the Seventh Circuit reached a much different conclusion involving similar violations under the Fair Housing Act.[131] Craigslist.com was a website that provided a number of services, including a bulletin board for people who want a free alternative to news-

123 *See* 47 U.S.C. § 230(f)(3).

124 *Roommates.com*, 521 F.3d at 1171.

125 Norby-Jahner, *supra* note 7, at 240-41.

126 *Id.* at 240.

127 *See id.* at 241. The CDA was "expressly intended to protect children from offensive online speech." *Id.* at 249.

128 *Roommates.com*, 521 F.3d at 1176 (McKeown, J., dissenting).

129 *See id.*

130 *See id.* ("[I]nteractive service providers are left scratching their heads and wondering where immunity ends and liability begins.").

131 *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

paper classified advertisements.[132] The Chicago Lawyers' Committee took issue with the fact that some postings created by Craigslist users blatantly discriminated against minorities and families with children, in violation of the Fair Housing Act.[133] The court announced the reason for adopting § 230 was only to provide immunity for information content providers that filtered illegal or obscene content, but Congress wrote the statute in a more generalized form, altering its scope.[134] The court analogized Craigslist's causal role in the bulletin advertisement posting process to a person who saves money causing a bank robbery.[135] By only providing the forum for the illegal activity, the court asserted Craigslist did nothing to induce the unlawful discrimination and, therefore, should receive the immunity of an information content provider.[136]

While the *Craigslist* court likened online services to both newspapers and common carriers, such as telephone services, the court determined "[w]eb sites are not common carriers."[137] However, this conflicted with the court's later analysis determining that if Craigslist caused something to be discriminatory, so would phone companies and couriers.[138] This analogy was based on the court's holding that § 230 prohibits suing the messenger for what the third party's message reveals.[139] However, the court's statements created confusion as to which online websites are more closely related to common carriers or newspapers.[140]

The primary distinction between *Roommates.com* and *Craigslist* was the way each website obtains information from its users.[141] Room-

---

132 Adam Weintraub, Note, *"Landlords Needed, Tolerance Preferred": A Clash of Fairness and Freedom in* Fair Housing Council v. Roommates.com, 54 VILL. L. REV. 337, 359 (2009).

133 *Craigslist*, 519 F.3d at 668.

134 *See id.* at 671.

135 *Id.*

136 *Id.* at 671-72.

137 *Id.* at 668.

138 *Id.* at 672.

139 *Id.*

140 *See generally id.* at 668 (stating "[o]nline services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services").

141 Weintraub, *supra* note 132, at 361; *see also infra* notes 147-62 and accompanying text (distinguishing between active management and passive display of content).

mates.com's use of drop-down menus and online questionnaires contrasted significantly with the free posting method allowed on Craigslist's classified advertisement system.[142] This detail seems to be the primary motivation in determining that § 230 did not provide immunity to Roommates.com.[143] Although there are critics who believe the Ninth Circuit only created confusion with the opinion in *Roommates.com*, the decision has received support among some scholars.[144] One scholar interpreting *Roommates.com* suggests that something less than a content creator or developer, but something more than a mere passive conduit, is needed to trigger immunity.[145] The "something" needed is a material contribution to the illegal or unlawful nature of the third-party content—going beyond acting as a channel of information.[146]

Internet dating websites should face liability for third-party crimes committed online as a result of fraudulent profiles. Under the recent holding of *Roommates.com*, an argument can be made that websites such as eHarmony and Chemistry.com are actively developing content like Roommates.com was.[147] The illegal nature of dating website content is that the postings are fraudulent and, therefore, illegal. These dating websites are simply not similar to the Craigslist website that asks no questions and utilizes no drop-down menus in its free posting method.[148] Not only do dating websites question and use drop-down menus, but they also maintain an active involvement with the users in order to create "matches."[149] By doing this, the dating websites

---

142 Weintraub, *supra* note 132, at 361; *see infra* notes 147-62 and accompanying text.

143 *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165 (9th Cir. 2008).

144 *Compare* Weintraub, *supra* note 132, at 362 (arguing that *Roommates.com* created confusion in what was a stable interpretation), *with* Lisa Marie Ross, Note, *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, 364-71 (2009) (arguing that the CDA should not apply to the Fair Housing Act advertising violations).

145 *See* Varty Defterderian, Note, Fair Housing Council v. Roommates.com*: A New Path for Section 230 Immunity*, 24 BERKELEY TECH. L.J. 563, 576 (2009).

146 *Id.*

147 *See* McDonald, *supra* note 69, at 274 (arguing that gossip websites are actively soliciting defamatory material similar to Roommates.com).

148 *See* Weintraub, *supra* note 132, at 361.

149 *See supra* notes 28-33 and accompanying text.

are essentially performing the search function themselves that the *Roommates.com* court found was not immune from liability under the CDA.[150] However, there is potential for fraudulent users to use the preset answers Internet dating websites create and develop to achieve some illegal goal.[151] Children, as well as adults, could be harmed if the courts continue to give immunity to website dating services.[152] If more courts were inclined to follow *Roommates.com*, and narrow the holding of *Craigslist* to apply only to free posting method websites, more victims of fraudulent postings would survive the immunity of § 230.[153]

While some critics believe the court effectively distinguished the previous holdings of both *Carafano* and *Roommates.com* based on the specific facts of the cases, the facts are very similar.[154] In attempting to narrow the interpretation of *Roommates.com* by limiting the case to its facts, these scholars are trying to create a consensus among the United States circuit courts.[155] However, the en banc opinion of the Ninth Circuit described exactly when an online service provider goes too far in developing user content.[156] Creating profile questions and answers, requiring subscribers to give personal information based on predetermined answers in order to use the website services, and creating a search system based on preferences subscribers were forced to disclose, are all examples of going too far in development.[157] Courts should implement the Ninth Circuit's analysis in all cases interpreting § 230 immunity, including Internet dating cases, because these cases essentially use the same techniques to match potential couples.

---

150 *See supra* notes 111-15 and accompanying text.

151 *See* Norby-Jahner, *supra* note 7, at 256.

152 *See id.*

153 *See id.* ("If other courts were to follow *Craigslist's* and *Roommates.com's* narrow reading of § 230, rather than *Zeran's* broad reading, then online sexual harassment claimants would have a much better chance of having their case heard in court.").

154 *See* Defterderian, *supra* note 145, at 578.

155 *See* Colette Vogele & Ilana Sabes, *Attention Web Site Operators: Be Certain You Qualify for § 230 Protection*, J. INTERNET L., Nov. 2008, at 1, 14 (arguing that *Roommates.com* may be limited in future proceedings to its facts); *see also* Defterderian, *supra* note 145, at 577-79 ("The *Roommates.com* court justified its deviation from the clearly stated goals of a statute and the accompanying consistent judicial interpretation by proclaiming strong policy grounds.").

156 *See* Norby-Jahner, *supra* note 7, at 240-41.

157 *Id.*

E. Passive Display Versus Active Development

"Passive conduit" is a legal term that had significance in the defamation area of tort law even before Congress enacted the CDA.[158] Some scholars believe that because of the difficulty in distinguishing a passive conduit from an active manager, the CDA was enacted to eliminate their different legal treatment.[159] In *Roommates.com*, the court attempted to clarify the meanings of "passive display" and "active development" by providing distinguishable examples of the two.[160] Passively displaying content created by third-party users will not subject a developer to liability, but an active developer is liable when it is responsible, completely or partly, for the creation and development of the content.[161] Immunity will be upheld even when a website edits content, as long as the content is not changed substantially.[162] Furthermore, to aid in distinguishing between active and passive control, the court explained the substantial involvement must be a material contribution to the illegality.[163] Thus, traditional functions such as editing and censoring obscenity do not pull the website operator into the active developer class.[164]

In the Internet dating service context, websites such as eHarmony and Chemistry.com would be characterized as active developers, because these websites require the input of personal characteristics though drop-down menus.[165] By analogizing Internet dating to the

---

158 *See* Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995), *superseded by statute*, Communications Decency Act of 1996, Pub. L. No. 104-104, § 203, 110 Stat. 56, 133, 137-39 (codified as amended at 47 U.S.C. § 230 (2006)).

159 Vogele, *supra* note 155, at 13.

160 *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

161 *Id.*

162 *Id.* at 1173-74.

163 *Id.* at 1167-68 ("[W]e interpret the term 'development' as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.").

164 *Id.* at 1169.

165 *See* CHEMISTRY.COM, http://www.chemistry.com/tour/works.aspx (last visited Feb. 23, 2011) (advertising a user personality test, personalized matches, and help for users to get to know each other); EHARMONY.COM, http://www.eharmony.com (last visited Feb. 23, 2011) (same).

Roommates.com example, Internet dating websites would be active developers with some responsibility for their development, because the scientific approach to matching couples is based on answering personal questions.[166] Also, dating websites attempt to match users through a search function that analyzes the inputs and results of an online questionnaire.[167] The active involvement of websites like Chemistry.com in the operation and creation of user content is exactly what the Ninth Circuit determined was not immune under *Roommates.com*.[168] In an effort to avoid this liability, dating websites usually plant an exculpatory clause in its terms of use that provides immunity under contract law.[169]

Some scholars do not believe a bright line was drawn between the active and passive control of websites, and that the activity the *Roommates.com* court allowed was arguably active involvement.[170] While the line may not be clear, the passive and active control determination is relevant for purposes of § 230 immunity, because courts will only hold information content providers liable for a third party's statements under current court opinions.[171] For a website to be considered an information content provider, it must develop the content, at least in part, which requires active control.[172] With the disturbing number of scammers and fraudulent profiles on Internet dating sites,[173] the determination of passive versus active control over the website should be a determinative factor for possible liability. However, because some

---

166 *See supra* notes 160-61; *see also supra* notes 111-15 and accompanying text (by requiring users to answer personal questions that the Internet dating websites develop independently, the websites are not passively displaying content created by third-party users—they are partly responsible for the creation and development of the user's content because the user is required to fill out the website's questionnaire).

167 *See supra* notes 116-17 and accompanying text.

168 *See supra* notes 111-15 and accompanying text.

169 *See infra* notes 183-99 and accompanying text.

170 Vogele, *supra* note 155, at 14.

171 *See* Weintraub, *supra* note 132, at 347 ("Finding such liability hinges on whether the ISP is determined to be an 'interactive computer service' or 'information content provider.'").

172 *See* 42 U.S.C. § 230(f)(3) (2006).

173 Tom Homer, *An Analysis of Top Dating Sites*, DATINGSITESREVIEWS.COM (May 11, 2009, 9:54 AM), http://www.datingsitesreviews.com/article.php?story=An-Analysis-of-the-Top-Dating-Sites ("It is estimated with free dating sites, at least 10 percent of new accounts created each day are from scammers.").

scholars believe the line between passive and active control is blurred, courts should view § 230 as including all Internet dating websites under information content providers, if the websites attempt to match people based on their own questionnaires and drop-down menu answers.

V. Potential Theories of Liability

A. Breach of Contract

Plaintiffs have brought claims under several causes of action against Internet dating websites in an attempt to recover damages flowing from the fake profiles of others.[174] In *Doe v. SexSearch.com*, the plaintiff brought several claims against an Internet dating service that assisted in creating sexual encounters between members.[175] The court failed to reach the issue of whether the CDA provided immunity for SexSearch.com because the court dismissed all of the causes of action for failure to state a claim.[176] The plaintiff alleged SexSearch.com was in breach of contract because minors were permitted to become members of its service in violation of a requirement that members be eighteen years of age or above to register.[177] However, the court dismissed this claim because SexSearch.com made no affirmative promise in the terms and conditions to prevent minors from registering.[178]

A breach of contract claim should arise when the Internet companies enable these imposters to receive the services they offer. Breach occurs when any party fails to perform a duty under a contract.[179] In some cases, a valid contract is formed when the customer accepts terms and conditions of managing their own profile.[180] It can be assumed when subscribers accept the terms and conditions, they expect that all

---

174 *See, e.g.*, Doe v. SexSearch.com, 551 F.3d 412, 415 (6th Cir. 2008) (alleging fourteen causes of action); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1121 (9th Cir. 2003) (alleging invasion of privacy, negligence, defamation, and misappropriation of right to publicity); Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 293 (D.N.H. 2008) (alleging eight causes of action).

175 *SexSearch.com*, 551 F.3d at 415.

176 *Id.*

177 *Id.* at 416-17.

178 *Id.*

179 Restatement (Second) of Contracts § 235(2) (1981).

180 *See, e.g.*, *SexSearch.com*, 551 F.3d at 416; A.V. v. iParadigms, LLC, 544 F. Supp. 2d 473, 480 (E.D. Va. 2008) ("By clicking 'I Agree' to create a . . . profile and enter

others have accepted the terms and conditions as well. When someone takes advantage of a website's terms and subscribers by posting false information, it is not the website who gets hurt, only the subscriber.[181] The website is in the best position to protect subscribers against the false materials because it is the only party that can verify whether the information is true.[182] Age verification systems work well in other areas of commerce,[183] therefore they should be utilized for Internet dating purposes.[184]

B. Negligence

The tort of negligence places liability for physical harm upon the actor who fails to exercise a duty of reasonable care.[185] An injured subscriber of an Internet dating website can bring a negligence cause of action because the website owes this duty of reasonable care to its customers.[186] Websites alone have the ability to oversee the interactions between subscribers that happen on a day-to-day basis.[187] Therefore, websites are in the best position to distinguish fake profiles from real profiles. Websites breach the duty of reasonable care when they do

---

the . . . web site, Plaintiffs accepted iParadigms' offer and a contract was formed based on the terms of the Clickwrap agreement.").

[181] *See, e.g.*, *SexSearch.com*, 551 F.3d at 416.

[182] *See* Norby-Jahner, *supra* note 7, at 244 (arguing that Internet service providers should be liable for sexual harassment because they have control over the environment they host).

[183] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989). "The FCC, after lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors." *Id.* Age verification is completely effective in combating sales of alcohol to underage customers. Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 426-27 (2007). "Age-verification technologies are effective according to many experts, who believe that regulation can establish a framework to block minors from gambling online in the United States." Press Release, Safe & Secure Internet Gambling Initiative, Regulated Internet Gambling & Age-Verification Techs. Effective in Combating Underage Internet Gambling (Aug. 7, 2007), *available at* http://www.safeandsecureig.org/sites/default/files/releasefact.pdf. "Age-verification technologies have been effective in European nations where regulated internet gambling is already a reality." *Id.*

[184] *See infra* Part X.

[185] RESTATEMENT (THIRD) OF TORTS §§ 6-7 (2005).

[186] *See id.*

[187] Norby-Jahner, *supra* note 7, at 244.

nothing to prevent a person from creating a false profile. Although websites may claim the existence of imposters on the Internet is common knowledge to subscribers, when a person receives a service, they expect to be protected from harms that flow from that service.[188] Dating websites must be cognizant of their role in preventing harm.[189] While the websites should focus on their duty to verify age and identity,[190] monitoring subscriber characteristics such as height, weight, and marital status would be futile because little, if any, harm can flow from this information.

C. Fraud

Internet matchmaking websites should also be held liable for fraud. A cause of action for fraud can arise when a person or entity represents that all persons are over eighteen years of age or the profiles on their website are of real people, and that representation turns out to be false.[191] A misrepresentation may become fraudulent when its maker either "knows or believes that the matter is not as he represents it to be, does not have the confidence in the accuracy of his representation that he states or implies, or knows that he does not have the basis for his representation that he states or implies."[192] State courts have found their own elements of fraud and the injured party must be able to plead all the required elements of fraud in order to prevail.[193] While the CDA has exempted other interactive computer services from liability arising from fraud,[194] they have yet to decide if the same would apply to Internet dating websites.[195]

---

188 *See, e.g.*, Doe v. SexSearch.com, 551 F.3d 412, 415-16 (6th Cir. 2008).

189 *See* Norby-Jahner, *supra* note 7, at 244.

190 *See infra* Part X.

191 *SexSearch.com*, 551 F.3d at 417.

192 RESTATEMENT (SECOND) OF TORTS § 526 (1977) (subsection indicators omitted).

193 *See, e.g.*, *SexSearch.com*, 551 F.3d at 417. The elements of fraud in Ohio are (1) a representation, (2) material to the transaction, (3) falsity with knowledge, (4) intent to mislead another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) an injury results as a cause of the reliance. *Id.*

194 *See* Zeran v. Am. Online, Inc., 129 F.3d 327, 328 (4th Cir. 1997) ("Section 230, however, plainly immunizes computer service providers like AOL from liability for information that originates with third parties.").

195 *SexSearch.com*, 551 F.3d at 415.

VI. Limiting Liability

Most Internet websites seek to limit their potential liability by eliminating damages in the event their website would be liable for harm.[196] Sophisticated Internet dating websites usually have a terms of use form or a contract the consumer must agree to by accessing the web page.[197] The case law points out that many of these dating websites make the subscriber assent to the terms and conditions before using the services.[198] Limitation of liability clauses are closely scrutinized, but if freely bargained for, the courts will generally enforce them absent some form of overreaching or substantially unequal bargaining power.[199] These are usually standard form contracts which are essentially offered on a take-it-or-leave-it basis, with no opportunity to negotiate the terms.[200] Furthermore, public policy and unconscionability concerns are often involved in cases examining exculpatory clauses over the Internet.[201] For example, in a case concerning an advertising agreement between a website search engine and an attorney, the website's agreement was not unconscionable under California or Pennsylvania law, even though prospective advertisers were required to assent to all terms

---

196 Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 Hamline L. Rev. 499, 542-44 (2003).

197 *See, e.g.*, *Terms of Service*, eHarmony, http://www.eharmony.com/about/terms (last revised Jan. 12, 2011) ("No Liability for non-eHarmony Actions. To the maximum extent permitted by applicable law, in no event will eHarmony be liable for any damages whatsoever, whether direct, indirect, general, special, compensatory, consequential, and/or incidental, arising out of or relating to the conduct of you or anyone else in connection with the use of the services, including without limitation, bodily injury, emotional distress, and/or any other damages resulting from communications or meetings with other registered users of the services (or your spouse in the marriage services). This includes any claims, losses or damages arising from the conduct of users who have registered under false pretenses or who attempt to defraud or harm you." (emphasis omitted)).

198 *See, e.g.*, *SexSearch.com*, 551 F.3d at 416.

199 *Id.* at 419.

200 *See, e.g.*, *Terms of Service*, eHarmony, *supra* note 197.

201 *See* Sandeen, *supra* note 196, at 543 ("Public policy often trumps exculpatory clauses and indemnification provisions."); Asch Webhosting, Inc. v. Adelphia Bus. Solutions Inv., LLC, 362 F. App'x 310, 312-14 (3d Cir. 2010) (finding the public policy against exculpatory clauses outweighed the interest to freely contract where the plaintiff argued for a reversal of the district court's dismissal of his unconscionability claim); Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1097 (9th Cir. 2009); *SexSearch.com*, 551 F.3d at 419.

and conditions before being allowed to advertise.[202] The court added that there were a number of alternate websites that advertisers could utilize instead.[203]

Although the jurisdiction of the court usually determines whether exculpatory clauses are against public policy, the matter usually turns on whether the legislature has determined that the term is against public policy.[204] Also, courts may look at the offer and acceptance between the parties at contract formation.[205] Unconscionability is usually determined by the equality of bargaining power between the parties, whether the putative term appears to have been buried in boilerplate language, and the harshness placed on the aggrieved party if the term were upheld.[206] If a situation of unconscionability in the contract terms arises, unconscionability can only be used as a defense to enforcement of the contract and not as a way of seeking damages.[207]

Unconscionability is Internet dating subscribers' best defense against enforcement of exculpatory clauses when fraudulent profiles have harmed the subscribers. Whether subscribers like it or not, Congress has already chosen to weigh the public policy of protecting the Internet market above individual users.[208] Clearly, the bargaining power an Internet dating website has over their users and subscribers is grossly one-sided because the majority of users are not sophisticated business persons.[209] Evidenced by the eHarmony and Chemistry.com terms of use, the exculpatory clauses of dating websites are buried in

---

202 Feldman v. Google, Inc., 513 F. Supp. 2d 229, 240-41 (E.D. Pa. 2007).

203 *Id.* at 240 n.5.

204 RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981); *see also* Sandeen, *supra* note 196, at 543 ("Generally, the enforceability of such provisions depends on applicable public policy and how broadly the clauses are written.").

205 Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 612 (1988) ("When examining exculpatory clauses, courts police: (1) the technical formation of the contract, i.e., the offer and acceptance; (2) the status or position of the parties to the bargain; and (3) public policy concerns.").

206 Carter v. Exxon Co. USA, 177 F.3d 197, 207 (3d Cir. 1999).

207 Doe v. SexSearch.com, 551 F.3d 412, 419 (6th Cir. 2008).

208 *See supra* notes 58-82 and accompanying text (discussing the CDA).

209 *See* Asch Webhosting, Inc. v. Adelphia Bus. Solutions Inv., LLC, 362 F. App'x 310, 314 (3d Cir. 2010) ("[T]here was no evidence of unequal bargaining power between the parties because Asch was a commercial entity that had previously entered

the boilerplate language of standard form contracts.[210] The subscribers are severely burdened when they are placed at the mercy of exculpatory clauses because the only party in the position to verify the fraudulent profiles is the website.[211] Therefore, the website subscribers withstand the worst of this harsh effect, and they have a strong claim of unconscionability in the terms of use. However, unconscionability claims rarely give injured subscribers what they want because they are likely to receive only an opportunity to get out of the contract instead of recovering damages.[212]

VII. Concerns of Dating Website Liability

Noting that Congress's essential purpose for enacting § 230 was to promote freedom of speech, one fear is holding Internet dating websites liable would actually have a chilling effect on free speech.[213] This theory is based on the assumption that website operators would remove too much speech in an effort to avoid litigation.[214] Dating websites that self-regulate in good faith will not produce this chilling effect, so long

---

into internet service agreements with several other service providers and was managed by an experienced businessman who had graduated from law school.").

[210] *See Terms of Use*, Chemistry.com, http://www.chemistry.com/help/terms.aspx (last visited Feb. 23, 2011) ("Limitation on Liability. In no event shall Match.com be liable for any attorneys' fees or damages whatsoever, whether direct, indirect, general, special, compensatory, consequential, and/or incidental, arising out of or relating to the conduct of you or anyone else in connection with the use of the Service, including without limitation, bodily injury, emotional distress, breach of contract, or any other claim of any type or nature resulting from your use, communications or meetings with other registered users of the Service or persons you may meet through the Service."); *see also Terms of Service*, eHarmony, *supra* note 197.

[211] *See infra* Part X.

[212] *See, e.g.*, *SexSearch.com*, 551 F.3d at 419-20; Johnson v. Long Beach Mortg. Loan Trust, 451 F. Supp. 2d 16, 36 (D.D.C. 2006) ("Plaintiff cannot recover compensatory [or restitution] damages under the common law doctrine of unconscionability."); Bennett v. Behring Corp., 466 F. Supp. 689, 700 (S.D. Fla. 1979) ("[T]he equitable theory of unconscionability has never been utilized to allow for the affirmative recovery of money damages."). *But see* Ahern v. Knecht, 563 N.E.2d 787, 793 (Ill. App. Ct. 1990) (awarding restitution damages for overpayment made under an unconscionable contract).

[213] *See supra* notes 69-74 and accompanying text (discussing Congress's intent in passing the CDA).

[214] Zeran v. Am. Online, Inc., 129 F.3d 327, 330-31 (4th Cir. 1997).

as the Good Samaritan exception of the CDA remains in place.[215] Congress's intent was not only to promote free speech but also to encourage self-regulation of offensive content.[216] While courts have not expressly viewed fraud as being offensive in nature, the test for offensiveness is whether a reasonable person would find the content offensive.[217] Therefore, if the CDA remains in effect, the requirement of self-regulating offensive, fraudulent content on dating websites will immunize the website, even if it fails to remove something so long as it did not contribute to the content's development.[218] This interpretation of the CDA should alleviate any fears Internet dating websites have regarding their liability from third-party content.[219] Chilling effects on speech would require overregulation, not self-regulation.[220] Thus, holding dating websites liable for their users' fraudulent profiles would create only an incentive to self-regulate, because they still remain protected under the Good Samaritan exception if they act only as a service provider and not a content provider.[221] This incentive to self-regulate gives dating websites the ability to avoid liability by eliminating only offensive fraudulent profiles because no subscriber could be subject to injury.

A second concern of placing liability on Internet dating websites for fraudulent profiles is the potential decrease in innovation.[222] Critics argue websites will allow fewer Internet users to publish their own works leading to a substantial burden on the Internet's creative potential.[223] Yet, protecting Internet dating websites that allow third parties to publish fraudulent material is not furthering innovation or fundamental rights.[224] Another fear of Internet service provider liability is it will

---

215 Norby-Jahner, *supra* note 7, at 254.

216 *See* 47 U.S.C. § 230(c)(2) (2006).

217 *See* Four Navy Seals v. Associated Press, 413 F. Supp. 2d 1136, 1147 (S.D. Cal. 2005).

218 *See supra* notes 60-68 (explaining the Good Samaritan provision and definitions of § 230 immunity).

219 *See supra* notes 60-68 and accompanying text.

220 *See* Norby-Jahner, *supra* note 7, at 254-55.

221 *Id.*; *see also supra* notes 63-65 and accompanying text (defining "information content provider" and "interactive service provider").

222 Weintraub, *supra* note 132, at 364.

223 *See id.* at 365-66.

224 *See id.* (arguing that the liability created by the Ninth Circuit in *Roommates.com* should be sacrificed in order to protect citizens' fundamental right of free speech); *see*

have a substantial effect on the costs and fees, and individual subscribers will bear that burden.[225] When considering the vast, and very lucrative, market of Internet dating, this argument fails because the burden need not fall on subscribers given that dating websites have excessive profits to provide the monitoring.[226] Despite the fact that filtering may create a privacy concern if dating websites are required to screen, users are already giving up some privacy rights just by going online.[227] With decreased privacy rights occurring just by accessing the Internet, website filtering does not add to these privacy concerns and any expenses should fall squarely on the website.

VIII. Regulating Dating Services

A. State Legislation Regarding Dating Services

Due to the current complications and risks placed on subscribers of Internet dating sites, many states have led the way by placing rules on dating services.[228] While state statutes provide some protections from dating services, these protections are not applicable nationwide. In New Jersey, the legislature found a need to increase public awareness regarding risks of online dating, and a need to disclose whether the website performed criminal background screenings on users.[229] To further their goal of increasing public awareness, the act required Internet dating services to notify users of safety measures they should take when dating online.[230] Furthermore, an online dating service must disclose

---

also supra notes 171-73 (explaining why free speech would not be curtailed by holding Internet dating websites as information content providers).

225 *See* Weintraub, *supra* note 132, at 366.

226 *See generally* Bill Snyder, *Finding Love Online*, Stan. Bus. Mag., Feb. 2008, http://www.gsb.stanford.edu/news/bmag/sbsm0802/feature-online-love.html (explaining that although eHarmony refuses to disclose its profit margin, the sales were reported to reach $200 million in 2008).

227 United States v. Hambrick, 55 F. Supp. 2d 504, 507-09 (W.D. Va. 1999) (holding that the defendant had no legitimate expectation of privacy with information he voluntarily turned over to the Internet provider; therefore, he was not entitled to Fourth Amendment protection).

228 *See, e.g.*, N.J. Stat. Ann. § 56:8-169(a) (West 2008).

229 *Id.*

230 *Id.* § 56:8-171(a)(2). An example of this type of notification is: "There is no substitute for acting with caution when communicating with any stranger who wants to meet you." *Id.*

"clearly and conspicuously" whether it performs criminal background screenings.[231] The act makes it unlawful for Internet dating services to fail to provide these notices or suggest that it screens when, in fact, it does not.[232] If the website has a policy of conducting background screenings, a notice must identify if the website allows criminals to contact other members.[233] By placing a heavier burden on these websites, it is evident that New Jersey has recognized the subscribers' concerns with the amount of criminal activity going on in cyberspace.[234] The attempt to notify potential subscribers will hopefully lead them to seek other possible dating methods provided through different channels, so they can avoid fraudulent Internet profiles.

Other states simply prohibit certain contractual provisions or provide certain remedies specifically for users of dating services.[235] In Arizona, a contract for any dating referral service is prohibited from requiring a customer to give up any rights against the entity.[236] Additionally, it protects consumers because any contract that has been induced by fraud or misleading information is void and unenforceable against the subscriber.[237] Considering this statute, it would be hard for an online dating service to disclaim liability because this would be a right the customer would be giving up to the business entity.[238] However, if the CDA is not revised, these websites will still be immune from liability unless a provision is added holding all Internet dating services liable for fraudulent profiles.[239]

---

231 *Id.* § 56:8-171(b)-(c).

232 *Id.* § 56:8-172.

233 *Id.* § 56:8-171(d).

234 *See id.* §§ 56:8-169, 56:8-172.

235 *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-7154 (2003); CAL. CIV. CODE § 1694.1 (West Supp. 2010).

236 ARIZ. REV. STAT. ANN. § 44-7154(A)(3).

237 *Id.* § 44-7154(E).

238 *See id.* § 44-7154(A)(3), (C); *see also supra* Part VI (discussing limitation of liability clauses in the non-negotiable terms of Internet dating websites' term of service agreements).

239 *See infra* Part IX.

California, on the other hand, provides dating referral service customers with additional rights.[240] If a contract for dating services willfully contains fraudulent information regarding the service, the contract will be unenforceable.[241] It follows that the terms of use of the dating website, including the exculpatory clause, would be void, allowing for recovery against the seller.[242] The California statute also gives buyers who are injured the right to seek recovery of damages for injury sustained in violation of the statute.[243] This statute seems as though it would directly conflict with the federal statute providing § 230 immunity.[244] Perhaps the next time someone is injured as a result of a fraudulent profile, the statute will be used as a claim for damages against an online dating service.

B. Cases Interpreting State Consumer Protection Laws

Notwithstanding the § 230 immunity, courts have had no problem holding an Internet dating service liable for damages for violations of state consumer protection laws.[245] In one such case, claimants argued the Internet dating referral service they used violated the New York law governing dating services.[246] Although the statute did not expressly name Internet dating services as a social referral service, the court determined there was no exception to consumer protection laws for businesses run over the Internet.[247] The New York statute required a specific number of referrals per month if the dating service charged over twenty-five dollars, and the service could not charge over one

---

240 *See* CAL. CIV. CODE §§ 1694.1-1694.4 (including a buyer's right to revoke a service contract for three days after signing the agreement).

241 *Id.* § 1694.4(b).

242 *See id.* § 1694.4(b)-(c), (e).

243 *Id.* § 1694.4(c) ("Judgment may be entered for three times the amount at which the actual damages are assessed.").

244 *Compare id.* § 1694.4(b)-(c) (allowing any injured buyer of dating services to bring an action for the recovery of damages), *with* 47 U.S.C. § 230(c)(2) (2006) (stating that no provider or user of an interactive computer service may be held liable).

245 *See, e.g.*, Doe v. Great Expectations, 809 N.Y.S.2d 819, 821-23 (Civ. Ct. 2005) (holding an Internet dating referral service liable when a person was required to pay an excessive fee to the service in order to post their profile with a video attached).

246 *See id.* at 820; N.Y. GEN. BUS. LAW § 394-c (McKinney 1996).

247 *Great Expectations*, 809 N.Y.S.2d at 821.

thousand dollars for the total overall package.[248] Since the dating referral service violated nearly every mandate required of it by the statute, the court allowed the claimants to recover their actual and restitution damages.[249]

In addition to New York, other jurisdictions have case decisions interpreting statutes that are designed to protect consumers.[250] In applying a test of fairness to an alleged deceptive trade practice, the Sixth Circuit made clear the act must induce the customer into believing something that is not true.[251] The provision that the plaintiff claimed was deceptive was a warning SexSearch.com gave to all users declaring all customers to be over eighteen years old.[252] Under Ohio law, a deceptive act must be likely to induce a state of mind in the consumer that is not in harmony with the facts.[253] While finding for the website, the court relied on the single fact that in the terms of use, SexSearch.com proclaimed it did not verify users' ages.[254] The court expressed that this warning could not induce a state of mind in a subscriber that was not in harmony with the facts.[255] However, the court did not take into account the fact that few people read the terms of use or that the two clauses were directly in conflict.[256] If the court had found the contract to be unconscionable, the terms of use would fail, thus allowing the plaintiff to recover.[257] The court failed to reach the issue and simply claimed the doctrine of unconscionability to be inapplicable to the case.[258] However, it is hard to imagine a more deceptive and unconscionable act than

---

248 GEN. BUS. § 394-c(2) to (3).

249 *Great Expectations*, 809 N.Y.S.2d at 822-24 (holding that due to the defendant's violations, as the amendment to the statute in 1992 allowed, the remedy of restitution is given to even the playing field).

250 *See, e.g.*, Doe v. SexSearch.com, 551 F.3d 412, 418-19 (6th Cir. 2008).

251 *Id.* at 418.

252 *Id.*

253 *Id.*

254 *Id.* at 420 (finding that because the user had gone through the same process himself, he was put on notice that the website did nothing to check the accuracy of its users' promises).

255 *Id.* at 418.

256 *Id.*

257 *See supra* notes 206-07 and accompanying text (describing and applying the elements of unconscionability).

258 *SexSearch.com*, 551 F.3d at 420.

promising one thing and later stating the direct opposite in an effort to create a shield from liability.

IX. Modifying § 230 Immunity

The CDA currently provides that in some circumstances the Internet service provider is not immune from liability.[259] These "effect on other laws" provisions provide that the CDA has no effect on federal criminal laws and federal and state intellectual property law.[260] If courts are still reluctant in the future to hold Internet dating websites as information content providers under this section, the code should be modified to include a provision that would establish no effect on the laws of breach of contract, negligence, and fraud for any Internet dating service.[261] Admittedly, it is foreseeable that increasing liability would create potential for non-Internet dating services to be held liable for these actions as well.[262]

A concern of critics is that holding all Internet websites liable for these claims could create a strain on the free flow of information on the Internet.[263] This concern could be alleviated with a new Good Samaritan provision similar to the following: all Internet dating or matchmaking services shall forever after be considered information content providers, regardless of their passive or active nature, unless they utilize an industry approved screening and verification system.[264] Thus, dating websites should receive special provisions under the CDA in order to protect the consumers and entice them to regulate their own content by screening out false profiles.[265] Instead of totally rewriting the CDA, this language could be used, while allowing the statute to remain effec-

---

259 *See* 47 U.S.C. § 230(e)(1)-(2) (2006).

260 *Id.*

261 *See supra* notes 179-95 and accompanying text.

262 *Cf.* Doe II v. MySpace Inc., 96 Cal. Rptr. 3d 148, 156 (Ct. App. 2009) (holding a broad interpretation for § 230 immunity by allowing it to apply to not only Internet dating services but also to MySpace, an Internet based social network).

263 Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

264 *See infra* Part X (discussing verification systems and how they can aid and hinder Internet websites).

265 *See infra* Part X.

tive and forcing dating websites to remember their responsibility to be a "Good Samaritan" in order to receive immunity.[266]

Scholarly critics agree that action should be taken by Congress to amend the CDA in some form.[267] Jeffrey Lipschutz, author of *Internet Dating . . . Not Much Protection Provided By the Communications Decency Act of 1996 Based on* Carafano v. Metrosplash.com, argued by creating a balancing test at the end of the current CDA statute, the third party harmed would be put on equal footing with the Internet dating websites.[268] The balancing test should be a clause at the end of § 230 allowing for suits against interactive computer services.[269] The balancing test would allow claims to proceed against Internet dating services if the need to protect Internet users outweighed the burden placed on the online dating service.[270] In most instances concerning Internet dating sites, the burden of preventing the harm would only be slight because the site could implement a verification system.[271] A balancing test would allow for common law claims to proceed and would prevent the overly broad immunity that is currently granted to Internet dating sites.[272] While Lipschutz's proposed solution would hold dating websites accountable, there would be almost no escape from liability for the websites because their burden would be minimal and liability would be limitless.[273] Therefore, a new approach that denies immunity to dating websites that verify information, and leaves open liability to those

---

266 *See infra* Part X.

267 *See, e.g.*, Lipschutz, *supra* note 82, at 241 (arguing that a balancing test is needed to weigh the harms to the individual against the public policy of upholding immunity).

268 *Id.*

269 *Id.* ("[T]his section could be altered as follows: '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 unless the harms to the alleged victim outweigh the public policy behind immunity as defined in § 230(b).' ").

270 *See id.*

271 *See id.* (arguing that the suit should be dismissed because the Internet service provider has no reasonable alternatives in alleviating the problem and little harm flows from the claims).

272 *Id.* at 242.

273 *See id.*; *see also* Doe v. SexSearch.com, 551 F.3d 412, 419 (6th Cir. 2008) (explaining that without limiting liability, dating websites would be liable for arrests, STDs, other diseases of various kinds, and injuries caused by angry family members or others).

dating websites that do not, would drastically reduce the fraudulent profile outbreak while, at the same time, holding each website accountable.

Whether the subscriber is a person looking for love and a lifelong relationship or someone who simply is looking for an adult friend with whom they can have a sexual relationship, the vast number of people who are currently using the Internet to find these "matches" cannot be ignored.[274] Even if Congress had other policy interests in mind when it enacted the CDA, Congress also has a strong interest in protecting Internet users from fakers and frauds who use the sites for some unknown personal gratification.[275] The public policy of protecting honest subscribers should outweigh any other policy for upholding the immunity for Internet dating websites.[276] Therefore, if courts do not change their perception of Internet dating sites to information content providers under the *Roommates.com* analysis, Congress must amend the CDA to hold all Internet dating websites liable for fraudulent third-party-created content.[277]

X. Verifying Subscriber Information

By implementing a screening and verification process to ensure the person creating the profile is in fact real, the Internet dating websites would not create a chilling effect on the freedom of speech.[278] An age verification or identification system may not be as burdensome or difficult as content screening.[279] A website could require users to submit their social security number when registering for the website. The web-

---

[274] *See Online Dating Facts*, Online Dating Mag., http://www.onlinedatingmagazine.com/mediacenter/onlinedatingfacts.html (last visited Feb. 23, 2011) (estimating that twenty million people visit at least one Internet dating website per month).

[275] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[276] *See* Lipschutz, *supra* note 82, at 239 ("This decision to provide such lenient standards to Internet companies under the notion that the Internet should be less regulated than other media sources is lacking in fairness.").

[277] *See* McDonald, *supra* note 69, at 279.

[278] *See* Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008); *cf.* McDonald, *supra* note 69, at 279 (determining that giving websites an opportunity to argue against disclosure by requiring collection of identifying information from users would not chill free speech on the Internet).

[279] *See* Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 668 (7th Cir. 2008).

site could verify the authenticity of the number and then allow posting of the profile. Verification is not a significant or harsh burden for Internet dating websites to follow since many companies already require this information from their subscribers.[280]

In *Ashcroft v. ACLU* and *Reno v. ACLU*, the Supreme Court addressed the use of credit cards to identify and verify subscribers' information.[281] Almost thirteen years ago, the Court in *Reno* found verification techniques ineffective at validating the ages and identities of users who were accessing material.[282] However, this determination only applied in the context of email, chat rooms, and newsgroups—distinguishing Internet dating websites from other commercial websites.[283] Credit card verification is less reliable and significantly more burdensome than a social security verification process, because the credit card process excludes adults who do not have a credit card, thereby making content unavailable to those who do not have the resources to attain one.[284] Similarly, *Ashcroft* found that credit card and age verification techniques were less reliable than content screening processes.[285] However, this conclusion ignores the fact that many commercial websites refuse to screen or verify identity and, therefore, may not apply to Internet dating services.[286]

While it is true that every citizen of the United States has a social security number, foreign citizens may oppose this verification technique since only United States citizens receive social security numbers.[287] Nevertheless, dating websites would have to choose

---

280 *See* BIRTH DATE VERIFIER, http://www.birthdateverifier.com/ (last visited Feb. 23, 2011).

281 Ashcroft v. ACLU, 542 U.S. 656, 668 (2004); Reno v. ACLU, 521 U.S. 844, 849 (1997).

282 *Reno*, 521 U.S. at 855-57.

283 *See id.* at 855-56.

284 *Id.* at 856 (noting that such a credit card verification process would forbid adults from exercising their right to access pornographic material).

285 *Ashcroft*, 542 U.S. at 668; *accord* ACLU v. Mukasey, 534 F.3d 181, 196 (3d Cir. 2008) ("[T]he possibility that some minors may have access to credit cards merely demonstrates that no system of age verification is foolproof.").

286 *See Ashcroft*, 542 U.S. at 669.

287 *Your Social Security Number and Card*, SOC. SECURITY ONLINE, http://www.socialsecurity.gov/pubs/10002.html (last visited Feb. 23, 2011).

whether they will appeal to United States citizens, requiring verification to avoid liability, or appeal to foreign citizens, without having the added expense of verification.[288] The more reliable approach would be an identity and age verification system for Internet dating websites utilizing social security numbers.

Dating websites are not the only Internet medium that could benefit from age and identity verification.[289] Both social networking sites and dating websites share the problem of sexual solicitation of minors.[290] Even if the website requires the user to be a certain age, the user can simply create a fake birth date that makes them appear older.[291] A foreseeable problem with some age verification techniques is that teens may not have the same amount of public records as adults, which could lead to false approvals.[292] However, all United States citizens have a social security number and if kept private by the websites, use of social security numbers would be the best verification tool.

One scholar argues that Congress or the courts should require websites to collect identifying information, while another scholar proposes that there be a law requiring everyone to carry an encrypted Universal Serial Bus (USB) device.[293] Without identity verifying processes, there is concern that most injured subscribers will fail to receive any remedy from the original wrongdoer or the website.[294] Anonymity on the Internet takes away the "safety valve" providing a strong

---

288 *Id.*

289 *See* Sarah Merritt, Comment, *Sex, Lies, and MySpace*, 18 ALB. L.J. SCI. & TECH. 593, 597 (2008); *see also* Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 846 (W.D. Tex. 2007) (addressing a situation where a fourteen-year-old held herself out as an adult on a social networking site, then met up with a nineteen-year-old who sexually assaulted her).

290 Merritt, *supra* note 289, at 596; *see also* Doe v. SexSearch.com, 551 F.3d 412, 415-16 (6th Cir. 2008) (discussing claims against "an online adult dating service that facilitates sexual encounters between its members" for failing to discover a minor who misrepresented her age while using the service).

291 Merritt, *supra* note 289, at 599 ("[A]n intelligent user need only enter an age older than fourteen, and after the user confirms his or her email address the user can begin to use MySpace.").

292 *Id.* at 600.

293 McDonald, *supra* note 69, at 279; Merritt, *supra* note 289, at 621-24.

294 *See* McDonald, *supra* note 69, at 279.

argument to lift § 230 immunity using the *Roommates.com* analysis.[295] This safety valve rests on the premise that injured parties may sue the original culpable party.[296] Even if courts required websites to release the imposter's identifying information so that a victim could have some remedy, most websites go to great lengths to ensure anonymity because it is a staple of their business.[297] The original culpable party may go unpunished if the reasoning of *Craigslist* is applied to Internet dating sites, because the site may not know the truly culpable party.[298]

Dating websites could avoid the anonymity problem by requiring a social security number for every subscriber because there would always be a real person from whom the injured party could seek damages. Although a portable USB device with encrypted personal data would equivalently do the same as a social security verification procedure, it comes with the annoyance of carrying around and keeping up with a device that many teens could lose.[299] The benefits of using unique encryption for each device to deter hackers would be unnecessary for a social security number verifying process, if everyone simply memorized their number.[300] By utilizing a verification system, the Internet dating websites would be able to screen out false profiles which would significantly reduce the injuries that result. Therefore, they should implement a screening and verification system using social security numbers to identify the subscriber.

XI. CONCLUSION

Despite past treatment of Internet dating websites as interactive service providers, the *Roommates.com* decision has paved the way for

---

295 *Id.* at 275.

296 *Id.*

297 *Id.* at 279 (claiming courts should have the freedom to compel websites to release their posters' identities in defamation cases in order to achieve a remedy for the victim).

298 *See id.* In the *Zeran* case, the plaintiff got nothing out of his lawsuit, and the original culpable party went unpunished. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

299 *See* Merritt, *supra* note 289, at 621-22 (stating that the device would be the same size as a keychain and would require a duty to report a lost or stolen device).

300 *See id.* at 622-23 (arguing that the USB could incorporate Verisign technology, which has yet to be hacked by a hacker).

imposing liability when active measures are taken to develop the content.[301] Courts have interpreted the Good Samaritan laws much too broadly, leaving Internet subscribers with little hope for recovery when harmed.[302] Notwithstanding Congress's intent to eliminate disincentives for screening and filtering, due to the language of the CDA, courts are now asked to take on the difficult task of determining when a dating website is an interactive service provider and when it is an information content provider.[303] With courts handing down such broad interpretations of the CDA prior to *Roommates.com*, the trend effectively eviscerated information content provider liability.[304]

While some dating websites are active developers and others are passive conduits, websites such as eHarmony and Chemistry.com have all the characteristics of active developers.[305] Dating websites would face the potential of liability if the injured party states a claim for breach of contract based on the terms of use agreement, negligence for failing to recognize the standard of care, and fraud.[306] Dating websites could potentially limit their liability in the terms of use; hence, these clauses should be a violation of public policy and unconscionable.[307]

Congress should recognize the current efforts by states to pass consumer protection statutes and lead the way for potential federal changes to Internet dating website immunity.[308] *Roomates.com* provides the information content provider analysis for courts to follow. The only thing left to do now is apply the analysis to the Internet dating websites which allow users to create fraudulent profiles. While courts are reluctant to change prior case law, narrowing the immunity given to these websites will not frustrate Congress's policy interest in promoting

---

301 *See supra* Part IV.B.

302 *See supra* notes 60-78 and accompanying text; *see also supra* notes 83-85 and accompanying text (providing that the *Zeran* decision reviewed the Good Samaritan provision and essentially paved the way for other courts to bar all causes of action).

303 *See supra* Part IV.

304 *See* Ross, *supra* note 144, at 377-78 (arguing that the CDA has eviscerated provisions of the Fair Housing Act).

305 *See supra* notes 147-50 and accompanying text.

306 *See supra* Part V.

307 *See supra* Part VI.

308 *See supra* Part VIII.

filtering and screening.[309] To further this policy, Congress could add a clause to the current CDA proclaiming all Internet dating websites to be information content providers.

Because people are being allowed to freely post fraudulent profiles with little possibility of repercussions, third parties are having their lives ruined or ended.[310] Federal law aids this disturbing trend, and unless the Internet dating websites incur some liability, nothing will be done to stop the offenders. With dating websites failing to perform screening and filtering, Congress must enact legislation demanding identity verification procedures be taken.[311]

---

[309] *See supra* Part VII (explaining that holding dating websites liable would only create an incentive to screen).

[310] *See, e.g.*, *supra* notes 91-96 and accompanying text.

[311] *See supra* Part X.