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Facebook and the Future of Fair Housing Online

Introduction

Facebook, the behemoth social media company founded in 2004, is no stranger to criticism in pursuit of its mission “to give people the power to build community and bring the world closer together.”¹ Facebook’s critics have variously attacked its stance on privacy,² retention of member information,³ and its role in proliferating false news,⁴ among a host of other issues.⁵ Amidst the hail of allegations against Facebook, the claim that Facebook’s advertising platform violates the Fair Housing Act has some powerful backers in the Department of Housing and Urban Development and the Justice Department.⁶ This Note focuses on the National Fair Housing Alliance’s (NFHA) suit against Facebook as an exemplar for understanding the current state of law governing housing discrimination online. Although Facebook and the NFHA ultimately reached a settlement agreement,⁷ the facts alleged in NFHA’s suit reify the larger issue of how to effectively and pragmatically effectuate potentially conflicting legislative goals (specifically the goals of the Fair Housing Act (FHA) and the Communications Decency Act (CDA)).⁸

1. *FAQs: What Is Facebook’s Mission Statement?*, FACEBOOK: INVESTOR REL., <https://investor.fb.com/resources/default.aspx> (last visited Dec. 10, 2019).

2. Geoff Duncan, *Open Letter Urges Facebook to Strengthen Privacy*, DIGITAL TRENDS (June 17, 2010, 9:28 AM PST), <https://www.digitaltrends.com/computing/open-letter-urges-facebook-to-strengthen-privacy/>.

3. Maria Aspan, *How Sticky Is Membership on Facebook? Just Try Breaking Free*, N.Y. TIMES (Feb. 11, 2008), <https://www.nytimes.com/2008/02/11/technology/11facebook.html>.

4. *Hillary Clinton Says Facebook ‘Must Prevent Fake News from Creating a New Reality’*, TELEGRAPH (June 1, 2017, 4:21 AM), <https://www.telegraph.co.uk/technology/2017/05/31/hillary-clinton-says-facebook-must-prevent-fake-news-creating/>.

5. Alyssa Newcomb, *A Timeline of Facebook’s Privacy Issues—and Its Responses*, NBC NEWS (Mar. 24, 2018, 6:02 AM CDT), <https://www.nbcnews.com/tech/social-media/timeline-facebook-s-privacy-issues-its-responses-n859651>.

6. Brakkton Booker, *HUD Hits Facebook for Allowing Housing Discrimination*, NPR (Aug. 19, 2018, 7:42 AM ET), <https://www.npr.org/2018/08/19/640002304/hud-hits-facebook-for-allowing-housing-discrimination> (citing a HUD complaint against Facebook and the Justice Department’s filing of a statement of interest in the National Fair Housing Alliance’s suit against Facebook).

7. *Facebook Settlement: Civil Rights Advocates Settle Lawsuit with Facebook: Transforms Facebook’s Platform Impacting Millions of Users*, NAT’L FAIR HOUSING ALLIANCE, <https://nationalfairhousing.org/facebook-settlement/> (last visited Dec. 10, 2019).

8. Even though Facebook and the NFHA have settled their dispute, the issues

This Note will analyze the questions presented in the NFHA case against Facebook in three parts. Part I analyzes the apparent statutory conflict between the provisions of the FHA and the CDA and the policy goals driving both enactments. Part II discusses CDA immunity in other contexts and the only two circuit court cases that specifically address the tension between the CDA and the FHA. Both cases are instructive as starting points for adjudicating housing discrimination claims in the digital context, though neither entails the level of sophistication alleged in NFHA's complaint. Finally, Part III applies existing case law to the NFHA complaint and argues that reinvigorating the good faith language of the CDA and using modern tools to ensure compliance with the FHA will create a legal climate in which the purposes of both statutes may be better fulfilled.

I. The Building Blocks of Online Housing Discrimination

A. The Fair Housing Act

The Fair Housing Act, enacted in 1968, aimed to “replace America’s segregated residential landscape with ‘truly integrated and balanced living patterns.’”⁹ The FHA bares its teeth in § 3604, which prohibits the following: discriminatory rejections of potential buyers or renters;¹⁰ discrimination in terms or conditions of renting and provision of services to buyers or renters;¹¹ discrimination in housing advertisements based on

discussed in this Note are still pressing for several reasons. First, Facebook has previously made hollow proclamations that it would stop discriminatory housing ads. Julia Angwin, Ariana Tobin & Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, PROPUBLICA (Nov. 21, 2017, 1:23 PM EST), <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin>. Second, HUD charged Facebook with discrimination in violation of the Fair Housing Act which is unimpacted by the settlement agreement between the NFHA and Facebook. Charge of Discrimination, HUD v. Facebook, Inc., FHEO No. 01-18-0323-8 (HUD Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf. Finally, and perhaps most importantly, there is a distinct financial incentive to use targeted advertising, which means that issues involving discriminatory targeted advertising are unlikely to dissipate. See HOWARD BEALES, NETWORK ADVERT. INITIATIVE, THE VALUE OF BEHAVIORAL TARGETING 1 (2010), https://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

9. Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125, 1129 (2010) (quoting 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale)).

10. 42 U.S.C. § 3604(a) (2012).

11. *Id.* § 3604(b).

protected characteristics;¹² and false representations that a property is not for rent or sale when such representation is made based on a protected characteristic of the prospective renter or buyer.¹³ Section 3604(c) is the basis of the complaint against Facebook, as it makes it unlawful

[t]o make, print, or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.¹⁴

Subsequently, courts broadly applied this provision to traditional forms of print media.¹⁵

In *United States v. Hunter*, the Fourth Circuit became the first appellate court to consider § 3604(c) and the potential liability not only for those creating discriminatory advertisements but also for publishers of discriminatory advertisements.¹⁶ The court rejected the claim that an ad for a “white home” was beyond the FHA’s reach and instead held that “discriminatory classified advertisements in newspapers was precisely one of the evils the Act was designed to correct.”¹⁷

Courts have also interpreted the breadth of § 3604(c)’s prohibition expansively in the context of traditional print media.¹⁸ In *Ragin v. New York Times Co.*, the Second Circuit considered whether the district court properly denied the New York Times’ motion to dismiss a complaint alleging that the Times’ “real estate advertisements ‘featur[ed] thousands of human models of whom virtually none were black,’ and that the few blacks depicted rarely represented potential home buyers or renters,” under Federal Rules of Civil Procedure 12(b)(6).¹⁹ In affirming the denial, the Second Circuit held that § 3604(c) is “violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or

12. *Id.* § 3604(c).

13. *Id.* § 3604(d).

14. *Id.* § 3604(c).

15. *See Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999–1000 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 210 (4th Cir. 1972).

16. *See Hunter*, 459 F.2d at 209.

17. *Id.* at 209, 211.

18. *See Ragin*, 923 F.2d at 999–1000.

19. *Id.* at 998 (quoting the complaint).

dispreferred for the housing in question.”²⁰ The court rejected the “intolerably narrow” reading of the statute the Times proffered, which would have limited the prohibition to “the most provocative and offensive expressions of racism or . . . outright refusal to sell or rent to persons of a particular race.”²¹ Instead, the court looked at the “broad language” in § 3604(c) to hold that “the word ‘preference’ . . . describe[s] any ad that would discourage an ordinary reader of a particular race from answering it.”²² This expansive interpretation of § 3604(c)’s prohibition and the accompanying potential for liability largely led to the disappearance of discriminatory housing advertising in traditional media after the early 1970s.²³

B. The Communications Decency Act

In 1995, the New York Supreme Court issued a decision²⁴ that, in part, sparked Congress’s urgency in passing the Communications Decency Act.²⁵ A securities investment banking firm alleged that Prodigy Services, a computer network provider that hosted the “Money Talk” bulletin board, which was “allegedly the leading and most widely read financial computer bulletin board in the United States,” was liable as a publisher for libelous statements made by third-party posters.²⁶ Because Prodigy issued statements about how it sought to control the content on its bulletin boards, provided guidelines for permissible content, and ran automatic screening software, the court concluded that Prodigy was “a publisher rather than a distributor.”²⁷ In essence, the court applied the model of

20. *Id.* at 999.

21. *Id.*

22. *Id.* at 999–1000.

23. Oliveri, *supra* note 9, at 1143 (“Thus, after the early 1970s discriminatory housing ads largely vanished.”) (citing 17 AM. JUR. 2D *Civil Rights* § 394 (2010)).

24. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, Index No. 031063/94, 23 Media L. Rep. (BNA) 1794 (N.Y. Sup. Ct. 1995), 1995 WL 323710.

25. Julie Hsia, Note, *Twitter Trouble: The Communications Decency Act in Inaction*, 2017 COLUM. BUS. L. REV. 399, 408. (noting that *Stratton Oakmont* and *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), together brought about the urgency to create the Act).

26. *Stratton Oakmont*, 23 Media L. Rep. at 1795, 1995 WL 323710, at *1.

27. *Id.* at 1797, 1995 WL 323710, at *4. “[O]ne who repeats or otherwise republishes a libel is subject to liability as if he had originally published it. In contrast, distributors . . . may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.” *Id.* at 1796, 1995 WL 323710, at *3 (citations omitted).

liability used in the traditional media context to an internet bulletin and held that “PRODIGY’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than . . . other computer networks that make no such choice.”²⁸

The decision in *Stratton Oakmont*²⁹ immediately stirred resistance in Congress because it created a perverse incentive for website operators to exercise less editorial control to avoid publisher liability for third-party content.³⁰ In 1996, Congress passed the Communications Decency Act, which aimed to “promote the continued development of the Internet and . . . preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”³¹ The Act had the dual purpose of overruling the decision in *Stratton Oakmont* and enlisting internet service providers (ISPs) in the battle against what Congress perceived to be obscene material proliferating on the nascent internet.³² Ultimately, a federal district court enjoined most of the Act one week after its enactment³³—a decision subsequently affirmed by the Supreme Court in *Reno v. ACLU*.³⁴

Section 230(c) of the Communications Decency Act survived the Supreme Court’s decision in *Reno* unscathed and has since become a cornerstone for website operator immunity in a variety of contexts.³⁵ The

28. *Id.* at 1798, 1995 WL 323710, at *5.

29. Martin Scorsese brought the story of this firm and its demise to life in the 2013 film *The Wolf of Wall Street*. See Eriq Gardner, *Paramount Defeats ‘Wolf of Wall Street’ Libel Suit from Stratton Oakmont Alum*, HOLLYWOOD REP. (Dec. 13, 2018, 1:55 PM PT), <https://www.hollywoodreporter.com/thr-esq/paramount-defeats-wolf-wall-street-libel-suit-stratton-oakmont-alum-1169108>.

30. See Matthew Schruers, Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 212–13 (2002).

31. 47 U.S.C. § 230(b)(1)–(2) (2018).

32. Schruers, *supra* note 30, at 213; see also *Scope, Exclusions and Legislative Purpose*, 4 E-COMMERCE AND INTERNET LAW 37.05[1][A] (2019 update), ECOMMINTLAW 37.05[1][A] (Westlaw) (“Subpart 230(c)(1) was intended to overrule the *Stratton Oakmont* decision.”).

33. *ACLU v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

34. *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (“[T]wo statutory provisions enacted to protect minors from ‘indecent’ and ‘patently offensive’ communications on the Internet . . . [unconstitutionally] abridge[] ‘the freedom of speech’ protected by the First Amendment.”) (footnote omitted).

35. See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) (holding social network immune from state negligence claim); *Green v. Am. Online (AOL)*, 318 F.3d 465,

immunity provided under § 230(c) is twofold. First, § 230(c)(1) prohibits any “provider or user of an interactive computer service” from being “treated as the publisher or speaker of any information provided by another information content provider.”³⁶ Next, § 230(c)(2) essentially creates a “Good Samaritan” portion of the immunity provision by exempting “provider[s] or user[s] of an interactive computer service” from liability for “action[s] voluntarily taken in good faith” to limit or remove obscene material.³⁷

The statute also defines two terms that have become critical in the jurisprudence surrounding CDA immunity: “interactive computer service [provider]” and “information content provider.”³⁸ The CDA defines interactive computer service providers as any “information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”³⁹ By contrast, the CDA defines information content providers as 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.”⁴⁰ Scholars have noted that the first portion of § 230 seems to entail a robust immunity when read alone, but when read in context, the statutory immunity is more limited in its scope.⁴¹

In a decision interpreting § 230 just over one year after its enactment, the Fourth Circuit held that it granted “broad immunity” to service providers.⁴² The question of how this broad immunity interacted with the

468 (3d Cir. 2003) (holding AOL immune from state tort law claim); Ben Ezra, Weinstein, & Co. v. Am. Online, Inc., 206 F.3d 980, 984 (10th Cir. 2000) (holding defendant immune from state law claims for defamation and negligence).

36. 47 U.S.C. § 230(c)(1) (2018).

37. *Id.* § 230(c)(2)(A).

38. *Id.* § 230(f)(2), (3).

39. *Id.* § 230(f)(2).

40. *Id.* § 230(f)(3).

41. *See* Oliveri, *supra* note 9, at 1140.

42. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Here an unknown person posted messages to an AOL bulletin board on April 25 and 26, 1995, advertising shirts mocking the Oklahoma City bombing (which occurred on April 19, 1995) and listed the plaintiff’s phone number urging users to call. *Id.* at 329. As a result of these posts and a subsequent Oklahoma City radio station broadcast about the posts, the plaintiff received a deluge of angry calls and death threats. *Id.* In upholding AOL’s immunity under the CDA, the court recognized the important interests of ensuring open communications on the internet and encouraging website operators to self-police without the threat of publisher liability hanging over their heads. *Id.* at 331. Accordingly, the court held that “Congress’ desire to

Fair Housing Act was left unanswered for over a decade, until the Seventh and Ninth Circuit Courts first addressed the potential conflict.

II. Craigslist & Roommates – Two Circuits Consider the Conflict

A. Craigslist: FHA Liability for Purely Third-Party Content

Although some scholars noted the potential conflict between the FHA's advertising provisions and § 230's immunity,⁴³ the issue was not considered at the circuit level until a pair of decisions by the Seventh and Ninth Circuit Courts of Appeals in 2008.⁴⁴ In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, a public interest consortium alleged that Craigslist violated § 3604(c) of the FHA by permitting notices on its site that included statements such as "NO MINORITIES" and "No children."⁴⁵ Although the court expressed general support for the notion that "§ 230(c)(1) provides 'broad immunity from liability for unlawful third-party content,'"⁴⁶ it rejected the notion that § 230(c) could "be understood as a general prohibition of civil liability for web-site operators and other online content hosts[.]"⁴⁷

Nevertheless, the Seventh Circuit affirmed the district court's summary judgment for Craigslist because the site could only be liable as a publisher under § 3604(c) of the FHA and § 230(c)(1) states that "an online information system must not 'be treated as the publisher or speaker of any information provided by' someone else."⁴⁸ The court reasoned that §

promote unfettered speech on the Internet must supersede conflicting common law causes of action." *Id.* at 334.

43. 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, 1011 (2002) ("This complete legislative silence [on the FHA/CDA conflict] suggests not only that [Congress] failed to realize that fair housing interests would be implicated at all in the passage of § 230, but that Congress did not intend for the fair advertising mandates to be abrogated.").

44. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc); *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008).

45. *Chi. Lawyers' Comm.*, 519 F.3d at 668.

46. *Id.* at 669 (citing *Zeran*, 129 F.3d at 327; *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. Am. Online (AOL)*, 318 F.3d 465 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Universal Comm'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007)).

47. *Id.*

48. *Id.* at 671 (quoting 47 U.S.C. § 230(c)(1)).

230(c)(1)'s prohibition on liability need not mention the FHA because "a law's scope often differs from its genesis."⁴⁹ The impetus for § 230(c)(1)'s immunity was the *Stratton Oakmont* decision, in which the court held "an information content provider liable, as a publisher, because it had exercised some selectivity with respect to the sexually oriented material it would host for customers."⁵⁰ Even so, the issue for the court was not the particular impetus that led Congress to enact the CDA, but rather the language of the statute itself which "covers ads for housing, . . . and everything else that third parties may post on a web site."⁵¹ Further, the court noted that "[n]othing in the service Craigslist offers induces anyone to post any particular listing or express a preference for discrimination."⁵² The court concluded that the plaintiffs could pursue a claim against the third-party creators of the discriminatory advertisements, but they could not "sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination."⁵³

B. Roommates.com: Creating Discrimination Online

The Ninth Circuit addressed the same statutory tension in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*.⁵⁴ The defendant, Roommates.com, LLC ("Roommate"),⁵⁵ operated a website that matched prospective roommates.⁵⁶ Roommate required users to create profiles before using the website⁵⁷ and also required that they disclose their sex, sexual orientation, and whether the user would be moving in with children.⁵⁸ Roommate also offered an optional "Additional

49. *Id.*

50. *Id.*; see also Oliveri, *supra* note 9 at 1139–40 ("The ruling in *Prodigy* troubled lawmakers, who wanted to facilitate the free flow of ideas on the Internet but also wished to encourage website operators to screen and filter offensive content, particularly pornographic or indecent material. Thus, a provision entitled "good Samaritan" blocking and screening of offensive material' was added to the CDA[.]") (footnote omitted).

51. *Chi. Lawyers' Comm.*, 519 F.3d at 671.

52. *Id.*

53. *Id.* at 672.

54. 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc).

55. *Id.* at 1161 n.2 ("For unknown reasons, the company goes by the singular name 'Roommate.com, LLC' but pluralizes its website's URL, www.roommates.com.").

56. *Id.* at 1161.

57. *Id.*

58. *Id.*

Comments” section, which encouraged users to describe themselves and what they were looking for in a prospective roommate.⁵⁹ The Fair Housing Councils of the San Fernando Valley and San Diego (“Councils”) filed suit, alleging that Roommate violated the Fair Housing Act by requiring disclosure of protected characteristics, using this information to develop profile pages for each user, and therefore perpetuating discrimination.⁶⁰ Further, the Councils “argue[d] that Roommate should be held liable for the discriminatory statements displayed in the ‘Additional Comments’ section of the profile pages.”⁶¹

A majority of the en banc Ninth Circuit held that, under the CDA, Roommate was not immune from liability for requiring disclosure of protected characteristics and publishing profiles based on those characteristics, but it was immune from liability for discriminatory statements in the “Additional Comments” section.⁶² In holding that Roommate was not immune as to user profile registration and information disclosure, the court focused on the fine line between being a purely “interactive computer service provider” as opposed to an “information content provider.”⁶³ The court interpreted CDA immunity as applying only to interactive computer service providers insofar as they are not “responsible, in whole or in part, for the creation or development of” the offending content.⁶⁴ Since a website can both “passively display[] content that is created entirely by third parties,” as well as create content itself, “a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.”⁶⁵

Addressing the required questionnaire, the court viewed Roommate as “undoubtedly the ‘information content provider’” and held that it could not “claim . . . immunity for posting [the questions] on its website, or for forcing subscribers to answer them as a condition of using its services.”⁶⁶ While the court left the issue of whether the questions violated the FHA or warranted First Amendment protection for remand, the court roundly rejected the notion that the questions existing online entitled Roommate to

59. *Id.*

60. *Id.* at 1164–65.

61. *Id.* at 1173.

62. *Id.* at 1164, 1172, 1174–75.

63. *Id.* at 1162.

64. *Id.* (quoting 47 U.S.C. § 230(f)(3)).

65. *Id.* at 1162–63 (footnote omitted).

66. *Id.* at 1164.

immunity under the CDA.⁶⁷ The court reasoned that “asking questions certainly *can* violate the Fair Housing Act . . . in the physical world . . . [and such questions] don’t magically become lawful when asked electronically online.”⁶⁸ Thus, Roommate was not immune under the CDA because it “induc[ed] third parties to express illegal preferences.”⁶⁹

The second issue—Roommate’s use of user responses to build user profiles and match prospective roommates—keyed on the notion of what it means for an interactive computer service to create or develop the information in whole or in part.⁷⁰ While the majority recognized that reading the term “develop” too “broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides,” it also rejected the notion that an information content provider must be the exclusive developer of discriminatory content in order to remove CDA immunity.⁷¹ With this tension between under- and over-inclusivity in mind, the court interpreted the term “development” as “referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness.”⁷² In light of this definition, the court viewed Roommate’s role in the development of the allegedly unlawful content as “direct and palpable.”⁷³ Since Roommate designed its website “to force subscribers to divulge protected characteristics . . . and to match . . . based on criteria that appear to be

67. *Id.*

68. *Id.* (footnote omitted).

69. *Id.* at 1165.

70. *Id.* at 1162 (citing 47 U.S.C. § 230(f)(3)).

71. *Id.* at 1167.

72. *Id.* at 1167–68.

73. *Id.* at 1169. The court summarized Roommate’s role in actively developing discriminatory content as follows:

Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children. Roommate selected the criteria used to hide listings, and Councils allege that the act of hiding certain listings is itself unlawful under the Fair Housing Act, which prohibits brokers from steering clients in accordance with discriminatory preferences. We need not decide the merits of Councils’ claim to hold that Roommate is sufficiently involved with the design and operation of the search and email systems—which are engineered to limit access to housing on the basis of the protected characteristics elicited by the registration process—so as to forfeit any immunity to which it was otherwise entitled under section 230.

Id. at 1169–70 (footnotes omitted).

prohibited by the FHA,” the court held that it could not enjoy immunity under § 230.⁷⁴

The court further emphasized the difference between those activities that enjoy CDA immunity and those that do not by holding that Roommate enjoyed immunity for the “Additional Comments” section.⁷⁵ Effectively, Roommate provided “a blank text box, in which [users could] type as much or as little” as they pleased.⁷⁶ The court reasoned that such blank entry forms are “precisely the kind of situation for which section 230 was designed to provide immunity,” because such content “comes entirely from subscribers and is passively displayed by Roommate.”⁷⁷ Unlike the questionnaire and profile matching issues, Roommate’s “Additional Comments” section “does not tell subscribers what kind of information they should or must include.”⁷⁸ Ultimately, the court concluded that Congress did not pass § 230

to prevent the enforcement of all laws online; rather, it sought to encourage interactive computer services that provide users *neutral* tools to post content online to police that content without fear that through their ‘good samaritan . . . screening of offensive material,’ they would become liable for every single message posted by third parties on their website.⁷⁹

The decisions in *Craigslist* and *Roommates.com* elucidate a few critical ideas courts have used in resolving the potential conflict between the FHA and CDA. First, websites enjoy a presumption of immunity for third-party content, and purely neutral tools (open text boxes or blank-entry search engines, for example) will generally enjoy immunity under the CDA as the statute relates to the FHA. Second, to overcome this presumption of immunity, plaintiffs must show that the website operator participates in creating or developing the content at issue—as the Ninth Circuit defines it, “materially contributing to its alleged unlawfulness.”⁸⁰ Finally, if a website operator takes steps to induce or require users to disclose protected characteristics and subsequently operationalizes that

74. *Id.* at 1172, 1175.

75. *Id.* at 1174.

76. *Id.* at 1173.

77. *Id.* at 1174.

78. *Id.*

79. *Id.* at 1175 (citation omitted).

80. *Id.* at 1168.

information, the website operator may thereby become a content provider and forfeit its immunity.

III. Facebook and the Future of Fair Housing Online

The preceding analysis of the Fair Housing Act, the Communications Decency Act, and the case law interpreting the conflict between the two, exposes two critical issues in the NFHA complaint against Facebook. The first, and perhaps more basic, issue is whether Facebook's "Pre-Populated List[.]" which allegedly allows "landlords and real estate agents [to] target certain persons or groups for, and exclude other persons or groups from, receiving housing ads," constitutes a sufficient act of creation or development so as to overcome Facebook's immunity under the CDA.⁸¹ The second, and more difficult, issue is whether Facebook participated in the development of discriminatory housing advertisements and vitiated its immunity by "extract[ing] data from its users' online behavior . . . and us[ing] algorithms designed to sort that data, process it, and repackage it to group potential customers into . . . categories for advertisers to choose from when targeting their ads."⁸²

Essentially, the latter issue concerns whether Facebook is immune when it allows advertisers to exclude certain users based on their interest in proxy categories such as "Telemundo" or "Interest in Disabled Parking Permit."⁸³ More generally, this issue will only grow as digital advertisement continues to grow in importance, as evidenced by digital advertising "account[ing] for half of total US advertising sales for the first time [in 2018]."⁸⁴

A. Facebook's Reply and Issues of Law

In its reply to the NFHA complaint about discriminatory housing advertisements, Facebook argues that its activities are distinct from those of the defendant in *Roommates.com* in that Roommate offered "an *online housing service* used by *only housing advertisers*, whereas Facebook offers a generic *online advertising service* used by *all advertisers* placing

81. First Amended Complaint at 34, Nat'l Fair Hous. All. et al. v. Facebook, Inc., No. 1:18-cv-02689-JGK (S.D.N.Y. 2018).

82. *Id.* at 13.

83. *Id.* at 34.

84. Press Release, MAGNA, MAGNA Advertising Forecasts (Fall Update – Executive Summary) at 3 (Sept. 20, 2018), <https://magnaglobal.com/magna-advertising-forecasts-fall-update-executive-summary>.

ads for *all types of products, services and information*.⁸⁵ This initial distinction as to the nature of the websites seems dubious at best. In the context of traditional media, courts would not treat a newspaper publishing a discriminatory housing ad among ads for “all types of products, services and information” differently from a publication dedicated exclusively to publishing housing advertisements.⁸⁶

Ultimately, Facebook argues that “there is nothing unlawful under the FHA . . . about Facebook requiring users to identify their sex at signup or using that information to create tools that allow, but do not require, *all advertisers* to target ads for *all types of products, services and information*.”⁸⁷ As to the “‘pre-populated list’ of targeting options,” Facebook flatly denies that discriminatory options are readily available.⁸⁸ Instead, Facebook argues that these tools are only an “option” accessed “through searches using a blank search box or by browsing multi-level menus.”⁸⁹ With the required disclosures at sign-up and use of the information disclosed, Facebook argues that “there is no publication of a discriminatory housing ad on Facebook *unless* an advertiser decides to (1) create a housing ad and (2) target it in a discriminatory manner.”⁹⁰ Such a system “is the definition of a ‘neutral tool’ under the CDA and establishes, under well-settled precedent, that Facebook is not an ‘information content provider’ in this case.”⁹¹

As to this second line of argument, it is likely that Facebook is correct under current precedent. To dispel the dissent’s concerns about the holding in *Roommates.com*, the majority opinion provided some examples of activity that would “not amount to ‘development’ under section 230.”⁹² The court’s list of examples included “ordinary search engine[s] used] to query for a ‘white roommate,’ . . . [or] a housing website that allows users to specify whether they will or will not receive emails by means of *user-*

85. Reply Memorandum of Law in Support of Motion to Transfer Venue, or Alternatively to Dismiss Plaintiffs’ First Amended Complaint at 9, Nat’l Fair Hous. All. v. Facebook, Inc., No. 1:18-cv-02689-JGK (S.D.N.Y. 2018).

86. See *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 999–1000 (2d Cir. 1991).

87. Reply Memorandum of Law in Support of Motion to Transfer Venue, or Alternatively to Dismiss Plaintiffs’ First Amended Complaint, *supra* note 85, at 11.

88. *Id.*

89. *Id.* (citation omitted).

90. *Id.*

91. *Id.* (citing *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 589–90 (S.D.N.Y. 2018)).

92. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1169 (9th Cir. 2008) (en banc).

defined criteria.”⁹³ If Facebook’s factual allegations are true, then it is likely immune under current jurisprudence because it does nothing to require or encourage discriminatory housing advertisements. In *Roommates.com*, it was critical to the court’s decision that the website operator required disclosure and then matched users based on this disclosure. By contrast, nothing Facebook has done could be viewed as requiring discrimination as a functional part of its platform. Discriminatory housing advertisements within its system are discriminatory only insofar as a third-party chooses to make them so. Under the current legal framework, it is likely Facebook would succeed though this question is still open since the parties have reached a settlement agreement.⁹⁴

B. Looking Beyond the Facebook Complaint

Although Facebook and the NFHA have settled their dispute, the complaint exposes some of the limitations of the current framework for analyzing the conflict between the Fair Housing Act and the Communications Decency Act and provides an opportunity for reflection on potential improvements. This Note offers two suggestions to address the shortcomings of the statute. The first suggestion is backward-looking. Although the provisions of § 230 have been interpreted generally as providing “broad immunity from liability for unlawful third-party content,” such an interpretation ignores the context within which the CDA was enacted and the text of the statute itself.⁹⁵ The second suggestion is forward-looking. If Facebook’s, or any other website’s, advertising algorithms are truly functioning as a “neutral tool,” how are agencies tasked with enforcement of applicable federal regulations (or other interested parties) to know? Recent scholarship has underscored the

93. *Id.*; see also *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008) (“Nothing in the service craigslist offers induces anyone to post any particular listing or express a preference for discrimination If craigslist ‘causes’ the discriminatory notices, then so do phone companies and courier services (and, for that matter, the firms that make the computers and software that owners use to post their notices online), yet no one could think that Microsoft and Dell are liable for ‘causing’ discriminatory advertisements.”).

94. See *supra* note 7.

95. *Chi. Lawyers’ Comm.*, 519 F.3d at 669–70 (citing *Zeran*, 129 F.3d at 327; *Ben Ezra, Weinstein & Co. v. Am. Online, Inc.*, 206 F.3d 980 (10th Cir. 2000); *Green v. Am. Online (AOL)*, 318 F.3d 465 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007)).

importance of understanding “technical accountability [as] a necessary step to enable political accountability.”⁹⁶ These two avenues are in no way fool-proof or complete solutions to the issue of fair housing online; however, they represent realistic means through which the goal of ending discriminatory housing advertisements may be effectuated, with due respect for the past and appropriate acknowledgment of the future.

The first avenue to resolving the conflict between the CDA and the FHA is to recognize, as the Seventh Circuit has, that “§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators.”⁹⁷ The court understood that if § 230 immunity is divorced from its origins and title (“Protection for ‘Good Samaritan’ blocking and screening of offensive material”),⁹⁸ then the logical conclusion is that websites lack motivation to monitor the material they host.⁹⁹ Instead, the immunity afforded under § 230(c) must be understood according to its language that requires “action[s] voluntarily taken in good faith.”¹⁰⁰ As the Seventh Circuit persuasively argued in *Craigslist*, immunity from civil liability under the CDA is earned, not granted regardless of whether the website operator takes action.¹⁰¹ To effectively pursue the goals of the Fair Housing Act online, courts should require good faith actions by

96. Deven R. Desai & Joshua A. Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 HARV. J.L. & TECH. 1, 11 (2017).

97. *Chi. Lawyers’ Comm.*, 519 F.3d at 669.

98. 47 U.S.C. § 230(c) (2018).

99. *Chi. Lawyers’ Comm.*, 519 F.3d at 669–70 (“If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, . . . ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1). Yet § 230(c)—which is, recall, part of the ‘Communications Decency Act’—bears the title ‘Protection for “Good Samaritan” blocking and screening of offensive material’, hardly an apt description if its principal effect is to induce ISPs to do nothing about the distribution of indecent and offensive materials via their services.”) (quoting *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003)).

100. 47 U.S.C. § 230(c)(2)(A).

101. *Chi. Lawyers’ Comm.*, 519 F.3d at 669–70 (“Section 230(c)(2) tackles this problem [of potential liability for hosting pornographic pictures] not with a sword but with a safety net. A web host that *does* filter out offensive material is not liable to the censored customer. Removing the risk of civil liability may induce web hosts and other informational intermediaries to take more care to protect the privacy and sensibilities of third parties.”) (quoting *Doe*, 347 F.3d at 659) (alterations in original).

entities like Facebook when their tools are used to perpetuate discrimination.

Policing discriminatory housing advertisements purely by pursuing claims against individual users is largely ineffective.¹⁰² The most straightforward and efficacious avenue is to “simply add[] the FHA to the list of exemptions already contained in the CDA.”¹⁰³ While this would certainly be an effective modification, such an amendment is arguably unnecessary if courts follow the Seventh Circuit’s interpretation of § 230(c). In the present case, both the NFHA and Facebook could make effective arguments about whether Facebook has adequately operated as a Good Samaritan trying to screen discriminatory housing advertisements. In NFHA’s favor, it certainly seems contradictory that Facebook made public statements about addressing the issue while ProPublica’s reporting demonstrated that such statements do not reflect the reality of what users can do with the targeted advertising platform.¹⁰⁴ However, Facebook could likely overcome such an argument by pointing to the neutral nature of the tools it provides and the repeated warnings it provides to advertisers about violating the FHA and similar laws.¹⁰⁵

The above analysis addresses many of the legal issues presented by NFHA’s suit against Facebook; however, the case against Facebook reveals an instance of the larger issue of effectively regulating behavior in a digital world with laws designed in a non-digital world. *Ragin* involved adjudicating whether a single advertisement violated the FHA.¹⁰⁶ *Stratton Oakmont*, which partially prompted Congress to adopt the CDA, involved a website that was essentially a series of web-based bulletin boards with around two million users.¹⁰⁷ Facebook, by contrast, boasts over two

102. Oliveri, *supra* note 9, at 1173.

103. *Id.* at 1174; see also Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 627, 653 (2020) (addressing the factors legislators must consider when imposing liability on online intermediaries for user-generated content).

104. See *supra* note 7.

105. See Reply Memorandum of Law in Support of Motion to Transfer Venue, or Alternatively to Dismiss Plaintiffs’ First Amended Complaint, *supra* note 85, at 9–10.

106. See *supra* notes 18–22 and accompanying text.

107. See *supra* notes 24–28 and accompanying text.

billion users and includes everything from group pages to messaging, advertising, personal profiles, business pages, and more.¹⁰⁸

The second avenue of effectively implementing the FHA and the CDA in an online world involves addressing a fundamental disconnect between legal and technical accountability.¹⁰⁹ In the world of law, there is a deeply rooted notion that the builder of object X, which performs function Y, will know precisely what X will do and that another person with proper instructions could similarly determine what object X will do.¹¹⁰ Within the digital context, one might argue that if Facebook were forced to reveal the code (in lieu of plans) behind its targeted advertising system, one could readily determine whether Facebook contributes to online housing discrimination in any meaningful way. However, such an argument fails to recognize the unique nature of dynamic online systems in which the plethora of potential system interactions makes it so that “social science auditing methods can only test ‘a small subset of those potential inputs.’”¹¹¹

While the idea of “looking under the hood” of Facebook’s advertising platform is enticing, it would likely prove fruitless.¹¹² Instead, two effective technical solutions would help bridge the gap between legal and technical accountability: a system of input filtration¹¹³ and an effective system of ex-post analysis.¹¹⁴ Input filtration would require that website operators use filtering software to halt the publication of potentially discriminatory housing advertisements briefly.¹¹⁵ Website operators could accomplish this filtering by showing the user a warning regarding the ad’s potentially discriminatory nature and submitting the advertisement for individualized review if the user chooses not to remove the language or adjust the targeting.¹¹⁶ This system would also support the website

108. Meira Gebel, *In 15 Years Facebook Has Amassed 2.3 Billion Users—More Than Followers of Christianity*, BUS. INSIDER (Feb. 4, 2019, 12:29 PM), <https://www.businessinsider.com/facebook-has-2-billion-plus-users-after-15-years-2019-2>.

109. Desai & Kroll, *supra* note 96, at 7–8.

110. *Id.*

111. *Id.* at 10.

112. *Id.* at 34 (“[I]f the goal or dream is to test, for example, an online ad network, and see whether a specific outcome—like race or gender discrimination—will occur, there is no analysis that will always determine that.”).

113. Oliveri, *supra* note 9, at 1175.

114. Desai & Kroll, *supra* note 96, at 39.

115. Oliveri, *supra* note 9, at 1176.

116. *Id.*

operator's Good Samaritan immunity argument under the CDA because it would allow the operator to emphasize its removal efforts, the kind of actions Congress sought to protect in response to *Stratton Oakmont*.

Ex-post analysis of software systems is a subject beyond the scope of this Note, but there are "technical tools including cryptographic commitments and zero-knowledge proofs to allow for an automated decision process to be used and at the same time 'provide accountability.'"¹¹⁷ In essence, these are tools that allow observers to review whether a system performed according to its design. Given the limitless number of possible inputs inherent in dynamic online systems like Facebook, it is simply impossible to know every potential outcome before the systems are in operation or what exact process produced a given output.¹¹⁸ Consequently, the best approach in such systems is to design them with appropriate filtration systems, as discussed above, and use effective methods to verify that the system is functioning as instructed on the back end. While neither technical suggestion is without its faults, both represent meaningful steps towards effectuating the legislative goals underlying both the FHA and the CDA.

IV. Conclusion

Even though the NFHA complaint against Facebook has been settled, the parties' filings bring two legitimate, competing societal interests into

117. Desai & Kroll, *supra* note 96, at 40 (footnotes omitted). "[A] cryptographic commitment 'is the digital equivalent of a sealed document held by a third party or in a safe place.'" *Id.* at 40 n.203 (quoting Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 655 (2016)).

A zero-knowledge proof works as part of a cryptographic commitment. It "allows a decisionmaker . . . to prove that the decision policy that was actually used (or the particular decision reached in a certain case) has a certain property, but without having to reveal either how that property is known or what the decision policy actually is."

Id. at 40 n.204 (internal citations omitted) (alteration in original) (quoting Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 668 (2016)).

118. *Id.* at 37 ("There are two common settings in which one tests software: white-box and black-box. In white-box settings, the analyst has access to the source code. . . . Black-box settings, in which the analyst is restricted to only see the inputs and outputs of the system but not its internal operation, pose more problems. Some limitations apply in both settings. In either setting, there are two categories of analysis: static analysis, which examines the program's structure or code without actually running it; and dynamic analysis, which runs the program and observes its behavior on certain inputs.").

sharp focus. On the one hand, an open and free internet has allowed for incredible economic growth—one of the principal purposes behind the Communications Decency Act. On the other hand, the Fair Housing Act’s purpose of ensuring equal access to housing is no less important today than it was in 1968. Accordingly, courts and legislatures should pursue an approach that balances these competing interests.

The approach advocated herein—that website operators claiming CDA immunity should be required to show good faith regulatory efforts that are technically accountable¹¹⁹—appropriately balances these two goals. In the interest of fair housing, this approach prohibits website operators from merely providing “neutral” tools and claiming CDA immunity whenever a claim arises without reference to any standard. Instead, website operators would be required to show good faith efforts and verify those efforts. The goal of truly fair housing online will be most effectively pursued through jurisprudence that upholds the intent of the Fair Housing Act by appropriately applying the immunity afforded under the Communications Decency Act and implementing reasonable technical requirements to ensure dynamic online systems are functioning desirably.

Jacob Parker Black

119. Meaning specifically, online dynamic systems generating reliable evidence to verify the system functions in the desired way.