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**LICENSE TO KILL (THE DREAM OF FAIR  
HOUSING): HOW THE SEVENTH CIRCUIT IN  
CRAIGSLIST GAVE WEBSITES A FREE PASS TO  
PUBLISH DISCRIMINATORY HOUSING  
ADVERTISEMENTS**

JOSEPH J. OPRON III\*

Cite as: Joseph J. Opron III, *License to Kill (the Dream of Fair Housing): How the Seventh Circuit in Craigslist Gave Websites a Free Pass to Publish Discriminatory Housing Advertisements*, 4 SEVENTH CIRCUIT REV. 152 (2008), at <http://www.kentlaw.edu/7cr/v4-1/opron.pdf>.

INTRODUCTION

The Fair Housing Act provides that it is unlawful “[t]o make, print, or publish, or cause to be made, printed, or published” advertisements for sale or lease of real property that discriminate against certain protected classes of persons.<sup>1</sup> Passed in 1968, in the wake of a wave of urban riots caused, in no small part, because of housing inequality,<sup>2</sup> the ban on discriminatory advertising has acted as

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\* J.D. candidate, May 2010, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., Political Science, Oakland University. I would like to thank my Mom, Dad, Gram, Popa, and the rest of my family and friends for all of their love and support. Additionally, special thanks are owed to Dave, Kristopher, and Lori Opron for their help with this Note.

<sup>1</sup> Civil Rights Act of 1968, 42 U.S.C. § 3604(c) (1968).

<sup>2</sup> A survey taken of urban minorities in 1968 by the DETROIT FREE PRESS revealed that the number two cause of the 12th Street Riots in Detroit, Michigan, was “Poor Housing.” This factor was second only to police brutality and was more important than poverty, lack of jobs, and six other enumerated factors. JUNE MANNING THOMAS, REDEVELOPMENT AND RACE: PLANNING A FINER CITY IN

a first line of defense against discrimination and a mitigator of the devastating psychological effects of public displays of racism.<sup>3</sup>

Unfortunately, the Fair Housing Act's prohibition against discriminatory advertisements has come under attack. In 1996, Congress passed the Communications Decency Act to protect children from websites that display inappropriate sexually oriented content.<sup>4</sup> This act aimed to limit the liability of interactive computer service providers that attempt to screen inappropriate and illegal user-generated content from their websites.<sup>5</sup> However, a misguided interpretation of this act made interactive computer service providers civilly immune as publishers and speakers of third party content, unlike their print media counterparts.<sup>6</sup> Thus, a newspaper company has to screen its print edition for classifieds that violate the Fair Housing Act, but is free to post the discriminatory ads in their online edition. In many jurisdictions, the ultimate result has been that those wishing to find a place to discriminate based on race, color, religion,

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POSTWAR DETROIT (CREATING THE NORTH AMERICAN LANDSCAPE) 130-131 (The Johns Hopkins University Press 1997). Additionally, a major cause of the Watts Riots of 1965 was the overturning of the Rumford Fair Housing Act of California, which mandated equality of opportunity for black home buyers. Valerie Reitman & Mitchell Landsberg, *Watts Riots, 40 Years Later: Nine People who Were in the Midst of the Turmoil Recall how Six Days of Violence Changed Lives—and L.A. Itself*, L.A. TIMES, Aug. 11, 2005, available at <http://www.latimes.com/news/local/la-me-watts11aug11,0,7619426.story>. Inequality of housing opportunity also played a pivotal role in the 1967 Newark Riots. Charisse Jones, *Years Later, Lessons from Newark Riots to Be Learned* USA TODAY, Nov. 19, 2006, available at [http://www.usatoday.com/news/nation/2006-11-19-riots\\_x.htm](http://www.usatoday.com/news/nation/2006-11-19-riots_x.htm).

<sup>3</sup> For information regarding the psychological and physiological effects of racism see David R. Williams & Ruth Williams-Morris, *Racism and Mental Health: The African American Experience*, 5 ETHNICITY AND HEALTH 243, 243-68 (2000); Rodney Clark, *Racism as a Stressor for African Americans: A Biopsychosocial Model*, 54 AM. PSYCHOLOGIST. 805, 805-16 (1999).

<sup>4</sup> Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2000).

<sup>5</sup> 141 CONG. REC. H8469-H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

<sup>6</sup> *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

sex, handicap, familial status, or national origin are now only a mouse click away.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, the Seventh Circuit held that an interactive computer service provider is not liable for unscreened, user-generated content displayed on its website.<sup>7</sup> The court held that the Communications Decency Act mandates that an interactive computer service provider may not be held civilly liable as the publisher or speaker of user-generated content on its service. Thus, Craigslist could not be held liable under the Fair Housing Act's ban on making, printing, or publishing discriminatory advertisements. Additionally, the court held that Craigslist did not cause the discriminatory postings to be "made, printed, or published." Therefore, Craigslist was not liable under the Fair Housing Act's housing advertisement regulations.

Part I of this note will provide the historical and jurisprudential background for the *Craigslist* decision. Part II will examine the Seventh Circuit's decision in *Craigslist*. Part III will argue that the Seventh Circuit reached the incorrect result in *Craigslist* because the court misinterpreted the Communications Decency Act and overlooked that Craigslist should have been liable under the Fair Housing Act for "making the discriminatory advertisements, notwithstanding Communications Decency Act immunity. Finally, Part IV argues that the court was incorrect to imply that public policy dictates that interactive computer service provider should be treated differently from other advertising mediums.

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<sup>7</sup> 519 F.3d 666, 672 (7th Cir. 2008).

## I. BACKGROUND

### A. *The Fair Housing Act.*

In June 1963, Dr. Martin Luther King, Jr. proclaimed, “[I]njustice anywhere is a threat to justice everywhere.”<sup>8</sup> Dr. King explained that if injustice was to be defeated, America must set out to eliminate not only its overt manifestations but also its “subtle and hidden forms” such as “housing discrimination.”<sup>9</sup>

In reaction to the assassination of Dr. King<sup>10</sup> and the plight of urban minorities, President Johnson signed into law the Civil Rights Act of 1968. Title VII of that act, commonly known as the Fair Housing Act,<sup>11</sup> sought “to provide, within constitutional limitations, for fair housing throughout the United States.”<sup>12</sup> Congress intended this act to “alter the whole character of the housing market.”<sup>13</sup>

Section 3604(c) of the Fair Housing Act prohibits the use of discriminatory housing advertisements. This ban is crucial to Congress’ goal of eliminating housing discriminations because it mitigates the harmful psychological effects of public displays of racism<sup>14</sup> by making it illegal for sellers to announce their intent to discriminate. The pertinent part of the Fair Housing Act states that it is illegal:

To make, print, or publish . . . any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that

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<sup>8</sup> Dr. Martin Luther King, Speech at the Great March on Detroit (June 23, 1963) (transcript and audio recording *available at* <http://xroads.virginia.edu/%5C~PUBLIC/civilrights/a0121.html>).

<sup>9</sup> *Id.*

<sup>10</sup> Jean Eberhart Dubofsky, *Fair Housing: A Legislative History And Perspective*, 8 WASHBURN L.J. 149, 160 (1968-1969) (identifying that Dr. King’s assassination encouraged the passage of the bill).

<sup>11</sup> Fair Housing Act, 42 U.S.C. § 3601 note (2000).

<sup>12</sup> 42 U.S.C. § 3601.

<sup>13</sup> *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972).

<sup>14</sup> *See, Williams, supra* note 3.

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.<sup>15</sup>

Additionally, reflecting Congress' intent to create a broad prohibition, the Fair Housing act provides that it is also illegal to *cause* discriminatory advertisements to be made, printed, or published.<sup>16</sup>

Courts have uniformly acknowledged that the test for determining whether a notice, statement, or advertisement violates § 3604(c) of the Fair Housing Act is whether it would indicate to an ordinary reader a discriminatory preference or limitation prohibited by the statute.<sup>17</sup> Where this objective test is met, a plaintiff need not establish that the advertisement was made with a discriminatory intent.<sup>18</sup>

Moreover, Congress designed § 3604(c) using broad, sweeping language so it could be applied to “any publishing medium.”<sup>19</sup> Thus, the ban on discriminatory advertising has been enforced in a wide variety of circumstances, including: newspaper advertisements,<sup>20</sup> oral statements,<sup>21</sup> signs,<sup>22</sup> telecommunication devices for the deaf,<sup>23</sup>

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<sup>15</sup> 42 U.S.C. § 3604(c).

<sup>16</sup> 42 U.S.C. § 3604(c) (emphasis added).

<sup>17</sup> *Jancik v. Dep't of Hous. & Urban Dev.*, 44 F.3d 553, 556 (7th Cir. 1995) (noting that it is uniformly accepted that because the Fair Housing Act prohibits advertisements that indicate a discriminatory preference, courts should employ an objective, ordinary reader standard, notwithstanding the subjective intent of the author); *Ragin v. New York Times Co.*, 923 F.2d 995, 999 (2d Dist. 1991) (citing *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972)); *see also Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 29 (D.C. Cir. 1990) (utilizing an analogous reasonable reader standard).

<sup>18</sup> *Jancik*, 44 F.3d at 556; *Ragin*, 923 F.2d at 999.

<sup>19</sup> *Hunter*, 459 F.2d at 210-11.

<sup>20</sup> *Id.* at 210.

<sup>21</sup> *Jancik*, 44 F.3d at 556-557 (holding that oral statements can violate § 3604(c) of the Fair Housing Act).

<sup>22</sup> *Fair Hous. Cong. v. Weber*, 993 F. Supp. 1286, 1291-92 (C.D. Cal. 1997).

<sup>23</sup> *United States v. Space Hunters, Inc.*, 429 F.3d 416, 419-421 (2d Cir. 2005).

racially restrictive covenants recorded by a recorder of deeds,<sup>24</sup> and even visual advertisements with racially suggestive themes.<sup>25</sup>

However, the internet has become a devastating exception that threatens to render the Fair Housing Act ineffective. The Communications Decency Act has been inappropriately interpreted by numerous courts as precluding an interactive computer service provider from being considered a publisher or speaker of information provided by a third party. Thus, interactive computer service providers currently have no risk of liability under the Fair Housing Act's ban on the publishing of discriminatory advertisements. At a time when the internet has emerged as a dominant and rapidly growing force in the real estate industry,<sup>26</sup> this could prove to be a fatal blow to Congress' goal of a discrimination free housing market.

### *B. The Communications Decency Act*

In order to modernize an antiquated telecommunications regulatory scheme, Congress passed the Telecommunications Act of 1996. Section 230 of Title V of the Communications Decency Act aimed to protect interactive computer service providers "who take[] steps to screen indecent[] and offensive material for their customers."<sup>27</sup> This section states in pertinent part:

#### SEC. 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

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<sup>24</sup> *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1972).

<sup>25</sup> *Tyus v. Robin Constr. Corp.*, 1993 U.S. Dist. LEXIS 2791, 9-10 (N.D. Ill. Mar. 4, 1993).

<sup>26</sup> Sam Diaz, *On the Internet, A Tangled Web Of Classified Ads With So Many Sites, Sifting Is Difficult*, WASHINGTON POST, Aug. 31, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/30/AR2007083002046.html?hpid=sec-tech>.

<sup>27</sup> 141 CONG. REC. H8469-H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

c. Protection for "Good Samaritan" blocking and screening of offensive material.

(1) Treatment of publisher or speaker. 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.

(2) Civil liability. No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).<sup>28</sup>

For the purposes of this act, the term interactive computer service means:

any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.<sup>29</sup>

Furthermore, an information content provider is defined as "any person or entity that is responsible, in whole or in part, for the creation

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<sup>28</sup> Communications Decency Act of 1996, 47 U.S.C. § 230(c) (2000)

<sup>29</sup> 47 U.S.C. § 230(f)(2).

or development of information provided through the Internet or any other interactive computer service.”<sup>30</sup>

There is no dispute that Craigslist, as a website operator, falls under the statutory definition of an interactive computer service. Furthermore, there is no dispute that the third party visitors to Craigslist’s fall under the statutory definition of information content provider. Thus, the issue lies in the effects of the statute’s provisions, not the applicability of the parties to its effects.

Section 230(c)(1) immunity began to take shape in *Zeran v. America Online*.<sup>31</sup> In *Zeran*, the Fourth Circuit considered the appeal of a customer of America Online who alleged that America Online: (1) unreasonably delayed in removing defamatory messages posted by third parties about him on America Online’s website, (2) wrongfully refused to post a retraction of those messages, and (3) failed to screen for future third-party-created defamatory messages.<sup>32</sup> The Fourth Circuit held that “[b]y its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. . . and precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”<sup>33</sup> Furthermore, the *Zeran* court stated that the purpose of the Communications Decency Act was to minimize the threat that tort-based lawsuits pose to freedom of speech on the internet.<sup>34</sup> Thus, the

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<sup>30</sup> 47 U.S.C. § 230(f)(3).

<sup>31</sup> *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

<sup>32</sup> *Id.* at 328.

<sup>33</sup> *Id.* at 330.

<sup>34</sup> *Id.* The court assembled sparse comments made by Congresspersons about reducing government involvement in the regulation of inappropriate content on the internet. *Id.* However, the court failed to identify that this was not a call for free speech on the internet, but rather an attack on the Exon Amendment to the same bill that planned to use public rather than private forms of enforcement. For an overview of the Exon Amendment, see Robert Cannon, *The Legislative History of Senator Exon’s Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 57-64 (1996).

court held that the customer could not successfully maintain a negligence suit against America Online.<sup>35</sup>

The *Zeran* interpretation of § 230(c)(1) was largely accepted by the other federal circuit courts of appeals<sup>36</sup> until the Seventh Circuit challenged the interpretation in *Doe v. GTE Corp.*<sup>37</sup> In *Doe*, a group of varsity athletes alleged that hidden cameras were placed in their locker rooms, and videos of them were sold online.<sup>38</sup> One of the parties named in the suit was the webhost, GTE Corporation (“GTE”).<sup>39</sup> In considering potential liability for GTE’s role in the case, Judge Easterbrook provided, in dicta, two possible interpretations of the Communications Decency Act.<sup>40</sup> First, he suggested that § 230(c)(1) could be read as a “definitional clause.”<sup>41</sup> Thus, “an entity would remain a ‘provider or user’—and thus be eligible for the immunity under § 230(c)(2)—as long as the information came from somewhere else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.”<sup>42</sup> Second, Judge Easterbrook stated that “perhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP a ‘publisher.’”<sup>43</sup> However, the court ultimately decided that § 230(c) liability was not implicated in *Doe* and left the decision for another day.<sup>44</sup> That day finally came in 2008 when *Craigslist* came before the Seventh Circuit.

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<sup>35</sup> *Zeran*, 129 F.3d at 332.

<sup>36</sup> See *Ben Ezra, Weinstein & Co., Inc. v. Am. Online, Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Blumenthal v. Drudge*, 992 F.Supp. 44, 52 (D.C. Cir. 1998); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

<sup>37</sup> 347 F.3d 655, 659-60 (7th Cir. 2003).

<sup>38</sup> *Id.* at 656.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 659-60.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 660.

## II. CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. V. CRAIGSLIST, INC.

### A. District Court

“NO MINORITIES,” “only Muslims,” and “no children” are among the discriminatory messages contained in over 120 housing advertisements posted on Craigslist, Inc.’s website from July, 2005 to January 2006.<sup>45</sup> These discriminatory advertisements formed the inspiration for the complaint filed by Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. (“CLCCRUL”). CLCCRUL is a non-profit consortium of Chicago law firms that provides free legal services in civil rights cases, including those involving the Fair Housing Act.<sup>46</sup> The defendant, Craigslist, Inc. (“Craigslist”), is a Delaware Corporation, whose business is founded upon its operation of a network of websites that facilitate advertising for a wide array of goods and services, including the sale and rent of housing.<sup>47</sup>

The CLCCRUL’s primary motivation for bringing suit was to seek a declaratory judgment that Craigslist, Inc.’s violated § 3601 of the Fair Housing Act.<sup>48</sup> Additionally, the CLCCRUL asked the court to enjoin Craigslist from continuing to publish discriminatory advertisement and require that Craigslist take necessary precautions to screen for discriminatory advertisements.<sup>49</sup> The CLCCRUL suggested that the court require Craigslist to adopt a publicly displayed anti-

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<sup>45</sup> Complaint, Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 461 F.Supp2d 681, 698-99 (N.D. ILL. 2006) (No. 06 C 0657).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

discrimination policy<sup>50</sup> and employ computerized screening software.<sup>51</sup>

Craigslist argued that CLCCRUL's complaint failed on the pleadings because Craigslist had immunity under §230(c)(1) of the Communications Decency Act.<sup>52</sup> The District Court granted Craigslist's motion for judgment on the pleadings.<sup>53</sup> The court agreed with the defendant that the Communications Decency Act barred the defendants from being found liable for posting discriminatory user-generated content.<sup>54</sup> The court reached this conclusion by utilizing its interpretation of the plain language of § 230(c)(1).<sup>55</sup> The court rejected the holding of *Zeran* because it "overstates the 'plain language' of § 230(c)(1)" by announcing a broad immunity for claims against information content providers based on third-party content, irrespective of whether the claims involve liability as a publisher or speaker.<sup>56</sup> Instead, the court found that the plain language of the bill only prohibits an interactive computer service provider from being held civilly liable as a publisher of third party content.<sup>57</sup> The court stated that it was not important to determine if Congress intended the Communications Decency Act to apply outside the context of defamation suits.<sup>58</sup> Instead, it was sufficient that the the plain language

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<sup>50</sup> To its credit, Craigslist now has an anti-discrimination policy that is displayed on its website, *available at* <http://www.craigslist.org/about/FHA>.

<sup>51</sup> Complaint, Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 461 F.Supp2d 681, 698-99 (N.D. ILL. 2006) (No. 06 C 0657).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 698.

<sup>56</sup> *Id.* at 693-94.

<sup>57</sup> *Id.* at 696.

<sup>58</sup> As discussed below in Part III(A)(2), Congress expressly intended to legislatively overturn a line of defamation cases including *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.), wherein courts held that treated interactive computer service providers as publishers because they tried to screen and restrict access to objectionable material on their sites.

was not at odds with Congress' intent.<sup>59</sup> The court stated that its plain language reading was "at least as harmonious with congressional intent" as the readings proffered by Craigslist and the CLCCRUL.<sup>60</sup> Thus, the court found that its interpretation was proper and the CLCCRUL was thus precluded from bringing its claim against Craigslist as a publisher of the allegedly discriminatory advertisements.<sup>61</sup>

The District Court also briefly considered whether Craigslist could be found liable under one of the Fair Housing Act's other prohibitions involving discriminatory housing advertisements.<sup>62</sup> The court found that Craigslist did not *make* the discriminatory advertisements because they originated from users of Craigslist's website.<sup>63</sup> Furthermore, the court found that Craigslist did not *print* the discriminatory advertisements because when the statute was drafted, the plain meaning of the term print did not encompass computer based reproduction.<sup>64</sup> Thus, the court held that Craigslist could not be found liable under any of the Fair Housing Act's prohibitions against discriminatory advertisements.<sup>65</sup>

### *B. The Seventh Circuit's Opinion*

On appeal, the Seventh Circuit affirmed the District Court's grant of judgment on the pleadings.<sup>66</sup> First, the court found that the Communications Decency Act barred the defendants from being found liable as the "publisher or speaker" of the user-provided content posted

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<sup>59</sup> Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 461 F.Supp2d 681, 696-97 (N.D. ILL. 2006) (N.D. ILL. 2006).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 698-99.

<sup>62</sup> *Id.* at 698 n. 18.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

on its website.<sup>67</sup> Second, the court held that Craigslist was not liable under the Fair Housing Act for causing the advertisement to be made, printed, or published.<sup>68</sup> Finally, albeit in dictum, the court posited that several public policy considerations called for granting interactive computer service providers immunity for civil claims involving user-provided content.<sup>69</sup>

Although § 3604(c) of the Fair Housing Act is regularly enforced against newspapers and other publishers,<sup>70</sup> the Seventh Circuit held that § 230(c)(1) of the Communications Decency Act precludes aggrieved parties' ability to "sue the messenger" when the messenger is an interactive computer service provider.<sup>71</sup> In reaching this conclusion, the court rejected both the CLCCRUL's and Craigslist's proposed interpretations of § 230(c)(1).<sup>72</sup>

The CLCCRUL advanced the position that § 230(c)(1) is applicable only to interactive computer service providers that engage in some sort of filtering, blocking, or screening of published information.<sup>73</sup> It posited that § 230(c)(1) should be interpreted in light of the section's title: "Protection for 'Good Samaritan' blocking and screening of offensive material."<sup>74</sup> The CLCCRUL stated that this narrower interpretation was necessitated by § 230(c)(2)'s focus on limiting civil liability for those who filter or screen objectionable material.<sup>75</sup> It argued that nothing in § 230's text or history suggested that Congress meant to immunize an information service provider from liability under the Fair Housing Act.<sup>76</sup> Furthermore, there was no evidence that Congress even remotely contemplated discriminatory

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<sup>67</sup> *Id.* at 671.

<sup>68</sup> *Id.* at 671-72.

<sup>69</sup> *Id.* at 668-69.

<sup>70</sup> *Id.* at 668.

<sup>71</sup> *Id.* at 672.

<sup>72</sup> *Id.* at 669-70.

<sup>73</sup> *Id.* at 669.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 672.

<sup>76</sup> *Id.* at 671.

housing advertisements when it passed §230.<sup>77</sup> Conversely, Craigslist interpreted §230(c)(1) to provide interactive computer service providers with comprehensive civil liability from information posted on their services, notwithstanding any efforts to screen or block objectionable or illegal information.<sup>78</sup>

However, the Seventh Circuit affirmed the District Court's opinion that §230(c)(1) neither grants broad based immunity nor limits immunity to interactive computer service providers that screen objectionable and illegal information.<sup>79</sup> By engaging in what the court called a natural reading of § 230(c)(1), it held that "an online information system must not 'be treated as the publisher or speaker of any information provided by' someone else."<sup>80</sup> The court held that this precluded Craigslist from being held liable as a publisher or speaker of the allegedly discriminatory advertisements under the Fair Housing Act's ban on "publishing" discriminatory housing advertisements.<sup>81</sup>

The court also considered the CLCCRUL's alternative contention that Craigslist could also be found in violation of §3604(c) of the Fair Housing Act because it *caused* discriminatory advertisements "to be made, printed, or published."<sup>82</sup> The court admitted that Craigslist played a causal role in the publishing of the discriminatory advertisement.<sup>83</sup> It explained that "no one could post a discriminatory ad if craigslist did not offer a forum."<sup>84</sup> However, the court held that this causal link was insufficiently proximate.<sup>85</sup> It insisted that "[c]ausation in a statute such as §3604(c) must refer to causing a particular statement to be made, or perhaps the discriminatory content

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 672.

<sup>79</sup> *Id.* at 669.

<sup>80</sup> *Id.* at 671.

<sup>81</sup> *Id.* at 672.

<sup>82</sup> *Id.* at 671.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

of a statement.”<sup>86</sup> The court held that an idle publisher cannot be one who causes a statement to be made.<sup>87</sup> Therefore, the court held that Craigslist could not be found to have the requisite causal relationship under §3604(c) because the record did not show that it offered any inducement for anyone to post discriminatory advertisements.<sup>88</sup>

Finally, Chief Judge Easterbrook spent a substantial portion of the opinion providing dictum on the public policy reasons for absolving Craigslist of liability as a publisher or speaker.<sup>89</sup> First, Chief Judge Easterbrook argued that online services are not analogous to newspaper classifieds, against which courts regularly enforce §3604(c) of the Fair Housing Act.<sup>90</sup> Without elaboration, the court admitted that online services share some common characteristics as a classified section of a newspaper.<sup>91</sup> The court then compared online service providers to both telephone services and courier services such as FedEx and UPS.<sup>92</sup> Without further explanation, the court proclaimed that craigslist neither made nor published any information transmitted through its service.<sup>93</sup> Thus, the court implied that interactive computer service providers should not be held to the same standard as newspapers.<sup>94</sup>

Second, the court suggested that the screening of user-generated-content may raise first amendment issues.<sup>95</sup> The court noted that § 3603(b)(1) of the Fair Housing Act allows owners of single-family homes who do not own more than three single-family homes to discriminate against the otherwise protected classes of people for

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 671-72.

<sup>89</sup> *Id.* at 668-69.

<sup>90</sup> *Id.* at 668.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

whatever reason during the sale of their property.<sup>96</sup> However, the court recognized that this exemption does not apply to discriminatory advertisements under § 3604(c) of the Fair Housing Act.<sup>97</sup> Despite its recognition, the court argued that “any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment.”<sup>98</sup>

Third, the court argued that the screening of user-generated content may not be effective.<sup>99</sup> First, the court stated that simple word filters would not work.<sup>100</sup> For example, a simple filter would block color words such as white or black that may or may not be racially descriptive.<sup>101</sup> Second, the court argued that human reviewers may be equally poor at filtering out violative advertisements from legally permissible posts.<sup>102</sup>

Finally, the court stated that screening postings would be economically inefficient for craigslist.<sup>103</sup> The court argued that requiring Craigslist to screen its nearly 30 million posts per month would be prohibitively expensive because the posts would have to be reviewed by Craigslist’s staff of fewer than 30 employees.<sup>104</sup> Thus, either Craigslist would have to increase its staff, and therefore, its operating costs, or accept a long delay in posting time which would make the service much less useful.<sup>105</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 668-69.

<sup>100</sup> *Id.* at 669.

<sup>101</sup> *Id.* at 668-69.

<sup>102</sup> *Id.* at 669.

<sup>103</sup> *Id.* at 668-69.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 669.

III. THE SEVENTH CIRCUIT ERRED IN *CRAIGSLIST* BY MISINTERPRETING THE COMMUNICATIONS DECENCY ACT AND INCORRECTLY HOLDING THAT CRAIGSLIST DID NOT FALL UNDER THE COVERAGE OF THE FAIR HOUSING ACT.

This section argues that Craigslist should have been held liable under the Fair Housing Act for its role in the discriminatory housing advertisements at issue. First, the Seventh Circuit incorrectly declared blanket immunity for interactive computer service providers posting user generated content. Second, the court could have alternatively found Craigslist liable under the Fair Housing Act as one who made the discriminatory advertisements.

*A. The Seventh Circuit erred by basing its holding on a misinterpretation of the Communications Decency Act*

In *Craigslist*, the Seventh Circuit killed the dream of a discrimination-free housing market. And worse, it did so by utilizing an anachronistic textualist method of statutory interpretation. The court viewed the Communications Decency Act as if it were drafted in a vacuum, devoid of historical and jurisprudential context and legislative history. The following sections seek to illuminate the errors of the court's use of this short-sighted mode of statutory interpretation. Part 1 of this section begins, as all proper statutory interpretation should, by analyzing the text of the Communications Decency Act. Next, Part 2 puts the text of the statute in its proper context by identifying the legislative history of the Act. Finally, Part 3 applies this foundational material to prevailing canons of statutory interpretation to reveal that the Communications Decency Act precludes civil liability only where an interactive computer service provider screens its site for inappropriate and illegal material.

1. Textual Analysis of the Communications Decency Act

Although an examination of a statute's text is not an end in and of itself, it is the proper starting point for statutory interpretation. This

section argues that under a thorough textual analysis of the Communications Decency Act, an interactive computer service provider would be precluded from being treated as the publisher and/or speaker of user-generated content for the purposes of civil liability only where: (1) the information being presented was generated by a third party, and (2) the provider makes efforts to screen objectionable and illegal material.

For a case of such magnitude, that put the civil rights of so many in the balance, *Craigslist's* textual analysis is contemptuously short. Section 230(c)(1) states that “[n]o 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.” The court held that because “[S]ubsection (c)(2) does not deal with the liability of speakers and publishers” it read § 230(c)(1) as an autonomous provision. *Craigslist* held that “[a] natural reading of § 230(c)(1)” precluded an interactive computer service provider from being held liable as a publisher or speaker of third party content, notwithstanding any attempts to filter inappropriate or illegal material.<sup>106</sup> However, nowhere in the opinion does the court explain why its reading is a natural reading, nor does it affirmatively refute why other possible readings are inferior.

Despite the court’s silence, there is another plausible and more logical interpretation of § 230. The whole act rule is a common rule of statutory interpretation utilized by proponents of virtually every doctrine of statutory interpretation. It provides that “Statutory construction. . .is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . .because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”<sup>107</sup>

To apply the whole act rule, it is pertinent to identify each of the Communications Decency Act’s components. The title of the

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<sup>106</sup> *Id.* at 670-671.

<sup>107</sup> *United Sav. Ass’n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

Communications Decency Act reads, “PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.”<sup>108</sup>

An ordinary reader would expect that the material under such a heading would be qualified by or directly related to the protection for private blocking and screening of offensive material. Moreover, this assumption is strengthened by the title of § 230(c) that reads, “Protection for ‘Good Samaritan’ blocking and screening of offensive material.”<sup>109</sup> Next, § 230(c)(1), the portion of the statute at issue in *Craiglist*, states that “[n]o 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.”

Finally, § 230(c)(2) outlines the civil liability for providers of an interactive computer service that “restrict access to ... obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” material.<sup>110</sup>

When the whole act rule is applied to the Communications Decency Act, it is apparent that the court should have accepted the CLCCRUL’s interpretation of the text of the Act. First, it would be illogical to assume that Congress intended to place a wholly independent clause in the middle of an act whose title, subsection title and other provision all share the common theme of screening of offensive material. Second, the effect of such a reading is inconsistent with the text of the other sections. The other sections of the Communications Decency Act make a quid-pro-quo offer of legal protection in return for interactive computer service provider’s screening of certain material.<sup>111</sup> The government’s consideration in this bargain is forfeited if § 230(c)(1) is interpreted, as it was by *Craiglist*, as offering this protection up for free. Although it is possible that this was the Congress’s intent, it is certainly more logical to assume that, given the text surrounding § 230(c)(1) the government

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<sup>108</sup> Communications Decency Act of 1996, 47 U.S.C. § 230 (2000).

<sup>109</sup> 47 U.S.C. § 230(c).

<sup>110</sup> 47 U.S.C. § 230(c)(2).

<sup>111</sup> This is evidenced by the operative word *for*, which appears in both the title of § 230 and § 230 (c).

intended to get its part of the legislative bargain. Thus, taken together, § 230(c)(1) should be read to apply to interactive computer service providers only when they engage in screening of offensive material.

As illustrated in the background section of this Note, the CLCCRUL's principal complaint with Craigslist's behavior was that Craigslist did not engage in any type of screening for the discriminatory housing classifieds that were being posted on its site. Because a proper textual analysis would hold that Craigslist would only be precluded from civil liability as a publisher or speaker when it screens offensive and illegal material, the court should have held that Craigslist was in violation of the Fair Housing Act. However, a statutory interpretation that considers only the text of a statute is short-sighted because it presumes that a legislature was perfect in articulating its desires through the language it used. Because this is an unrealistic presumption, it is pertinent that a statutory analysis consider contextual evidence such as legislative history.

Moreover, even unapologetic proponents of textualism, who adamantly devalue the weight of legislative history, recognize that in some instances there is value in examining legislative history to aid in interpreting the meaning of an ambiguous statute.<sup>112</sup> As textualism proponent Judge Easterbrook wrote in *In re Sinclair*, “[c]larity depends on context, which legislative history may illuminate. The process is objective; the search is not for the contents of the authors’ heads but for the rules of language they used.”<sup>113</sup> In the instant case, there is ambiguity as to which rules of language Congress used in drafting the Communications Decency Act. The court’s interpretation states that a § 230(c)(1) is a stand-alone sentence that is properly interpreted notwithstanding the surrounding text and title of the act. Conversely, CLCCRUL’s position posited that the drafters intended to qualify § 230(c)(1) with the surrounding text and title of the act. Although, as demonstrated in the preceding paragraphs, the

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<sup>112</sup> See *Green v. Bock Laundry*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (proclaiming that where a statute produces an absurd result, it is “entirely appropriate to consult all public materials” including the background of a rule and its legislative history).

<sup>113</sup> 870 F.2d 1340, 1342 (7th Cir. 1989).

CLCCRUL's textual interpretation is logically superior to the court's interpretation, there exists a genuine question of linguistic construction. Thus, as even Chief Justice Easterbrook's prior holding dictates, this ambiguity should be resolved by an examination of the legislative history of the Act.

## 2. Legislative History of the Communications Decency Act

Legislative history<sup>114</sup> is commonly regarded as the focal point of traditional Anglo-American theories of statutory interpretation.<sup>115</sup> Furthermore, despite attempts by textualists to virtually eliminate the role of legislative history in statutory interpretation, a majority of commentators remain champions of the modes of interpretation that highlight legislative intent.<sup>116</sup> In the instant case, the legislative history of the Communications Decency Act provides support for the position that the Act was meant to apply to an interactive computer service provider only when it takes an affirmative effort to screen illegal and offensive material from its websites.

The Cox-Wyden amendment to Title V of the Telecommunications Act of 1996 became § 230(c) of the Communications Decency Act. This amendment was inspired by what congress felt was an unjust result in *Stratton Oakmont, Inc. v. Prodigy Services Co.*<sup>117</sup> Thus, it is pertinent to consider the *Prodigy* decision.

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<sup>114</sup> For the purposes of this note, the term legislative history will utilize its commonly accepted definition: "the internal legislative pre-history of a statute – the internal institutional progress of a bill to enactment and the deliberation accompanying that progress." WILLIAM N. ESKRIDGE ET AL., *CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY* 971-72 (4th ed. 2007).

<sup>115</sup> WILLIAM N. ESKRIDGE, *LEGISLATION AND STATUTORY INTERPRETATION* 221 (2d ed. 2006).

<sup>116</sup> See Eskridge, *supra* note 115, at 990.

<sup>117</sup> 141 CONG. REC. H8469-H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (expressing discontent at increased liability for Prodigy because it took affirmative steps to screen material in violation of its terms of use).

In *Prodigy*, a securities investment banking firm, Stratton Oakmont, Inc., brought claims against Prodigy Services Company (“Prodigy”) for per se libel, among other things.<sup>118</sup> The main issue before the *Prodigy* court was whether Prodigy was a publisher of allegedly libelous statements posted by third party users on Prodigy’s popular electronic message board, Money Talk.”<sup>119</sup> The finding of Prodigy as a publisher rather than a mere distributor of third party information was central to Stratton Oakmont’s defamation claims because one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.<sup>120</sup> However, one who merely relays a libel is liable only if they knew or had reason to know of the libelous statements.<sup>121</sup> Thus, the court set out to determine if Prodigy exercised enough editorial control over its computer bulletin board to render it a publisher, and thus, subject it to the same editorial responsibilities as a newspaper.<sup>122</sup>

The court found that Prodigy was a publisher of its users’ content because it: (1) held itself out to the public and its members as controlling the content of its bulletin boards, and (2) implemented control over the boards by utilizing technology and manpower to delete offensive postings.<sup>123</sup> The court explained that Prodigy would not have been held liable as a publisher but for these affirmative steps to control the content of its bulletin board.<sup>124</sup> The court justified this position by placing Prodigy’s decision to monitor its board within the framework of free-market economic theory.<sup>125</sup> The court presumed

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<sup>118</sup> Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710, at \*1 (N.Y. Sup. Ct. 1995).

<sup>119</sup> The statements at issue in *Prodigy* included accusations that Stratton Oakmont had committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd. *Id.*

<sup>120</sup> *Id.* at \*3.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at \*4.

<sup>124</sup> *Id.* at \*5.

<sup>125</sup> *Id.* Free-market economic theory generally posits that it is preferable to conduct economic activity through voluntary private exchange rather than

that Prodigy screened the content of its bulletin boards in order to profit over its competitors by becoming a more family-oriented service, not for altruistic reasons.<sup>126</sup> Thus, the court stated that Prodigy must also face the legal consequences of its screening.<sup>127</sup> In *Prodigy*, this meant that Prodigy was liable as a publisher for the allegedly libelous statements.<sup>128</sup>

In response to *Prodigy*, Rep. Christopher Cox, co-sponsor of the Cox-Wyden amendment that became § 230 of the Communications Decency Act, stated that the amendment would take measures to make sure that good samaritan screening would be rewarded rather than being punished.<sup>129</sup> Impliedly unconvinced by *Prodigy*'s free-market solution, Cox stated that the amendment would "protect computer Good Samaritans, online service providers, [and] anyone. . .who takes steps to screen indecency and offensive material for their customers. . .from taking on liability. . .that they should not face. . .for helping us solve this problem."<sup>130</sup> Thus, Cox sought to make a deal with private companies. He saw the bill as an exchange of immunity from liability in situations such as *Prodigy* where interactive computer service providers, such as Prodigy, are willing to take an active role in screening "things not only prohibited by law, but prohibited by parents."<sup>131</sup> This incentive based approach stands in direct contrast to *Prodigy*'s free-market approach and *Craigslist*'s interpretation of

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government intervention. *See*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1968). For a compelling and detailed critique free-market economic theory *see* KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 35 (2d ed. 2001) (stating that "[i]t should need no elaboration that a process of undirected change. . .should be slowed down, if possible, so as to safeguard the welfare of the community").

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at \*4.

<sup>129</sup> 141 CONG. REC.. H8469-H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

§ 230(c)(1) of the Communications Decency Act because neither of them provide incentive to undertake the costly process of screening.

Other members of Congress also echoed their support for Cox's vision of the bill. Representative Pat Danner stated that she strongly supported the efforts taken "to address the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornographic materials available on the Internet."<sup>132</sup> Similarly, Rep. Robert Goodlatte praised the amendment because it "removes the liability of providers such as Prodigy who currently make a good faith effort to edit the smut from their systems. It also encourages the online services industry to develop new technology, such as blocking software, to empower parents to monitor and control the information their kids can access."<sup>133</sup>

Additionally, Cox stated that the bill will "establish as the policy of the United States that we do not. . . wish to have a Federal Computer Commission with an army of bureaucrats regulating the Internet."<sup>134</sup> Although this statement resembles laissez-faire, free-market rhetoric, it should not be read to imply that Cox would have accepted the *Craigslist* court's position that the plain meaning § 230(c)(1) of the Communications Decency Act, granting publishers and speakers immunity notwithstanding their efforts to screen inappropriate material, is consistent with the intent of Congress. The court's reading of § 230(c)(1) creates a disincentive for publishers or speakers to engage in screening of public material much like the way the *Prodigy* court's free-market prescription to the problem of liability for libelous statements did. Under the *Prodigy* free-market approach, an interactive computer service provider that screens is considered a publisher for purposes of liability. Similarly, under the *Craigslist* court's interpretation of § 230(c)(1) of the Communications Decency Act, an interactive computer service provider always has civil liability for publishing third party content. Thus, there is no incentive to engage in costly screening efforts. As noted above, Congress explicitly rejected

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

this type of prescription in favor of a more incentive-based solution which offers immunity in return for screening.

In sum, the legislative history of the Communications Decency Act supports the CLCCRUL's reading of § 230(c)(1). Although there is an ambiguity in the text of that section, the legislative history shows that CLCCRUL was correct to suppose that Congress intended § 230(c)(1) was to be read in light of the surrounding provisions. Thus, an interactive computer service provider should only be offered immunity under that section of the Communications Decency Act only where it takes affirmative efforts to screen illegal and offensive material from its services.

### 3. Analysis

The section above detailed substantial support from the text and legislative history of the Communications Decency Act for the position that the Act's § 230(c)(1) immunity applies only to interactive computer service providers that screen for offense material. This section applies familiar principals of statutory interpretation to this evidence to demonstrate why the Act's immunity should be so limited.

First, it is pertinent to recognize that the Communications Decency Act is wholly devoid of any mention of the Fair Housing Act, civil rights, or any other federal laws.<sup>134</sup> In *Craigslist*, Chief Judge Easterbrook admitted that "Congress did not even remotely contemplate discriminatory housing advertisements when it passed § 230."<sup>135</sup> Moreover, the court noted that "nothing in § 230's text or history suggests that Congress meant to immunize an interactive computer service providers from liability under the Fair Housing Act."<sup>136</sup>

At this point in the court's analysis, it would have been proper for Chief Judge Easterbrook to acknowledge the familiar rule against

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<sup>134</sup> Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

repeals by implication which states that “Congress does not create discontinuities in legal rights and obligations without some clear statement.”<sup>137</sup> In *Craigslist*, the court’s interpretation of the Communications Decency Act has left § 3604(c) of the Fair Housing Act fragmented despite absence of any evidence of framer’s intent to do so.<sup>138</sup> Once a universally broad statute,<sup>139</sup> applying to “any publishing medium,”<sup>140</sup> it is now powerless against interactive computer service providers that are distinguishable only because their information can be found on internet rather than in paper-based or verbal forms. Therefore, applying the rule against repeals by implication, the court should have held that the CDA does not fragment the coverage of the Fair Housing Act by giving a free pass to interactive computer service providers who do not engage in screening for offensive material. To not follow this principle of statutory interpretation would beg the absurd result that a newspaper company would be required to screen classified housing advertisements for its print edition but could publish discriminatory advertisements free from liability in its online edition.

Notwithstanding this illogical result, the court held that Congress’ silence regarding the Fair Housing Act was inconsequential.<sup>141</sup> The court declared that in order to exclude the Fair Housing Act from the reach of § 230(c)(1) of the Communications Decency Act, Congress must have explicitly stated that it was excluded.<sup>142</sup> In support, the court cited the rule that “Congress need not think about a subject for a law to affect it; effects of general rules continue unless limited by

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<sup>137</sup> *Finley v. United States*, 490 U.S. 545, 554 (1989). *See also* *Green v. Bock Laundry*, 490 U.S. 504, 521-22 (1989).

<sup>138</sup> *Craigslist*, 519 F.3d at 671.

<sup>139</sup> The Fair Housing Act explicitly states that its purpose is “to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601 (2000).

<sup>140</sup> *U.S. v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972).

<sup>141</sup> *Craigslist*, 519 F.3d at 671.

<sup>142</sup> *Id.* at 671.

superseding enactments.”<sup>143</sup> The court reasoned that the Communications Decency Act is a general statute because of Congress’ use of the word “information” in §230(c)(1).<sup>144</sup> The court recognized that the impetus of the statute was to protect interactive computer service providers, like Prodigy, from being punished for good samaritan screening of inappropriate content.<sup>145</sup> However, it argued that by utilizing the word “information” instead of expressly indentifying what types of information the Communications Decency Act covers, the Act was intended to have a general application.<sup>146</sup> Thus, the court interpreted Communications Decency Act to apply to the Fair Housing Act despite Congress’ silence on the subject.<sup>147</sup>

The *Craigslist* court failed to consider that congress expressly stated the Communications Decency Act’s intended effect on other laws in § 230(e) of the Communications Decency Act.<sup>148</sup> In Section § 230(e)(3), the court identified the statute’s intended effect on state law by stating, “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section” However, nowhere does the statute make note of its intended effect on inconsistent federal law. Where the legislature is silent regarding the effect legislation will have on a legal rule, there is a presumption that a prior legal rule should be retained.<sup>149</sup> Congress was silent regarding the Fair Housing Act. Thus, it is proper to

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<sup>143</sup> *Id.* (citing a descriptive parenthetical from *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974).

<sup>144</sup> *Id.* at 671.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Communications Decency Act of 1996, 47 U.S.C. § 230(e) (2000).

<sup>149</sup> *Zuni Pub. Sch. Dist. No. 89 v. Dep’t of Educ.*, 127 S.Ct. 1534, 1541 (2007) (holding that there is a presumption that a prior legal rule should be retained if no one in legislative deliberation even mentioned the rule); *Shine v. Shine*, 802 F.2d 583, 587 (1d Cir. 1986) (stating that where the legislature is silent regarding a particular effect of a bill, the bill should not be read to effect a reversal of the long-standing principles governing an area of law because “[s]uch a reversal would surely have been noted in the congressional discussions.”).

interpret the Communications Decency Act to not impact the allegedly inconsistent, well-settled Fair Housing Act.

The *Craigslist* court offered an alternative basis for ignoring the supportive legislative history and textual construction of the Communications Decency Act. The court argued that although the impetus of the statute was to protect interactive computer service providers who screen offensive content, “[o]nce the legislative process gets rolling, interest groups seek (and often obtain) other provisions.”<sup>150</sup> Thus, the court implied that Congress changed its goals for the Communications Decency Act to offer immunity to all interactive computer service providers notwithstanding any effort to screen offensive material.

Although interest groups play a regrettably prevalent role in our legislative process, the court was hasty to imply that this is the only possible explanation for the wording of § 230(c)(1).<sup>151</sup> In fact, it is also common to our legislative process that the legislature makes mistakes and simply drafts poorly worded bills.<sup>152</sup> Furthermore, albeit less likely, sheer laziness on behalf of the drafters of the Cox-Wyden amendment could account for their choice to use the word information instead of including every possible type of inappropriate or illegal material. Finally, the drafters could have presumed that the use of the broad term “information” would not be problematic as it was quite obvious by the legislative history and the statutory construction of the amendment that it was intended to be applied to offensive material.<sup>153</sup> Each of these explanations for Congress’ word choice is superior to the court’s explanation because the court’s explanation is mere conjecture. There is nothing in the legislative history that suggests

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<sup>150</sup> *Craigslist*, 519 F.3d at 671.

<sup>151</sup> Although the court may have had another explanation, it failed to articulate it in *Craigslist*.

<sup>152</sup> *Green v. Bock Laundry*, 490 U.S. 504, 527 (1989) (noting that if the words of a statute were given their plain meaning, the statute would necessitate an unconstitutional result).

<sup>153</sup> 47 U.S.C. § 230(c). *See also* 47 U.S.C. § 230(c)(2) (expressly identifying types of “offensive material” such as that which is “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable”); *See also supra* Part III(a)(2).

interest group lobbying for favorable provisions, nor is there any mention whatsoever of affording any type of immunity to online service providers who do not provide the public with good samaritan screening. Absent such evidence, there is no reason to accept the court's argument that any lobbying took place that changed Congress' intended application of the Act.

Finally, an ambiguous statute should not be interpreted to restrict rights granted by a prior statute unless restricting those rights is necessary to execute the new statute's purpose. As stated above, the purpose of the Communications Decency Act was to encourage interactive computer service providers to screen objectionable material by offering them civil immunity as a publisher or speaker when they engage in such screening. The purpose of § 3604(c) of the Fair Housing Act was to mitigate the harmful psychological effects of racism and frustrate the efforts of those seeking to discriminate against the protected classes of persons in the sale or rent of housing.

The court's interpretation frustrates the purpose of the Fair Housing Act by turning the internet into an arena for discriminatory housing advertisements by providing the websites that host them civil immunity. Furthermore, the court's interpretation runs counter to the purpose of the Communications Decency act because it provides a disincentive for websites, like Craigslist, to screen illegal content, such as discriminatory housing advertisement, from their websites. Thus, under the court's interpretation of the Communications Decency Act, neither statute's purpose is fulfilled.

In contrast, CLCCRUL's proposed interpretation of the Communications Decency Act fulfils the purposes of both statutes. The CLCCRUL's interpretation provides that unless an interactive computer service provider uses some form of screening, it has no immunity.<sup>154</sup> This interpretation fulfills the purpose of the Communications Decency Act because it encourages interactive computer service providers to screen inappropriate and illegal content by rewarding them with immunity from civil liability. Furthermore, the CLCCRUL's interpretation allows the purpose of the Fair Housing

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<sup>154</sup> *Craigslist*, 519 F.3d at 669.

Act to be carried out by not frustrating its current state of universal applicability.<sup>155</sup> In contrast, the court's interpretation of the Communications Decency Act tramples upon the rights guaranteed by the Fair Housing Act by exempting interactive computer service providers which make up a large and rapidly growing segment of the market for housing advertisement. Therefore, because the court's interpretation is not necessary, and in fact contrary, to achieving the purpose of the Communications Decency Act, the court's interpretation should have been rejected in favor of CLCCRUL's interpretation which suffers from neither of these deficiencies.

As this section demonstrates, the textual construction of the Communications Decency Act, its legislative history, and even the admission of Chief Judge Easterbrook reveal that Congress had no intention of making it an end-run around liability under the Fair Housing Act's provision against publishing discriminatory advertisements. And even if one should feel so strongly about the single canon of statutory interpretation utilized by the court that one thinks it should prevail over the several other more applicable canons listed above, it should be remembered that "a thing may be within the letter of the statute, and yet not within the statute, because it is not within its spirit, nor the intention of its makers."<sup>156</sup> Although there are those that would disagree with this axiomatic principal, we would be remiss to follow their lead and suffer such absurd and painful results as those that will be discussed in Section IV below.

### *B. Alternative theories for liability under the Fair Housing Act*

#### 1. The Scope of the Fair Housing Act

The *Craigslist* court held that the Communications Decency Act provided Craigslist civil immunity from being treated as the

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<sup>155</sup> However, because intent is not necessary for liability under the Fair Housing Act, this too could be seen as a restriction on the Fair Housing Act's reach.

<sup>156</sup> *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

“publisher” or “speaker” of user provided content.<sup>157</sup> The court then swiftly, and without justification, declared that only “as [a] publisher could Craigslist be liable” under the Fair Housing Act.<sup>158</sup> However, as this section demonstrates, the court drew a hasty conclusion.

The Fair Housing Act’s ban on discriminatory advertisements, notices, and statements is broad.<sup>159</sup> It covers not only those who publish discriminatory advertisements, notices, and statements, but also those who print them, make them, or cause them to be made, printed, or published.<sup>160</sup> It is a well known canon of statutory interpretation that each phrase in a statute must, if possible, be given effect.<sup>161</sup> Furthermore, another well-settled canon of statutory interpretation states that courts should avoid interpreting a provision in a manner that renders other provisions superfluous.<sup>162</sup> Thus, although the actions prohibited by the Fair Housing Act may seem almost indiscernible at first glance, it is important that each word be interpreted to give effect to its inherently distinct meaning.

Perhaps the most highly litigated action prohibited under § 3604(c) of the Fair Housing Act is publishing. In 1968, when the Fair Housing Act was passed, the word publish meant “[t]o make public; to circulate; to make known to the people in general.”<sup>163</sup> In the instant case, the discriminatory advertisements were made public by Craigslist posting them on their website. However, under the court’s interpretation of the Communications Decency Act, an interactive computer service provider is precluded from civil liability for publishing third-party content. Thus, if one accepts the court’s interpretation, Craigslist is immune for its activities as a publisher.

Section 3604(c) also makes it illegal to print discriminatory advertisements. As the district court pointed out in *Craigslist*, when

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<sup>157</sup> *Craigslist*, 519 F.3d at 671.

<sup>158</sup> *Id.*

<sup>159</sup> *United States v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972).

<sup>160</sup> Fair Housing Act, 42 U.S.C. § 3604(c) (2000).

<sup>161</sup> *United States v. Menasche*, 348 U.S. 528, 538-539 (1955).

<sup>162</sup> *Walters v. Metro. Educ. Enters., Inc.*, 529 U.S. 202, 208-209 (1997).

<sup>163</sup> BLACK’S LAW DICTIONARY 1297 (Revised 4th ed. 1968).

the drafter's of the Fair Housing Act passed the bill in 1968, to print meant simply to "[t]o stamp by direct pressure as from the face of types, plates, or blocks covered with ink or pigments, or to impress with transferred characters or delineations by the exercise of force as with a press or other mechanical agency."<sup>164</sup> The Communications Decency Act is silent regarding interactive computer service provider immunity for "printing." Nonetheless, Craigslist's actions do not fit the Fair Housing Act's prohibition because creating a computer file and placing it on a server is highly dissimilar to applying ink to paper. Thus, Craigslist could not be held liable under this part of § 3604(c).

Furthermore, the Fair Housing Act makes it illegal to *cause* a discriminatory advertisement to be made, printed, or published. In 1968, the word cause meant to be the occasion of or "to effect as an agent"<sup>165</sup> The *Craigslist* court rejected the claim that Craigslist could be liable for causing the advertisements to be made, printed, or published.<sup>166</sup> The court stated that, "causation in a statute such as § 3604(c) must refer to causing a particular statement to be made or perhaps the discriminatory content of a statement."<sup>167</sup> Other courts have interpreted causation under § 3604(c) in a similar manner. In *Hunter*, the Fourth Circuit stated that "in the context of classified real estate advertising, landlords and brokers 'cause' advertisements to be printed or published."<sup>168</sup> Craigslist played no such role in the creation of the discriminatory advertisements posted on its website. As the *Craigslist* court correctly pointed out, "nothing in the service craigslist offers induces anyone to. . .express a preference for discrimination."<sup>169</sup> Thus, although the Communications Decency Act is silent regarding liability for *causing* something to be made, printed, or published,

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<sup>164</sup> *Id.* at 1457.

<sup>165</sup> *Id.* at 278.

<sup>166</sup> Chicago Lawyers' Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 671-72 (7th Cir. 2008).

<sup>167</sup> *Id.* at 671

<sup>168</sup> United States v. Hunter, 459 F.2d 205, 210 (4th Cir. 1972).

<sup>169</sup> *Craigslist*, 519 F.3d at 671.

Craigslist was correctly found not liable under this part of § 3604(c) of the Fair Housing Act.

Finally, § 3604(c) of the Fair Housing Act makes it illegal to *make* any discriminatory notice, statement, or advertisement, with respect to the sale or rental of housing. In 1968, the common definition of the word *make* was “to cause to exist. . .[t]o form, fashion, or produce”<sup>170</sup> Under the court’s interpretation of the Communications Decency Act, an interactive computer service provider is immune from being treated as a speaker for the purposes of civil liability. The ordinary meaning of the verb to speak is “to communicate. . .by talking”<sup>171</sup> Thus, an interactive computer service provider cannot be held liable under § 3604(c) of the Fair Housing Act for making any orally communicated statements. However, this immunity does not preclude an interactive computer service provider, such as Craigslist, from being found liable under § 3604(c) for making a discriminatory non-verbal advertisement or notice. The following section argues that Craigslist made the discriminatory housing advertisements complained about in *Craigslist*. Thus, the court should have held that *Craigslist* was liable under § 3604(c) of the Fair Housing Act.

## 2. Liability for Making Discriminatory Advertisements

The Fair Housing Act provides that it is a violation of the act to “make. . .any notice, statement, or advertisement. . .that indicates any preference, limitation, or discrimination” in the sale or lease of housing.<sup>172</sup> The common definition of the word *make* is “to cause to exist. . .[t]o form, fashion, or produce.”<sup>173</sup> This section demonstrates that the allegedly discriminatory advertisements at issue in *Craigslist* were computer files that were made exclusively by Craigslist. Thus, the court should have held Craigslist liable under the Fair Housing

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<sup>170</sup> BLACK’S LAW DICTIONARY 1107 (Revised 4th ed. 1968).

<sup>171</sup> WEBSTER’S NEW WORLD DICTIONARY 566 (1990).

<sup>172</sup> Fair Housing Act, 42 U.S.C. § 3604(c) (2000).

<sup>173</sup> BLACK’S LAW DICTIONARY 1107 (Revised 4th ed. 1968).

Act's prohibition against making discriminatory housing advertisements.

The process of a Craigslist posting begins by a user accessing a form on Craigslist's website ("File 1") designed to accept from the user, among other things, a description of the housing the user seeks to sell or rent, the asking price, and the location. Upon submitting the information, the content that the user provided is sent to a web server. When the information is at the web server, it is analyzed and reformatted by a computer program. Subsequently, a new file ("File 2") is created that contains the users input along with Craigslist's signature look, feel, and added features. File 2 is then placed on Craigslist's website to be viewed by the website's future visitors. Additionally, a hyperlink is created on another webpage that is used as a reference to access and view that file.<sup>174</sup>

The discriminatory advertisements at issue in *Craigslist* were not the File 1 type. Although each visitor provided in File 1 the inspiration for the contents of File 2, it cannot be said that any Craigslist user *made* the resulting file. The following two scenarios illustrate this point.

Consider the process of a person purchasing a housing advertisement in the local newspaper. The person drives to the newspapers office, fills out a form with information to assist the newspaper in creating the advertisement, and hands the piece of paper to an employee of the newspaper. The employee then takes the customer's input and creates an advertisement fit for publication. The next day, the paper is distributed to its subscribers, complete with the advertisement purchased by the customer.

Contrast this situation with a person who attempts to sell their home by posting a notice on a public bulletin board. The person simply writes the pertinent information on a piece of paper and places the paper on the board. No other actors are required to create the advertisement because the piece of paper is the end product.

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<sup>174</sup> For an overview of HTML programming and website design, *see generally* Todd Stauffer, *Absolute Beginner's Guide to Creating Web Pages* (Que Publishing 2003).

In the first scenario, it cannot be said that the advertisement was made by anyone but the newspaper company. Although the person provided input by filling out the form, that form is a completely distinct object from the resulting advertisement. The customer had no role in purchasing the materials, formatting the information, instructing the printer, or any other activity associated with creating the newspaper. Simply put, but for the newspaper's efforts, the form would simply be a form, not an advertisement in the newspaper. Thus, if the advertisement contained a discriminatory message, it would be proper to hold the newspaper company liable under the Fair Housing Act's prohibition against making discriminatory advertisements.

Conversely, the advertisement placed on the bulletin board was created by the person who placed it there. The bulletin board had no capacity to reformat or otherwise alter the piece of paper; the advertisement was solely the product of the person's own efforts. Thus, if the piece of paper contained a discriminatory message, the person who posted it would be liable under the Fair Housing Act's prohibition against making discriminatory advertisements.

Craigslist is analogous to the newspaper company. Like the newspaper company, Craigslist offered a place for user input, processed the input, and, unlike the bulletin board, created a new product. Furthermore, the new product in both of these situations would not have been created, but for the efforts of the respective services. Analogous to the newspaper office being closed, if the server containing Craigslist's formatting program was down, the resulting advertisement could not have been made.

The Fair Housing Act makes it illegal to "make. . .any notice, statement, or advertisement" that contains a discriminatory message. Each of these words should be presumed to not be redundant. In *Craigslist*, it is clear that by inputting a discriminatory message into the website form, the user made a discriminatory *statement*. However, as demonstrated above, this form was not the advertisement. The *advertisement*, albeit containing the statement provided by the user, was made by the computer program on Craigslist's servers that was programmed to create a Craigslist advertisement with Craigslist's signature look, feel, and added features.

Furthermore, it is pertinent to note the distinction between Craigslist's role as a publisher and as a maker of the allegedly discriminatory advertisements at issue in *Craigslist*. As noted above, Craigslist *made*<sup>175</sup> the advertisements when Craigslist's computer program took the users input and created File 2. However, *Craigslist* did not *publish*<sup>176</sup> File 2 until it placed it on its web space to be viewed by the public. This distinction is crucial because although the court's interpretation of the Communications Decency Act provides civil immunity for interactive computer service providers from being treated as a publisher or speaker, the Act provides no such immunity for those who *make* a discriminatory advertisement.<sup>177</sup> Therefore, the *Craigslist* court erred by not holding Craigslist liable under the Fair Housing Act's Ban on making discriminatory advertisements.

#### IV. THE *CRAIGSLIST* COURT WAS INCORRECT TO IMPLY THAT PUBLIC POLICY DICTATES THAT INTERACTIVE COMPUTER SERVICE PROVIDERS SHOULD BE AFFORDED IMMUNITY.

In *Craigslist*, Chief Judge Easterbrook spent a substantial portion of the opinion providing dictum on the public policy reasons for

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<sup>175</sup> When the Fair Housing Act was passed, the word make meant "[T]o cause to exist. . .[t]o form, fashion, or produce." BLACK'S LAW DICTIONARY 1107 (Revised 4th ed. 1968).

<sup>176</sup> When the Fair Housing Act was passed, the word publish meant "[t]o make public; to circulate; to make known to the people in general." BLACK'S LAW DICTIONARY 1297 (Revised 4th ed. 1968)..

<sup>177</sup> In *Tyus v. Robin Constr. Corp.*, the United States District Court for the Northern District of Illinois rejected an agency's argument that it could not be held liable under § 3604(c) because it did not publish the advertisements in question. 1993 U.S. Dist. LEXIS 2791, \*9-\*10 (N.D. Ill. Mar. 4, 1993). The court held that although the advertising agency was not the publisher of the advertisements, it was still liable because creating the advertisements fell "within the ambit of the statute." *Id.* at \*9. The court explained that § 3604(c) "does not limit liability only to those who publish an advertisement. That provision also expressly imposes liability on those who 'make. . .any advertisement. . .that indicates any preference. . .based on race, [or] color.'" *Id.*

absolving Craigslist of liability as a publisher or speaker.<sup>178</sup> This section argues that interactive computer service providers require no such special treatment.

The *Craigslist* court began its policy analysis by implying that § 3604(c) of the Fair Housing Act may violate the Free Speech Clause<sup>179</sup> of the First Amendment regardless of the publishing medium.<sup>180</sup> The court noted that single-family homes sold or rented by an owner who does not own more than three single-family homes are exempted from the Fair Housing Acts ban on discriminating in the sale or purchase of a home.<sup>181</sup> However, § 3604(c)'s ban on discriminatory advertising still applies in these situations. The court found this problematic; it stated that “any rule that forbids truthful advertising of a transaction that would be substantively lawful encounters serious problems under the first amendment.”<sup>182</sup> However, despite the *Craigslist* court’s warning, courts have consistently held that although these types of landlords “are legally permitted to discriminate in the sale or rental of housing [they still] may not advertise their intention to do so.”<sup>183</sup> Moreover, it is well settled law that there is no disruption of the traditional role of the free press by the prohibition of the publication of discriminatory advertisements.<sup>184</sup> Thus, the Fair Housing Act’s prohibition against discriminatory advertisement is likely not problematic under the First Amendment.

The *Craigslist* court further argued that the screening of user-generated content would be prohibitively difficult for interactive computer service providers.<sup>185</sup> The court posited that a simple filter

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<sup>178</sup> Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc., v. Craigslist, Inc., 519 F.3d 666, 668-69 (7th Cir. 2008).

<sup>179</sup> The First Amendment provides in pertinent part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend.. I.

<sup>180</sup> *Craigslist*, 519 F.3d at 668.

<sup>181</sup> Fair Housing Act, 42 U.S.C. § 3603(b)(1) (2000).

<sup>182</sup> *Craigslist*, 519 F.3d at 668.

<sup>183</sup> *United States v. Hunter*, 459 F.2d 205, 213 (4th Cir. 1972).

<sup>184</sup> *Id.* at 212-13.

<sup>185</sup> *Craigslist*, 519 F.3d at 668-669.

that blocks words such as “white” would not work because the filter would block neutral sentences such as: “red brick house with white trim.”<sup>186</sup> The court also posited that human filterers may be equally poor at determining whether or not some advertisements are discriminatory.<sup>187</sup> One of the advertisements complained about in *Craigslist* read, “Catholic Church and beautiful Buddhist Temple within one block.”<sup>188</sup> The court held that one could interpret this in a discriminatory as well as a harmless manner.<sup>189</sup>

Although screening advertisements for discriminatory messages requires significant effort, requiring interactive computer service providers to do so is not unreasonable. In fact, the Fourth Circuit has gone so far to say that a publisher can “easily distinguish between permissible and impermissible advertisements in discharging its duty to reject those that violate § 3604(c).”<sup>190</sup> Furthermore, courts have required virtually every other conceivable medium of expression to engage in screening for § 3604(c) violations.<sup>191</sup> Interactive computer service providers should not be allowed a free pass simply because they generally receive higher volumes of advertisement submissions. The drafter’s of the Fair Housing Act made it clear that they intended to “alter the whole character of the housing market.”<sup>192</sup> Thus, Congress certainly did not intend to bend the requirements of the Fair Housing Act whenever a company received too many requests for advertisements.

Finally, the court argued that the high volume of submissions would require Craigslist to hire more staff and pass the added expense on to the consumer.<sup>193</sup> The court is certainly correct that screening is expensive. However, this is a cost that newspapers and every other

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<sup>186</sup> *Id.* at 668.

<sup>187</sup> *Id.* at 669.

<sup>188</sup> *Id.* at 669.

<sup>189</sup> *Id.*

<sup>190</sup> *United States v. Hunter*, 459 F.2d 205, 210-11 (4th Cir. 1972).

<sup>191</sup> *Id.* at 210-211.

<sup>192</sup> *Mayers v. Ridley*, 465 F.2d 630, 652 (D.C. Cir. 1972).

<sup>193</sup> *Craigslist*, 519 F.3d at 668-669.

publishing medium have bared since the Fair Housing Act was passed. For a newspaper to increase its volume, it must increase its staff. By exempting interactive computer service providers for § 3604(c)'s ban on discriminatory advertising, interactive computer service providers have been given a distinct and unjustified competitive advantage over their competitors that use other publishing mediums.

Although there is often reason to regulate market-based competition to protect a needy segment of the population, interactive computer service providers offering internet-based housing advertisements are not such entities. In the past decade, websites such as Craigslist have become a dominant force in the housing classified market. In 2000, online classified advertisement revenue totaled just over \$500,000 million.<sup>194</sup> By 2006, that figure shot up to an astonishing \$3.1 billion. No small player in the market, Craigslist is estimated to top \$80 million in revenue in 2008 and would “easily” be able to make over \$200 million per year with minor changes to its pricing structure.<sup>195</sup>

Furthermore, any advantage awarded to interactive computer service providers further handicaps the greatly imperiled newspaper industry.<sup>196</sup> Typically, a newspaper derives eighty percent of its revenue from advertising.<sup>197</sup> Since online classified advertisements have entered the market, stock prices of newspapers have tumbled and many papers have been forced to go out of business.<sup>198</sup>

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<sup>194</sup> See, Diaz, *supra* note 26.

<sup>195</sup> Elinor Mills, Report estimates Craigslist 2008 revenue at \$80 million (April 3, 2008), [http://news.cnet.com/8301-10784\\_3-9911097-7.html](http://news.cnet.com/8301-10784_3-9911097-7.html).

<sup>196</sup> HELEN THOMAS, *WATCHDOGS OF DEMOCRACY? THE WANING WASHINGTON PRESS CORPS AND HOW IT HAS FAILED THE PUBLIC* 113 (Scribner 2006) (noting that even industry moguls such as Warren Buffett, whose company owns an 18 percent interest in the Washington Post Company, predicted that the economic health of newspapers is deteriorating).

<sup>197</sup> Richard Pérez-Peña, *Shrinking Ad Revenue Realigns U.S. Newspaper Industry* INTERNATIONAL HERALD TRIBUNE, Feb. 7, 2008, available at <http://www.iht.com/articles/2008/02/07/business/paper.php>.

<sup>198</sup> Sarah Rabil, *Newspapers Axe Monday Issues on Paper Cost, Ad Slump* BLOOMBERG Oct. 13, 2008,

Whether print media should be saved or should be left to die by the invisible hand of the market is beyond the scope of this Note. It is sufficient to point out, as detailed above in this section, that the court proffered no substantial justification for providing interactive service providers with special privileges not enjoyed by any other mediums of expression. Thus, absent a compelling justification not identified in *Craigslist*, public policy dictates that interactive computer service providers should be held to the same standard under the Fair Housing Act's ban on discriminatory advertisements as every other medium.

### CONCLUSION

In 1968, the country was forever changed when Congress passed the Fair Housing Act. At that moment in time, Congress demonstrated to the entire nation that it was committed to a future wherein all citizens would be able to experience discrimination free housing opportunities. Acknowledging the harmful psychological effects of public displays of discrimination, Congress included in the Fair Housing Act a strong and thorough ban on the dissemination of any type of discriminatory message in the sale of lease of real property. This ban remained complete until it was fragmented by courts interpreting the Communications Decency Act to provide interactive computer service providers with civil immunity from being treated as a publisher or speaker of third-party content.

In *Craigslist*, the Seventh Circuit was presented with an opportunity to correct the prevailing misinterpretation of the Communications Decency Act, but balked at the invitation. As this Note demonstrates, the textual construction and the legislative history of the Communications Decency Act both favor an interpretation of § 230(c)(1) that an interactive computer service provider should be afforded immunity as a publisher or speaker of third-party content only when it fulfills its duty to screen its service for inappropriate and illegal content. Furthermore, notwithstanding the immunity offered by

the Communications Decency Act, Craigslist should have been found liable under the Fair Housing Act's ban on making discriminatory advertisements.

Although Congress never contemplated the effect of the Communications Decency Act on the Fair Housing Act, the continuing debate over the proper interpretation of the Communications Decency Act has put the onus on Congress to take a side. Consistent with the arguments of this Note, Congress should amend the Communications Decency Act to explicitly state that an interactive computer service provider cannot be held civilly liable under § 3604(c) of the Fair Housing Act for printing, publishing, or making a discriminatory notice, advertisement or statement only when it engages in the good faith screening of third-party content posted on its services.