News

Roommates.com liable under Fair Housing Act

Company plans appeal in 5-year-old lawsuit

BY MATT CARTER , WEDNESDAY, DECEMBER 3, 2008.
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A federal district judge has ruled the Web site **Roommates.com** can be held liable for violations of the Fair Housing Act because it requires users to disclose their gender, sexual orientation and family status, and allows them to use the same information about others to facilitate roommate matches.

Flickr photo by **dreamsjung**.

But the site continues to collect such information from users, and an attorney representing parent company Roommate.com LLC says the company intends to appeal the decision -- all the way to the Supreme Court, if necessary.

In the meantime, fair housing groups that have reached a partial monetary settlement with Roommate.com are seeking an injunction to stop the site from collecting information that could allegedly be used to discriminate against users, such as their sexual orientation. A hearing on the injunction has been scheduled for Jan. 12.

Since it was filed nearly five years ago, the lawsuit has been closely watched for the precedents it could set for other interactive Web sites, real estate or otherwise.

In a similar but unrelated case, a federal court of appeals ruled in March that under the Communications Decency Act, the online classified ad site craigslist was merely a "messenger" and not liable for discriminatory ads posted by its users (**see story**).

Making similar arguments, Roommate.com scored an initial victory when a trial court ruled that the Communications Decency Act provided the site with immunity from potentially unlawful conduct of its users.

But the decision was partially overturned on appeal, and Roommate.com must now defend itself against allegations that the company is liable for violations of the Fair Housing Act and similar state and local laws.

Roommate.com maintains that when Congress enacted the law 40 years ago, members never intended for it to apply to the selection of roommates. If that was the law's intent, the company says, it amounts to an unconstitutional restriction of free speech and association.

"We don't think Congress in 1968 intended to legislate the selection of roommates," said Timothy Alger, the Palo Alto, Calif.-based attorney representing Roommate.com LLC. "If we are wrong, then the question becomes whether the statute is constitutional."

In a Nov. 7 decision, those arguments were rejected by Judge Percy Anderson of

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the U.S. District Court for the Central District of California. Prompting users to provide information about their gender, sexual orientation or familial status and publishing that information clearly violates the Fair Housing Act, Anderson said.

If the decision is not overturned on appeal, fair housing councils in San Diego and California's San Fernando Valley have already agreed to accept $175,000 to settle their damage claims against Roommates.com.

The housing groups claimed that the time and expense they put into investigating the company's alleged violations of the Fair Housing Act diverted them from other work.

Alger said that once Anderson ruled that Roommates.com could be held liable for damages under the Fair Housing Act, it made more sense to determine a damage amount through mediation than to conduct a costly trial on that issue. The settlement does resolve who pays hundreds of thousands of dollars in attorneys' fees, and is contingent on Anderson's ruling withstanding the expected appeal.

"Our position is they are not entitled to anything," Alger said. If Roommate.com prevails in its appeal, the groups will receive "zero" damages or attorneys' fees, Alger said. "This is the type of case that could reach the Supreme Court, because it involves some pretty important questions. Until they are resolved, nobody is getting any money."

Broader implications

The lawsuit has already made one trip to the Ninth Circuit Court of Appeals, which found in April that the Communications Decency Act provided only partial immunity to Roommate.com for the potentially unlawful actions of its users (**see story**).

Lawmakers passed the Communications Decency Act to provide some protection to interactive Web sites that facilitate the creation of user-generated content, mandating that the sites cannot be treated as the "publisher or speaker" of information provided by others.

The Ninth Circuit Court of Appeals found Roommates.com was not liable for open-ended statements users entered into an "additional comments" box on the site. But by creating drop-down menus in forms that asked users for information that could be used to discriminate against them -- like their sexual orientation -- Roommates.com became more than a "passive transmitter" of information, the court of appeals ruled.

The San Francisco-based Electronic Frontier Foundation filed a "friend of the court" brief urging broad immunity for Web site operators under the Communications Decency Act.

A narrow interpretation would threaten Internet innovators with "potentially insurmountable liability problems -- impacting everything from search engine functionality to the ability to tag content on media sharing sites such as YouTube and Flickr," the group said in a 2007 **press release**.

(A spokeswoman for the Electronic Frontier Foundation said the group's interest in the lawsuit was limited to how Section 230 of the Communications Decency Act is applied, and that it's no longer actively involved in the case.)

In finding that Roommate.com was not entirely immune from the actions of users under the Communications Decency Act, the appeals court downplayed the impact for other interactive Web sites.

Unlike generic search engines such as Google and Yahoo! that do enjoy protection of the Communications Decency Act, Roommate.com's search function was "designed to steer users based on discriminatory criteria," said Chief Judge Alex Kozinski, in his majority opinion.

A user identifying himself as a "gay male," for example, would not receive e-mail notifications of new housing opportunities from users who indicate a preference for "straight males," "straight females" and "lesbians," the court said. Subscribers with children would not be notified of new listings if the person seeking a roommate specified a preference for a roommate with "no children."

"If you don't encourage illegal content, or design your Web site to require users to input illegal content, you will be immune" under Section 230 of the Communications

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Decency Act, the **opinion said**.

Fair Housing Act

The April 3 ruling by the Ninth Circuit Court of Appeals sent the case back to the trial court for decisions on Roommate.com's other arguments -- that the federal Fair Housing Act does not apply to "shared living arrangements," and that enforcing the act in situations involving the housing decisions of roommates would be unconstitutional.

Roommate.com argues that no court has ever applied the Fair Housing Act to an individual's choice of a roommate, and that the Department of Housing and Urban Development has yet to interpret the act as prohibiting the publication of discriminatory advertisements involving roommates.

But **Anderson said** that in his view, the language of the act "unambiguously applies to situations involving shared living arrangements" such as those sought by Roommate.com's users. When individuals agree to become roommates, he said, that agreement involves the rental of a portion of a building or structure as clearly defined by the act.

"To hold otherwise would ignore the intent of Congress in passing the Fair Housing Act" to provide fair housing throughout the U.S., Anderson said. One possible loophole -- the "Mrs. Murphy" exception -- applies to rooms in one- to four-family residences when the owner lives in one of the units. But that's not a situation arising often in this case, because most of Roommate.com's users aren't owners, Anderson said.

Prompting users to provide information about their gender, sexual orientation or familial status and then publishing that information violates the Fair Housing Act, Anderson said.

If that's the case, Roommate.com argues, the Fair Housing Act infringes on its users rights to "intimate association" -- the freedom to pick and choose whom one associates with -- and also the company's own free speech rights.

Since the Fair Housing Act was enacted, the Supreme Court has made several rulings on commercial free speech rights and rights of "intimate association" -- the ability of individuals or groups like the Boy Scouts to choose who they will or will not associate with.

Anderson said that even if the right to intimate association gives individuals the right to discriminate in the selection of a roommate, the lawsuit is against Roommate.com and not its users.

When Roommate.com prompts users to provide their sexual orientation and family status, Anderson said, that's "mere conduct" as opposed to constitutionally protected speech.

Even if Roommate.com's prompts for "discriminatory information, searches and matches could be considered speech, it would be, like Roommate's publication of its users' discriminatory preferences, speech of a commercial nature," and less exempt from regulation, Anderson concluded.

The government's interest in preventing housing discrimination is "substantial," Anderson said, and Roommate.com "makes discrimination both possible and respectable," he said, quoting from the Ninth Circuit Court of Appeals' opinion.

Failing to prohibit "explicitly discriminatory advertising for housing ... would drastically undermine the (Fair Housing Act's) goals of reducing and preventing housing discrimination by communicating the message that housing discrimination is permissible," Anderson said.

Injunction sought

The Fair Housing Council of San Fernando Valley and the Fair Housing Council of San Diego, which sued Roommates.com in December 2003, share that view.

In a Nov. 24 **motion for injunction**, the groups asked Anderson to order Roommate.com to stop collecting information on gender, sexual orientation or family status, or making roommate matches based on those criteria, even if users provided that information before resolution of the case.

Roommate.com, the groups said, "has operated and continues to operate ... in violation of the Fair Housing Act and (the California Fair Employment and Housing Act). Throughout the almost five-year duration of this litigation, Roommate has operated its Web site without any substantive change relevant to the practices challenged here."

Christopher Brancart, a Pescadero-based attorney representing the fair housing groups, said that while there have been cosmetic changes to the site over the years, there have been no significant changes to the forms new users fill out.

Alger did not dispute that claim, and said Roommate.com hopes Anderson would stay any order he issues on how the site operates until the Ninth Circuit Court of Appeals weighs in on the company's liability under the Fair Housing Act. (Although the site is owned and operated by Roommate.com LLC, its main URL is **Roommates.com**.)

Users logging onto the site this week were asked to use drop-down menus to enter their age, gender, sexual orientation and occupation, and reveal whether they smoked, or had pets or children.

The two choices for sexual orientation were "straight" or "gay/lesbian." Leaving the field blank generated a prompt: "Sexual orientation is required."

The site also prompted users for their roommate preferences, including their gender, sexual orientation and family status.

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What's your opinion? Leave your comments below or send a **letter to the editor**. To contact the writer, click the byline at the top of the story.

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Submitted by Brian Larson on December 3, 2008 - 5:37am.

This article did a nice job of covering a complicated issue. Congrats!

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Submitted by Fred Light on December 3, 2008 - 6:02am.

If one is sharing their own personal space (i.e. renting out one bedroom in their two bedroom apartment), I think discrimination is perfectly OK. I don't think it's related at all to any laws pertaining to fair housing that would apply to an empty apartment or house that is being rented. You're just not comparing apples to apples! If I'm a female, shouldn't I be able to discriminate against a having a MALE roommate in my own house for whatever reasons I have? I just don't see that Fair Housing laws pertain to personal roommate situations in any way, shape or form.

I would think BOTH parties would respect and prefer that they both be comfortable in a particular living situation. I can't imagine a gay man desiring to live with someone who did not want to live with them because they were gay!

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Submitted by Peter J. Pike on December 3, 2008 - 7:04am.

Unfortunately, fair housing groups (a misnomer, in my opinion, most of them seem to just use the laws to legally blackmail companies into paying them money - $175K is their demand in this instance) use both the courts and the media well, in getting people to believe that all discrimination is evil. Sometimes (as noted in the comment above), discrimination is not only rational, but necessary. I am referring to the fact that as roommates, there is way more personal interaction than as between landlord and tenant, and buyer and seller. Sometimes, we need to be disciminate in our choices of with whom we wish to share our home.

Peter J. Pike, Esq.
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Destin, Florida

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