IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.,	)	
Plaintiff,	)	CASE NO. 06 C 0657
v.	)	Judge Amy J. St. Eve
CRAIGSLIST, INC.,	)	Magistrate Judge Jeffrey Cole
Defendant.	)	

PLAINTIFF CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC.'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e)

The Fair Housing Act ("FHA") prohibits the making, *printing* or publishing of a discriminatory housing preference. There is no functional difference for FHA purposes between printing on a computer screen and printing on a piece of paper. This Court should hold Craigslist liable for printing the discriminatory advertisements at issue and grant Plaintiff Chicago Lawyers' Committee for Civil Rights Under Law, Inc.'s ("CLC") Motion to Alter or Amend Judgment under Rule 59(e) of the Federal Rules of Civil Procedure.

ARGUMENT

I. Section 3604(c) Uses All-Encompassing Language to Prohibit Discriminatory Housing Preferences.

Congress passed the FHA to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C.A. § 3601 (2001). "The language of the Act is broad and inclusive" and reflects "a policy that Congress considered to be of the highest priority." *Trafficante v. Metro Life Ins. Co.*, 409 U.S. 205, 209, 211 (1973). The FHA must be given a generous construction. *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995).

Sections 3604(a) and (b) prohibit discrimination in the sale or rental of housing. In § 3604(c), the FHA prohibits any sort of notice, statement or advertisement that indicates any sort of discriminatory limitation or preference. Congress gave § 3604(c) a remarkably expansive reach, for example, by making 3604(c) applicable even to housing providers who are exempt from all other FHA provisions,[1] by prohibiting even unintentional statements, and, most importantly for purposes of this case, by applying 3604(c) not just to housing providers (who utter discriminatory preferences), but to those entities that merely print, publish or pass on illegal

[1] *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972); Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 196-97 (2001).

preferences, in spoken word or written text.[2]

Section 3604(c) makes it unlawful:

> To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.[3] 42 U.S.C.A. § 3604(c) (2001).

II. Congress Prohibited "Printing" as a Stand Alone Violation.

Craigslist argues (Mem. in Opp'n to Mot. to Alter or Amend J. at 6) that because, as a factual matter, publishing often encompasses printing, liability for "publishing" under the FHA must encompass liability for "printing." That argument ignores the plain language of § 3604(c), which, as discussed below, plainly distinguishes between "publishing" and "printing."[4]

This Court must interpret § 3604(c) to give effect to each individual word. *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 697–98 (1995). Section 3604(c) prohibits the printing *or* publishing of a discriminatory housing preference. Congress intended to prohibit printing separate and apart from publishing.[5] The words "cause to be

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[2] Unlike federal employment discrimination statutes, § 3604(c) of the FHA applies to newspapers and to other media that merely pass on discriminatory statements made by others. Robert G. Schwemm, *Discriminatory Housing Statements and 3604(c): A New Look at the Fair Housing Act's Most Intriguing Provision*, 29 FORDHAM URB. L.J. 187, 211 (2001).

[3] HUD, the federal agency charged with enforcing the FHA, implemented the ample reach of § 3604(c) by regulating that discriminatory advertisements, notices or statements include "[E]xpressing to agents, brokers, employees, prospective sellers or renters or any other persons a preference for or limitation on any purchaser or renter because of race, color, religion, sex, handicap, familial status, or national origin of such persons," and "all written or oral notices or statements by a person engaged in the . . . rental of a dwelling [and include] any documents used with respect to the . . . rental of a dwelling." 24 C.F.R. §100.75 (b).

[4] Craigslist also ignores this Court's ruling that the Communications Decency Act only bars claims with publication as an element. Indeed, Craigslist goes so far as to rewrite this Court's holding, erroneously asserting (Mem. in Opp'n to Mot. to Alter or Amend J. at 4) that this Court barred any claim "for disseminating third party content."

[5] CLC alleged that Craigslist violated § 3604(c). Under notice pleading rules CLC need not specifically

printed" and "to print" are not surplusage. This Court must recognize that printing without publication constitutes a stand alone violation of § 3604(c).

III. Congress Sought to Reach Every Step or Stage in the Making or Dissemination of a Discriminatory Preference.

By prohibiting any person who makes, prints or publishes a discriminatory statement, notice or advertisement, or causes a discriminatory statement to be made, printed or published, Congress intended to regulate every entity that participates in any stage in the making or distribution of any sort of discriminatory statement. In particular, Congress intended to hold liable intermediaries between housing providers and housing seekers (such as Craigslist) who participate in the dissemination of discriminatory statements.

Courts have consistently held that § 3604(c) applies not only to the author of a discriminatory statement but also to those essential intermediaries, like newspapers, which only disseminate or pass along the discriminatory statement. For example, courts have held that § 3604(c) applies to newspapers (who only pass on discriminatory statements by printing and publishing them), *Ragin v. N.Y. Times Co.*, 923 F.2d 995 (2d Cir. 1991); *United States v. Hunter*, 459 F.2d 205, 211 (4th Cir. 1972) ("the drafters of the Act could not have made more explicit their purpose to bar all discriminatory advertisements . . ."); to a Recorder Of Deeds, which merely records discriminatory preferences, *Mayers v. Ridley*, 465 F.2d 630, 633 (D.C. Cir. 1973) ("nor can it be doubted that when the Recorder files restrictive covenants he '*makes, prints and publishes*' these notices and statements");[6] to multiple listing services that include such listings,

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allege that Craigslist "printed" the discriminatory words in order to set forth a claim for print liability under § 3604(c). *See Conner v. Illinois Dept. of Natural Resources*, 413 F.3d 675, 679 (7th Cir. 2005) (citing *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998)).

[6] "True, there is nothing in the legislative history tending either to support or to refute the inference arising from the language that the Act prohibits statements of racial preference emanating from the

Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 447 F.Supp. 838, 842 n.3 (E.D.N.Y. 1978) (multiple listings service "undoubtedly fall within the statute's coverage"); and to landlords who print discriminatory housing rules, *see, e.g.*, *Blomgren v. Ogle*, 850 F.Supp. 1427 (E.D.Wash. 1993) (landlord's printing and distribution of discriminatory rules violated § 3604(c)).

IV. By Prohibiting the Making, Printing or Publishing of a Discriminatory Housing Preference, Congress Prohibited Any Expression of a Discriminatory Preference, Whatever the Medium.

Congress used the most all-encompassing language possible to capture every type of discriminatory housing preference known in 1968. By distinguishing between discriminatory *statements* and discriminatory *notices,* Congress reached both spoken and written housing preferences. 24 C.F.R. §100.75 (b). By prohibiting both the *printing* and the *publishing* of discriminatory notices, Congress reached all forms of written statement, whether privately or publicly made, whatever the medium of written expression. This Court should interpret the words "to print" to include modern day forms of printing. In *Erickson v. Dorchester State Bank*, 815 F.2d 1090, 1092 (7th Cir. 1987), Judge Easterbrook noted that statutory terms do not designate particular items but rather a class of items that share an important feature, and held that the word "mower" in a 1935 statute encompassed a modern day version of the mower. The court stated, "if the statute applies only to farm implements customary in 1935 . . . it does not achieve its purpose today. . . . [L]anguage evolves." *Erickson*, 815 F.2d at 1092. In § 3604(c), the words "to print" and "cause to be printed" designate not just the printing of text on paper, but the act of

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Recorders' office. In all likelihood, few congressmen even addressed their thinking to this particular problem. But no Court has ever held that Congress must specifically indicate how a statute should be applied in every case before the judiciary can go about the business of applying it." *Mayer*s, 465 F.2d at 634.

making text visible to a reader. Craigslist has made the discriminatory preferences visible to a reader by displaying them on its website.

V. When Craigslist Displays a Discriminatory Housing Preference in Print on its Website, it "Prints" and "Causes the Printing" of the Discriminatory Housing Preference.

In its opinion (Nov. 14, 2006 Op. at 27, n.18.) this Court suggested that Craigslist did not "print" or "cause to print" the discriminatory advertisements at issue because Craigslist did not impress the discriminatory text on paper. But the definition cited by the Court encompasses what Craigslist did here: "to perform or cause to be performed some or all of the operations necessary to the production of (as a publication, a piece of printed matter, a picture . . .)."[7] Here, Craigslist creates a product—in this case, an online product—which makes the discriminatory text visible to home seekers. For that reason, Craigslist "printed" or "caused" the discriminatory advertisements "to be printed" by placing them on its website.

More importantly, this Court is not constrained by antiquated definitions.[8] Electronic or digital printing, faxes, email, PDFs and other electronic means of displaying content did not exist in 1968, when Congress passed the FHA. Technology has since evolved such that we read our news and advertise for all manner of commodities (including housing) on computers rather than

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[7] Without discovery into the mechanics of Craigslist's process, CLC cannot precisely explain how Craigslist placed the text on its website, but at a minimum, Craigslist received the discriminatory text, electronically created a copy of the discriminatory text, stored the text in some manner, and displayed the discriminatory text on its website. Craigslist caused "some of the operations necessary to the production of a picture" on a computer screen.

[8] As technology has evolved, the lexicographers have followed. The current edition of Merriam-Webster defines "print" as "to display on a surface (as a computer screen) for viewing." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (2005). But any dictionary—whatever its vintage—is of limited utility, especially when the word at issue has so many applications, *Sanders v. Jackson*, 209 F.3d 998, 1000 (7th Cir. 2000); the true touchstone must be Congressional intent.

in our newspapers.[9]

Words in statutes are not frozen in time, but must be understood in light of both changing technology and statutory purpose. "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic." *West v. Gibson*, 527 U.S. 212, 218 (1999) (interpreting Title VII's phrase "appropriate remedies" to find that compensatory damages are available in suits against federal agencies). "[U]nderlying the whole (Communications Act) is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (interpreting Communications Act of 1934 to find that FCC had authority to regulate providers of a new technology not explicitly mentioned by the Act—namely, cable television) (citation omitted). *See also Kyllo v. United States*, 533 U.S. 27, 29 (2001) (Scalia, J.) ("the use of a thermal-imaging

[9] In fact, after a document is written using word processing software (e.g., Microsoft Word or Word Perfect) and the author desires "to print" the document to review or to send to another person, the author uses the computer's "PRINT" function. That function allows multiple options, including (a) print to Adobe Acrobat, which converts the document to a PDF file; (b) print on paper as a hardcopy at a designated ink-jet or laser printer; or (c) print or save to other digital formats. When one prints to Adobe Acrobat or some other digital format, the document is converted to a different digital copy format. With Adobe Acrobat, the computer screen is the medium which displays the content, and the content is in a form that allows the document to be emailed to another. Printing to Adobe Acrobat's PDF format is exactly the same as printing a hard copy on paper; the author simply chooses on which format he desires to print. The results are also identical. The PDF format produces an actual, non-modifiable, hard copy in the universal PDF electronic format, identical in every way to a hard copy on paper. The 7th Circuit Rules of Appellate Procedure specifically address this printing. *See* Circuit Rule 31(e) ("Digital versions") (Subsection (3) states: "[t]he electronic version must be in Portable Document Format (also known as PDF or Acrobat format). This format must be generated by *printing to PDF* from the original word processing file, so that the text of the digital brief may be searched and copied: PDF images created by scanning paper documents do not comply with this rule.") (emphasis added). Similarly, using eFax software and Microsoft Fax, content is converted by a fax machine, transmitted using telephone lines, converted by eFax or Microsoft Fax into an electronic format (instead of a corresponding piece of paper), and then emailed to the recipient. The content of the original piece of paper is delivered to the recipient in a tangible, non-modifiable digital format viewed on a computer screen.

device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment."). *See id.* at 31–35 (discussing evolution of Fourth Amendment jurisprudence in relationship to advances in methods of surveillance).

Technological change should not eviscerate the FHA. By displaying discriminatory housing advertisements on its website, Craigslist has "printed" discriminatory advertisements (or "caused" them "to be printed") just as a traditional newspaper does, and should be held accountable under the FHA. "Printing" has evolved, and this Court should not allow a change in technology to destroy FHA jurisprudence.[10]

VI. "Printing" Liability Would Not Run Afoul of the CDA.

A. "Printing" Liability Does Not Require Publication as an Element.

This Court held that the CDA precludes any claim that would "treat" Craigslist as a "publisher," which this Court interprets as claims that require publication as an element.[11] As discussed above, § 3604(c) separately prohibits printing and publication. By the plain terms of 3604(c), printing liability does not require publication as an element. Congress intended to prohibit each and every step of the making of a discriminatory housing statement: the making of the discriminatory statement, the printing of the discriminatory statement, the publishing of the

[10] Similarly, this Court accepts electronic transmissions as "filings" and as "service," and accepts electronic signatures as "signatures," although the Supreme Court and Congress did not contemplate these electronic acts when they promulgated rules regarding "filing," "service," and "signatures." Electronic filing, electronic service, or an electronic signature does not actually involve a piece of paper and is not the same thing as physical filing, service, or signatures. This Court has correctly determined that an electronic filing, service, and signature is a "filing," "service," and a signature for purposes of the Federal Rules of Civil Procedure.

[11] While we respectfully disagree with the Court's analysis on this point for the reasons previously submitted and are not asking the Court to reconsider this point, we must discuss "printing" liability under § 3604(c) in the context of § 230 of the CDA. We do so in the remainder of this brief.

statement, and the participation of any entity in causing the making, printing or publishing of the discriminatory statement. Without entirely reading out the words "to print" from the FHA, this Court cannot conclude that printing liability requires publication as an element.[12]

B. "Printing" Liability Would not Impose Liability on Craigslist for Blocking and Screening Activities.

Printing liability would not treat Craigslist as a publisher in the sense intended by Congress, i.e., as a publisher *because* Craigslist screened out discriminatory third party content. The CDA's language and legislative history demonstrate that by prohibiting "[t]reatment of publisher or speaker," Congress intended to preclude imposition of liability on an ICS because it screened third party content. Notably, the sentence which is now § 230(c)(1) was intended to preface § 230(c)(2). In other words, § 230(c), as originally written, did not contain a separate prohibition on "[t]reatment of publisher or speaker."

> (c) PROTECTION FOR 'GOOD SAMARITAN' BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.–No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider. No provider or user shall be held liable on account of –
> (1) any action voluntarily taken in good faith to restrict access to 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
> (2) any action taken to make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[13]

The fact that the prohibition on "[t]reatment of publisher or speaker" was originally the first sentence of what is now § 230(c)(2) suggests that the prohibition on "[t]reatment of publisher or speaker" merely explains and prefaces the screening protection set forth in the next

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[12] Even if printing without publication results in no damages, CLC would be entitled to declaratory and injunctive relief, and damages for the diversion of resources required to obtain the injunction.

[13] 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995).

sentence.[14] Moreover, the authoritative legislative history also demonstrates that, by prohibiting "[t]reatment of publisher or speaker," Congress intended to preclude the specific result in *Stratton Oakmont v. Prodigy*, i.e., the imposition of liability on an ISP because it assumed screening responsibility. The Conference Committee report states, "[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions *which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.*" H.R. CONF. REP. NO. 104-458 at 191 (1996).

When drafting the prohibition on "[t]reatment of publisher or speaker," Congress repeatedly acknowledged that it was troubled by two defamation decisions *(Stratton Oakmont v. Prodigy* and *Cubby v. CompuServe*) which treated an ISP as a publisher or speaker when the ISP exercised editorial control, but only as a distributor when the ISP refused to exercise editorial control. Under defamation law, a "publisher" is held to a higher liability standard than a "distributor." *Stratton Oakmont Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, at 7 (N.Y. Sup. Ct. 1995) ("with this editorial control comes increased liability"); Statement of Rep. Cox, "The court said...You...are going to face higher, stricter liability because you tried to exercise some control over offensive material") 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995).

In short, Congress itself noted that, by prohibiting "[t]reatment of publisher or speaker," Congress wished to ensure that no court treated an ICS as a publisher just because that ICS had screened third party content. Here, this case would not treat Craigslist as a publisher *because*

[14] Although the Conference Committee separated what is now 230(c)(1) into a separate provision and added a subtitle, the Committee stated that it did not intend to alter the substance of § 230(c). The Conference Committee report states, "The conference agreement adopts the House provision with *minor modifications* as a new section 230 of the Communications Act." H.R. CONF. REP. NO. 104-458 at 194 (1996).

Craigslist screened third party content. Instead, CLC argues that Craigslist *failed to screen* out the discriminatory third party content by "printing" the discriminatory advertisements and is therefore not entitled to § 230(c) protection for good faith screening.

CONCLUSION

Discriminatory housing advertisements insult home seekers, deter them from seeking housing, and mislead the public into thinking that it is lawful to base housing decisions on factors such as race, gender and family status. Housing providers should not be permitted to end run the FHA by placing their discriminatory advertisements on the Internet. CLC respectfully asks this Court to hold Craigslist responsible under the FHA for printing discriminatory housing preferences on its website.

Respectfully submitted,

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