NEWSLETTER: DECEMBER 2003

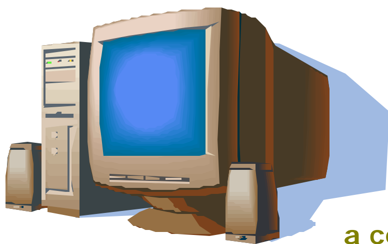
WEB LIBEL: NEW RULING FOR WEB SITE OPERATORS' LIABILITY

The Ninth Circuit of the Federal Courts ruled in June of 2003 as to the liability of Web site operators for the libelous information placed on the Internet by users of the Net. The decision may have wide ranging repercussions given the tremendous credibility of this most forward looking of Circuit Courts and the issues inherent in the decision. Betzel v Cremers, 03 C.D.O.S.

FACTS OF THE CASE:

Ton Cremers was responsible for the security of countless priceless Rembrandts at the world famous Rijksmuseum in Holland and received an e mail in 1999 in which a "tipster" by the name of Robert Smith stated he had worked inside of a home owned by a lawyer Ellen Batzel and that he had, while working, overhead Betzel claim she was an ancestor of "one of Adolf Hitler's right hand men" and that her walls were decorated with what appeared to be old European masterpieces.

Since Cremers ran a web site entitled, *Museum Security.org* whose purpose was to track thefts of great artwork so that they may be retrieved, the e mail had immediate results. One activity of Cremers' web site was to track down missing art by sending clips of e mails, articles and information to museum directors, law enforcement personnel and others who sign up on Cremers' security list. Thus, the e mail went on the web to all those person and any other person who entered the web site.



Outraged, Batzel sued both Cremer and Smith. She states she is not a Nazi heir but has clients in the art world, both in North Carolina and Los Angeles where she now resides. She claims Smith was retaliating for a contract dispute and was angry that she refused to distribute his screenplay around to her contacts in Hollywood. Indeed, she alleged that any valuable works of art she had were in storage during the construction work Smith had performed and he could not have seen any such works and mistaken them for stolen art.

QUESTION OF LAW:

Was Cremers and his website a valid defendant assuming that the e mail from Smith was libelous? (See our web article on Torts: Negligent and Intentional for a general description of tort law.)

RULING OF THE COURT:

Under the 1996 COMMUNICATIONS DECENCY ACT ("CDA") there can be no suit against "providers and users of an interactive computer service" when the information posted is provided by another content provider. The Act reasons that web sites would soon all be out of business if they were liable for each and every piece of information they simply posted. However, the provider of the information (in this case Smith) MAY be sued for libel if the information is false and injurious to the plaintiff.

Smith argued that he did not think that the e mail to Cremers would end up posted on the site, it was simply a private e mail, and he should not be liable for the public publication of it. Batzel claimed that Cremers and his site should be liable since the information destroyed much of her South Carolinian business and she should not suffer the effects while Cremers is absolved of all liability.

In a divided opinion of the three judge panel, the Court announced a new rule for claims against web site operators. Web site operators *can* be sued *only* for posting information that a reasonable person would have know was *not intended for publication* (publication in this sense means communication to third parties or the public.) If the Web site operator receives information that is clearly intended for posting, then no liability arises if the web site operator posts it. However, if the web site operator takes private information not sent to him or her for the purpose of posting, and then posts it, liability may arise against the web site operator...e.g. the operator assumes the liability for the publication.

Pondering the factual situation, the Court ruled, "There are facts that could have led Cremers reasonably to conclude that Smith sent him the information because he operated an Internet service," and the case was sent back to the lower court to determine whether, "a reasonable person in Cremers' position would conclude that the information was sent for Internet publication or whether a triable issue for the jury is presented on that sole issue."

The dissent, Judge Gould, felt that the issue was not simply whether Cremers knew it was sent for publication (thus Cremers was not liable) but whether Cremers had discretion as to whether to publish it.

The dissent argued that if Cremers' role was more than just automatically posting received information, liability could attach. "In my view," wrote Justice Gould, " there is no immunity under the CDA if Cremers made a discretionary decision to distribute on the Internet defamatory information about another person without any investigation whatsoever. If Cremers

made a mistake, we should not hold he may escape all accountability just because he made that mistake on the Internet."

But that, recall, is the minority opinion. In California, the law now is that the Internet service provider is NOT liable, only the provider of the information, if the provider reasonably concluded that the information was received for the purpose of posting.

The plaintiff is pondering whether to appeal that decision but recall this decision is for the Ninth Circuit in the United States in any event and ultimately this case or a case like it must go to the United States Supreme Court to have nation wide significance.

THOUGHTS…

As with so much involving the Internet, the law is in flux and conflicting social goals must be accommodated. No one can act as an Internet poster and be liable and responsible for each thing posted: but that also means that one can be slandered essentially without redress given the international aspect of the Internet.

Consider: someone in China or North Korea sends libelous information to an AOL message board and you are ruined. There is no effective court relief in those two nations: your chances of success are nil. Yet the purveyor of the libel is free from liability no matter how outrageous the libel. The web sites make their living from people entering their web sites, but are immune from the content in terms of liability. Is that right?

The contrary considerations is that imposing a duty of investigation would put such a burden on the web site providers that no one would be insane enough to assume that responsibility unless a corporate giant with massive resources. The day of the small web site would be effectively over.

And above and beyond that particular issue is the over arching question of what law applies. Even if the United States adopts a uniform approach to the law, how would that affect other jurisdictions. Note that three jurisdictions (California, North Carolina and Holland) were involved in this case and the web site would have been visible all over the world. As stated elsewhere in these articles on our own web site, until there is an international approach to these vital questions, the efficiency of the law is questionable in the extreme.

But for now…in the Ninth District including California…if you operate a web site and someone sends you information, you are probably not liable if you post it, though the sender may be. How long will that last?

Stay tuned…