



Attorneys at Law

Internet Law Update

December 2003

By Patrick T. O'Regan, Jr. and Cecily Anne Snyder*

ISP SERVICE NOT LIABLE FOR HOSTING WEBSITE FEATURING HIDDEN LOCKER ROOM VIDEOS

Video cameras were secreted into the locker rooms, bathrooms and showers of several sports teams, including Northwestern University and Illinois State. The videos showing undressed players were compiled and sold under various names. Additionally, portions of the tapes were made available over the Internet using several ISP web hosting services.

Football players at Northwestern University and wrestlers at Illinois State University, along with athletes from other schools, joined together and brought a suit against the schools for failing to detect the presence of the video cameras, the parties that offered the tapes for sale (collectively referred to as "Franco"), and the corporations that provided Internet access and web hosting services (including GTE and Genuity Inc.).

GTE and Genuity sought dismissal under F.R.Civ.P.12(b)(6) for failure to state a claim. The district court granted its motion, and plaintiffs' appealed to the Seventh Circuit. [John Doe v. GTE Corporation and Genuity Inc., 347 F.3d 655 (7th Cir. 2003).

The district court based its dismissal of GTE and Genuity on the Communications Decency Act of 1996. The act provides that "(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

* Patrick T. O'Regan, Jr., is a principal of O'Regan & O'Regan in Falmouth MA. He works with local Cape Cod businesses handling a wide variety of both litigation and transactional matters. He can be reached at patrick@oreganlaw.com. Cecily Anne Snyder is the Vice President of Legal Affairs at Imaging Therapeutics, Inc., Lexington MA. She handles a wide range of intellectual property matters, including developing market focused patent strategies. She can be reached at cecily@imatx.com. © 2003 Patrick T. O'Regan, Jr. and Cecily Anne Snyder.



Attorneys at Law

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).” 47 U.S.C. § 230(c). Under § 230(e)(3), “no cause of action may be brought and no liability may imposed under any State or local law that is inconsistent with this section.”

Plaintiffs allege that GTE is liable for aiding and abetting Franco. The 7th Circuit, however, rejects this notion stating that “nothing in the statute condemns assistants.” A statute’s structure may, in some instances, implicitly establish secondary liability (citing to *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir.)), courts do not, however, typically create liability that is not specified in the statute (citing *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994)). Thus, the 7th Circuit concluded that additional and unspecified liability should not be created in a statute that is precise about who can be liable.

The court went on to discuss whether GTE’s activity as an ISP was an activity that would satisfy the ordinary understanding of culpable assistance. The analogy used by the court was that the provision of cell phones and pagers to drug dealers didn’t make the service provider liable for facilitating their illegal activities. The fact that GTE profits from the sale of server space was not a sufficient basis for aiding and abetting because GTE’s services are useful commodities that are overwhelmingly socially productive.