UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56380

ELLEN BATZEL, a citizen of California,

Plaintiff-Appellee,

v.

ROBERT SMITH, a citizen of the State of North Carolina,
NETHERLANDS MUSEUM ASSOCIATION, an entity of unknown form,
MOSLER, INC., a Delaware corporation with principal place of business in Ohio,

Defendants,

and

TON CREMERS, a citizen or subject of the Netherlands,

Defendant-Appellant.

Appeal from a Collateral Order of the United States District Court for the Central District of California, Judge Stephen V. Wilson, No. CV-00-09590-SVW

BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE URGING REVERSAL AND REMAND

Paul Alan Levy
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorney for Amicus Curiae

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STATEMENT

A. Facts

This case arises from a message posted to the Internet in the Newsletter of Museum Security News ("MSN"). MSN is an Internet website and e-mail newsletter devoted to the security and safety of cultural property, including reports about artwork stolen by the Nazi regime from victims of the Holocaust. Excerpt of Record ("ER") 338. Many persons in the museum and art business find MSN a valuable and credible source of such information. ER354-524.

Members of the public may obtain the Newsletter without having to visit the MSN website by subscribing to the MSN listserv, which automatically transmits the Newsletter to every subscriber. ER338-339. The Newsletters are also archived on the MSN website. *E.g.*, ER1058-1187. The record does not disclose the mechanism by which the contents are placed on the site and in the periodic messages.

The Newsletter consists principally of media reports that pertain to the subject of the Newsletter, and which are reproduced verbatim, crediting the source of each report. Many editions of the Newsletter also contain communications from the public, some but not all of whom are subscribers to the listserv; from time to time, MSN publishes responses to these messages. Defendant-appellant Ton Cremers operates MSN in his spare time from his personal residence. ER338.

In support of his SLAPP motion, Cremers averred that all reports that he

receives are posted without any editing, and that he "only screen[s] for relevance to the subject matter of the Site prior to posting such items to the Site." ER 339 ¶8. A few of Cremers' own email messages, however, suggest that he screens messages more thoroughly, perhaps even deciding on a case by case basis whether a particular message is best treated as a private communication to be answered privately, or as a communication to the listserv that is best disseminated to his entire readership. *E.g.*, ER 305, 841.

Defendant Robert Smith, a North Carolina building contractor, sent an email message to Cremers, allegedly after having found MSN through an Internet search. ER198, 853. Smith stated that while he was working for plaintiff Ellen Batzel, she bragged about being descended from a Nazi war criminal and about inheriting a large number of paintings which, Smith said, must have been stolen from Jews during World War II. ER8. During his deposition, Smith claimed that he did not know that MSN included a message board feature, and that he sent the message to MSN, not with the expectation that his message would be forwarded to a message board, but because he hoped that MSN would investigate his concerns. ER 198-202.

Cremers included the message in the MSN Newsletter without investigating either Smith's bona fides or the basis for his accusations. ER831. Several days later, the MSN Newsletter included subscriber messages that criticized Cremers for

publishing Smith's message. ER831, 840-841. Cremers responded that he had chosen not to censor the message, ER 831, admitted that it might well have been wrong to post the message (and especially to give Batzel's name and address), and expressed the hope that nobody would be hurt. ER 841. Cremers added that the information had been provided to persons who could investigate further, including the FBI. *Id.* Meanwhile, Cremers erased Batzel's name and address from the online message archive. *Id.*

After learning of Smith's message, Batzel wrote to Cremers protesting her innocence, expressing her outrage, and demanding satisfaction. ER345-352. Cremers and an assistant responded by apologizing, saying that Cremers had already apologized publicly (apparently a reference to the Newsletters cited above), offering to include any response that Batzel chose to make in the Newsletter, and suggesting that litigation would undoubtedly publicize the accusations more widely, but would not produce any money because Cremers had no resources to pay damages. ER936-937, 954, 977, 992.

B. Proceedings to Date.

Enflamed rather than mollified by these responses, Batzel sued Smith, Cremers, and two entities that were alleged to be sponsors of the MSN and which, Batzel apparently believed, could finance payment of her damages. Batzel took several

depositions, including the deposition of Smith, who swore under oath that Batzel had made most of the statements that his email had attributed to her. However, certain apparent inconsistencies emerged from the interrogation, and the deposition makes clear that, at the same time that he sent his email, Smith was engaged in a dispute with Batzel about the quality of his work on her house and about the amount of money she had paid him.

Cremers moved to dismiss and to strike the complaint under the California SLAPP statute. Cremers contended that MSN was a public forum, that the issue of stolen art was a matter of public interest, and that, consequently, the complaint should be stricken as a SLAPP. Cremers offered two alternate grounds for SLAPP relief. First, he claimed that the Communications Decency Act ("CDA") immunized him, as the provider of an interactive computer service, from being sued based on the content of an email that was transmitted through MSN. Second, he argued that Batzel was a limited purpose public figure and that, in light of the fact that Smith was standing by his comments, she had no probability of success on her libel claim.

Batzel responded by arguing that the CDA extends immunity only to major internet service providers ("ISP") such as AOL, and that a person like Cremers who creates an Internet newsletter must be treated as an information content provider, even if that content consists of emails written by other persons. Further responding with

respect to the CDA, Batzel argued that Smith's deposition had revealed the possibility that Cremers had edited Smith's message, and that Cremers' own later messages on the list, written in response to readers' criticism, implicitly endorsed Smith's contents by stating that its contents had been reported to the FBI. In those respects, Batzel argued, Cremers went beyond the role of neutral provider of an interactive computer service and became an information content provider.

Batzel swore that Smith's accusations were false. She argued that she was a private figure, that Smith had an axe to grind and that his accusations against her were inconsistent in various ways, and that Cremers should have investigated before forwarding such a potentially damaging accusation to a large public audience. She also detailed the serious damages that the message had caused. ER737-742, 749-752.

The district court considered these contentions in two stages. On June 6, 2001, the court rejected the claim of CDA immunity solely on the theory that the CDA applies only to ISPs like AOL, not to persons who use such ISP's to host websites and listserv's as Cremers does. ER1470. The court did not, however, address Batzel's other objections to CDA immunity. Next, the Court held that Batzel was a private figure, and hence that she only had to show a probability that she could succeed in establishing that Cremers was negligent in forwarding the Smith email to his Internet audience. ER1473. However, the Court did not deny the SLAPP motion at that time;

instead, the Court directed the parties to brief the issue of whether Batzel had established a prima facie case of defamation against Cremers. ER1474.

On July 25, 2001, the court ruled that Batzel had established a probability that she could show that Cremers' forwarding of Smith's email was at least negligent, and hence denied Cremers' special motion to strike the complaint under the SLAPP statute. ER1489-1490.

On July 27, 2001, Cremers appealed the July 25 order, and the underlying resolution of the CDA immunity issue that was merged into it. Batzel moved to dismiss the appeal for lack of appellate jurisdiction. Cremers, supported by Public Citizen as amicus curiae, argued that the July 25 denial of his motion to strike was appealable as a final order under the collateral order doctrine enunciated in *Cohen v. Industrial Loan Corp.*, 337 US 541 (1949). After hearing oral argument on this issue, a panel of this Court denied the motion to dismiss without prejudice to reconsideration after briefing on the merits.

SUMMARY OF ARGUMENT

The Court has jurisdiction of this appeal because both the CDA and the California SLAPP statute confer immunity from defamation litigation on providers and users of an interactive computer system who are sued for information content supplied by others using their interactive system. The decision below should be

reversed because it erroneously rejected the CDA defense on the ground that it applies only to ISPs that enable access to the Internet; the CDA requires only that the provider enable access to a computer server. However, the Court should remand for development of a better record establishing whether Cremers was the operator of an interactive listserv and whether Cremers should be treated as the provider of such a system or as a provider of the informational content that is claimed to be defamatory.

ARGUMENT

A. The Court Has Jurisdiction of Cremers' Appeal from the Denial of His SLAPP Motion, Which Turns on Whether He Has Immunity Under the CDA.

The order of July 25 denying the motions to dismiss and to strike is final for purposes of appeal not because the case is now over, but because it is a "collateral order," under *Cohen v. Beneficial Indus. Loan Corp.*, 337 US 541, 546 (1949); *Quackenbush v. Allstate Ins. Co.*, 517 US706, 711-714 (1996). A collateral order is appealable before the end of the litigation where, if the party who lost the motion could not appeal until the entire case were over, he would lose the opportunity to get review. *Cohen* does not create an exception to 28 USC § 1291, but rather represents a "practical construction" of the term "final," *Digital Equipment Corp. v. Desktop Direct*, 511 US 863, 867 (1994), ensuring that, where an otherwise interlocutory decision threatens important statutory or constitutional rights that are "too important

to be denied review right away," an immediate appeal can be taken. *Id.* 878. In that regard, the federal courts have a long tradition of treating certain denials of motions to dismiss as "final decisions," and thus permitting appeals to be taken from such orders immediately, instead of only after judgment.

The most notable category of cases are decisions denying official immunity. *Behrens v. Pelletier*, 516 US 299 (1996); *Hunter v. Bryant*, 502 US 224 (1991); *Mitchell v. Forsyth*, 472 US 511 (1985). These cases rest on the idea that the general rule barring piecemeal appeals because of the burden that they impose both on the courts and on the parties can be outweighed by the burdens that discovery and other forms of trial preparation impose on plaintiffs who are immune from suit, as well as by the chilling effect that the prospect of being sued can have on officials' "fearless and independence performance of duty." *E.g.*, *Mitchell,* 472 US at 522. Such defenses must be recognized "at the earliest possible stage in litigation," *Hunter*, 502 US at 227, and thus denial of the motion may be appealed immediately.

1. Cremers seeks review of an order that is analogous to one denying official immunity. Courts have ruled that section 230 of the Communications Decency Act cloaks the provider of an interactive computer service with an immunity from suit based on any content provided by some other person through their service. *Zeran v. AOL*, 129 F3d 327, 330-331 (CA4 1997); *Marczeski v. Law*, 122 FSupp2d 315, 327

(DConn 2000) *Doe v. Franco Publications*, 2000 WL 816779 (NDIll); *Kathleen R. v. City of Livermore*, 104 CalRptr 772 (CalApp 2001); *Barrett v. Clark*, 2001 WL 881259 (CalSuper). Section 230(e)(3) provides that **"No cause of action may be brought** and no liability may be imposed under any State or local law that is inconsistent with this section" (emphasis added). The language in bold would be mere surplusage if the section did not confer an immunity from suit as well as protecting against a finding of liability. Moreover, similar language in other statutes has been held to show Congress' intent that the particular defense should be treated as an immunity from suit, whose denial is immediately appealable. *Kennedy v. Bell Helicopter Textron*, 283 F3d 1107, 1111 (CA9 2002); *see also Decker v. IHC Hospitals*, 982 F2d 433, 435 (CA10 1992) (language in prior bill, stating that defendant "shall not be subject to an action or liable under any . . . law," would have conveyed intent to confer immunity from suit).

Moreover, the question whether a particular defendant was acting as a service provider or content provider in a given case is distinct from the merits of a libel claim (such as whether a statement is false or whether there is actual damage). Accordingly, denial of a motion to dismiss based on CDA immunity constitutes a final order under *Cohen*, and an immediate appeal is permitted.

2. Turning to the appealability of the denial of Cremers' SLAPP motion,

Cremers errs by contending that California's statutory provision allowing an appeal as of right must be borrowed along with the state's substantive SLAPP law under the *Erie* doctrine. Br. 8. Federal law determines whether orders are "final decisions" within the meaning of 28 USC § 1291: "In using the phrase 'final decisions' Congress obviously did not mean to borrow or incorporate state law." *Budinich v. Becton Dickinson & Co.*, 486 US 196, 198-199 (1988). Thus, the California statutory provision authorizing appeals of any denial of a SLAPP motion, Code of Civil Procedure § 425.16(j), cannot control the issue of appealability, in the same way that this Court has held that the special motion to strike must itself be borrowed in a diversity case. *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 171 F3d 1208, *amended*, 190 F3d 963 (CA9 1999).

On the other hand, like the immunity defense under the CDA, the SLAPP statute provides a right not to be subject to suit, and hence denial of such a motion is appealable immediately under the *Cohen* doctrine. Like the CDA, the SLAPP statute was aimed directly at the chilling effect that such suits cause:

> SLAPP suits stifle free speech. They undermine the open expression of ideas, opinions and the disclosure of information. The marketplace of ideas, not the tort system, is the means by which our society evaluates [and validates] those opinions. The threat of a SLAPP action brings a disquieting stillness to the sound and fury of legitimate . . . debate.
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> *Beilenson v. Superior Court*, 44 CalApp4th 944, 956 (1996).

Accordingly, the statute creates a presumption against the maintenance of litigation arising from any act "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue." § 425.16(b). Once a court determines that such an issue is involved, the cause of action "shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." *Id.*

Courts have given special consideration to SLAPP cases and have noted that "the early termination of [such a] lawsuit is highly desirable . . . . The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain." *Baker v. Los Angeles Herald Examiner*, 42 Cal3d 254, 269 (1986). Thus, SLAPP motions must be filed within sixty days of service of the complaint, § 425.16(f); discovery is stayed pending determination of the motion unless the trial court orders otherwise, § 425.16(g); the motion must ordinarily be heard within thirty days, § 425.16(f); and if the motion is denied, the defendant has an automatic, immediate right of appeal. § 425.16(j). The state's determination to see that these issues are decided at the earliest stage of a case could not be more plain.

The reasons for these provisions are also apparent:

> While SLAPP suits "masquerade as ordinary lawsuits" the conceptual features which reveal them as SLAPP's are that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so. . . . Because winning is not a SLAPP plaintiff's primary motivation, defendants' traditional safeguards against meritless actions, (suits for malicious prosecution and abuse of process, requests for sanctions) are inadequate to counter SLAPP's. Instead, the SLAPPer considers any damage or sanction award which the SLAPPee might eventually recover as merely a cost of doing business. . . . By the time a SLAPP victim can win a "SLAPP-back" suit years later the SLAPP plaintiff will probably already have accomplished its underlying objective. Furthermore, retaliation against the SLAPPer may be counter-productive because it ties up the SLAPPee's resources even longer than defending the SLAPP suit itself.
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> *Wilcox v. Superior Court* 27 CalApp4th 809, 816 (1994) (citations omitted).

Similarly, in explaining the need for an amendment granting the right of immediate appeal, the bill's sponsors repeatedly explained that the SLAPP statute's purpose is to protect speakers from the burden of litigation and not just from an ultimate judgment of liability:

> Without [the right of immediate appeal], a defendant will have to incur the cost of a lawsuit before having his or her right to free speech vindicated. When a meritorious anti-SLAPP motion is denied, the defendant, under current law, has only two options. The first is to file a writ of appeal, which is discretionary and rarely granted. The second is to defend the lawsuit. If the defendant wins, the anti-SLAPP law is useless and has failed to protect the defendant's constitutional rights.
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> California Senate Judiciary Committee Report on AB 1675, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1651-1700/

ab_1675_cfa_19990701_075825_sen_ comm.html.

Accordingly, the SLAPP statute's immunity from being sued for exercising the right of free speech has a purpose similar both to the CDA's immunity for providers of interactive computer services – lest they be chilled whenever they decide whether to permit the expression of the views contained in a particular message, *Zeran v. AOL*, 129 F3d 327, 330 (CA4 1997) – and to the doctrine of official immunity, which was developed so that officials facing a choice about whether a particular course of action is forbidden by law "[w]ould not err always on the side of caution because they fear being sued." *Hunter v Bryant*, 502 US 224, 229 (1991). That protection would not be nearly so effective if an official had to face "the burdens of such pretrial matters as discovery." *Behrens v. Pelletier*, 516 US 299, 308 (1996).

Similarly, the right to early dismissal of SLAPP suits is intended by the state not just as a protection against liability, but also as a protection against litigation, so that Californians who speak on public issues need not hold their tongues for fear of having to defend against a lawsuit. And, because the SLAPP motion here turns on the legal issue of whether Cremers is protected by the CDA's immunity provisions, there can be no denying that the issue is distinct from the merits. If Cremers cannot appeal now, the immunity from suit that California desires to extend to SLAPP defendants will be irretrievably lost.

Moreover, although the issue of whether a decision is "final" under 28 USC § 1291 is a matter of federal rather than state law, every circuit to consider whether to permit an immediate appeal of a state immunity defense has looked to whether the state defense was intended to protect only against liability or also against the right to bring and litigate the cause of action at all.[1] For example, in *Brown v. Grabowski*, 922 F2d 1097, 1106-1107 (CA3 1990), the court considered whether the New Jersey Tort Claims Act gave public officials an immunity from suit or simply an immunity from liability. Judge Becker resolved that issue by analyzing the statutory language and the case law construing it, and found that New Jersey not only describes its tort immunity as relating only to liability, but also does not allow a defendant to appeal from an adverse ruling on immunity without obtaining a "highly discretionary" leave to pursue immediate review that is "exercised only sparingly" by New Jersey courts. 922 F2d at 1107-1109. Here, by contrast, the California SLAPP statute is expressly designed to protect those who exercise their First Amendment rights from being sued, not just from liability. Moreover, the right to appeal from an adverse decision on a SLAPP motion is contained in the SLAPP statute itself, and not in a general statute

[1] *Cantu v. Rocha*, 77 F3d 795, 803-804 (CA5 1996); *Walton v. City of Southfield*, 995 F2d 1331, 1343 (CA6 1993); *Decker v. IHC Hospitals*, 982 F2d 433, 435-436 (CA10 1992); *Griesel v. Hamlin*, 963 F2d 338, 340-341 (CA11 1992); *Napolitano v. Flynn*, 949 F2d 617, 621 (CA2 1991); *Newman v. Massachusetts*, 884 F2d 19, 22 n4 (CA1 1989); *Sorey v. Kellett*, 849 F2d 960, 962-963 (CA5 1988).

on appeals, thus strengthening the character of this right as a substantive part of the immunity against having to defend a SLAPP suit.

This approach to determining the appealability of orders denying state law immunity claims is sound for several reasons. First of all, even though *Erie* does not require application of state law to determine the immediate appealability of a ruling in a diversity case, the same danger of forum-shopping based on different rules on outcome-determinative issues is present with respect to the issue of appealability. If prospective plaintiffs that desire to suppress the free speech of their critics through the threat of litigation know that federal courts bar defendants from appealing the denial of a SLAPP motion, such plaintiffs will have a great incentive to bring their cases in the federal courts. By the same token, such a rule would greatly undercut the effectiveness of the substantive protection that California intends to afford its citizens' free speech rights. Moreover, because the determination of whether to allow immediate appeals in certain categories of cases rests on a balancing test, it stands to reason that the Court should consider the importance that the state accords to the underlying interests, whether the state treats the defense as forbidding litigation or only liability, and whether the state treats those cases as an exception to the general rule against interlocutory appeals. Because California enacted its SLAPP statute to protect speakers against the burden of litigation and not simply to protect them from

liability, and because it has furthered that purpose by creating a special right to appeal denial of SLAPP motions, this Court should allow such appeals when the cases are filed in the federal courts as well.

Finally, the propriety of the SLAPP ruling turns on an issue that is completely separate from the merits of the case – whether Cremers is immune from suit under the CDA. Accordingly, the conditions for appeal under the collateral order doctrine are met either directly under the CDA, or under the California SLAPP statute.

B. CDA Immunity Is Not Limited to Internet Service Providers Through Which the Public Gains Access to the Internet.

The CDA provides that "[n]o provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider." 47 USC § 230(c)(1). Every court to consider the issue has ruled that the CDA bars suit under any law, federal or state, that might impose liability on an Internet provider for content supplied by a different person. *Ben Ezra, Weinstein & Co. v. America Online*, 206 F3d 980 (CA10 2000); *Zeran v. America Online*, 129 F3d 327, 330-331 (CA4 1997); *Lockheed Martin Corp. v. NSI*, 985 FSupp 949, 962 n7 (CDCal 1997), *aff'd*, 194 F3d 980 (CA9 1999); *Marczeski v. Law*, 122 FSupp2d 315, 327 (DConn 2000); *Doe v. Franco Publications*, 2000 WL 816779 *4-5 (NDIll); *Blumenthal v. Drudge*, 982 F Supp 44, 49-53 (DDC 1998);

Kathleen R. v. City of Livermore,104 CalRptr2d 772 (CalApp 2001); *Barrett v. Clark*, 2001 WL 881259, *9 (CalSuper).

The legislative history makes clear that Congress provided this immunity because it was concerned about the impact of federal or state regulation on the "vibrant and competitive free market that presently exists for the Internet." Section 230(b)(2). As the court explained in *Zeran*, Congress was worried about the chilling effect that even the possibility of tort liability for the many postings that are disseminated through their services could have on interactive computer service providers, because they could not possibly screen every message for every potential problem that it might present. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." 129 F3d at 331. Only by protecting such providers from such suits could Congress avoid this chilling effect.

The district court rejected Cremers' CDA immunity claim "because MSN/Cremers is not an ISP within the meaning of the Act," ER 1469, and because "the qualifying entities [in all other CDA immunity cases] were true internet service providers, like America Online, that provided individuals with access to the internet . . .. MSN . . . is clearly not an internet service provider, as it has no capability to provide internet access." ER 1470. This conclusion is based on a patent misreading

both of the statutory definition of the term "interactive computer service," and of the cases that the judge cited, and it ignores numerous other cases that have extended CDA immunity to persons who are not ISP's and do not provide access to the Internet.

Under 47 USC § 230(f)(2), an interactive computer service is "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." The fundamental flaw in the judge's analysis is that he reads the two "including" clauses as providing the universe of coverage, instead of recognizing that those two clauses simply clarify that two categories are intended to be **part** of that universe. "Including specifically" does not mean "limited to."

Moreover, numerous cases hold that persons whose Internet activities provide a message board or comparable facility that enables members of the public to disseminate their views on the Internet by placing their communications on a computer server come within the definition of the provider of an interactive computer service that cannot be sued for content provided by other persons. Thus, in *Marczeski v. Law*, the defendant was the organizer of a chat room for the discussion of a dispute about the plaintiff, and an anonymous poster accused the plaintiff of threatening her

children; once the Court was satisfied that the defendant had not posted those comments, it dismissed the claim against her. Similarly, in *Schneider v. Amazon.com*, 31 P3d 37 (WashApp 2001), the court held that an Internet retailer was immune from suit based on an defamatory statement in a book review that an Amazon customer posted on its website: "We can discern no difference between website operators and ISPs in the degree to which immunity will encourage editorial decisions that will reduce the volume of offensive material on the Internet." *See also Stoner v. eBay, Inc.*, 2000 WL 1705637, at *1 (CalSuper 2000) (host of auction website immune under section 230 from suit over content of materials sold on its site). In *Barrett v. Clark*, one defendant reposted to a newsgroup a report prepared by someone else; the court held that section 230 immunized the defendant from liability because she had not created the underlying report. *See also Donato v. Moldow*, No. BER-L-6214-01 (NJSuper December 21 2001), http://www.geocities.com/emersoneye/lawsuit/decision.html.

Finally, although the cases cited by the court below on the subject of section 230 immunity were brought against ISP's, they were brought against ISP's that provided specific informational websites in addition to providing access to the Internet itself, and the claims related more to the websites than to the basic Internet access. In *Zeran v. America Online,* for example, the actionable content had been posted on an

interactive bulletin board sponsored by AOL, on which any AOL member could both read existing messages or post new messages. And in *Blumenthal v. Drudge* and *Ben Ezra v. American Online*, the plaintiffs claimed that they had been libeled by the content of news sites provided under contract with AOL, the former suing over content prepared by the notorious muckraker Matt Drudge, and the second suing over content prepared by certain stock price reporting services. None of these cases involved a defendant that was sued simply for acting in the capacity of an ISP, and the courts, in analyzing these cases, recognized that AOL was acting as a publisher of content provided by others. *See also Doe v. Franco Publications*, 2000 WL 816779 *4-5 (NDIll) (characterization of defendants as web hosts does not require denial of section 230 immunity). The major difference between this case and the AOL cases is that Cremers is not an ISP; he is the creator of a listserv whose function is at least arguably the same as the AOL function at issue in the foregoing cases. Because AOL's status as an ISP was not the basis for either the suits against it or for the judicial recognition of its immunity under section 230, this difference should not deprive Cremers of the protection of the statute.

C. The Court Should Refrain From Deciding the Remaining Issues Raised by the Parties About the CDA, but Should Remand to the District Court With

Instructions to Develop a Full Record and Address The Legal Issues in the First Instance.

Although the Court can vacate the denial of CDA immunity because the district court failed to apply the correct legal standard, Cremers asks the Court to go further and declare that he is the provider of an interactive computer service, namely, a moderated listserv, and therefore does not bear any legal responsibility for including Smith's email in his messages or on his website. Moreover, Batzel will argue that the denial of immunity should be affirmed on alternate grounds, because Cremers allegedly edited and endorsed Smith's email, and hence should be treated as an information content provider.

No reported decision has addressed the application of CDA immunity to a listserv. Indeed, except for *Truelove v. Mensa Int'l*, No. 97-3463 (DMd March 23, 1999) (copy attached to Cremers' opening brief) – where one of the interactive services at issue, the "L-Soft List," was a listserv – we are unaware of any decided case on the issue. *Cf. ACLU v. Reno*, 929 FSupp 824, 878 n20 (EDPa 1996), *aff'd*, 521 US 844 (1997) (assuming listserv is "interactive computer service" whose misuse may be prosecuted under 47 USC § 223). Moreover, because there are so many different kinds of listserv's, and because the record is so unclear about the precise nature of Cremer's listserv, the Court should not decide on this appeal how CDA

immunity applies to Cremers' MSN Newsletter, but should remand that issue for further development below.

We agree that listserv's, like the websites and newsgroups at issue in the CDA cases discussed in the previous section, **can** qualify as interactive computer services, and hence that private individuals who operate listserv's may be immune from liability under the CDA for content provided by other persons. A listserv is a computer program, placed on a computer server, whose function is to distribute mail from authorized users to other users whose addresses appear on a specified mailing list. *Internet Basics 101*, www.usd.edu/trio/tut/start/listserv.shtml; *The LISTSERV Guide for General Users*, http://www.benthos.org/AboutNABS/server.html.

> This service provided an extremely convenient means for the exchange of ideas and information between the members of any list since it was LISTSERV (and not individual users) who managed the distribution of e-mail to all final recipients. Users had only to send mail to the e-mail address of a list in order to communicate with any number of list members. This greatly simplified the task of sending e-mail to potentially very large audiences.
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> *Id.*

As a general matter, a listserv fits within the literal definition of an interactive computer service because it is a program that "provides or enables computer access by multiple users to a computer server." However, there are many thousands of different listserv's, and many different kinds of listserv's. At one extreme, listserv's

may be generally open to any member of the public who sends a "subscribe" message to the server; at the other extreme, only members of pre-determined groups may be permitted to join. Between these extremes are listserv's whose operator may reserve the right to approve individual subscriptions to the list. Listserv's may be configured so that any reply to a message from the listserv automatically goes back to the listserv (thus encouraging participants to continue discussions as a group), or so that messages go only to the individual sender and an extra step is needed to send a response to the complete list. Similarly, listserv's may authorize any person to send messages to the mailing list, or may limit the right to send messages to persons who subscribe to the list; or it may authorize only certain categories of list members or designated persons to send mail to the list; or, it may allow only the operator to send messages. In a variation on the latter procedure, any person may be allowed to send messages for potential dissemination to the list, but one or more persons may have to give their approval before the message is actually disseminated to the entire mailing list. In the latter event, the listserv is considered to be "moderated." It is this last category under which Cremers claims CDA immunity.

An interpretive difficulty is posed when a listserv is moderated, however, because, as a technical matter, it may be only the moderator who has the power to cause mail to be disseminated by the server. Thus, the application of the CDA to that

situation may depend on whether the "access" that must be afforded to qualify for status as an "interactive computer service" and thus for immunity under the Act is merely access to the information that is disseminated, or access to the ability to disseminate information.

We are inclined to believe that the statute's use of the term "interactive," coupled with the crucial statutory distinction between simply hosting the service and being responsible for provision of information by others, suggests that the computer service must be one that enables access in the form of the ability to send out information, and not simply the ability to receive it. Otherwise, there would be no liability for defamation for any person who posts on his website information received from other persons, even the rankest anonymous rumors, on the theory that the ability of members of the public to access the information on the site through its server made it interactive.[2] On the other hand, a holding that the interposition of a moderator deprives the listserv of CDA immunity would run counter to the well-established statutory purpose of encouraging providers to self-regulate objectionable content by avoiding regulation of their operation of the system through the tort system. Section 230(b)(2) and (4); *Zeran*, *supra*, 129 F3d at 331.

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[2]In a different context, when applying the "sliding scale" test for personal jurisdiction over website hosts, the term "interactive" requires a two-way exchange of information. *E.g.*, *Cybersell v. Cybersell,* 130 F3d 414, 419 (CA9 1997).

In any event, on the record before the Court we have qualms about whether the MSN Newsletter is properly characterized as a moderated listserv. The few issues of the Newsletter that appear in the record consist primarily of downloaded copies of media reports about topics that Cremers deemed relevant to the Newsletter. There is no suggestion that anyone had sent these articles to Cremers for redistribution to his list; rather, it appears that Cremers conducts his own search for relevant articles to be included. Accompanying these articles are email messages from individuals, sometimes set forth without comment and sometimes accompanied by Cremers' statements. It is this aspect of this newsletter that Cremers apparently considers to be the "moderated listserv."

There are other troublesome facts. First, although some messages published in the Newsletter imply that readers consider the Newsletter to incorporate a discussion list feature, there is no evidence that this characterization is prominently displayed on the website, telling visitors like Smith that any email sent to Cremers might be published to the world. Second, because emails appear only sporadically among content that is apparently provided by Cremers himself, the Newsletter does not have the appearance of being an interactive listserv, moderated or otherwise. Third, Smith claimed in his deposition that he sent the email to Cremers, not to be republished to a mailing list, but to encourage MSN (which he assumed was an organization) to

conduct an investigation. ER 198-202. Although after he was sued Smith obviously had an incentive to downplay his intent to cause injury, and although the mere intent of the sender of an email should not deprive a listserv host of CDA immunity, Smith's claimed understanding seems credible given the appearance of the site. Fourth, although Cremers' affidavit asserts that he routinely includes in his newsletter any email he receives that is relevant to the topic, several of Cremers' emails suggest that he receives many emails that he treats as private communications. Again, even if it turns out that a moderator decides to disseminate only a small fraction of all emails sent to the list, the exercise of such close control is not inconsistent with the purposes of CDA immunity. However, if the moderator tends to treat most messages as private communications, and only sends a handful to the mailing list, a court might well question whether it is examining a moderated listserv at all.

Rather than making broad legal pronouncements about how this case might be resolved depending on the facts ultimately proved, the Court should remand for further development of these factual questions. Once the district court has analyzed the record under a proper standard, the Court will be in a better position to review the case on a subsequent appeal, should the parties be unable to resolve their differences in the interim.

Because a remand is otherwise appropriate, the Court also should not address

Batzel's contentions that Cremers forfeited his CDA immunity by allegedly editing Smith's email message and by implicitly endorsing Smith's message through a later statement that his charges had been reported to the FBI. Some of Batzel's arguments seem weak at first blush – for example, the claim that Smith's email was edited is based on deposition testimony in which Smith expressed uncertainty about whether a document on his hard drive that was slightly different from the email was a draft or the actual email that he sent. Moreover, section 230(c)(2)(A) of the CDA exempts service providers from liability for editing "objectionable" matter so long as it is done in good faith, and none of the alleged edits tended to increase the defamatory power of the message. In any event, these matters can be more fully aired on remand, and if the case comes back on appeal the Court will have the benefit of the district court's analysis.

CONCLUSION

The July 25 order denying the motion to strike based on CDA immunity should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted,

Paul Alan Levy

Public Citizen Litigation Group
1600 - 20th Street, N.W.

Washington, D.C. 20009
(202) 588-1000

Attorney for Amicus Curiae

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