



Legal and policy  
aspects of  
information-  
technology use and  
development.

*George Trubow, Editor*

## WHO'S LIABLE FOR ELECTRONIC ABUSE?

WITH THE PERSONAL COMPUTER HAS come an explosion of electronic bulletin boards and similar communication networks that let you broadcast news and views widely to diverse audiences throughout the world. Many of these systems are operated as cottage industries; individuals make their home or office computers available to host conversations on a wide range of topics. Educators, scientists, and a variety of professionals use bulletin boards to discuss matters pertaining to both work and relaxation. Some clandestine groups may even support nefarious activities; cultists, hate groups, and the lunatic fringe may exchange the latest on pornography, perversions, or prostitution.

But whether an electronic bulletin board is cultured or cultist, if you are a host system operator, you may be liable for crimes or torts that may be aided or abetted through the use of your board.

**CIVIL LIABILITY.** A variety of state and federal laws are clear about the right to prosecute a sysop who knowingly initiates or participates in criminal activity through an electronic bulletin board. But the law is less clear about civil liability in tort for wrongful communications appearing on a board without the sysop's knowledge or consent. The law views the sysop in the same way it views a publisher, so many of the same liabilities apply.

As in paper publishing, the tort of defamation is committed when the publisher publishes a false statement that defames the user. A statement is considered published if it is communicated to anyone other than the user. It is considered defamatory if it tends to injure the user's reputation or the respect, confidence or esteem that the user is accorded.

**WHO'S LIABLE?** Whoever posts an offensive message is liable, of course, but on many boards, users gain access with minimal identification that is not verifiable, such as pseudonyms. The sysop then becomes the only identifiable person to whom the defamed user can vent his anger.

But what if a sysop doesn't have the time or resources to screen materials submitted for public viewing (which is frequently the case)? Can he still

be liable for defamatory or objectionable matter that appears on the board? The short answer is yes — and no.

The sysop is liable as a publisher of the material because his electronic bulletin board displayed the communication. As an example of the tort of defamation, suppose a user, U, posts a message that says "X has embezzled money from his employer." Suppose further that one of the following scenarios occurred:

1. The message was automatically posted when U submitted it and the sysop, S, was unaware of it until a day later. He then viewed the board but did nothing about the message.

2. The message was posted, displayed for about a day before it scrolled off because heavy traffic replaced it, and S never did see it.

3. Upon viewing the previously posted message S promptly removes it.

4. S, while screening messages before they are posted to the board, reads the message from U and posts it anyway.

S's liability to X clearly depends on whether S is considered to have published the message.

The court could hold that U is liable or not liable, depending on which prior decisions it follows from cases involving other media; to date, no cases have addressed these hypothetical electronic-media scenarios directly.

**LIABLE.** In cases involving analogous media, the courts have said that S's liability depends on how actively he participated in publishing the defamatory statement. In an 1889 Massachusetts case, a railroad employee put a defamatory message on the bulletin board affixed to a wall in the train depot and then failed to remove it when someone complained. The railroad was held liable. In a 1952 California case, an employee of a tavern owner allowed a defamatory message to remain on a wall in the tavern's restroom. The court held the tavern owner liable saying, "One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on ... chattels ... under his control is subject to liability for its continued publication." The court stated that "persons who invite the public

**IF YOU ARE A  
HOST SYSTEM  
OPERATOR,  
YOU MAY BE  
LIABLE FOR  
CRIMES ON  
YOUR BOARD.**

Editor: George B. Trubow  
John Marshall Law School  
315 S. Plymouth Ct.  
Chicago, IL 60604

to their premises owe a duty to others not to knowingly permit their walls to be occupied with defamatory matter."

Similarly, a 1918 Oklahoma court held the editor of a newspaper liable for a defamatory article published while he was away on vacation. The court said, "The managing editor ... is equally liable with the proprietor...as it is his duty to know the contents of all articles published." And a Nebraska court found a radio station liable for defamation when it failed to censor a prepared script when it had the opportunity to do so. Finally, a Minnesota court held a telegraph company liable for a patently defamatory message that it received and transmitted without inquiry.

**NOT LIABLE.** Unfortunately, there are many similar cases in which the court made the opposite ruling. A 1906 federal court held the president of a newspaper not personally liable when defamatory material was published in his absence because he "could not have had any actual part in composing or publishing..." For a similar reason, a 1939 Pennsylvania court held a radio station not liable for an impromptu defamatory remark made by a guest during a live broadcast. In 1980, a Wisconsin court held a contract printer not liable for a defamatory statement in material it printed without proof that it knew about the offending statement. The court said that such liability might have a deleterious effect on the free dissemination of information.

Finally, in 1991, in one of the few cases involving an electronic bulletin board, a federal district court in New York held that CompuServe Inc. was not liable to Cubby, Inc., one of its users, which had sued when defamatory material appeared in a newsletter available through the CompuServe Information Service. The newsletter, "Rumorville," was offered by one of the many special-interest forums accessible through CIS. The daily newsletter, which concerned broadcast journalism, was offered to those who participated in the Rumorville forum. The newsletter was uploaded directly into CIS databanks, without an opportunity for CIS to edit it, and was then immediately available to subscribers.

In holding that CIS was not liable, the court likened the computerized database to a traditional news vendor. The court said, "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it

### SEND US YOUR QUESTIONS

*Law Review's charter is to address legal issues that may be of general interest to IEEE Software readers. Although we do our best to assess the relevance and importance of a variety of possible subjects, we still gauge much of what we do on reader response.*

*As an experiment, we invite you to send in questions that pertain to software legal issues. Send them to George B. Trubow, Law Review Editor, Center for Informatics Law, John Marshall Law School, Chicago, IL 60604-3907. All letters become the property of the Center; we will not acknowledge or reply directly to any inquiry. We will not consider personal legal matters, and questions must be fewer than 100 words. Depending on volume and interest, the column will occasionally (once or twice) during the year reply to questions.*

would be no more feasible for CompuServe to examine every publication it carries...than it would be for any other distributor to do so.... Given the relevant First Amendment considerations, the appropriate standard of liability...is whether [CompuServe] knew or had reason to know of the...defamatory Rumorville statements."

**BEST BET IS INSURANCE.** Thus, if the court follows the cases in which no liability was found, there may be no liability in scenario 2 or 3 because S either had no active role in the publication or promptly removed the offensive material when he became aware of it. There could also be liability in 1 and 4, because S knew of the defamatory material but allowed it to be displayed anyway.

But if the court follows the rulings on cases in which liability was found, S could be held liable in all the scenarios because by selling the service and inviting subscribers to use his system, S has a duty to protect them by screening messages for offensive material.

And if such a ruling were made, sysops could find themselves out of business from the prohibitive cost of this screening.

The bottom line is there's no guarantee. If you're a sysop, the best bet is to get liability insurance. If you can't do that, at the very least, consult a lawyer in the jurisdiction where you wish to operate the bulletin board. Before allowing users on the system, get them to acknowledge that

- ◆ The board is not screened.
- ◆ They are responsible for any messages they post.
- ◆ They can expect no privacy regarding their bulletin-board communications.
- ◆ They accept the risk of being subject to offensive messages on the system.

Even then, the court may hold that public policy requires you to carefully screen messages, and none of these understandings are likely to protect you from a suit by someone who is not using the system but is the subject of offensive messages. That's why insurance may be the only guarantee you have. ◆

### CALL FOR ARTICLES

## EUROPEAN RESEARCH INITIATIVES

A special issue will report from the companies and universities involved in various government-sponsored research projects, focusing on both technology and the special demands and rewards of cooperative research. We seek articles that describe new techniques and experience reports on program management, dissemination of results, and lessons learned about technology transfer.

Send five copies to

*Amie Kuntzmann-Combelle  
Corelis Technologie  
31 Ave. du Général Lederc.  
F 92340 Bourg-la-Reine  
France  
Internet akc@corelis.fr*

*Luqi  
Naval Postgraduate School  
Code CS/Lq  
833 Byer Rd., Room 515  
Monterey, CA 93943  
Internet luqi@cs.nps.navy.mil*

**Submission deadline is March 31**

IEEE  
**Software**