On-line services & the law

Michelle McAuslan warns of the perils of being lured into the Net.

While surfers enjoy the ride of their lives on the apparently lawless waves of the Internet, lawyers are busily circling - applying and extending current laws to ensure protection of their clients.

Despite the perceived anarchy of the Internet, and the commonly held misconception by surfers, laws do apply to the Net.

Recent US cases[1] suggest that persons involved in publishing (and republishing), even in remote ways may attract liability for all manner of legal wrongs. Liability for publication of content on the Internet has been judicially considered in Australia in only one case,[2] where a subscriber to a computer bulletin board service (BBS) was held liable for defamation but the service provider or manager of the BBS could also have been sued.

So what are the legal pitfalls if you want to run a site or service on the Internet? Will you be legally liable if, for example:

- a defamatory article is available on the Internet and is accessed through your Home Page?
- a subscriber to a BBS accessible through all schools that you operate or manage posts an obscene or offensive message or picture?

US cases indicate that your liability will depend on the extent to which you are involved in the control, screening, editorial selection and/or modification of content on the proposed service, and on the relationships between you, the service provider, content providers and users or subscribers.

You also need to consider whether your service is providing:

- Mere access to other people's content through your Home Page
- Access to content of your own either as an originator, creator, or by modifying/editing anyone else's content in any way
- Some element of public interactivity - ie will there be any form of BBS?

In the first case, if you exercise no control whatsoever over the selection, management or production of content, you are less likely to be liable for publication which gives rise to some civil or criminal cause of action. In the other cases, you will need to look at whether you are in any way participating in, sanctioning, approving or countenancing the breach of others' rights. If so , you may be liable even though you may have been only remotely involved.

Failure to exercise care in control of content may itself, in some instances give rise to liability (eg. s74 Trade Practices Act 1974 implies a warranty into consumer contracts that services are rendered with due skill and care) or negate relevant defences (for example, innocent dissemination in an action for defamation).

Main Areas of Liability

If you exercise *some* control over content then the areas of potential liability include:

Copyright

Three activities raise copyright issues:

- Unauthorised use by you of copyright material.
- Unauthorised use of your copyright material.
- Unauthorised use of copyright material by users of the service which is sanctioned, approved or countenanced by you.

Australian Courts have held that a person 'authorises' and is therefore liable for infringement by another where the person 'sanctions, approves and countenances' a breach of copyright by that other person[3]. Even if you don't personally copy protected material by downloading it (but your subscribers do), if you exercise any control over the service, you may be liable for breaches of copyright by third parties.

Defamation

Any person who publishes or republishes defamatory material is liable in damages to the person defamed.

The defence of innocent dissemination can be relied upon to avoid liability for defamation where you had no control over content, that is, you were a mere distributor or passive conduit of the material. You would be liable only if you knew or had reason to know of the defamatory statements. In the **Prodigy** case, Prodigy was a bulletin board service provider and made decisions as to content which arguably amounted to editorial control. The Court held that Prodigy was liable as a publisher as opposed to a mere distributor or 'innocent disseminator'. (The case has since been appealed and settled leaving the law unclear).

Prodigy contrasts with **Cubby v CompuServe**[4] where the BBS provider was not liable for defamation published on the BBS by a subscriber where the service provider had no opportunity to review content, did not hold itself out as controlling content and the BBS managers were not agents of CompuServe. CompuServe was not a publisher and therefore

- a guide for the wary

subject to lesser standards of a distributor of material published by others, like a book store or library.

Deliberately avoiding control over content may not be the solution. The 'innocent dissemination' defence to defamation available under Australian law requires that:

- You had no knowledge that the information contained or was likely to contain defamatory material;
- Your lack of knowledge about the defamation is not due to any negligence.

There may also be a general duty of care to ensure that defamatory statements are not republished.[5] Where you are notified that your facility contains defamatory material and you continue to promote adopt or in some way countenance the continued presence of the material on your Home Page so that persons other than the person defamed may continue to read it, you may also be liable.[6]

You can be sued for defamation in each place of publication, ie every place that the material can be read or downloaded. The defences to defamation vary from state to state and country to country. The huge numbers of readers Internet publications reach internationally may result in exponential jumps in damages awards. If a jury considered that Andrew Ettinghausen's shower scene photo in *HQ Magazine* was worth $350,000 (reduced to $100,000 on appeal), in damage to his reputation, how would the same jury react to a defendant who publishes the same photo world wide on the Internet?

Trade Practices

In promoting your activities, and in publishing material on the Internet, you will need to comply with the Trade Practices Act (TPA) and Fair Trading Act. For example, sections 52 and 53 of the TPA regulate statements as to the approval, price, standard and quality of service. Section 74 of the TPA implies a warranty into any contract with consumers that services will be rendered with due care and skill.

Other liability

In addition to the above general heads of liability, you should be aware of current and future regulation of the Internet.

- For example, the Office of Film and Literature Classification has issued guidelines for materials published on BBS - see also the Classification (Publications, Films and Computer Games) Act 1995. and the swag of new State and territory laws which carry criminal offences (see story page 4).
- There is a proposal to extend the Privacy Act 1988 to the private sector to protect databases on marketing and consumer information collected by service providers (eg credit card details).

Limiting the Risks - or how to swim between the flags

In the development of any Internet activity or service, you will need to carefully consider options to limit or manage the risk of liability.

As an Internet publisher or user you will need to consider the level of control you can and should exercise over the service, and the level of liability you are prepared to accept. In striking the balance between exercising and abrogating control over content you need to weigh up the risks of exposure to liability for various actions.

Options to minimise any exposure to liability include:

- Notice to users of the service that material published on the Internet may be subject to copyright and unauthorised use may breach copyright.
- Disclaimers (eg as to compliance with eg defamation or contempt laws in all jurisdictions in which the material is published).
- Indemnities from Internet service providers.
- Indemnities from content providers.
- Indemnities from users that they will not breach copyright, defame etc.
- Detailed user compliance agreements or guidelines.
- Director's insurance, indemnities.
- Defamation insurance.
- Employees to agree to refrain from publishing defamatory material or material in breach of copyright.
- Screening software (usually effective to prevent publication of obscene/offensive material).

If in doubt - seek legal advice from your local friendly shark, er... lawyer. ❑

1. **Prodigy** Supreme Court State of New York 24/5/95; **Playboy Enterprises v Frena** (839 F Sup 1552 (M.D. Fla 1993)

2. **Rindos v Hardwick**, unreported WA Supreme Court 1993

3. **UNSW v Morehouse** (1975) 133 CLR • See also **Playboy v Frena** (839) F Supp 1552 (M.D. Fla 1993) where a bulletin board operator was held liable for a breach of copyright by subscribers.

4. 776 F. Supp 135 (1991)

5. **Thompson v Australian Capital Television Pty Limited** (1994) 12676 ALR 317 (see for example, McGregor, S. *Telecommunications Law and Policy* Aug 1995 Vol 3 No 8 p 73)

6. **Urbanchich v Drummoyne Municipal Council** 1988 NSW SR. (see for example, Leonard, P. Libellous Lines *SMH* June 1995).