Current Comment

COMPUTERS AND INTERNET

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ISP's and Defamation - An Update

Over the last year we have commented in detail on cases in various jurisdictions relating to the liability (or lack thereof) of Internet Service Providers (ISPs). In every case, the courts have held that an innocent ISP is not liable for the activities of its subscribers any more than a telephone company is. Indeed in both the United States and Germany, specific legislation has been enacted making this clear. It should be said however that where the ISP knows the material to be illegal there might still be liability.

This month I would like to look at recent cases from England, the United States and France which have considered the question of ISP liability. As you will recall, in most countries ISPs have no liability for what subscribers do without their involvement. England is different.

In a judgment of 26 March 1999, (http://www.courtservice.gov.uk/ godfrey2.htm), Mr. Justice Morland in the High Court held that Demon Internet Limited, one of the largest ISPs in the United Kingdom, was liable in relation to the defamatory posting on the soc.culture.thai Usenet newsgroup made by an unknown person (who was not a Demon Internet subscriber).

It appears that on 13 January 1997, someone made a posting to the soc.culture.thai newsgroup which purported to come from a Laurence Godfrey, a lecturer in physics, mathematics and computer science resident in England. On 17 January Mr Godfrey faxed Demon Internet's managing director informing him that the posting was a forgery, that he was not responsible for it and asking Demon to remove the posting from their Usenet news server. The case report does not indicate whether Mr Godfrey alleged at this point that the posting was defamatory to him or merely that it was a forgery. The judgment states that "This posting was squalid, obscene and defamatory of the plaintiff", although it is not clear from the court report at what point Demon were made aware of this.

The court majors on the interpretation of section 1 of the Defamation Act 1996, which provides:

1. (1) In defamation proceedings a person has a defence if he shows that-
   (a) he was not the author, editor or publisher of the statement complained of,
   (b) he took reasonable care in relation to its publication, and
   (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

The court considered that Demon fell outwith section 1(a) but that from the moment Mr Godfrey faxed them with his objection, they failed to be protected by sections 1(b) and (c) because:

> "After the 17 January 1997 after receipt of the Plaintiff's fax, the Defendants knew of the defamatory posting but chose not to remove it from their Usenet news servers."

This seems at odds with the reported facts; even if in his fax Mr Godfrey had stated that the posting was defamatory, this should not immediately place Demon in a position where it required to comply with the request from Mr Godfrey or face liability. On 17 January, all that Demon would have known was that Mr Godfrey had alleged that the posting was defamatory of him. Although Mr Godfrey has successfully sued for libel in relation to Internet postings on previous occasions, (a report in Wired.com (http://www.wired.com/news/news/politics/story/18764.html) suggests that Mr Godfrey "has already won settlements against New Zealand TeleCom, the Melbourne PC users group and the online edition of the Toronto Star. In October [1998] he filed suit against the University of Minnesota, Minneapolis ISP StarNet, and Kritchai Quanchairut, a former University of Minnesota student. Most recently, he filed suit against Cornell University and against Michael Dolenga, a postgraduate at Cornell, over comments posted to the soc.culture.canada newsgroup."), none of the reported cases seems to relate to a posting in January 1997.

Although section 1 is poorly drafted, it does seem to require that the statement in question is "defamatory". This would require, in normal course, some judicial finding unless the subject matter were so clear as to be patently obvious to all who read it. If this were not the case the exclusion from the definition of "author, editor or publisher" in section 1 of a person who is only involved

> "(e) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control."

would absolve Demon from liability. It may be that

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Current Comment

these were issues argued and considered before Morland J; if so it is unfortunate that he did not mention this in his judgment.

Much of the judgment is taken up with an examination of US authorities, including the *Lunney v Prodigy* decision which is discussed below, all of which are dismissed because Morland J thought that the 1996 Act was not intended to provide an immunity from tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. in order to deter harmful online speech.

Whilst the judgment quotes at length from the Consultation Document which preceded the 1996 Act and from selected parts of the debate thereon, it is far from clear that Parliament intended these arguments to apply in situations such as the *Demon* case (or indeed that Parliament was even aware in 1995 that defamation could occur in such circumstances). The cases cited in the judgment are far from convincing insofar as the subject matter is the Internet.

The difference, which the court appears to have overlooked, ignored, or simply not understood, is that with traditional "publication", the publisher has some control over whether or not the material is published. This is not the case in relation to an ISP. Could Mr Godfrey have threatened BT for allowing the defamatory information to pass over their telephone lines? – the distinction is not clear.

It is also not immediately apparent why Morland J considered that all three paragraphs of section 1 had to be satisfied in order for a defence to succeed. If 1(1)(a) is not satisfied, surely 1(1)(b) becomes irrelevant? In relation to 1(1)(c), nothing that Demon did "caused" the publication of a defamatory statement – Demon not being the "publisher" pursuant to section 1(3)(e) and having no control over the contents of Usenet groups (its only activity being to purge old postings from its servers to conserve space). Nor for the same reason did it "contribute to the publication" of the defamatory statement, publication having occurred without Demon's intervention and without its assistance or knowledge. Nevertheless, the court decided that as Demon "knew of the defamatory content of the posting", they cannot avail themselves of the protection provided by section 1 of the Defamation Act 1996.

The judgment makes reference to an amended defence proposed by Demon, which the judge indicated "is likely to succeed", but no indication is given in the Court's judgment of what this defence would be.

Overall, the *Demon* decision is deeply worrying both for ISPs and for the Internet community as a whole. It may be that a UK ISP could avoid liability if it did not host Usenet groups on its servers and UK subscribers accessed these postings directly in the US. Whether an English court would still find liability on the basis that UK based subscribers were given the address of a US based news server by the UK ISP must be open to doubt. In any event UK subscribers would suffer immediately from the degradation in access speed.

In addition, if the *Demon* case is correct (and this is very questionable) the same issues would arise in relation to websites, the contents of which someone considered to be defamatory. On a practical level, it must be questionable whether selective censorship on websites is possible or practicable, or whether it complies with the UK's obligations under the European Convention on Human Rights.

The *Demon* case is being appealed, and one must hope that this appeal will be successful. If it is not, the government should take the opportunity (if it is serious about making the UK a technologically desirable place to do business) to change the law as the E-commerce Bill goes through Parliament.

The *Lunney* Case

In the *Demon* case, reference was made by the judge to the US case of *Lunney v Prodigy Services Company* (NY Supreme Court, 28 December 1998) (http://legal.web.aol.com/decisions/dldefam/lunney.html), a case which he distinguished from *Demon*. With that in view, we have considered the *Lunney* case and find that it is in fact not that dissimilar from *Demon*, albeit that it reached a very different conclusion.

The facts were very simple; on 7 September 1994, an unknown person accessed the Prodigy network and sent "an offensive message" to a Boy Scout leader. The intended victim seemed to be less the Boy Scout leader than Mr Lunney, who was at that time a 15 year old prospective Eagle Scout and whose name appeared as signatory and author of the message. Lunney was initially suspected of having sent the message although after police investigation, it appears that neither they nor the Boy Scout authorities took any action against Mr Lunney apparently accepting at face value Mr Lunney's denial of involvement.

By letter dated 14 September, Prodigy wrote to Mr Lunney and advised him that his account had been suspended due to the transmission of "abusive, obscene and sexually explicit material", for which he (at that time) was incorrectly presumed to be responsible. Lunney wrote back to Prodigy advising that he had never subscribed to Prodigy and that anyone who had opened an account in his name had done so fraudulently. By letter dated 27 October Prodigy apologised and advised that several accounts opened in his name had been closed.

In December 1994, Lunney sued Prodigy for compensatory and punitive damages for libel, negligence and harassment. Prodigy denied liability.

In its judgment, the court stated that the statements complained of by Lunney did not immediately appear to be defamatory; although they purported to be written by Lunney, neither were "of or concerning" Lunney. Even if the statements were defamatory, the court considered that:

> "Prodigy could not be liable for the statements nor for the allegedly defamatory bulletin board postings because (1) Prodigy did not publish the statement, and (2) even if Prodigy could be considered a publisher of the statement, a qualified privilege protected it from any liability given the absence of proof that Prodigy knew such a statement would be false."

The court goes on to consider the issue of the necessary knowledge of a publisher, noting that under

Current Comment

US law no liability would exist unless the defendant in question has some "editorial or at least participatory function" in connection with the defamatory material. Reference was made to the earlier decision in *Anderson v New York Telecom* (35 NY2d 746) in which a telephone company was sued for allowing recorded messages (allegedly defamatory) to be transmitted over its phone lines.

In *Anderson* the phone company had been advised of the defamatory nature of the calls but had done nothing to stop them. The distinction drawn in that case was that:

> "in the case of a modern day *telephone* call ... the caller communicates directly with the listener over the facilities of the telephone company, with no publication by the company itself".

In *Lunney v Prodigy*, the court considered Prodigy's role to be the same as the telephone company in *Anderson*. Further, even if the telephone company were the equivalent of a publisher, it would be protected by a qualified privilege. As a matter of (US) common law, a telephone company could only be held liable upon a showing of actual malice, that is knowledge of the falsity of the message. In these circumstances, the court found in Prodigy's favour.

The Similarity of the Underlying Issue

What then of the *Demon* Decision? The facts were not identical, indeed they were closer to those in *Anderson*, but the underlying issue is the same. In *Lunney* the court imposed the test that the ISP required *to know* that the statement was false before it could incur a liability. This knowledge appears to be a critical point. What is needed is knowledge, proof, some form of certainty that the position is one of defamation or libel. This goes far beyond the "on notice" test of the High Court in *Demon*, and, it is submitted, is a much more appropriate standard to apply in these circumstances.

Demon is presently under appeal; we have seen reference recently to E-Commerce providers moving to the Channel Islands to avoid what they perceive to be an unfavourable UK tax regime. If we are to avoid ISPs doing likewise, it is important that the law be clarified in a way which will not stymie the growth of online activities in the UK.

The French View

On the other view, is the recent decision of the Cour de Cassation Chambre Criminelle in a decision rendered on 8 December 1998 (http://www.legalis.net/jnet/1999/actualite_04_99.htm#flash4). In that decision the Court held that a creator of a Bulletin Board system was liable for the content of two anonymous messages. Although he had been acquitted at first instance, the Cour de Cassation decided that as he had expressly created a bulletin board for the exchange of political opinions, he knew in advance what subjects would be discussed and was liable accordingly.

> "Mais attendu qu'en statuant ainsi, alors que, ayant pris l'initiative de créer un service de communication audiovisuelle en vue d'échanger des opinions sur des thèmes définis à l'avance, M. R. pouvait être poursuivi, en sa qualité de producteur, sans pouvoir opposer un défaut de surveillance des messages incriminés, la Cour d'appel a méconnu les textes susvisés."

The US *Barrett* Case

Finally, in this round up, a decision of the Eastern District of Pennsylvania of 12 April 1999, *Barrett v The Catacombs Press, Darlene Sherrell and others* (http://www.paed.uscourts.gov/opinions/99D0282P.HTM). Barrett is a resident and psychiatrist in Allentown, Pennsylvania. Since 1969, he has been involved in investigating and dealing with many aspects of quackery, health frauds, misinformation and consumer strategy. Barrett alleged that Defendant Sherrell posted messages with a hypertext link back to her website on several listserves or USENET discussion groups including: (1) a Dental Public Health list maintained by a computer at the University of Pittsburgh, which has national distribution; (2) to the owner of the Chiro-List which has about 350 chiropractors across the country; (3) at "sci.med.dentistry"; (4) at "misc.health.alternative," a USENET group that is believed to have tens of thousands of participants; and (5) at "misc.kids.health," a USENET news group that probably has thousands of participants. In December, Sherrell opened another website which Barrett alleges is dedicated to "attacking me and several colleagues." Barrett alleges that he has "good reason to believe that she posted a total of at least 90 messages to at least 12 USENET news groups, with total membership in the tens of thousands, and that many of these messages encouraged people to visit one or more [of] her sites that contained defamatory statements about me".

Defendant, Sherrell is closely associated with individuals who are interested in advocating against the fluoridation of water sources throughout the United States. Sherrell stated that she has never been physically present in the Commonwealth of Pennsylvania except to pass through the state a few times, more than ten years ago. She also alleges that the information which she has posted on the World Wide Web "was not targeted to the Commonwealth of Pennsylvania" and that her activity was part of a larger public debate on fluoridation issues.

In a detailed decision, the Court stated that "the Defendant's (Sherrell's) Websites may include defamatory information about the Plaintiff as the creator of the Quackwatch Website, but the fact that such information is accessible worldwide does not mean that the Defendant had the intent of targeting Pennsylvania residents with such information."

> "We agree with the Plaintiff (Barrett) that posting of messages to listserves and USENET discussion groups technically differs from the maintenance of a 'passive' Web page because messages are actively disseminated to those who participate in such groups. ... However, for jurisdictional purposes, we find that these contacts are akin to a 'passive' Website and insufficient to trigger this court's jurisdiction. Here, the nature and quality of the contacts made by the Defendant (Sherrell) were accessible around the world and never targeted nor solicited Pennsylvania residents.

Current Comment

> Moreover, we cannot help but think that the exercise of personal jurisdiction over non-commercial on-line speech that does not purposefully target any forum would result in hindering the wide range of discussion permissible on listserves, USENET discussion groups and Websites that are informational in nature. However, we need not reach the issue of whether the exercise of jurisdiction would be unreasonable or unfair in this case. Plaintiff (Barrett) has failed to prove that Defendant (Sherrell) has the minimum contacts sufficient to meet the first prong of the specific jurisdiction analysis."

Barrett was primarily related to jurisdiction; however, a number of the statements made by the judge are of wider interest. Contrast the approach taken here with that in either *Demon* or the French case mentioned above. The law is far from clear here; but again, the law on defamation and libel varies materially between countries, so it is probably not unreasonable for the cyberlaw in this area to vary also. We shall just have to await developments.

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