

Part 6: Defamation via the Internet: liability of Internet intermediaries

6.1 Introduction

In Part 2 of this paper it was explained how the phenomenon known as “disintermediation” involves, among other things, the removal of editorial intermediaries. The Internet, however, is a decentralised system of communications; it is not a centralised system, such as broadcasting.¹ Whereas in conventional broadcasting, there is a high level of functional vertical integration, whereby the one organisation produces its own program material, packages program material produced by others, transmits material, and owns and operates communications facilities, the Internet allows for a high degree of functional diversification. This means that, while there may be a removal of editorial intermediaries, there is a proliferation of other kinds of communications intermediaries. Part 2 of the paper identified the most important functional intermediaries as ISPs, content hosts, BBS operators, discussion moderators and sysops, and search engines and Web portals. Each of these intermediaries may be located at points other than the extremes of the content/carriage continuum. This suggests that it may be more complex to fit such intermediaries within the established legal categories of liability for publishing defamatory material than for the content providers, message originators and telecommunications carriers dealt with in Part 5 of this paper.

This part of the paper examines the liability of various Internet intermediaries for publishing defamatory material by means of the Internet. For the purposes of analysis, the Internet intermediaries are categorised in terms of the discrete functions that may be performed in communicating by means of the Internet. As pointed out in Part 2 of the paper, in practice, these functions may be combined in a wide variety of commercial arrangements. It should therefore be borne in mind that the functional analysis presented in this paper is a simplification for the purposes of analysis only. In applying the law to “real world” Internet intermediaries, the actual roles and activities of any given intermediary must be identified; it is not sufficient, for example, to simply label an intermediary as an ISP, then mechanically fit it within the “ISP category” of liability. The correct procedure is no doubt similar to that which Takach suggests should be followed under Canadian law:

... the first step in analyzing an intermediary’s liability for libel publication over the Internet should begin with a detailed assessment of the defendant’s role and activities on the Internet as they specifically and actually pertain to the alleged libel. This requires going beyond labelling the defendant an “Internet service provider”, an “on-line content supplier”, a “bulletin board service operator”, a “common carrier” a “discussion forum or usegroup moderator”, or one of any number of other labels. Similarly, the urge to instantly categorize the defendant by analogy to a “news vendor”, “library”, “newspaper”, “broadcaster” or one of any number of other pre-Internet categories should equally be avoided. Rather, a

¹ In *ACLU v Reno (No 1)* the federal District Court stated that: “No single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web”: 929 F Supp 824, 838 (1996).

functional assessment of the defendant's specific activities related to the alleged libel should be undertaken ...²

This Part of the paper has three substantive sections and a conclusion. The first section deals with three United States cases, and one English case, which have examined the common law liability of Internet intermediaries. To date, no Australian case has dealt with the liability of Internet intermediaries. The second section explains legislative modifications to the common law which have been enacted in the United States and United Kingdom to provide statutory protection for intermediaries, such as ISPs, and examines the case law interpreting the United States and United Kingdom statutory defences. It also investigates the possible application of a statutory defence in Australia, under 1999 Commonwealth legislation introduced to regulate Internet content. The third section applies the Australian common law relating to liability for the publication of defamatory material to the various functional intermediaries. The conclusion summarises the liability of Internet intermediaries for defamatory material published by means of the Internet.

6.2 Common law liability of Internet intermediaries

Courts in the United States and England have considered the common law liability of Internet intermediaries for publishing defamatory material by means of the Internet. As the only available common law precedents, these decisions are the starting point for consideration of the liability of Internet intermediaries under Australian common law. Given that the United States was in the forefront of the development of computer-based communications and the Internet, it is unsurprising that the majority of decisions on the liability of Internet intermediaries have been made by United States courts.

6.2.1 United States decisions

During the late 1980s and early 1990s, use of computer-based communications and, subsequently, of the Internet, began to increase in the United States. The first two important United States decisions to consider liability for publishing defamatory material by means of computer networks were concerned with the liability of bulletin board system (BBS) operators. These two decisions, *Cubby, Inc v CompuServe Inc*³ and *Stratton Oakmont v Prodigy*,⁴ established the legal parameters for determining the liability of intermediaries under United States common law. The decisions, which may be usefully contrasted, were concerned mainly with whether intermediaries, such as BBS operators, were entitled to the limited form of liability available to secondary publishers, or distributors, under United States common law. Following these decisions, the common law position of Internet intermediaries was modified by the *Communications*

² George S Takach, "Internet Law: Dynamics, Themes and Skill Sets" (1999) 32(1) *Canadian Business Law Journal* 1 at 37.

³ 776 F Supp 135 (1991).

⁴ 23 Media L Rep (BNA) 1794 (1995).

Decency Act of 1996 (the “CDA”). The CDA was thought to govern the position of Internet, and computer network, intermediaries. Despite this legislative intervention, however, the legal basis for the liability of Internet intermediaries was questioned by a 1998 decision, *Lunney v Prodigy Services Company*.⁵ That decision raised the issue of whether an intermediary, such as an ISP, was exempt from liability because, like the telecommunications carrier in *Anderson’s case*, it did not publish material transmitted by means of its facilities. Taken together, these three decisions involved consideration of the legal bases for distinguishing primary publishers from secondary publishers, or distributors; and publishers from non-publishers. The cases illustrate how the Internet tests the legal boundaries between different levels of liability under United States common law.

Cubby, Inc v CompuServe Inc

*Cubby, Inc v CompuServe Inc*⁶ was the first major case to consider the liability of intermediaries for publishing defamatory material by means of computer networks. In that case, CompuServe provided an on-line information service, offering access to more than 150 special interest forums, including electronic bulletin boards, interactive online conferences and databases. One forum, called the “Journalism Forum”, was dedicated to topics relating to journalism. Under a contract with CompuServe, another company, Cameron Communications, Inc, agreed to create, manage, edit and control the Journalism Forum. Part of the Journalism Forum was a daily newsletter, entitled “Rumorville USA”. “Rumorville” was published by Don Fitzpatrick Associates, and provided to the Journalism Forum under a contract between Cameron Communications, Inc and Don Fitzpatrick Associates. The contract provided that Don Fitzpatrick Associates accepted full responsibility for the contents of the “Rumorville” newsletter.

CompuServe had no direct commercial relationship with Don Fitzpatrick Associates. Moreover, CompuServe had no opportunity to review the contents of “Rumorville” before it was downloaded to a CompuServe server and made available to subscribers. An action was brought by Cubby, Inc, a rival electronic publishing company, claiming that CompuServe was liable for allegedly defamatory statements published in “Rumorville”. CompuServe argued that it was a distributor (or “secondary publisher”), and that therefore, under United States law, it was not liable unless Cubby could establish that it knew, or had reason to know, of the defamatory statements.

Leisure J, of the New York District Court, held that CompuServe was a distributor. In reaching this conclusion, the Court was strongly influenced by the First Amendment basis for establishing a limited form of liability for mere distributors. Thus, Leisure J stated that:

The requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed for distributing that publication is

⁵ 250 AD 2d 230 (1998).

⁶ 776 F Supp 135 (1991).

deeply rooted in the First Amendment, made applicable to the states by the Fourteenth Amendment.⁷

The Court distinguished between those entitled to the limited form of liability applied to a distributor, and those not so entitled, mainly on the basis that a distributor had little or no editorial control over the contents of published material. It held that, once CompuServe decided to carry certain electronic material, it had very little control over the contents of the material. Leisure J pointed out that:

While CompuServe may decline to carry a publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over the publication's contents. This is especially so when CompuServe carries the publication as part of a forum that is managed by a company unrelated to CompuServe.⁸

This conclusion may be contrasted with the joint decision of the High Court in *Thompson's case*.⁹ As explained at para [4.3] above, the joint decision held that the broadcaster had control over the broadcast material, essentially because it decided to make a near instantaneous re-transmission. In *Cubby v CompuServe*, however, Leisure J decided that CompuServe had no editorial control because, once it decided to carry a publication, it was impossible, in practice, for it to exercise editorial control. He followed *Lerman v Flynt Distributing Co*¹⁰ in holding that requiring distributors to monitor the contents of published material would infringe First Amendment free speech guarantees. Thus, Leisure J stated that:

CompuServe has no more editorial control over such a publication than does a public library, book store, or newstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.¹¹

Finally, the Court held that it would be an impermissible burden on the “free flow of information” to provide a lesser standard of protection to electronic distributors than that applied to distributors of print material, such as libraries, book stores or news vendors.

As explained at para [4.3] above, under United States law, the plaintiff has the burden of establishing that a distributor knows, or has reason to know, of the defamatory statements. The Court held that the plaintiffs had failed to show either that CompuServe knew, or had reason to know, the contents of the “Rumorville” newsletter. The Court therefore concluded that CompuServe was not liable for publishing any defamatory material contained in “Rumorville”. Moreover, the Court rejected an argument that CompuServe was vicariously liable for the actions of Don Fitzpatrick Associates in

⁷ 776 F Supp 135, 139 (1991).

⁸ 776 F Supp 135, 140 (1991).

⁹ (1996) 186 CLR 574.

¹⁰ 745 F 2d 123 (1984).

¹¹ 776 F Supp 135, 140 (1991).

publishing “Rumorville”. It held that, under United States law, CompuServe had insufficient control over the activities of Cameron Communications, Inc and Don Fitzpatrick Associates for either party to be considered an agent.

The *CompuServe case* therefore established that intermediaries that provide access to material by means of computer networks may be subject to only the limited form of liability applied to distributors, or secondary publishers, under United States law. The case confirmed that, under United States common law, the distinction between distributors, and publishers not entitled to the limited form of liability, is that distributors have little or no editorial control over the published material. When applied to intermediaries involved in publishing by means of computer networks, however, this distinction had the potential for paradoxical results. This potential was realised in the second important United States decision, *Stratton Oakmont, Inc v Prodigy Services Company*.

Stratton Oakmont, Inc v Prodigy Services Company

*Stratton Oakmont, Inc v Prodigy Services Company*¹² raised the issue of the liability of an intermediary that adopted a more active role than the BBS operator in the *CompuServe case*. Prodigy Services Company owned and operated a computer bulletin board, which included an online forum dealing with financial information, known as “Money Talk”. Defamatory statements about Stratton Oakmont, Inc, a securities investment banking firm, and others involved in a public stock offering, were posted to “Money Talk” by an unidentified user. The plaintiffs argued that Prodigy’s involvement in the bulletin board was such that it was not entitled to the limited form of liability applicable to distributors.

Unlike CompuServe, Prodigy had advertised itself as exercising editorial control over content posted to its bulletin boards. The evidence established that Prodigy exercised a number of forms of editorial control. First, the bulletin boards were subject to “content guidelines”, which requested users to refrain from posting insulting, harassing or distasteful material, and reserved Prodigy’s right to remove such material. Secondly, Prodigy used a “software screening” or filtering program to search for offensive language. Thirdly, Prodigy contracted with Board Leaders, or discussion moderators, who were required to participate in board discussions, and to enforce the “content guidelines”. Fourthly, the Board Leaders could remove material that breached the guidelines, or which was otherwise not relevant, by means of an “emergency delete function”.

The central issue before the Supreme Court of New York was whether this level of editorial control meant that Prodigy was a primary publisher, like a newspaper, or a distributor, like CompuServe. The Court held that Prodigy was a primary publisher and not a distributor. It drew two distinctions with the arrangements established by Prodigy and those applying to CompuServe:

¹² 23 Media L rep (BNA) 1794 (1995).

- Prodigy held itself out as controlling the content of the bulletin boards that it operated; and
- Prodigy actively controlled the content by means of its “content guidelines”, filtering software and enforcement of the guidelines by Board Leaders.

The Court also distinguished the level of control exercised by Prodigy from the control exercised by the broadcasting affiliates in *Auvill v CBS 60 Minutes*,¹³ discussed at para 4.4 above. It held that, while the affiliates in *Auvill* had the ability to exert editorial control, they did not do so. Prodigy’s Board Leaders, on the other hand, actively monitored material. Thus, the Court stated that:

... here PRODIGY has virtually created an editorial staff of Board Leaders who have the ability to continually monitor incoming transmissions and in fact do spend time censoring notes.

Furthermore, the Court argued that the First Amendment basis for limiting the liability of distributors was not applicable to Prodigy because it had decided to censor material. In other words, it maintained that Prodigy could not rely on the First Amendment protection of free speech because it had decided to restrict free speech on its bulletin boards. The Court concluded that, although most computer bulletin boards should be regarded as distributors, Prodigy had lost this protection because it had decided to exert editorial control. It stated that:

PRODIGY’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice.

The obvious problem with this finding is that, making the level of liability depend upon whether an intermediary exercises some degree of actual editorial control would seem to remove incentives for intermediaries to exercise any control over material published by means of computer networks. The Court, however, argued that this would not necessarily result in the removal of controls over material published by means of computer networks, because there would continue to be a market demand for services which offered some control over content. It therefore suggested that the market could compensate intermediaries for the higher level of liability resulting from a decision to impose controls over material published by computer networks.¹⁴

The plaintiffs also argued that Prodigy was vicariously liable for the acts of its Board Leaders in publishing material posted on its bulletin boards. The Court held that, largely because the Board Leaders were required to follow the “Content Guidelines”, Prodigy exercised sufficient control over the activities of Board Leaders to render them agents for the purpose of monitoring and editing material posted to a moderated bulletin board.

¹³ 800 F Supp 928 (1992).

¹⁴ For this argument, the Court cited Eric Schachter, “Cyberspace, the Free Market and the Free Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions” (1993) 16 *Hastings Communications and Entertainment Law Journal* 87.

The *CompuServe* and *Stratton Oakmont* decisions appeared to create a choice for intermediaries, such as BBS operators, involved in publishing material by means of computer networks. From the *CompuServe* decision it was clear that, if an intermediary did not exercise any editorial control over the content of material, it would be classified as a distributor and, therefore, entitled to a limited form of liability. Thus, an intermediary that exercised no editorial control would not be liable for publishing defamatory material, unless it could be established that it knew, or had reason to know, of the defamatory material. From the *Stratton Oakmont* decision, however, it was clear that an intermediary that exercised any degree of editorial control over material would not be classified as a distributor, and would therefore be subject to the same liability as a primary publisher, such as a newspaper. The *Stratton Oakmont* decision did not deal with the degree of editorial control necessary to deny an intermediary the benefit of the limited liability available to distributors, but seemed to suggest that any degree of control would be sufficient. At the very least, it would seem that the combination of a system of rules or norms for publishing material, and the enforcement of those rules by a discussion moderator, would make the intermediary a primary publisher, and not a distributor. In any case, the *Stratton Oakmont* decision appeared to create an incentive for intermediaries, such as BBS operators and ISPs, to avoid taking any steps to control content accessible by means of their systems, in order to be classified as distributors, not primary publishers. Following the enactment of the *CDA*, a statutory immunity was given to Internet intermediaries, such as ISPs, regardless of whether the ISP exercised editorial control. The statutory immunity is explained at para [6.3.1] below. Uncertainty about the scope of the defence, however, suggested that there was a continuing role for the United States common law in determining the liability of ISPs not clearly protected by the *CDA*. The liability of an ISP that provided access to e-mail was considered in the next major United States decision on the common law liability of Internet intermediaries, *Lunney v Prodigy Services Company*.

Lunney v Prodigy Services Company

As explained at para 6.3.1 below, the defence established by the *CDA* applies to providers or users of an “interactive computer service”. An “interactive computer service” was essentially defined as an information service, system, or access software provider, that provides access to multiple users to a computer server. As e-mail is a form of person-to-person communications, it is perhaps arguable that it is not an “interactive computer service”, because it provides access to individual users, not to multiple users. Nevertheless, an ISP that provides access to e-mail appears to perform a quite limited role, somewhat analogous to the functions of a telecommunications carrier. It was therefore probably only a matter of time before an ISP defendant argued that its role in providing access to e-mail was similar to that of the carrier in *Anderson’s case* and, thus, that it was not a publisher. In *Lunney v Prodigy Services Company*,¹⁵ the defendant ISP, Prodigy, argued that it was not a publisher. A New York court upheld the argument.

¹⁵ 250 AD 2d 230 (1998).

Lunney's case was mainly concerned with an offensive e-mail, ostensibly from the teenage plaintiff, that was sent to a Boy Scout leader. The e-mail was sent by an unknown person, who had used the plaintiff's name, and not by the plaintiff. The plaintiff argued, *inter alia*, that the e-mail message, and two associated bulletin board messages, were defamatory. As the person who sent the message could not be identified, the plaintiff brought the action against Prodigy Services Company, the ISP. The New York Appeals Division held that the messages were not defamatory because, although purportedly from the plaintiff, they were not clearly "of and concerning" the plaintiff. The Court, however, went on to consider the liability of the ISP, assuming that the messages were defamatory.

In deciding that the ISP was not a publisher, the Court relied heavily on *Anderson's case*. It interpreted *Anderson's case* to mean that a person who provides the means for distributing defamatory material is not a publisher unless it performs some editorial or participatory function. Although it is true that the New York Court of Appeals in *Anderson's case* held that a facility provider would be a publisher if it performed an editorial or participatory function, at para 5.3 above it was pointed out that this simply raises the question of the meaning of "participatory function". As argued at para 5.3, the important distinction drawn by *Anderson's case* is between persons who perform an active function in the preparation or transfer of content, and those who do not. Nevertheless, in *Lunney's case*, the Appeals Division concluded that, as the ISP had performed no participatory function in disseminating the e-mail and bulletin board messages, it did not publish the messages. The Court held that the main distinction between *Anderson's case* and the facts in *Lunney's case* was not in the respective functions of the carrier and the ISP, but that the carrier, in *Anderson's case*, had been notified of the defamatory material. If anything, this reinforced the Court's view that Prodigy was not liable.

In concluding that Prodigy performed no editorial or participatory function, the Court referred to the use of filtering software by Prodigy, which had previously been a consideration in the *Stratton Oakmont* decision. It held that the use of filtering software did not constitute editorial control because editorial control involved the use of judgment, which can be applied only by a human editor, and cannot be applied by a computer program. There was no editorial control in *Lunney's case* because there was no evidence of human judgment being exercised in approving of the transmission of the messages. Although it dealt with the issue of editorial control in a different context from the Court in the *Stratton Oakmont* decision, there appears no reason to doubt the applicability of the *Lunney* decision to determining whether there is sufficient editorial control to deny an intermediary the limited form of liability available to distributors. Thus, the mere use of filtering software by an intermediary would appear to be insufficient to deny the intermediary the protection afforded distributors.

In deciding that Prodigy was not a publisher, the Court also referred to the distinction drawn between telegraph companies and telecommunications carriers by Witmer J in *Anderson's case*. It concluded that the role played by the ISP was more like a carrier than a telegraph company. Thus, the Court concluded that the ISP was not a publisher

because it performed no editorial or participatory function in disseminating the messages, and because its role was analogous to that played by a carrier.

As explained at para [5.3] above, Witmer J in *Anderson's case* had argued that, even assuming the telecommunications carrier was a publisher, it was entitled to the qualified privilege available to telegraph companies. As further explained, the Court of Appeals in *Anderson's case* concluded that it was unnecessary to consider whether the qualified privilege applied to a carrier. In *Lunney's case*, however, the Court resurrected the issue in connection with the liability of an ISP. Although it is somewhat arguable, the Court interpreted *Anderson's case* as extending the qualified privilege to telecommunications carriers. By analogy, it concluded that, even if Prodigy was held to be a publisher, it would be protected by the qualified privilege historically available to telegraph companies.

The Court of Appeals distinguished the facts in *Lunney's case* from those before the Court in the *Stratton Oakmont* decision. The most important distinctions drawn by the Court of Appeals were based on the level of editorial control exercised by Prodigy in the *Stratton Oakmont* case. Thus, it held that there was no possibility of editorial control over the e-mail sent in *Lunney's case* because it was not feasible for Prodigy to screen all e-mail messages. Moreover, it found that, before the events leading to *Lunney's case*, Prodigy had abandoned all attempts at editorial control at issue in *Stratton Oakmont*, including those in relation to bulletin board messages, apart from the use of filtering software. The Court of Appeals evidently considered that the use of filtering software, although not sufficient to amount to editorial control, might mean that an ISP participates in publishing a message. Assuming this to be the case, however, it concluded that an ISP would participate only in publishing those messages actually altered as a result of the application of the filtering software, and not the great majority of messages transmitted unaltered. On the facts before the Court in *Lunney's case*, it held that there was no evidence that the messages had been altered. Finally, the Court held that, even assuming Prodigy participated in publishing the messages, it was protected by the qualified privilege applicable to telegraph companies. On this basis, an ISP entitled to the qualified privilege would not be liable unless it knew that a message was defamatory. The Court in *Lunney's case* therefore concluded that the decision in *Stratton Oakmont* was not applicable to the instant facts because of the very different levels of control of content exerted by Prodigy in the two cases. In concluding, it stated that:

Our disagreement with the holding in *Stratton Oakmont* is not only compelled by our understanding of the holding of the Court of Appeals in *Anderson*, but is also dictated by at least one simple consideration of fairness. The *Stratton Oakmont* court itself acknowledged that a purely passive on-line service provider would face no liability based on the transmission of defamatory material through its services. Liability was imposed on Prodigy in that case solely because Prodigy had attempted, to some extent, to control the text of the various messages placed on its bulletin boards.

As the Court held that Prodigy was not liable, either because it was not a publisher, or because it was entitled to the qualified privilege available to telegraph companies, it did not find it necessary to decide whether Prodigy was entitled to the statutory defence established by the *CDA*. The Court was therefore able to avoid the issue of whether the immunity granted by the *CDA* applies to ISPs that offer access to e-mail services.

6.2.2 Godfrey v Demon Internet Ltd

*Godfrey v Demon Internet Ltd*¹⁶ is the only significant English decision on the liability of Internet intermediaries for publishing defamatory material. The case took place after the enactment of a legislative defence, which modifies the common law defence of innocent dissemination. The legislative defence is dealt with at para [6.3.2] below. Nevertheless, the case also dealt with the threshold question of whether, under English common law, an ISP is liable for publishing defamatory material by means of the Internet.

Godfrey v Demon Internet Ltd concerned the liability of an ISP for defamatory material posted to a Usenet newsgroup. Usenet newsgroups are explained at para [2.4] above. The defendant ISP, Demon Internet Ltd, offered subscribers access to Usenet newsgroups, including a newsgroup called 'soc.culture.thai'. The plaintiff, a British physicist, was defamed by a posting made to the newsgroup. The defamatory posting, which purported to be written by the plaintiff, was made by an unknown person in the United States. The posting was made available in England by means of a news server operated by the defendant ISP. The plaintiff notified the ISP that the posting was a forgery, and requested its removal. Although it could have removed the posting at any stage, the ISP did not do so until it was deleted in the ordinary course of business, two weeks after it had been posted. The plaintiff commenced an action against Demon for defamation in relation to the period following the ISP receiving notice of the defamatory material, and Demon relied on the legislative defence. In an interlocutory application by the plaintiff to strike out the defence, the ISP contended that it was not liable because it did not publish the defamatory material.

The defendant argued that it was not a publisher, but merely the owner of a device through which postings were transferred. In other words, the defendant argued that it was merely a facility provider. Morland J, however, did not accept this argument, and concluded that the ISP published the defamatory material. In reaching this conclusion, the judge relied on two lines of authority. First, he referred to cases such as *Emmens v Pottle*,¹⁷ which established the liability of disseminators of printed material, such as booksellers, libraries and newsagents. Secondly, he referred to the main English authority on liability for failing to remove defamatory material, *Byrne v Deane*,¹⁸ as establishing the possibility of a person being liable for failing to remove or obliterate material. Although the decision is not entirely clear, it appears that the ISP published defamatory material stored on its news server both because it distributed the material, and

¹⁶ [1999] 4 All ER 342.

¹⁷ (1885) 16 QBD 354.

¹⁸ [1937] 2 All ER 204.

because it failed to remove the material after receiving notice. Applying the common law in relation to multiple publications to the Internet, Morland J held that there was a separate publication each time a Usenet posting was accessed and read. Thus, he stated that:

In my judgment the defendant, whenever it transmits and whenever there is transmitted from the storage of its news server a defamatory posting, publishes that posting to any subscriber to its ISP who accesses the newsgroup containing that posting. Thus every time one of the defendant's customers accesses 'soc.culture.thai' and sees that posting defamatory of the plaintiff there is a publication to that customer.¹⁹

In arguing that an ISP is not a publisher, the defendant was clearly relying on the reasoning in *Anderson's case*, which is dealt with fully at para [5.3] above. As explained at para [5.3], in that case the carrier was held not to be liable for defamatory material communicated over its network, even though it had notice of the material and failed to remove it when requested to do so by the plaintiff. Morland J, however, concluded the ISP was not in a position analogous to the carrier in *Anderson's case*. He stated that:

In my judgment *Anderson's case* does not assist the defendant who in the present case did not play a merely passive role. It chose to receive the 'soc.culture.thai' postings to store them, to make them available to accessors and to obliterate them.²⁰

This interpretation of *Anderson's case* reinforces the conclusion drawn at para 5.3 that the relevant distinction made by that decision is between publishers that perform an active function in the preparation or transfer of material, and non-publishers who perform a merely passive role. Morland J suggested that three features of the ISP's operations meant that its role was not purely passive: first, it chose to store the newsgroup postings on its servers; secondly, the postings could be accessed by means of the newsgroup; and, thirdly, the ISP had the ability to remove the postings. Taken together, these features suggest that liability of an ISP is based more on a failure to remove material, than liability for distributing material.

This part of the decision needs to be approached with some caution. As pointed out at para [5.1] above, Morland J took pains to distinguish English common law from the United States common law, at one point asserting that the United States decisions were "of only marginal assistance".²¹ Morland J did not expressly adopt the distinction drawn by *Anderson's case* between publishers, who perform an active function in the preparation or transfer of material, and non-publishers. Rather, he concluded that *Anderson's case* was of no assistance to *Demon*, because *Demon's* role was not merely passive. The three features identified by Morland J were simply to indicate that the ISP was not merely the owner of facilities for transmitting material; the features are hardly

¹⁹ [1999] 4 All ER 342 at 348.

²⁰ [1999] 4 All ER 342 at 349.

²¹ [1999] 4 All ER 342 at 348.

persuasive in distinguishing *Anderson's case*. Thus, it could surely be argued that, in *Anderson's case*, the carrier chose to allow the telephone message service to be transmitted by means of its network, the message could be accessed by means of the carrier's network, and the carrier had the ability to deny access to the message. This suggests that, in concluding that Demon was a publisher, Morland J was influenced more by analogies drawn with English precedents than by distinctions drawn under United States law. Nevertheless, there is no doubt that the decision could have been improved by a more explicit analysis of the basis for distinguishing *Anderson's case*, and of the criteria for determining whether an ISP is a publisher.

In the course of the decision, Morland J also referred to the United States decisions on the liability of intermediaries for computer-based communications. His comments on the United States decisions were generally brief, and dismissive. The comments on *Lunney's case*, which, as explained above, held that an ISP does not publish e-mail messages in relation to which it exercises no editorial or participatory function, are particularly instructive on the differences between United States and English common law. Morland J held that *Lunney's case* was of no assistance to the defendant because "at English common law Prodigy would clearly have been the publisher of the practical joker's message".²² It therefore appears that, under English common law, there is no distinction between the liability of an ISP in relation to the publication of Usenet messages and e-mail messages; in both cases, the ISP is apparently liable for publishing the messages because it distributes the messages. As the Court in *Lunney's case* argued that the ISP was not a publisher because it performed an analogous function to the carrier in *Anderson's case*, these comments reinforce the conclusion that Morland J did not accept the distinction drawn by *Anderson's case*, between active and merely passive participants, as relevant to English common law.

The decision in *Godfrey v Demon Internet Ltd* establishes that an ISP that makes material available for access by means of the Internet publishes the material under English common law. An ISP may be a publisher because it is analogous to disseminators of printed material, such as booksellers, newsagents and libraries. It is perhaps more likely, however, that an ISP is liable for failing to remove material that can be accessed by means of a server operated by the ISP, on the same principles that a person who controls premises may be liable for failing to remove defamatory material. An ISP is liable regardless of the nature of the material which it makes available for access; there is no apparent distinction between liability for transmitting newsgroup postings and personal e-mail messages. An ISP is not analogous to the position of a telecommunications carrier under United States common law, because it does not play a purely passive role in the dissemination of material. Nevertheless, the distinction between publishers who perform an active function in the preparation or transmission of material, and non-publishers, who play a merely passive role, does not appear to be part of English common law. Although the decision of Morland J does not deal with the common law defence of innocent dissemination – it is concerned with the application of an English statutory defence that modifies the common law – it would appear that, from the analogy drawn with

²² [1999] 4 All ER 342 at 352.

distributors of printed material, ISPs would be entitled to the defence of innocent dissemination under English common law.

6.3 Statutory defences

In the United States and the United Kingdom the common law liability of Internet intermediaries has been modified by the introduction of statutory defences which provide a degree of protection for those, such as ISPs, involved in communicating material by means of computer networks. In both the United States and the United Kingdom, the legislation introducing the defences was enacted in 1996. The scope and application of the statutory defences is, however, quite different in the two jurisdictions. The differences are generally indicative of the divergent approaches adopted to defamation law in the United States and the United Kingdom. In both cases, the statutory defences have been subject to judicial interpretation. In Australia, legislation designed to regulate Internet content was introduced in 1999.²³ A provision of this legislation may provide a defence for some Internet intermediaries.

6.3.1 The United States statutory immunity

In 1996 the United States Congress enacted omnibus telecommunications legislation, in the form of the *Telecommunications Act of 1996*.²⁴ Title V of the Telecommunications Act is known as the *Communications Decency Act* (the “CDA”). The CDA was designed mainly to restrict access to indecent and patently offensive material communicated by means of the Internet. Defences established by the CDA were intended to protect ISPs from liability if they participated in restricting access to offensive material; the legislation was designed to encourage ISPs to self-regulate. As explained at para 6.2.1 above, however, the decision in the *Stratton Oakmont case* meant that an intermediary that exercised editorial control would be subject to the higher level of liability of a primary publisher, rather than being subject only to the more limited liability of a distributor. Largely to overcome the effect of the *Stratton Oakmont* decision, the CDA included provisions limiting the liability of Internet intermediaries.²⁵ The operative section, known as the ‘good samaritan’ provision, was enacted as s 230(c)(1) of the CDA.²⁶ Sub-paragraph 230(c)(1) states that:

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.

²³ See *Broadcasting Services Amendment (Online Services) Act 1999*(Cth) introducing a new Schedule 5 to the *Broadcasting Services Act 1992* (Cth).

²⁴ Pub L 104-104, 110 Stat 56.

²⁵ The conference committee report on s 230 stated that: “One of the specific purposes of this section is to overrule *Stratton-Oakmont v Prodigy* and any other similar decision which have treated providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material”: HR Rep No 104-458, at 194 (1996).

²⁶ 47 USC s 230(c)(1).

Further sections of the *CDA* defined terms used in s 230(c)(1). Thus, s 230(e)(2) defines an “interactive computer service” as:

... 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.

An “information content provider” is defined by s 230(e)(3) as:

... any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

The “good samaritan” provision appeared intended to protect intermediaries that provide access to material by means of computer networks, including the Internet, while preserving the liability of original publishers, such as content providers or message originators. Nevertheless, there are interpretative difficulties in construing the scope and application of the provision. As mentioned in relation to the *Lunney* decision, at para [6.2.1] above, it is questionable whether the provision applies to intermediaries that provide access to person-to-person communications, such as e-mail. Further interpretative issues arose in two subsequent decisions, *Zeran v America Online, Inc.*²⁷ and *Blumenthal v Drudge*.²⁸

Zeran v America Online, Inc

In *Zeran v America Online, Inc*, an unknown person posted messages to a bulletin board operated by America Online. The messages contained advertising for merchandise bearing offensive and tasteless slogans relating to the Oklahoma City bombing. The messages gave the business number of the plaintiff, Zeran, as the contact telephone number for those interested in the merchandise. The plaintiff was not involved with the merchandise, and the posting appeared to be a ‘prank’. As a result of the postings, the plaintiff received a large number of angry and threatening calls to his business number. The plaintiff complained to America Online, but new messages continued to be posted on the bulletin board. Moreover, a radio station broadcast a story about the offensive merchandise and encouraged listeners to call Zeran’s number to register their disapproval. Zeran brought an action against American Online, arguing that it was negligent because it had a duty to refrain from distributing material that it knew, or should have known, was defamatory. America Online contended that it was protected by the ‘good samaritan’ provision, and this argument was accepted by a United States federal District Court. Zeran appealed, principally on the basis of an argument that s 230 did not exempt intermediaries from liability as distributors.

²⁷ 129 F 3d 327 (1997).

²⁸ 992 F Supp 44 (1998).

Before a federal Court of Appeals, Zeran argued that liability as a primary publisher, and liability as a distributor, were two legally distinct forms of liability. He contended that the *CompuServe* and *Stratton Oakmont* decisions drew a legally significant distinction between publishers and distributors; and that the ‘good samaritan’ provision protected intermediaries from liability as publishers, but not from liability as distributors. The Court of Appeals rejected this argument, and held that America Online could rely on the statutory immunity conferred by s 230(c)(1). The Court held that a distributor was simply a form of publisher that was subject to a different standard of liability. Thus, the Court stated that:

It is undoubtedly true that mere conduits, or distributors, are subject to a different standard of liability. As explained above, distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability. But this distinction signifies only that different standards of liability may be applied *within* the larger publisher category, depending on the specific type of publisher concerned.²⁹

There is little doubt that, from the point of view of both legal principle and history, the Court was correct in concluding that distributors are publishers who, under United States law, are subject to a lesser form of liability. Under United States common law, derived as it is from English common law, to publish defamatory material is to communicate the material to someone other than the plaintiff.

The Court of Appeals held that the ‘good samaritan’ provision was intended to fulfil two purposes: to protect freedom of speech, and to encourage intermediaries to self-regulate the dissemination of offensive material. First, by exempting intermediaries, such as ISPs, from liability for making material available by means of a computer system, it was designed to avoid the sorts of self-censorship of controversial material that has always been of concern to United States courts.³⁰ Secondly, by removing liability of intermediaries, such as ISPs, that perform an editorial role in controlling content – such as moderating bulletin boards – the provision removed the disincentives to control material created by the *Stratton Oakmont* decision. The Court concluded that both of these purposes would be defeated if distributors were not protected by s 230. Thus, it asserted that retaining liability for distributors would result in intermediaries exercising self-censorship:

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement – from any party, concerning any message. ... Because service providers would be subject to liability only for the publication of information, and not for its removal, they would have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.³¹

²⁹ 129 F 3d 327, 332 (1997).

³⁰ See, for example, *Smith v California* 361 US 147 (1959).

³¹ 129 F 3d 327, 333 (1997).

It also maintained that retaining distributor liability would create incentives for intermediaries to avoid controlling content because attempts to control content would be likely to result in notice of defamatory material, thus rendering the distributor liable for the material. The Court stated that:

Any efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability. Instead of subjecting themselves to further possible lawsuits, service providers would likely eschew any attempts at self-regulation.³²

Finally, the Court concluded that there would be a more general adverse effect on freedom of speech if intermediaries, such as ISPs, were held liable as distributors. It asserted that the retention of distributor liability would create the possibility of those offended by speech communicated by computer networks silencing the speech by simply notifying service providers, and claiming that the material was defamatory. The sheer quantity of speech available on computer networks and the Internet would likely result in intermediaries removing the “offensive” material, because of the practical difficulties of determining whether the material is defamatory. Thus, the Court maintained:

Whenever one was displeased with the speech of another party conducted over an interactive computer service, the offended party could simply “notify” the relevant service provider, claiming the information to be legally defamatory. In light of the vast amount of speech communicated through interactive computer services, these notices could produce an impossible burden for service providers, who would be faced with ceaseless choices of suppressing controversial speech or sustaining prohibitive liability.³³

In emphasising the role of s 230 in protecting freedom of speech, the Court of Appeals appeared to be influenced by the strong protection of freedom of speech accorded Internet communications by the Supreme Court in *Reno v American Civil Liberties Union (No 1)*.³⁴ In that case, the Supreme Court had pointed to the unique nature of the Internet as a means for promoting freedom of speech. This was also apparent in the reasoning of the federal District Court in *Reno (No 1)*, in which Dalzell J stated that:

As the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion.³⁵

Zeran also argued that, as a matter of statutory interpretation, the “good samaritan” provision should be interpreted restrictively to apply only to primary publishers, and not to distributors. The Court of Appeals, however, concluded that there was an explicit

³² *Ibid.*

³³ *Ibid.*

³⁴ 117 S Ct 2329, 138 L Ed 2d 874 (1997).

³⁵ 929 F Supp 824, 883 (1996).

statutory intention to over-rule common law principles of liability. This intention was indicated by the use of the term “publisher”, which traditionally included distributors, and by the fact that retaining distributor liability would defeat the purposes of the legislation, including the promotion of freedom of speech on the Internet.

Blumenthal v Drudge

Matt Drudge produces an on-line newsletter known as the “Drudge Report”. The “Drudge Report” is concerned with gossip and rumour; it broke the Monica Lewinsky story. The self-avowed philosophy of Matt Drudge is to publish gossip and innuendo without time-consuming checks on the accuracy of the information.

In 1997, Drudge entered a licensing agreement with America Online, under which America Online paid Drudge for the right to distribute the “Drudge Report”. Drudge e-mailed new editions of the Report to America Online, which made them available to subscribers. Under the agreement, America Online reserved the right to remove, or require alterations to, the content of the Report. Later in 1997, the “Drudge Report” included a story on a Presidential aide, Sidney Blumenthal. The story was defamatory, and Blumenthal brought actions for defamation against Drudge and America Online. America Online argued that it was protected by the ‘good samaritan’ provision.

Blumenthal contended that America Online was not merely a provider of an interactive computer service, but that it was an information content provider that was responsible for information provided to its subscribers. He argued that the role performed by America Online was analogous to that of a newspaper, such as the *Washington Post*, which would be liable if it published a report without editing, verifying, or even reading it. A United States federal District Court rejected this argument. It held that America Online was nothing more than a provider of an interactive computer service and, therefore, was entitled to immunity under s 203. In reaching this conclusion, the Court was influenced by policy objectives underlying the decision to confer greater protection on Internet intermediaries than on publishers or broadcasters. It explained the distinction between the Internet and other forms of distributing information as follows:

In recognition of the speed with which information may be disseminated and the near impossibility of regulating information content, Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory material written or prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.³⁶

³⁶ 992 F Supp 44, 49 (1998).

The basis of the distinction between the role of a service provider, such as America Online, and the publisher of a traditional newspaper has been further explained by Pantazis:

Although the end result is that both the *Washington Post* and AOL may make available an article to thousands of readers, the process by which each publishes is inherently different. The *Washington Post* employs editors to read every article that it publishes. These editors are responsible for investigating the truthfulness of the article as well as for editing and reviewing the article. This treatment of the article warrants holding the publisher to a higher standard than one who unknowingly passes the information along. Although AOL also publishes information that it receives from third parties, it does so on a volume significantly greater than traditional newspapers. It would be impossible for AOL to verify and review messages posted by over nine million subscribers. Furthermore, if Congress mandated this type of review, the growth of interactive computer services and the Internet itself would inevitably be stifled.³⁷

Applying this policy, the Court in *Blumenthal's case* held that, although America Online could be jointly liable if it played some role in developing content, as it had no role in creating or developing the information in the 'Drudge Report', it was merely a provider of an interactive computer service.

The plaintiff also argued that America Online was something more than a provider of an interactive computer service because the agreement with Drudge reserved the ability to remove, or require the alteration of content; and because America Online had promoted the 'Drudge Report' as a source of instant gossip and rumour. The Court agreed that, because it had the right to exercise editorial control, America Online was not merely a passive conduit, like a telephone company. Nevertheless, it concluded that the policy of the 'good samaritan' provision was to provide immunity to service providers, even if they performed an active role in making content available. The essential reason for providing immunity, regardless of the level of editorial control exercised, was to encourage service providers to self-regulate. Thus, the Court stated:

In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful, or not even attempted.³⁸

The *Blumenthal* decision explains two important policies underlying the immunity conferred on service providers by s 230. First, service providers are not treated in the same way as primary publishers, such as newspaper publishers, because the volume of material made available by service providers means that it would be impossible for them

³⁷ Annemarie Pantazis, "Zeran v America Online, Inc: Insulating Internet Service Providers from Defamation Liability" (1999) 34 *Wake Forest Law Review* 531 at 552.

³⁸ 992 F Supp 44, 52 (1998).

to attempt to verify the information. To attempt to do so would impede the operation and development of the Internet. This suggests that service providers who exercise no control over content should not be held liable for deciding not to edit material. Secondly, even if service providers exercise editorial control, they are not held more accountable than those who exercise no editorial control because to do so would create disincentives for self-regulation. This suggests that service providers who do exercise some editorial controls should not be penalised by being held to a higher standard of liability. The result of these two policies was that, in *Blumenthal's case*, the Court held that America Online was protected by s 230 even though it retained the ability to control the content, but did nothing to exercise that ability.

6.3.2 The United Kingdom statutory defence

In the United Kingdom, the *Defamation Act 1996* (UK) introduced a statutory defence which altered the common law liability of intermediaries, essentially by modifying, codifying and clarifying the common law defence of innocent dissemination. The United Kingdom statutory defence differs considerably from the immunity conferred by s 230 of the *CDA*. It applies to a much broader range of people, including printers and broadcasters. More importantly, unlike the United States defence, it does not excuse liability if the defendant knew, or had reason to know, that material was defamatory; or failed to take reasonable care in publishing the material. This suggests that the United Kingdom Parliament saw no reason to distinguish publication by means of the Internet from other forms of publication.

It is not clear whether the statutory defence abolishes the common law defence of innocent dissemination. Nevertheless, it differs from the common law defence in two respects. First, it applies to a wider range of people. Secondly, the mental element required for the statutory defence to apply may be narrower than the common law defence.³⁹

Under s 1(1) of the Defamation Act, a defendant is entitled to the statutory defence if he or she can establish each of the following three elements:

- he or she was not the author, editor or publisher of the statement complained of;
- he or she took reasonable care in relation to publication of the statement; and
- he or she did not know, and had no reason to believe, that the statement was defamatory.

The three elements of the defence are further defined by the legislation. The term 'publisher' is given its common meaning, not the technical meaning accorded the term in defamation law. Thus, s 1(2) defines a 'publisher' as "a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business". The legislation lists persons who are not considered authors, editors or publishers, and who are entitled to

³⁹ See Milmo and Rogers (1998) *op cit* para [6.25] pp 149-150.

the defence. The list is not exhaustive. Those entitled to the statutory defence include some not entitled to the common law defence of innocent dissemination. Under subsection 1(3) those entitled to the statutory defence include people who are only involved:

- in printing, producing, distributing or selling printed material;
- in processing, copying or distributing films, sound recordings or other electronic media;
- broadcasters of live material with no effective control over the person who makes the defamatory statement; and
- the operator or provider of access to a communications system by means of which the statement is transmitted by a person over whom the operator or provider has no effective control.

Thus, the statutory defence goes further than the common law defence in clearly protecting printers and broadcasters of live material with no control over the content. There are some difficulties, however, in determining the application of the defence to those involved in the transmission of material by means of computer networks, including the Internet. It seems clear that telecommunications carriers are operators or providers of access to communications systems and, therefore, are entitled to the defence. The position of ISPs, and other intermediaries, is not so clear cut. For example, although an ISP provides access to a communications system, it may or may not have ‘effective control’ over a content provider or message originator. If an intermediary has the ability to delete messages, it is arguable that it has effective control, and is therefore not entitled to the defence. Moreover, if an intermediary exercised some editorial function, such as moderating a discussion group, it would seem to be performing the role of an editor, and therefore denied the defence.

Under s 1(5) of the legislation, the following factors are required to be taken into account in determining whether a defendant took reasonable care, or had reason to believe a statement was defamatory:

- the extent of the person’s responsibility for the content or the decision to publish it;
- the nature or circumstances of the publication; and
- the previous conduct or character of the author, editor or publisher.

The application of the defence to an ISP was considered in *Godfrey v Demon Internet Ltd*, which is also dealt with at para 6.2.2 above.

Godfrey v Demon Internet Ltd

In addition to arguing that it was not a publisher, the defendant ISP in *Godfrey v Demon Internet Ltd* contended that it was entitled to the statutory defence. Morland J held that the defence could apply to the ISP because it was not an author, editor or publisher of the

defamatory posting made to the newsgroup.⁴⁰ The Court did not consider whether the ISP had effective control over the person who posted the message. This was not surprising, given that it was impossible to establish the identity of the message originator. Although the ISP qualified for the defence, however, Morland J held that the ISP was not entitled to the defence because it had received notice of the defamatory material, and decided not to remove it. This meant that the ISP could not establish that it took reasonable care; or that it did not know, and had no reason to believe, that the statement was defamatory.⁴¹

The divergence in the approaches to defamation law, and to defamation law reform, in the United States and the United Kingdom is illustrated by extracts from policy documents cited by Morland J to support the conclusion that the ISP was liable for publishing the defamatory postings. Thus, the consultation document on the statutory defence explained that it preserved the balance established by the defence of innocent dissemination by retaining liability for distributors who knew, or ought to have known, of the defamatory material. Moreover, it rejected suggestions that, as under United States common law, the plaintiff should bear the onus of establishing that the defendant knew, or was negligent. The document stated that:

Although it has been suggested that the defence should always apply unless the plaintiff is able to show that the defendant did indeed have the disqualifying knowledge or cause for suspicion, only the defendant knows exactly what care he has taken. Accordingly, as in most defences, it is for the defendant to show that the defence applies to him.⁴²

Morland J also referred to the legislative debate on the bill, in which an amendment had been proposed to create an immunity similar to that applying under s 230 of the *CDA*. The amendment would therefore have protected an intermediary, regardless of whether it knew, or ought to have known, of the defamatory material. In rejecting the proposed amendment, Lord Mackay LC had stated that:

It is imperative that we do not lose sight of the effect on plaintiffs of giving a defence to those who have in fact been instrumental in bringing material which has defamed the plaintiff to its audience ... in my submission it would not be right to deprive a plaintiff of his cause of action against a defendant who was aware that he might be wrongdoing the plaintiff and misjudged the plaintiff's chances of succeeding in a defamation action.⁴³

The United Kingdom legislation therefore continues the traditional emphasis of the English common law on preserving the rights of plaintiffs to bring actions in relation to the distribution of defamatory material. The United States legislation, however, bears the marks of the greater emphasis given to freedom of speech under United States law. In

⁴⁰ [1999] 4 All ER 342 at 346.

⁴¹ *Ibid.*

⁴² Cited at [1999] 4 All ER 342 at 246.

⁴³ Cited at [1999] 4 All ER 342 at 246-7.

evaluating the two statutory defences, however, it is necessary not only to assess the appropriate balance to be struck between protecting reputation, on the one hand, and protecting freedom of speech, on the other; it is also necessary to determine whether the nature of communicating by means of the Internet alters this balance in any way and, if so, how.

6.3.3 The Australian statutory defence

In 1999 the Commonwealth enacted legislation intended to regulate and control access to Internet content.⁴⁴ The legislation introduced a new Schedule 5 to the *Broadcasting Services Act 1992* (Cth). The legislation was designed as part of a broader national scheme which divided responsibility for regulating Internet content between the Commonwealth, on the one hand, and the States and Territories, on the other. Under the scheme, the Commonwealth is responsible for regulating Internet Service Providers (ISPs) and Internet Content Hosts (ICHS), and the States and Territories are responsible for regulating content providers. Clause 91 of Schedule 5 gives effect to this policy by exempting ISPs and ICHs from the operation of State and Territory laws.

Clause 91 provides that State or Territory legislation, or a rule of common law or equity, has no effect to the extent that it:

- subjects an ICH or ISP to civil or criminal liability in respect of hosting or carrying Internet content where the ICH or ISP was not aware of the nature of the Internet content; or
- requires an ICH or ISP to monitor, make inquiries about, or keep records of, Internet content hosted by the ICH or carried by the ISP.

Sub-clause 91(2) allows the Minister to exempt State or Territory laws, or rules of common law or equity, from the operation of clause 91; in other words, the Minister can preserve the operation of State or Territory laws, rules of common law or equity.

Schedule 5 defines an ISP essentially as a person who supplies access to the Internet,⁴⁵ and an ICH as a person who hosts Internet content in Australia.⁴⁶ 'Internet content' is essentially defined as information that is kept on a computer that can be accessed by means of the Internet.⁴⁷

It is not entirely certain whether clause 91 provides a new statutory defence for ISPs and ICHs in relation to the dissemination of defamatory material by means of the Internet. Determining whether the clause has this effect is a matter of statutory construction. In interpreting the clause, recourse must be made to the statutory rule of interpretation that it is assumed that legislation does not abolish or modify fundamental common law

⁴⁴ See *Broadcasting Services Amendment (Online Services) Act 1999* (Cth).

⁴⁵ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 8.

⁴⁶ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 3.

⁴⁷ *Broadcasting Services Act 1992* (Cth), Schedule 5, cl 3.

principles or rights.⁴⁸ Moreover, there was no mention of providing a defence for ISPs or ICHs to actions for distributing defamatory material in the policy documents and Parliamentary debates associated with passage of the legislation. These factors must, however, be balanced against the clear words of the legislation. Clause 91 clearly states that common law rules, or State or Territory laws, have no effect to the extent to which they would render ICHs or ISPs liable for hosting or carrying Internet content, where the ICH or ISP was not aware of the nature of the content. It would therefore appear more likely than not that clause 91 modifies the liability of ICHs and ISPs for distributing defamatory material, despite there being no official or public debate about the implications of creating a new defence. Assuming that the clause does operate as a statutory defence, it confers greater protection on ICHs and ISPs than the common law defence of innocent dissemination. It does so because it insulates an ICH or ISP from liability unless it is aware of the nature of the Internet content. It is uncertain whether this means knowing that the material is defamatory, or merely knowing that it could be defamatory. It seems, however, that, unlike the common law defence, an ICH or ISP may escape liability for distributing defamatory material even if it has reason to suspect that material is defamatory, provided only that it does not actually know the nature of the material. The exact relationship between the protection given to ICHs and ISPs under clause 91, and the common law defence of innocent dissemination, is uncertain. This depends on whether ICHs and ISPs are entitled to the defence of innocent dissemination, which is discussed immediately below.

6.4 Liability of Internet intermediaries under Australian common law

Part 3 of this paper explained that the main basis of liability for defamation under Australian common law is that everyone who “takes part” in communicating defamatory material, in whatever degree, publishes the material, and is therefore liable for defamation. English and Australian courts have not felt the need to elaborate on the distinction between a person who “takes part” in a publication, and a person who is not a publisher. In determining whether an Internet intermediary is a publisher, analogies must therefore be drawn with parties that have been held to be publishers of print or broadcast material.

Part 4 of the paper explained that, following the joint decision in *Thompson’s case*, a publisher will be designated a “subordinate publisher”, and be entitled to the defence of innocent dissemination, if the publisher does not have the ability to “control” the published material. This section of the paper applies the Australian common law relating to liability for defamation to Internet intermediaries. As explained in Part 2 of the paper, the design of the Internet means that legal analysis of the Internet must be sensitive to the differences between Internet applications.

ISPs

⁴⁸ See, for example, *Bropho v State of Western Australia* (1990) 93 ALR 207 at 214-215; Reg Bartley, *The Modern Approach to Statutory Construction* (Bartley, Sydney, 2000) pp 84-6.

ISPs provide users with access to the Internet. An ISP may, however, fulfil analytically distinct functions in relation to different Internet applications. For example, the World Wide Web is a form of remote information retrieval. In providing access to the World Wide Web, an ISP is therefore involved with the distribution of information. The role of an ISP in applications principally concerned with interpersonal communications, such as e-mail, “listserv” mailing lists, or Internet Relay Chat (IRC), may be quite different. In relation to such applications, an ISP would appear to be facilitating the communication of messages between users. It could therefore be argued that, at least in relation to e-mail, the role of an ISP is much like that of a telecommunications carrier in traditional voice telephony. One potentially important difference, nevertheless, is that e-mail messages are commonly stored on mail servers operated by ISPs. On the other hand, a carrier offering a telecommunications message or information service, such as the carrier in *Anderson’s case*, also operates facilities for storing and retrieving information. The function of an ISP in providing access to Usenet newsgroups is somewhere between the role of providing access to the World Wide Web, and the role of providing interpersonal communications services, such as e-mail. This is because Usenet newsgroups – being a form of many-to-many messaging, or distributed message databases – are concerned with both the widespread distribution of information, and passing messages.

The most important issue in relation to the liability of ISPs is whether they “take part” in the publication of material by means of the Internet, and are therefore publishers. As explained at para 6.2.2 above, in *Godfrey v Demon Internet Ltd*, Morland J held that an ISP that offered access to Usenet newsgroups was a publisher. He held that an ISP published a posting every time information was transmitted from its news server to a subscriber. It appears that the decision was based, at least in part, on analogies with cases establishing the liability of disseminators of printed material, and cases establishing liability for failure to remove material. While not expressly incorporating into English common law the distinction drawn under United States common law between active and merely passive participants, Morland J distinguished *Anderson’s case*, on the basis that the role of an ISP in providing access to Usenet newsgroups is not merely passive. The decision in *Godfrey v Demon Internet Ltd* may be contrasted with the liability of an ISP under United States common law, as established in *Lunney’s case*. In that case, the New York Court held that an ISP that provided e-mail access was not a publisher because it performed no editorial or participatory function. In *Godfrey v Demon Internet Ltd*, however, Morland J maintained that the ISP in *Lunney’s case* would be held to be a publisher under English common law.

Australian courts are likely to follow the English common law, and conclude that ISPs are publishers, regardless of the different functions performed by ISPs in providing access to different Internet applications. In relation to the World Wide Web, the role of ISPs may be analogous to distributors of printed material, such as booksellers, newsagents, or even porters. In relation to Usenet newsgroups, an ISP both distributes information and operates news servers for storing information. The ISP may therefore be liable for distributing defamatory material, or for failing to remove defamatory material from a news server. At para [3.5] above, it was explained that, in *Urbanich v*

Drummoyne Municipal Council,⁴⁹ Hunt J held that a person could be liable for failing to remove material on the basis that he or she had consented to the publication of the material. In that case, he concluded that consent could be inferred from notice of defamatory material, an ability to remove it, and a failure to remove it within a reasonable period following a request. There may be different results depending upon whether an ISP is liable for distributing material or for failing to remove material. If an ISP is liable as a distributor, then notice of the defamatory material is irrelevant for determining liability, but if an ISP is liable for failing to remove material, liability commences only after the ISP receives notice of the defamatory material. In *Godfrey v Demon Internet Ltd*, as the action was brought only in relation to the period following the ISP receiving notice, the Court did not need to consider the liability of an ISP prior to receiving notice.

The role of an ISP in relation to person-to-person communications, such as e-mail, is more passive than its role in other Internet applications. It is arguable that an ISP's role in providing e-mail services is similar to that of a carrier in providing traditional telephone services. In Part 5 of this paper, it was explained that the liability of carriers under Australian law is uncertain because the courts have not developed a clear basis for distinguishing publishers from non-publishers. It was also suggested that policy considerations, such as the need to protect the privacy of telecommunications users, should be taken into account in determining whether a carrier is a publisher. Similar considerations may be relevant to determining the liability of ISPs for providing access to e-mail. Nevertheless, in *Godfrey v Demon Internet Ltd*, it was suggested that the ISP in *Lunney's case*, which provided an e-mail service, would be a publisher under English common law. Unless the courts develop a clearer basis for distinguishing publishers from non-publishers, it is likely that an ISP that does no more than provide access to e-mail will also be considered a publisher under Australian common law. If an ISP that provides access to person-to-person e-mail is a publisher it must be because of the role of the ISP in distributing messages. Although e-mail messages may be stored on a mail server operated by an ISP, liability for failure to remove material is not easily applicable to private communications sent from one person to another.

Irrespective of their precise function in providing access to Internet applications, ISPs are likely to be publishers under Australian common law. In *Godfrey v Demon Internet*, the decision that the ISP was a publisher was based, in part, on analogies drawn with distributors of printed material. Under English common law, if an ISP is a publisher because it is analogous to distributors of printed material, it would seem that the defence of innocent dissemination should be available to the ISP, just as it is to distributors such as newsagents, booksellers and libraries. As explained in Part 4 of this paper, however, Australian common law differs from English common law in that it does not determine whether a defendant is entitled to the defence of innocent dissemination solely by drawing analogies with decided cases. In accordance with the joint decision in *Thompson's case*, a publisher will be entitled to the defence of innocent dissemination if it does not have the ability to control and supervise the published material. In *Thompson's case*, the joint decision held that a broadcaster that merely re-transmitted

⁴⁹ (1991) Australian Torts Reports 81-127.

“live” material had the ability to control and supervise the material, essentially because it had decided to make the re-transmission near instantaneous, thus denying itself the opportunity to censor the material. At para 4.3 above, it was argued that this was a misapplication of the principle that a person who has some editorial control over published material is entitled to the defence of innocent dissemination. As explained at para 6.2.1 above, in the United States, in *Cubby, Inc v CompuServe*, it was held that, once a BBS operator decided to carry material, it was impossible for it to exercise editorial control. As a result of the volume of material accessed by means of the Internet, it is impractical for ISPs to exercise any meaningful editorial control. Even the use of filtering techniques, whether at the applications or packet level, presents significant practical difficulties. If the degree of editorial control is the basis for distinguishing subordinate publishers from publishers not entitled to the defence of innocent dissemination, then it would seem that ISPs that provide no more than access to Internet applications are subordinate publishers, and entitled to the defence of innocent dissemination.

Content hosts and BBS operators

Content hosts operate host computers, or servers, that store Internet content. Liability of a content host for defamation is most likely to arise in relation to storing Web sites. While many ISPs operate servers for hosting Web material, a content host is not necessarily an ISP. BBS operators provide host computers that allow subscribers to share or exchange messages, or transfer files. BBS operators may, or may not, also perform editorial functions, such as moderating discussion groups.

Under Australian common law it is probable that the courts will conclude that content hosts and BBS operators are publishers. People who offer a service of storing material on host computers are likely to be held responsible for failing to remove defamatory material, on analogy with cases establishing liability for failure to remove defamatory material from premises. Following the decision of Hunt J in *Urbanchich v Drummoyne Municipal Council*, a person who fails to remove defamatory material is a publisher if he or she has consented to publication of the material. It therefore seems that a content host or BBS operator will be a publisher if he or she fails to remove defamatory material within a reasonable period of receiving notice of the defamatory nature of the material. A content host or BBS operator will be liable for defamatory material stored on a host computer only after receiving notice of the defamatory nature of the material.

Content hosts that offer services for storing Web sites are unlikely to perform any editorial role in relation to the stored material. BBS operators may, or may not, perform an editorial role. For example, the BBS operator in the *Stratton Oakmont* decision established content guidelines, used filtering software and contracted with Board Leaders, who enforced the content guidelines. Content hosts and BBS operators that do not control and supervise Internet content, because they exercise no editorial control, are subordinate publishers, and therefore entitled to the defence of innocent dissemination.

A BBS operator may employ someone to exercise some editorial functions in relation to material posted to its bulletin boards, or it may have an agreement with an independent contractor to exercise editorial functions. The editorial functions exercised by an employee or contractor may include moderating discussion groups. If a BBS operator employs or engages another person to exercise editorial control over material, whether it can rely on the defence of innocent dissemination may depend upon whether it is vicariously liable for the person who exercises control. A BBS operator is, of course, vicariously liable for the actions of its employees. It may be difficult to determine whether a BBS operator is vicariously liable for the actions of an independent contractor. As explained at para [3.8] above, this depends upon whether the relationship between the operator and the contractor falls within an exception to the general rule that a principal is not vicariously liable for the tortious acts of an agent.

Discussion moderators and sysops

Internet applications involving group discussions, such as “listserv” mailing lists, Usenet newsgroups and Internet Relay Chat (IRC), may be moderated or unmoderated. A discussion moderator has the ability to decide which messages may be posted, or may delete messages. The moderator will usually make the decision to block a message based on whether it is relevant to the discussion group. In some groups, a moderator may also be responsible for blocking “offensive” messages. Different discussion groups have different rules, norms or practices about the level of intervention exercised by a discussion moderator.

A discussion moderator performs an editorial role and, like editors of newspapers and other printed material, is a publisher. As such, a discussion moderator is liable for defamatory material published by members of a moderated discussion group. If, as discussed at para [4.3] above, the basis of the distinction between subordinate publishers and publishers not entitled to the defence of innocent dissemination is that subordinate publishers do not exercise editorial control, then discussion moderators are not subordinate publishers, and are not entitled to the defence of innocent dissemination.

Sysops, or systems operators, are responsible for the day-to-day management of BBSs. In practice, a wide variety of roles may be performed by a sysop. At one extreme, a sysop may be concerned only with providing technical support for BBS subscribers, such as network maintenance concerned with ensuring access and security of communications. At the other extreme, a sysop may act as a discussion moderator in reading and editing messages posted to a bulletin board. A sysop that performs an editorial role is clearly a publisher, and liable for defamatory material posted to a moderated bulletin board. A sysop who performs editorial functions similar to a discussion moderator is clearly not a subordinate publisher, and not entitled to the defence of innocent dissemination. A sysop that merely provides technical support is in a different position. It could be argued that a sysop that provides no more than technical support is not a publisher because he or she performs a purely passive role in the publication of material, and therefore does not “take part” in publishing the material. Under English and Australian common law, however,

the courts have not endorsed a distinction between active and merely passive involvement in publishing material. A sysop that provides merely technical support might therefore be held liable for “taking part” in the distribution of defamatory material, or failing to remove defamatory material from a bulletin board. It appears more likely that a sysop that performs a purely technical role will be held to be a publisher if he or she receives notice of defamatory material, and fails to remove it within a reasonable period. A sysop that performs no editorial role would seem to be a subordinate publisher, and entitled to the defence of innocent dissemination.

ISPs and BBS operators may engage discussion moderators, or sysops, as either employees or independent contractors. ISPs and BBS operators are vicariously liable for the actions of discussion moderators or sysops that are employees. ISPs and BBS operators are less likely to be vicariously liable for the actions of discussion operators or sysops that are engaged as independent contractors.

Search engines and Web portals

Locating material on the World Wide Web often depends upon the use of a search engine. Some of the most important Internet companies, such as Yahoo! and Excite, began by offering search facilities. Search engines direct users to information published on the World Wide Web. Commonly, after a user enters a search, a search engine will display a list of Web sites that may be relevant to the search query. A user need only “click” on a hyperlinked site name to be directed to the requested Web site.

A search engine performs similar functions to hyperlinks included on a content providers Web site. Thus, a search engine directs users to Web material, and provides access to Web sites. The liability of content providers for defamatory material that may be accessed by hyperlinks included on the content provider’s Web site is dealt with at para 5.2 above. The main difference between a content provider that includes a hyperlink on his or her Web site, and an organisation that provides a search engine, is that a content provider must make a decision to include a hyperlink, whereas an organisation providing a search engine performs no conscious role in selecting the results displayed by a search engine. Search engines are completely automated. It could therefore be argued that cases, such as *Hird v Wood*,⁵⁰ which establish that a person who directs others to defamatory material publishes the material, are less applicable to search engine operators. It is difficult to argue that a person is responsible for directing someone to material if the person merely offers the means for others to select relevant material from the mass of material available on the Web. Likewise, it is difficult to make a case that the results displayed by a search are a republication, by reference, of defamatory material included on a Web site located by the search engine. The results displayed by a search are more like an index, or comprehensive bibliography of printed material. On the other hand, it could be argued that, as a search engine is a means of providing access to Web material, it is a mechanism for circulating material. On this basis, it could be contended that a search engine operator is involved in distributing Web material and, like an ISP, is a

⁵⁰ (1894) 38 SJ 234.

publisher. On the whole, it appears much less likely that a search engine operator would be held to be a publisher than other Internet intermediaries. If search engine operators are held to be publishers, then there is little doubt that they would be entitled to the defence of innocent dissemination if the elements are made out. In most cases, a search engine operator will neither know, nor have reason to suspect, that material accessed by means of a search is defamatory. It is therefore extremely unlikely that a search engine operator will be liable for defamatory material included on sites displayed as a result of a search.

In recent years, Internet-based organisations, such as ISPs, carriers and search engine operators, have established “portals” designed to be used as a starting point for accessing the World Wide Web. Portals may include search facilities, e-mail access, and material supplied by content providers, such as news, weather and financial information. Content providers supply and transmit their material to portal operators under an agreement with the portal operators. Portal operators may have some editorial role in selecting, or modifying, material supplied by content providers. A portal operator is clearly liable for publishing defamatory material supplied by a content provider that is displayed on its portal site. This form of liability is explained at para [3.10] above. The content provider will also be liable for defamatory material supplied to a portal operator and published on the portal pursuant to an agreement with the portal operator. As explained at para [5.2] above, if there is an agreement with the portal operator, the content provider will be liable for the republication of the defamatory material by the portal operator because it authorised or intended the republication. A portal operator that displays material supplied by content providers on its portal site will usually not be entitled to the defence of innocent dissemination because it will have the ability to control or supervise the material.

A portal operator that offers e-mail access is in essentially the same position, in relation to defamatory e-mails, as an ISP that provides e-mail access. Under Australian common law, the portal operator is likely to be a publisher of defamatory e-mails, but will be entitled to the defence of innocent dissemination if the elements of the defence are made out. A portal operator that provides search facilities performs the same role as a search engine operator. Thus, the portal operator is unlikely to be a publisher of defamatory material included on Web sites accessed by means of a search. If the portal operator is a publisher of such material, however, the operator will be entitled to the defence of innocent dissemination, and, on this basis, will rarely be liable for defamatory material included on Web sites displayed as a result of a search.

6.5 Conclusion

There are a potentially diverse array of function-based intermediaries involved in communicating material by means of the Internet. Internet intermediaries range from ISPs, that provide access to Internet applications, to discussion moderators, that control and edit messages posted to discussion groups. Internet intermediaries, such as ISPs, may perform analytically distinct functions in relation to different Internet applications. Moreover, a combination of functions may be performed by a single intermediary. A

different legal analysis may be appropriate for different intermediary functions, and for the different roles an intermediary may perform in relation to different applications.

The United States and English legal systems have responded in different ways to the legal issues raised by Internet intermediaries. As with other areas of defamation law, the United States common law in relation to liability for the publication of defamatory material has developed differently from English common law. Consequently, the application of United States common law to Internet intermediaries resulted in different conclusions about the liability of Internet intermediaries than have been reached under English common law.

Following the decision in *Lunney's case*, it appears that, under United States common law, an intermediary that performs no editorial or participatory function is not a publisher, and is therefore not liable for defamation. Thus, an ISP that provides access to e-mail was held not to be a publisher because it exercised no editorial control. It is arguable, however, that the Court in *Lunney's case* misinterpreted the decision in *Anderson's case*, which distinguished between publishers and non-publishers on the basis that a publisher performs an active function in the preparation or transfer of material, and not that a publisher performs an editorial function. Under United States common law, whether a defendant performs an editorial role is relevant to determining whether the defendant is subject only to the limited form of distributor liability, not to whether the defendant is a publisher. Nevertheless, even applying the distinction made in *Anderson's case*, in the United States, an ISP is not a publisher if it performs no active function in the preparation or transfer of material. This rule clearly applies to ISPs that provide access to e-mail, and may apply in relation to access to other Internet applications. If an intermediary, such as an ISP or BBS operator, is a publisher under United States common law, the decision in *Cubby v CompuServe* established that the intermediary is subject only to the limited form of distributor liability if it has little or no editorial control over the published material. The *Stratton Oakmont* decision held that an intermediary, such as an ISP or BBS operator is not entitled to the limited form of distributor liability if it exercises some degree of actual editorial control, such as establishing editorial guidelines, and taking steps to ensure those guidelines are complied with. The Court in the *Stratton Oakmont case* did not specify the degree of editorial control necessary to deny entitlement to distributor liability. In *Lunney's case*, however, the Court held that the use of filtering software did not amount to editorial control because it did not involve the use of judgment. The combined effect of the *Cubby* and *Stratton Oakmont* decisions was that a BBS operator or ISP, that took steps to control material published on a BBS or the Internet, was subject to a higher level of liability than an intermediary that did not attempt to control or monitor material. The United States common law therefore created an incentive for intermediaries to avoid establishing mechanisms for regulating material, including offensive or defamatory material, published by means of computer networks. The statutory immunity established by the *CDA* was intended, in large measure, to counteract the incentives to avoid self-regulation created by these common law decisions.

The process of deciding whether a defendant is a publisher under English common law is quite different. In *Godfrey v Demon Internet*, the Court drew analogies from previous

cases, rather than applying a principle for distinguishing between publishers and non-publishers. Thus, Morland J decided that an ISP that provided access to Usenet newsgroups was a publisher, essentially by drawing analogies with two lines of authority: cases establishing that distributors of printed material are publishers; and cases establishing liability for failing to remove defamatory material. Morland J did not expressly endorse the distinction drawn by *Anderson's case* between active and passive participants. Nevertheless, he concluded that an ISP that provides access to newsgroups does not perform a merely passive role because: it decides to store postings on its servers; the postings can be accessed by users; and the ISP has the ability to remove the postings. This suggests that liability of the ISP was based on failing to remove the defamatory material. In the course of the decision, Morland J maintained that the defendant ISP in *Lunney's case* would have been a publisher under English common law. It therefore appears safe to assume that, under English common law, ISPs are publishers, even if their role is confined to providing access to e-mail services.

In both the United States and the United Kingdom there have been legislative modifications to the common law liability of Internet intermediaries. In the United States, s 230(c)(1) of the *CDA* conferred a statutory immunity on certain Internet intermediaries. This immunity, known as the “good samaritan” provision, was intended to provide protection for ISPs or BBS operators that take an active role in monitoring or controlling material published by means of computer networks. In *Zeran's case*, a federal Court of Appeals held the provision applied to distributors because, under United States common law, distributors were simply publishers that were subject to a lesser form of liability. The Court held that the “good samaritan” provision was enacted both to protect freedom of speech, and to encourage intermediaries to take steps to regulate offensive material. In *Blumenthal's case*, it was contended that an intermediary that made an online newsletter supplied by another content provider available to subscribers was not entitled to the “good samaritan” provision because it was also an “information content provider”. A United States federal District Court held that the intermediary was not a content provider because it had no role in creating or developing the information in the newsletter. Even though the intermediary retained some editorial control over the newsletter, the Court held that it was entitled to protection, because the essential purpose of the “good samaritan” provision was to encourage intermediaries to exercise editorial control. The decision explained that the *CDA* treats providers of interactive computer services differently from other information providers, such as newspaper publishers or broadcasters, because the process of publishing online differs from the process of publishing a newspaper, or broadcasting.

The *Defamation Act 1996* (UK) introduced a statutory defence for Internet intermediaries, which is significantly different from the immunity conferred by the “good samaritan” provision. The United Kingdom legislation established a new statutory form of the common law defence of innocent dissemination. The statutory defence applies to a broader range of people than the defence of innocent dissemination. The defence applies to operators or providers of access to a communications system, if the operator or provider has no effective control over the person who transmits material. It applies if the defendant can establish that he or she was not the author, editor or publisher of material;

took reasonable care in publishing the material; and neither knew, nor had reason to believe, that the statement was defamatory. In *Godfrey v Demon Internet Ltd*, Morland J held that the statutory defence applied to an ISP that provided access to Usenet newsgroups. The defence will apply to an Internet intermediary that provides access to material produced by others, but does not apply if the intermediary is an editor or a publisher.

In Australia, Commonwealth legislation introduced to regulate and control access to Internet content may provide a statutory defence to some Internet intermediaries. The legislation immunises ISPs and ICHs from civil or criminal liability under State or Territory legislation, or rules of common law or equity, in relation to hosting or carrying Internet content, provided the ISP or ICH was not aware of the nature of the content.⁵¹ If the legislation applies to ISPs and ICHs in relation to actions for defamation, it appears to confer greater protection than the common law defence of innocent dissemination. The relationship between the statutory defence and the common law defence of innocent dissemination is unclear. Nevertheless, the common law defence continues to be relevant to intermediaries that are not ISPs or ISPs, and to ISPs and ICHs in relation to activities other than hosting or carrying Internet content.

Apart from the possible application of the statutory defence under Schedule 5 of the *Broadcasting Services Act 1992* (Cth), the liability of Internet intermediaries in all Australian States and Territories, except for the Code States, depends upon the common law rules of liability explained in Parts 3 and 4 of the paper. The likely position of Internet intermediaries under Australian common law is as follows:

- *ISPs*

By analogy with parties that have been held to be publishers of print or broadcast material, Internet intermediaries may be publishers because they participate in distributing material, or fail to remove defamatory material. Australian courts are likely to follow the English decision in *Godfrey v Demon Internet Ltd*, and hold that ISPs that provide access to Internet applications are publishers, regardless of functional differences in providing access to different applications. According to the joint decision in *Thompson's case*, a publisher is entitled to the defence of innocent dissemination if it does not have the ability to control and supervise published material. As it appears to be generally impractical to exercise editorial control over access to Internet applications, ISPs that merely provide access to Internet applications would appear to be entitled to the defence of innocent dissemination.

- *Content hosts and BBS operators*

Content hosts and BBS operators, that do no more than store material on host computers, are likely to be held to be publishers by analogy with cases establishing liability for failing to remove defamatory material. By analogy with the decision of Hunt J in *Urbanchich v Drummoyne Municipal Council*, a content host will be a publisher if,

⁵¹ *Broadcasting Services Act 1999* (Cth), Schedule 5, cl 91.

following notice of defamatory material, he or she fails to remove the material within a reasonable period. A content host or BBS operator therefore only becomes a publisher after receiving notice. A content host or BBS operator will be entitled to the defence of innocent dissemination if it exercises no editorial control over material stored on a host computer, but not to the statutory defences in the Code States.

- *Discussion moderators and sysops*

A discussion moderator exercises editorial control. Discussion moderators, and organisations that employ discussion moderators, therefore would not seem to be entitled to the defence of innocent dissemination. Sysops may perform a wide variety of functions in managing BBSs, and their liability may vary accordingly.

- *Search engine providers and portal operators*

It could be argued that, as a search engine is a means of providing access to material, a search engine operator directs users to material, or takes part in distributing Web material, and is therefore a publisher. It is, however, unlikely that a search engine operator would be held liable for defamatory material included on sites displayed as a result of a search. Portal operators are liable for publishing defamatory material, supplied by other content providers, that is displayed on a portal site.