

Part 7: Conclusion

This paper is concerned with the application of defamation law to the Internet. Defamation law represents the attempt of the legal system to balance the protection of reputation and freedom of speech. The Internet is primarily a system for distributing large amounts of information. The Internet holds the promise of increasing freedom of speech. By reducing barriers to entry, it increases the number of people who can become publishers. At the same time, it provides an unparalleled mechanism for the widespread dissemination of defamatory material. The Internet therefore affects the balance between the protection of reputation and freedom of speech. It does so because it introduces new ways of publishing and distributing information. In relation to defamation law, the Internet does not have immediate implications for the kind of material considered defamatory,¹ or for whether the material is sufficiently referable to a plaintiff. It does, however, introduce new considerations relevant to the communication, or publication, of defamatory material. Consequently, it is this element of the action for defamation - publication – that is the subject of this paper.

Applying traditional legal concepts to new forms of communication necessarily involves some adaptation and modification of those concepts. Thus, during the twentieth century, defamation law was required to adapt to the introduction of broadcasting. The Internet, however, poses more potential challenges for defamation law than broadcasting ever did. It therefore represents an important opportunity to re-examine the substantive law of defamation in a way that was not considered necessary to accommodate broadcasting.

Defamation is an extremely technical area of the law. The technicalities are the result of historical compromises and piecemeal changes; such is the operation of the common law. The English and Australian substantive law of defamation is largely the product of the historical development of the tort. In the United States, defamation law in the last half of the twentieth century was influenced by the First Amendment protection of free speech. The English and Australian legal systems have therefore established a different balance between protecting reputation and freedom of speech than the balance struck in the United States. While English and Australian courts have generally given more emphasis to the protection of reputation, the United States courts have given more weight to the protection of free speech. In applying defamation law to novel issues, such as those arising in relation to the Internet, United States precedents must therefore be treated with caution.

The publication of material by means of the Internet is different to the publication of print or broadcast material. As it lowers barriers to entry, allowing anyone with a computer and Internet access to be a publisher, it removes editorial intermediaries. It also allows for the near instantaneous, widespread circulation of information. This increases risks of the dissemination of defamatory material. On the other hand, it unbundles and

¹ As Quirk points out, however, because Internet communication practices, such as “flaming”, are more “robust” than other forms of communication, this may influence the way judges and juries view what is defamatory: see Patrick Quirk, “Defamation in Cyberspace and the Corporate Cybersmear” in Anne Fitzgerald et al (eds) *Going Digital 2000* (2nd ed, Prospect Media Pty Ltd, St Leonards, 2000) p 298.

decentralises communications processes that, in the print and broadcast media, have been conventionally performed by one organisation. The Internet therefore removes editorial intermediaries, but communications by means of the Internet potentially involve a diversity of other intermediaries. Given the volume of material available on the Internet, however, it is impractical for Internet intermediaries to exercise much control over Internet content. These features of the Internet raise issues of whether, applying existing defamation law, those involved in communicating by means of the Internet are liable as publishers of defamatory material, and, if they are liable, to what extent they are liable. The application of existing defamation law to those involved in communicating material by means of the Internet was considered in Parts 5 and 6 of this paper. By changing the way in which information is published, the Internet also raises the questions of who should be liable for publishing, and to what extent those who are regarded as publishers should be liable. This necessarily involves an assessment of the existing rules of liability.

This concluding section of the paper has three sections. The first section examines the question of who, as a matter of policy, should be considered a publisher of material distributed by means of the Internet. The second section investigates the proper extent of liability for intermediaries involved in publishing material on the Internet. The final section summarises recommendations for modifying defamation law to address the difficulties uncovered by the analysis of the application of existing liability rules to those involved with the publication of Internet material.

7.1 Who should be a publisher?

Reputation is harmed by the communication and circulation of defamatory material to people other than the plaintiff. The more widespread the circulation of defamatory material, the more potential harm to a person's reputation. Consequently, the courts have held that all those involved in the communication or distribution of defamatory material are publishers, and are therefore liable for the tort of defamation. Thus, apart from authors, editors and publishers (as that term is commonly used), those involved only in the sale or distribution of material, such as newsagents, booksellers and libraries, have been held liable for defamation. At times, this approach has reached apparently absurd lengths. For example, in the old English case of *R v Clerk*,² a printer's servant was held liable for merely "clapping down" the printing press.

The most important legal basis of liability for civil defamation under English and Australian common law is that a person is liable for defamation if he or she "takes part" in publishing defamatory material. The degree of involvement in communicating the material is irrelevant for the purposes of determining whether a person has "taken part" in publishing material. Although there are other potential bases of liability, including "authorising" a defamatory publication, the breadth of the principle that all those who "take part" in publishing material are liable, reduces the practical significance of these alternative forms of liability. The English and Australian courts have not found it necessary to elaborate on the meaning of "taking part" in a publication, and have developed no clear rule for distinguishing between different levels of involvement in

² (1728) 1 Barn 304.

communicating material. For the most part, this has not been necessary because, in relation to print and broadcast material, it is relatively clear whether a person has “taken part” in communicating the material.

Difficulties may arise, however, in borderline cases where a defendant plays a less than direct role in the communication of material. These difficulties are not confined to new communications technologies, but have sometimes appeared in connection with the print media. For example, in *Marchant v Ford*³ it was argued that a person who printed an advertisement for a book, but did not print the book, was liable for defamatory material contained in the book. It also remains an open question whether a person who provides photocopying facilities, used to make copies of defamatory material, is a publisher.⁴

The issue of whether a person has “taken part” in publishing material is likely to arise more often in relation to communications by means of the Internet. Plaintiffs are more likely to bring actions against borderline defendants for defamatory Internet publications because those who are more directly involved in publishing material, such as message originators or content providers, may be difficult to locate, or impecunious. As the Internet lowers entry barriers, it is unnecessary to have “deep pockets” to be a publisher; there is little point in a plaintiff bringing an action against an impecunious defendant. Message originators or content providers may be difficult to locate because the Internet allows for anonymous communications. Moreover, because the Internet is global, it may be difficult to bring an action against the defendant, or the defendant may be beyond the reach of local courts.

Under English and Australian common law, defamation is a tort of strict liability. Following the decision of the United States Supreme Court in *Gertz v Robert Welch, Inc.*,⁵ however, under United States law, defamation must include some element of mental fault under United States law.⁶ An important distinction between English and Australian common law, on the one hand, and United States law, on the other, is that, as a result of the influence of the First Amendment, mental fault is a necessary element of the tort of defamation in the United States. As, under English and Australian common law, liability for defamation is strict, knowledge of the defamatory nature of published material is generally irrelevant to determining whether a person has published defamatory material. A plaintiff need only establish that the publication was intentional or negligent, not inadvertent. The strict liability of defamation may, nevertheless, create difficulties if a defendant has a borderline involvement in publishing material. In borderline cases, such as printing an advertisement for a book, or providing photocopying facilities, there may be a tendency to think that a defendant should be liable if he or she knew of the defamatory material. As illustrated by *Anderson's case*, however, if a defendant is not a publisher, he or she is not liable, regardless of whether he or she had notice of the defamatory material. Under English and Australian common law, a person who is not a

³ (1936) 2 All ER 1510.

⁴ Cf *University of New South Wales v Moorhouse* (1975) 133 CLR 1 (in relation to copyright law).

⁵ 418 US 323 (1974).

⁶ See, for example, LH Bloom, “Proof of Fault in Media Defamation Litigation” (1985) 38 *Vanderbilt Law Review* 247.

publisher of defamatory material could only possibly be liable as a result of knowing of defamatory material, if the person fails to take down defamatory material following notice. Apart from this, knowledge may be relevant to whether a person is part of a “common design”, and therefore a joint tortfeasor. As explained at para [3.9] above, however, it is uncertain how the courts would react to an argument that a person is liable for a defamatory publication because he or she is a joint tortfeasor.

Liability for failing to take down defamatory material is a sub-set of liability for “taking part” in publishing defamatory material. In *Byrne v Deane*⁷ and *Urbanchich v Drummoyne Municipal Council*,⁸ it was held that a person who had authority to remove defamatory material, and failed to do so, would be liable as a publisher, because he or she consented to the continued presence of the material. In *Urbanchich v Drummoyne Municipal Council*, Hunt J held that consent to the presence of defamatory material could be inferred from notice of the defamatory material, an ability to remove it, and failure to remove the material within a reasonable period following a request. In these circumstances, therefore, liability may depend upon a defendant receiving notice of defamatory material. If liability for failing to remove material depends upon receiving notice, a defendant who fails to remove material can only become a publisher, and therefore be liable for defamation, after receiving notice of the defamatory nature of the material.

It is therefore extremely important to determine the basis on which intermediaries, such as ISPs, content hosts, or BBS operators, are liable for defamation. If they are liable for distributing material, by analogy with distributors of printed material, such as booksellers, or libraries, then notice is irrelevant to whether they are publishers. If, on the other hand, they are liable for failing to remove material, then liability only commences after notice of the defamatory material has been received. To date, cases dealing explicitly with liability for failing to remove material have been concerned only with defendants who control premises. It may be, however, that the *Demon Internet* case extended the principle to ISPs. It may also be that the principle could be extended to all defendants who provide the facilities or means for communicating defamatory material, if they have notice of the defamatory nature of the material communicated. Apart from the questionable decision in *Lobay’s case*, dealt with at para [3.7] above, the law has not developed to this extent.

Other than liability for failing to remove material, notice is relevant to the extent of liability of defendants who merely distribute defamatory material. Thus, distributors of printed material are entitled to the common law defence of innocent dissemination. In other words, mere distributors may escape liability if they neither know, nor have reason to know, of the defamatory nature of material they are disseminating. Again, this suggests that, where there is a less direct involvement in publishing defamatory material, there is a tendency for the courts to consider mental fault as relevant to the liability of a defendant.

⁷ [1937] 1 KB 818.

⁸ (1991) Australian Torts Reports 81-127.

As reputation is damaged by the communication of defamatory material, and the harm is related to the extent to which the material is circulated, all those who participate in the communication of defamatory material have been held liable for defamation. There may, however, be other policy considerations relevant to whether a person who is involved, to a limited extent, in the communication of material, should be liable for defamation. In determining whether a person is a publisher, English and Australian courts have not explicitly taken competing policy considerations into account. In *Anderson's case*, however, the New York Court of Appeals held that a person who did not perform an active or affirmative function in the preparation or transfer of material, but performed a merely passive role, was not a publisher. The policy basis for excluding carrier liability was not considered by the Court of Appeals to any great extent. The decision did, however, refer to the special position of carriers under United States law. As a public utility under United States law, a carrier is required to make its equipment available to the public, and cannot terminate service, except in certain limited circumstances.⁹

The dissenting opinion of Witmer J in the Appellate Division of the New York Supreme Court included a more complete consideration of the policy issues involved in determining whether a carrier should be liable for defamation. Witmer J argued that a carrier is in the same position as a person who leases a sound amplification system, or leases a typewriter or tape recorder. He contended that, regardless of whether a person who supplies facilities knows that they are being used to disseminate defamatory material, the facilities provider should not be liable because he or she has not participated in preparing the message, nor exercised any discretion or control over its communication.¹⁰ Put in this form, the question is whether a person who merely provides facilities should be liable for defamatory material published by means of the facilities, even if he or she knows of the specific defamatory material.

Although it is sometimes assumed that a mere facility provider is not a publisher, the question of whether a person becomes a publisher by providing the means for communicating defamatory material, knowing that the facilities will be used to communicate specific defamatory material, remains open under Australian common law. As a matter of general policy, and given the strong protection afforded reputation under English and Australian law, there appears no reason why a facility provider, who controls the means of communication, and knowingly supplies the means for communicating defamatory material, should not thereby become a party to the defamation. There would appear to be a clear analogy between facility providers who control the means of communication, and those who control premises, and fail to remove defamatory material. To be liable, however, facility providers would need to have the same level of involvement as an “accessory” to a tortious act or omission. That is, they would need to know that facilities were being used for communicating specific defamatory material.

Holding that facility providers who knowingly supply the means for communicating defamatory material are publishers, and therefore liable for defamation, provides stronger support for reputation. There may, nevertheless, be additional countervailing

⁹ 361 NYS 2d 913, 915-916 (1974).

¹⁰ 345 NYS 2d 740, 752 (1973).

considerations in the case of telecommunications carriers. In his dissenting opinion in *Anderson's case*, Witmer J held that, even if a carrier is a publisher, it should be entitled to the qualified privilege historically available to telegraph companies under United States law. He argued that extending the qualified privilege to telecommunications carriers would promote a number of important social policies. These policies included:

- the right of telephone subscribers to access public communications facilities, which could not be terminated, except in certain limited circumstances;
- the right of subscribers to private communications, including freedom from monitoring, and the recognition that carriers do not, and should not, exercise editorial responsibility over private messages;
- that it would be inefficient to require carriers to investigate complaints about the truth of communications between subscribers; and
- the First Amendment rights of subscribers, which required a hearing on the substantive merits of a case, before a telecommunications service could be terminated.¹¹

Economic activity has become increasingly dependent upon telecommunications infrastructure and services; the role of an efficient telecommunications sector in promoting economic growth is difficult to over-estimate. For example, it is acknowledged that telecommunications contribute to productivity by reducing transaction costs, improving market information and accelerating the diffusion of knowledge.¹² At the same time, the effectiveness of the telecommunications system for interpersonal messages depends, in large measure, upon confidence in the privacy of communications. Apart from privacy considerations, the volume of material transmitted across a carrier's network means that it is impractical for a carrier to monitor communications content. The role of a telecommunications carrier is therefore to provide connectivity between users, irrespective of the contents of material communicated. In relation to its usual activities, no policy objective is furthered by imposing liability on a carrier for defamatory material transmitted by means of its network, except to provide an additional potential defendant for aggrieved plaintiffs.

The most difficult question, in relation to carrier liability, is whether a carrier should be liable if it knows that its network is being used to transmit defamatory material. It is highly unlikely, not to mention undesirable, for a carrier to be aware of the nature of material communicated by private interpersonal messages. The issue is therefore likely to arise mainly in connection with the use of a telecommunications network to provide access to information in more permanent form, such as the telephone information service in *Anderson's case*, or comparable Internet services. If a carrier is considered to publish material included on services, such as recorded information services, then, under Australian common law, it will be liable for defamatory material included on such

¹¹ 345 NYS 2d 740 at 753-4.

¹² See C Antonelli, *The Diffusion of Advanced Technologies in Developing Countries* (OECD, Paris, 1991); SM Greenstein and PT Spiller, "Modern Telecommunications Infrastructure and Economic Activity: An Empirical Investigation" (1995) 4 *Industrial and Corporate Change* 647; Gary Madden and Scott J Savage, "Telecommunications Productivity, Catch-up and Innovation" (1999) 23 *Telecommunications Policy* 65.

services unless it can establish the defence of innocent dissemination. This is similar to the current position of carriers in the United Kingdom whereby, under the statutory defence explained at para 6.3.2 above, a carrier appears to be liable unless it can establish that it took reasonable care, and that it neither knew, nor had reason to know, that a statement was defamatory. Under either the common law defence, or the United Kingdom statutory defence, if a carrier is a publisher, it will be liable for defamation if it is notified of defamatory material being transmitted by a telecommunications service, and fails to remove it.

The problem may be analysed by examining the implications of holding a carrier liable in terms of the balance between the protection of reputation and freedom of speech, then looking at whether the analysis is altered by any additional policy considerations. On the one hand, holding a carrier liable, after it receives notice that defamatory material is being transmitted by a service, would offer greater protection to innocent plaintiffs who are harmed by defamatory messages. This may be beneficial if, for example, a content provider is impecunious. On the other hand, if carriers are held to be publishers of such material, a request to remove material would usually be sufficient for a carrier to take action to cancel a service, such as a recorded information service. This is because carriers would understandably not wish to bear the risk of potentially costly defamatory actions. The practical result of holding carriers liable as publishers would therefore be to offer additional protection for reputation, but to restrict freedom of expression of material communicated by means of telecommunications networks.

We therefore need to look more closely at the role performed by telecommunications carriers to see whether it is appropriate for carriers to make decisions about removing particular content. Historically, telecommunications carriers have been concerned almost exclusively with the carriage of communications, and not with content. With the convergence of communications, carriers have increasingly become interested in providing communications content, especially through strategic alliances with content-based corporations.¹³ Nevertheless, in relation to the traditional functions of providing communications connectivity, carriers appear ill-adapted to making decisions about communications content. Insofar as a carrier is involved purely with providing communications connectivity, it should be concerned with ensuring the efficiency and privacy of communications, and not with controlling the content of communications. These considerations suggest that, if the role of a carrier is merely to transmit material, including information services as well as interpersonal messages, there is little to be achieved by making it responsible for content communicated by means of a network under its control.

These policy considerations suggest that, unless a carrier is involved with the preparation of communications content, it should not be regarded as a publisher of material transmitted by its network. As explained in Part 5 of this paper, under Australian common law, the liability of a carrier for defamatory material transmitted by its network is not entirely clear. Legislation may therefore need to be considered to unequivocally

¹³ For example, Telstra, News Limited and Publishing and Broadcasting Limited (PBL) own shares in the major Australian Pay TV corporation, FOXTEL.

establish that a carrier is not a publisher, and therefore not liable for defamatory material transmitted by its network. This would bring Australian law into line with the position established by *Anderson's case* in the United States, and would confer greater protection on carriers than appears to be the case in the United Kingdom, where carriers must apparently rely on the limited protection available under the statutory defence.

The role of an ISP in providing access to e-mail services is almost functionally indistinguishable from the role of a carrier in transmitting interpersonal messages. Like a carrier, an ISP is concerned with two main functions, ensuring an e-mail reaches its destination, and respecting the privacy of interpersonal communications. As explained at para [6.2.1] above, in *Lunney's case*, a United States court held that an ISP that provided access to an e-mail service did not publish e-mail messages delivered by the service. The Court in *Lunney's case* clearly believed that it was not the proper role of an ISP to vet interpersonal e-mail messages. It held that the role of an ISP was more like that of a telecommunications carrier than a telegraph company.

It would therefore appear that an ISP that provides access to an e-mail service should be entitled to the same protection as a carrier. There are, however, some important differences between e-mail and traditional voice telephony. One difference is that it is easy for a user to compile a personal mailing list and send a single message to multiple receivers. Another difference is that an e-mail message may include an attachment, which contains information produced by someone other than the sender, or a hyperlink to Web material. Internet applications, including e-mail, blur the distinction between one-to-one and one-to-many communications. In relation to one-to-many applications, such as "listserv" mailing lists and Usenet newsgroups, it is arguable that an ISP performs a more active role than it does in providing access to an e-mail service. This is because ISPs store such messages on servers, from which the messages may be accessed by many users. The role of an ISP in providing access to one-to-many communications is similar to that of a person who controls premises on which defamatory information is displayed. It may, in fact, be easier for an ISP to remove a posting from a server than for a person who controls premises to remove material from a wall.

It would therefore seem that an ISP that operates facilities which store material that can be accessed by multiple users, should be subject to a higher level of responsibility than a carrier that does no more than provide the means for connecting telecommunications users. Although a functional analysis suggests that there are important differences between providing access to one-to-one communications, such as e-mail, and providing access to one-to-many communications, in practice, it may be difficult to draw adequate legal distinctions between these two kinds of service. It is, however, not difficult to distinguish ISPs from telecommunications carriers.

It is therefore possible to argue that ISPs, who provide access to Internet applications, should be considered publishers of material communicated by means of such applications, regardless of the different functions performed in providing access to different applications. Nevertheless, by analogy with the liability of those who control premises, an ISP should only become liable after receiving notice of defamatory material,

and failing to remove it within a reasonable period. The appropriate extent of liability for ISPs is considered further at para [7.2] below.

Some organisations, such as large corporations and universities, provide their own access to the Internet. If such an organisation monitors the e-mail of employees, it performs a more active role than an ISP that merely provides access to an e-mail service. There is little doubt that an organisation that monitors e-mail accepts responsibility for the content of the monitored messages, publishes the messages, and is therefore liable for any defamatory e-mails.

One of the most important features of the Internet is that it provides access to a large and diverse array of information. This feature is valuable, however, only insofar as users are able to quickly and effectively locate relevant material. Two important mechanisms for locating material on the World Wide Web are search engines and hyperlinks. Hyperlinks provide effective access to associated information, and are an important attempt to deal with the problem of “information overload”. Holding search engine operators, or content providers, liable for defamatory material accessed by means of search engines or hyperlinks, would undermine the effectiveness of the Internet as a means for distributing information. Given the volume of material available on the World Wide Web, there is no way for search engine operators to monitor information accessed by means of a search engine. Moreover, given that Web material may be regularly altered, it is difficult, or impractical, for content providers to monitor hyperlinked material. It is possible that a search engine operator, or content provider who includes a hyperlink, might be held liable for directing users to defamatory material, or publishing defamatory material by reference. Nevertheless, this would undermine the effectiveness of the Internet as a means for distributing information, and its potential for increasing freedom of expression. It may be unlikely that the courts would mechanically apply precedents to attach liability to search engines or hyperlinks. In any case, holding that search engine operators, and content providers who include hyperlinks, publish information accessed by means of search engines, or hyperlinks, would appear to serve no identifiable policy objective.

7.2 To what extent should Internet intermediaries be liable for publishing defamatory material by means of the Internet?

As the circulation of defamatory material harms reputation, those involved in the distribution of material have been held to publish the material, and therefore to be liable for defamation. In relation to the distribution of electronic material, there may be policy considerations which suggest that some who are involved, in a minor way, in the distribution of material, should not be regarded as publishers, even if they receive notice of defamatory material. Thus, telecommunications carriers are concerned mainly with the efficient delivery of communications, and should not be liable for defamatory material delivered by means of a telecommunications network. Search engine operators, and content providers that incorporate hyperlinks, perform valuable functions in assisting Internet users to locate relevant material. They should not be held liable for defamatory material accessed by means of search engines or hyperlinks. Other Internet

intermediaries perform more active roles in the distribution of material by means of the Internet. Thus, ISPs, content hosts, BBS operators and discussion moderators should generally be regarded as publishers, and therefore, as liable for defamatory material they may be involved in distributing or editing.

The common law defence of innocent dissemination was developed to protect distributors, such as newsagents, booksellers and libraries, who had no good reason to know the nature of material they were involved in distributing. The juridical basis for the defence has, however, never been entirely clear. A person entitled to the defence must establish that he or she neither knew, nor ought to have known, that the distributed material was defamatory. This suggests that the defence should apply to publishers whose function in the communication of material means that they are not generally in a position to know, or monitor, communications content. Thus, the volume of material distributed by a bookseller, newsagent or library, means that it would be impractical for them to monitor the contents of material they distribute.

In Australia, the High Court, in *Thompson's case*,¹⁴ experienced some difficulty in stating the criteria for distinguishing those entitled to the defence, from those not so entitled. The joint decision apparently distinguished between those responsible for the production, selection or composition of material, who are not entitled to the defence, and those with no ability to exercise control or supervision of material, who are entitled to the defence. The High Court held that a broadcaster who re-transmitted live material was not entitled to the defence. In *Auvill v CBS 60 Minutes*,¹⁵ however, a United States federal District Court held that a broadcaster that re-transmitted material was entitled to the limited form of liability available to distributors in the United States. As explained at para [4.4] above, the United States court advanced three reasons for extending distributor liability to the broadcaster: that it would be economically inefficient to impose a duty to censor on the broadcaster; that it would “chill” freedom of speech; and that a plaintiff would retain an action against the original broadcaster.

In *Thompson's case*, the joint decision in the High Court pointed out that United States decisions on “distributor liability”, including *Auvill's case*, must be treated with caution because of the influence of the First Amendment in shaping the decisions.¹⁶ The joint decision did not, however, take up the important argument that the broadcaster was entitled to “distributor liability” because it would be inefficient to require it to monitor or censor re-transmitted material. Subsequent United States decisions have also failed to give this argument the weight it deserves. Thus, in *Cubby's case* and the *Stratton Oakmont* decision, the United States courts distinguished between those with editorial control over material, who were not entitled to distributor liability, and those with no editorial control, who were entitled to distributor liability. In making this distinction, the courts were strongly influenced by the First Amendment basis for “distributor liability”, stemming from the decision in *Smith v California*.¹⁷ Thus, in *Cubby's case*, the Court

¹⁴ (1996) 186 CLR 574.

¹⁵ 800 F Supp 928 (1992).

¹⁶ (1996) 186 CLR 574 at 590, fn 76.

¹⁷ 4 L Ed 2d 205 (1959).

held that, if it was not feasible for a distributor to exercise editorial control, it would infringe the First Amendment to require the distributor to monitor content. In the *Stratton Oakmont* decision, however, the Court did not look at whether it was feasible to exercise editorial control, but whether Prodigy actually exercised editorial control. Thus, it distinguished the *Auvill* decision on the basis that, in that case, the broadcaster had the ability to exercise editorial control, but did not do so. The United States courts therefore confused the potential to exercise editorial control, with actual editorial control. This meant that, under United States common law, attempts by intermediaries, such as ISPs, to control or monitor communications content, would deny the intermediary the benefit of distributor liability. The consequent incentive to avoid attempts to self-regulate led directly to the introduction of the statutory immunity conferred by the *CDA*.

The problems presented in Australia by the joint decision in *Thompson's case* are quite different. According to that decision, a defendant with no ability to exercise control or supervision of material is entitled to plead innocent dissemination. In applying this distinction, the joint decision apparently concluded that an ability to control content by refusing to distribute material was sufficient to deny the availability of the defence. A distributor may, however, have an ability to control the distribution of material, but it may not necessarily be practical or efficient for the distributor to monitor the material distributed. Moreover, a distributor may attempt to impose some controls over the content of material distributed, even if it is not practical or efficient for the distributor to monitor or control all of the material distributed.

The decision in *Auvill's case* asserted that distributor liability should be available if it is not economically efficient to censor or monitor material. This suggests that the distinction between those entitled to the defence of innocent dissemination, and subordinate publishers, should be whether it is practical or efficient to monitor material. If a distributor deals with a large volume of material, it will generally be impractical or inefficient to monitor communications content. Thus, historically, newspapers, booksellers and libraries have been entitled to the defence of innocent dissemination. Similarly, as it is neither practical nor efficient for a broadcaster to monitor the re-transmission of live material, it should also be entitled to the defence. Under modern conditions, it would also appear impractical or inefficient to require printers to monitor material.

Internet applications make a large amount of material available to users. Intermediaries, such as ISPs, content hosts and BBS operators, may be involved in the dissemination of substantial amounts of material. It is generally impractical or inefficient to require such intermediaries to monitor the content they are involved in distributing, whether by providing Internet access, or by storing material that is able to be accessed by means of computer networks. Even though it may be impractical or inefficient to require such intermediaries to monitor content, an intermediary may engage in endeavours to control content, including, for example, the use of filtering software. Merely attempting to control Internet content should not deny an intermediary entitlement to the defence of innocent dissemination, if it is impractical or inefficient for the intermediary to monitor content.

As it is customary for a discussion moderator to read postings made to discussion groups, and to refuse to post or remove material, it would appear practical and efficient for moderators to monitor content. In most cases, the level of control exercised by discussion moderators will indicate that it is practical and efficient to monitor content. As suggested in the *Stratton Oakmont* case, the higher risk involved in offering a monitored service could be compensated by market demand for such services. On the other hand, if legislation were to be introduced, it may be difficult to adequately distinguish between moderated and unmoderated services. As moderators will usually be in a position to know the content of material posted to a discussion group they would, in most cases, fail to make out the defence. It would therefore not appear to impose undue hardships on plaintiffs to extend the defence of innocent dissemination to ISPs, content hosts, BBS operators and discussion moderators.

Under English and Australian common law, the onus of establishing innocent dissemination rests with the defendant. In the United States, on the other hand, the plaintiff bears the onus of proving that a defendant is not innocent. In his dissenting judgment in *Goldsmith v Sperrings Ltd*,¹⁸ Lord Denning contended that the onus of establishing innocent dissemination should be reversed under English common law, essentially because imposing a requirement on distributors to assess whether material being disseminated was defamatory would result in the suppression of contentious or controversial material. Lord Denning was concerned that requiring distributors to determine the likelihood of material being defamatory would result in self-censorship.

The ALRC expressed similar concerns about the dangers of self-censorship in its *Defamation Report*. The *Report* stated that the defence of innocent dissemination:

... has the effect of putting a disseminator on notice of the likelihood of the existence of defamatory matter as soon as a person claims that the disseminator is handling a document libellous of him: the library or distributor must immediately make a judgment whether to cease handling the document. In practice, libraries, news vendors etc are ill equipped to make a sound judgment. It is simply not worth their while to take the risk of retaining the document ... The effect is to stifle freedom of expression by imposing censorship without the intervention of a court.¹⁹

The same problem arises if liability is imposed on someone who controls premises, or hosts Internet content, for failing to remove defamatory material after receiving notice. Therefore, if liability is imposed on an ISP for distributing material, the operation of the defence of innocent dissemination means that, if a person complains about material, the ISP must make a decision about whether to cease distributing the material to prevent access. If the ISP decides not to block access to the material, it will not be able to rely on the defence of innocent dissemination because it has been notified of the material. A similar problem arises if liability is imposed on an ISP, content host or BBS operator for

¹⁸ [1977] 2 All ER 566.

¹⁹ ALRC (1979) *op cit* para 183, p 97.

failing to remove stored material. If a person complains about hosted material, the intermediary must decide whether to remove the material. If the intermediary fails to remove the material, and the material is defamatory, the intermediary will be regarded as publishing the material, and be liable for defamation from the time of receiving notice.

To overcome the problem of self-censorship, the ALRC recommended that those who were concerned with the publication of material solely as distributors be protected from prosecution, regardless of whether the distributor knew, or ought to have known, of the defamatory material.²⁰ The protection recommended by the ALRC is similar to the statutory immunity conferred on intermediaries in the United States by the “good samaritan” provision of the *CDA*. Although the defence proposed by the ALRC would deal with the problem of self-censorship, it would significantly reduce the protection available to defamed plaintiffs. The ALRC therefore proposed that an injunction be made available, so that a person claiming to be defamed could take action to restrain the distribution of defamatory material.²¹ The ALRC contended that protecting distributors, while providing a mechanism for plaintiffs to restrain publication, would strike an appropriate balance between the protection of reputation and freedom of expression. It would avoid the suppression of controversial material by making the courts, rather than distributors, responsible for deciding whether to restrict the circulation of material.

There are a number of problems with the solution proposed by the ALRC. First, by the time an injunction is granted, most of the damage to a plaintiff’s reputation arising from the defamatory material is likely to have taken place. On the other hand, this is little different to the position facing plaintiffs in relation to material published by newspapers, or broadcast material. Secondly, the ALRC proposed that an injunction be the only remedy available against mere distributors, thus restricting claims for damages to actions against publishers who are not mere distributors. This recommendation was, however, made on the understanding that a plaintiff would be able to recover damages in Australia from a defendant other than the distributor. The ALRC was concerned with the possibility that a plaintiff would be denied damages for imported material distributed in Australia. It therefore recommended against protecting distributors in relation to the distribution of imported material.²² As explained in Part 2 of this paper, however, it is more likely that plaintiffs will experience difficulties in bringing actions against message originators, or content providers, who publish material on the Internet, than if material is published in the print or broadcast media. This is because those responsible for producing Internet content are more likely to be impecunious, anonymous or located overseas than those responsible for print or broadcast material. The possibility that a plaintiff will be denied a remedy is an important consideration in assessing proposals for conferring immunity on Internet intermediaries. Thirdly, bringing a court action to restrict the circulation of defamatory material is a cumbersome, and potentially expensive exercise, especially if the material is clearly defamatory.

²⁰ *Ibid*, para 186, p 99.

²¹ *Ibid*.

²² *Ibid*, para 189, p 100.

In determining the appropriate extent of liability of Internet intermediaries, the protection of individual reputation must be balanced against the protection of free speech, in the new context of communications by means of the Internet. As the ALRC's *Defamation Report* explained, in relation to the traditional defence of innocent dissemination, this requires balancing the interests of innocent distributors, who cannot be expected to know the nature of the material they are involved with disseminating, and innocent plaintiffs, who are concerned to prevent the circulation of defamatory material.²³ If distributors are granted blanket protection, this will disadvantage plaintiffs, who may be denied a means for protecting themselves against defamatory publications. If, however, distributors become liable upon receiving notice of defamatory material, this is likely to result in the suppression of controversial material. The ALRC attempted to achieve a balance by relieving mere distributors of liability, while giving plaintiffs the option of applying for an injunction to restrain the circulation of material. This may not, however, adequately protect the interests of plaintiffs, especially in relation to Internet publications.

If intermediaries become liable only after receiving notice of defamatory material, the problem is to create a mechanism to prevent intermediaries responding to complaints by automatically suppressing controversial material. There are two theoretically possible ways of dealing with this problem" removing the decision to suppress material from the intermediaries; or providing a disincentive to deter those aggrieved by Internet material from requesting the removal of material that is not clearly defamatory.

First, if defamation by means of the Internet becomes a significant problem, an independent online body could be established to arbitrate disputes about potentially defamatory material. The body could have the power to order intermediaries to block access to, or remove, defamatory Internet material. Applications to remove material, and submissions against removal, could be made online. The body would be required to make decisions expeditiously. This would remove the ability of aggrieved plaintiffs to effectively veto material by simply notifying litigation-averse intermediaries of the presence of offending material.

There are, however, some potentially significant practical difficulties with this solution. Defamation is a complex area of the law, and may not be suited to informal procedures. An informal process may not be able to expeditiously deal with the complexities involved in applying defamation law to Internet communications. Moreover, establishing a new body to arbitrate complaints about online defamation may not be cost-effective.

Secondly, to deter offended parties from making groundless complaints to intermediaries, an action could be introduced similar to the action for unjustifiable threats of legal proceedings, available under intellectual property statutes in Australia. Under Australian intellectual property legislation, actions are available to prevent owners of intellectual property rights from inhibiting competition by unjustifiably threatening to bring infringement proceedings.²⁴ These actions enable a person who is aggrieved by the

²³ *Ibid.* para 186, p 99.

²⁴ See *Copyright Act 1968* (Cth) s 202, *Patents Act 1990* (Cth) s 128, *Trade Marks Act 1995* (Cth) s 129. For a discussion of actions for groundless threats of infringing intellectual property rights see: Staniforth

threats to bring proceedings against the person making a threat for a declaration that the threat is unjustified, an injunction against continuation of the threat, or for damages incurred as a result of the threat. On similar principles, an action could be introduced to deter people from making unjustified applications for the removal of Internet material. A content provider, message originator, or intermediary could therefore have an action against someone who complains about Internet material which could lead to a declaration that the material is not defamatory, an injunction against making similar applications, and damages for loss incurred by removal of the material from circulation. To support the action, an obligation would need to be imposed on intermediaries, such as ISPs or content hosts, to notify content providers or message originators that material has been removed from a server, or that access to content has been blocked. The introduction of an action for unjustified complaints about Internet material would help to remove incentives for offended parties to attempt to have material that is not clearly defamatory removed from the Internet. In cases where it is not clear whether the material is defamatory, offended parties would retain the right to seek an injunction to have the material removed from circulation, and to sue for damages. This proposal may, however, favour intermediaries or content providers with greater resources than aggrieved plaintiffs.

7.3 Recommendations for altering liability rules for defamatory material published by means of the Internet

The Internet challenges existing common law liability rules for publishing defamatory material. Legislatures in the United States and the United Kingdom have responded differently to the challenges. In the United States, a statutory immunity has been conferred on users or providers of an “interactive computer service”. The United States response is therefore confined to the publication of material by means of computer networks. In the United Kingdom, a statutory version of the common law defence of innocent dissemination was introduced. The statutory defence modified and extended the common law defence. The statutory defence was extended to all those liable for defamation except for authors, editors, or publishers, as the latter term is commonly used.

In Australia, there are problems with the application of the common law defence of innocent dissemination to the publication of printed and broadcast material. It is unclear precisely who is entitled to the defence. Following the High Court’s decision in *Thompson’s case*, the basis for extending the defence to those involved in publishing defamatory material is also unclear. Moreover, the application of the defence to distributors may result in the suppression of speech, as the defence cannot be relied upon once distributors are notified of potentially defamatory material.

This paper includes recommendations for modifying the common law liability rules as they apply to publishers of print and broadcast material, as well as recommendations about the appropriate liability rules for those involved in publishing material on the

Ricketson, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (2nd ed, LBC Information Services, Sydney, 1999-) paras [2.195]-[2.210]. Ricketson points out that threats made by e-mail or over the Internet are clearly encompassed by these provisions: see para [2.205].

Internet. It may be that the challenges presented by the Internet are an opportunity for revising the common law liability rules as they apply to print and broadcast material. On the other hand, the difficulties of reforming defamation law in Australia, and coordinating responses between the States and Territories must be acknowledged. If legislative intervention is considered necessary, it may therefore be preferable to confine reforms, at least initially, to publications by means of the Internet. This approach would also allow the Commonwealth to play a coordinating role, as it is clear that, under s 51(v) of the Constitution, the Commonwealth has the power to legislate in relation to the Internet.

This paper makes the following recommendations for clarifying and modifying the common law liability rules for publishing defamatory material:

- *Facility providers who knowingly supply the means for publishing defamatory material should generally be regarded as publishers, and therefore liable for defamation.*

Provided those who supply the means for publishing material, such as those who supply photocopy machines or printing presses, know that the facilities, are to be used to publish specific defamatory matter, there is no reason why facility providers should escape liability. If facility providers are not aware of specific defamatory material, or merely suspect that facilities will be used to publish defamatory matter, they should not be liable. Although the liability of facility providers is currently unclear, the common law should move in this direction, if the issue arises in the future. As explained below, telecommunications carriers perform important social and economic functions, and should not be subject to this rule.

- *The common law defence of innocent dissemination should be available to all publishers for whom it would be impractical or inefficient to monitor or censor the contents of published material.*

The defence of innocent dissemination protects those entitled to the defence if they neither know, nor ought to know, the defamatory nature of published material. The defence should therefore be available to those publishers for whom it would be impractical or inefficient to know the nature of material they are involved in publishing. Whether a publisher has the ability to exercise editorial control, or actually exercises editorial control, does not necessarily have any bearing on whether it is practical or efficient for the publisher to control communications content. This test would seem to produce a similar result to that statutory form of the defence of innocent dissemination introduced in the United Kingdom. The United Kingdom statutory defence is available to all those liable for publishing defamatory matter, except authors, editors, or publishers (as that term is commonly used). Given the problems encountered by Australian courts in establishing a satisfactory basis for distinguishing between those entitled to the defence, and those not entitled, it may be desirable to codify the defence, rather than to wait for the courts to develop adequate principles. If the defence of innocent dissemination is codified, it should replace the

existing inadequate statutory defences in the Code States of Queensland and Tasmania.

- *Telecommunications carriers should be immune from liability for transmitting defamatory material produced by others.*

The main role of a telecommunications carrier is to provide an efficient system for the communication of information. It is generally undesirable for a carrier to be concerned with the content of material communicated by means of its network. Carriers should therefore be concerned with ensuring the efficiency and privacy of communications, and not with whether material is offensive or defamatory. Unless a carrier is involved with the production of communications content, it should not be regarded as a publisher of material transmitted by means of its network. Thus, even if a carrier has notice that defamatory material is being transmitted by means of its network, it should not be liable for the material.

The following recommendations are made for clarifying and modifying the common law liability rules as they apply to those involved with publishing material by means of the Internet:

- *The operation of the potential statutory defence under Schedule 5 of the Broadcasting Services Act 1992 (Cth) should be clarified.*

As explained at para [6.3.3] above, it is not entirely clear whether clause 91 of Schedule 5 of the *Broadcasting Services Act 1992* (Cth) provides a new statutory defence for Internet Service Providers (ISPs) and Internet Content Hosts (ICHs) in relation to defamatory Internet content. If it does provide a defence, it protects ICHs and ISPs from actions for hosting or carrying defamatory Internet content, provided the ICH or ISP is unaware of the nature of the content. This appears to provide more protection than the common law defence of innocent dissemination. The provision was not, however, specifically introduced to deal with the liability of ICHs and ISPs for defamatory Internet content. It was not based on any public consideration of the policy implications of introducing a new statutory defence to actions for defamation by means of the Internet. There is therefore a need to clarify the application of the provision, and to assess whether it is an appropriate modification to common law liability rules.

- *Search engine operators, and content providers who include hyperlinks, should not be liable for directing users to, or providing access to, Internet content.*

The effectiveness of the Internet, and especially the World Wide Web, depends upon users being able to quickly and effectively locate relevant material. It is possible that search engine operators, or content providers, might be held liable for directing users to defamatory material, or publishing defamatory material by reference. This would, however, serve no identifiable policy objective, and would undermine the

effectiveness of the World Wide Web. Consequently, search engine operators, and content providers who include hyperlinks, should not be regarded as publishing material accessed by means of a search, or by a hyperlink.

- *Intermediaries such as ISPs, content hosts and BBS operators should become liable for publishing defamatory material only after failing to remove material following notification.*

Intermediaries, such as ISPs, may be liable for publishing defamatory material either because of their role in distributing the material, or for failing to remove the material after receiving notice. If an intermediary publishes material by distributing it, notice of the defamatory material is irrelevant to liability. Notice may, however, be relevant to whether the intermediary can rely on the defence of innocent dissemination. If an intermediary publishes material by failing to remove the material from a server, it is liable only after being notified of the material. It would be simpler if one liability rule were adopted for intermediaries, such as ISPs, content hosts and BBS operators, in relation to all Internet, or computer network, applications. Given the volume of material available by means of the Internet and computer networks, it is unrealistic and inefficient for intermediaries, such as ISPs, content hosts and BBS operators, to monitor communications content. An ISP, content host, or BBS operator should therefore only be held liable for failing to remove defamatory material after being notified of the material. Adopting this rule would mean that, in practical terms, the defence of innocent dissemination would have little significance for Internet intermediaries. This is because, if an intermediary fails to remove defamatory material following notification, it would not be able to establish that it was unaware of the material. It is arguable that discussion moderators should be liable for defamatory postings made to discussion groups, irrespective of whether the moderator is notified of defamatory material. Nevertheless, to ensure clarity and consistency, it may be preferable for moderators to be treated in the same way as other intermediaries. This would incidentally avoid penalising self-regulatory efforts to monitor and control offensive communications.

- *If defamation on the Internet becomes a serious concern, consideration could be given to establishing an online body to arbitrate complaints about defamatory material.*

If an intermediary faces legal action for failing to remove material, it will likely decide to suppress the material. This could possibly be avoided by establishing a process enabling expeditious and inexpensive decisions about whether material should be removed from circulation. Applications to remove material, and submissions against removal, could be made online. An intermediary could be protected from further liability if it continued to provide access to material following a decision that the material was not likely to be defamatory. The offended person could retain an action for defamation against the message originator or content provider. There are, however, two major difficulties with this proposal. First, it may

not be practical for an online body to decide the complex questions which may arise in defamation actions. Secondly, establishing a new body may not be cost-effective.

- *A new action for unjustified notification of material could be considered.*

Introducing an action for unjustified notification of material could remove the incentive for those aggrieved by Internet material to attempt to suppress it by notifying intermediaries of their concerns. It could provide a remedy for content providers and message originators, as well as intermediaries, who suffer loss by removing material from circulation. This might establish a better balance between the protection of reputation and freedom of speech than is established under the current law. Legislation would be required to introduce the new action. The legislation could be limited to publications by means of the Internet, or could apply more generally. An action for unjustified notification may, however, unfairly deter plaintiffs who have less resources than content providers or Internet intermediaries.