

FREE SPEECH ONLINE: STILL SHOOTING THE MESSENGER

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While the State and Territory Governments debate with the Federal Government as to whether Australia will have uniform defamation laws, private restraints on freedom of expression continue to be asserted against Internet Service Providers ('ISPs') in relation to material hosted on their servers.

Electronic Frontiers Australia ('EFA') has been regularly contacted in recent times by ISP customers who have been advised – often without details – that their web site has been the subject of a complaint by a law firm acting on behalf of a person who alleges defamation. Typically, the ISP has taken the complaint on face value and has taken down the webpage (or even the web site) under complaint without discussion or notice to the customer.

It appears that, nationwide, plaintiff lawyers are advising their clients not to engage with the content provider but, instead, to threaten defamation proceedings against the ISP. The ISP, having no financial or other incentive to test its legal position, routinely finds that the path of least resistance is to take down the webpage under threat. It is rare that any further action is brought against the ISP's customer – in fact it is rare for the customer to receive any notice whatsoever. Having achieved the purpose of removing the webpage, the plaintiff is satisfied and the awkward questions as to whether the material was defamatory or defensible are never resolved.

The decision in *Dow Jones v Gutnick*,¹ now well established as authority for the proposition that a plaintiff may sue for defamation in his or her own jurisdiction irrespective of the jurisdiction of the website,² has tended to add a layer of jurisdictional complexity to an ISP's decision as to whether to take material offline in response to allegations of defamation. While the uncertainties of the law in defamation are legion, jurisdictional issues diminish the ability of a defendant to obtain timely and relevant advice and dramatically increase the cost and risk of a defence. Though few ISPs would have invested in defamation insurance, most policies only cover actions brought within jurisdiction in any event, and it would be a bold ISP that would go out on a limb for a \$40 per month customer. The larger ISPs have made the business decision not to support

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1 (2002) 210 CLR 575.

2 Recently followed in Canada: see *Bangoura v Washington Post* (2004) 235 DLR (4th) 564.

their customers in these situations (often the terms and conditions of access not only allow the ISP to take down material at whim, but also require the customer to indemnify the ISP for any costs on a solicitor-client basis), smaller ISPs simply cannot afford to take a chance. Thus, in the online environment, the plaintiff lawyer knows well that the ISP will almost certainly submit under pressure of a letter of demand and the price of chilling online speech is cheap.

The *Broadcast Services Amendment (Online Services) Act 1999* (Cth) ('BSA') purports to exempt ISPs from any State and Territory laws – including defamation – which require monitoring of users' content or impose liability for content made available by the ISP's customers without the ISP's knowledge:

91 Liability of Internet content hosts and Internet service providers under State and Territory laws etc.

- (1) A law of a State or Territory, or a rule of common law or equity, has no effect to the extent to which it:
 - (a) subjects, or would have the effect (whether direct or indirect) of subjecting, an Internet content host to liability (whether criminal or civil) in respect of hosting particular Internet content in a case where the host was not aware of the nature of the Internet content; or
 - (b) requires, or would have the effect (whether direct or indirect) of requiring, an Internet content host to monitor, make inquiries about, or keep records of, Internet content hosted by the host; or
 - (c) subjects, or would have the effect (whether direct or indirect) of subjecting, an Internet service provider to liability (whether criminal or civil) in respect of carrying particular Internet content in a case where the service provider was not aware of the nature of the Internet content; or
 - (d) requires, or would have the effect (whether direct or indirect) of requiring, an Internet service provider to monitor, make inquiries about, or keep records of, Internet content carried by the provider.

However, the protection provided by this provision is illusory because the ISP becomes 'aware' of the content under complaint as soon as the plaintiff's letter arrives – the complaint may be wrong, the defamation alleged may not be actionable or may be wholly defensible, but the ISP has received notice and from that moment may no longer plead the BSA as a defence.

Accordingly, while the BSA defence is available on the same facts as the common law defence of 'innocent dissemination' of defamatory content, an ISP is liable as a publisher of the defamatory content once the requirement of notice has been established. While there are no published final decisions as to the liability of an Australian ISP for defamation arising from their user's material (present authorities being limited to interlocutory proceedings), it is reasonable to

assume that the American decisions³ apply. These decisions hold that an ISP is liable as publisher of a libel made by a customer in circumstances where any measure of editorial control is exerted by the ISP – for example where the ISP moderates a discussion group or, indeed, decides to ignore a letter of demand.

The US Congress subsequently enacted the *Communications Decency Act*, 47 USC § 230(c) (1996) which stated, quite simply 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’.

This had the consequence, according to the subsequent ISP-liability case *Zeran v America Online*,⁴ that Congress had removed an intolerable burden on ISPs to control and determine the propriety of their users’ content: ‘Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context’.⁵

To add a further burden, ISPs have also received letters of demand in relation to defamatory links on their customers’ webpages – asserting that the content linked to is defamatory and thus the reference to it is a form of publication. Again, an untested assertion – but an ISP in Australia is unlikely to have the financial clout to take on a test case (in contrast to AOL, or Prodigy’s owners IBM and Sears). In recent years, EFA has received a number of reports by politicians, churches and even public universities employing this tactic not only to chill particular expressions of opinion but also any references or links to them. This tactic is of considerable effectiveness when the content itself is hosted in the United States but the links to it are on Australian websites.

The liability of Australian ISPs upon receiving the plaintiff’s notice is somewhat mitigated by s 474.13 of the *Criminal Code Act 1995* (Cth), which states that a person is not taken to use a carriage service by engaging in particular conduct if:

the person is a carrier and, in engaging in that conduct, is acting solely in the person’s capacity as a carrier; or

the person is a carriage service provider and, in engaging in that conduct, is acting solely in the person’s capacity as a carriage service provider; or

the person is an Internet service provider and, in engaging in that conduct, is acting solely in the person’s capacity as an Internet service provider; or

the person is an Internet content host and, in engaging in that conduct, is acting solely in the person’s capacity as an Internet content host.

While organisations such as EFA⁶ and websites such as www.oznetlaw.net⁷ can be of some help to ISPs and content providers facing the hazards of

3 See, eg, *Stratton Oakmont Inc and Porush v Prodigy*, 24 Media L Rep 1126 (1995).

4 129 F 3d 327 (4th Cir, 1997).

5 129 F 3d 327, 333 (4th Cir, 1997).

6 Electronic Frontiers Australia, *Defamation Laws & the Internet* (2002) Electronic Frontiers Australia <<http://www.efa.org.au/Issues/Censor/defamation.html>> at 10 October 2005.

7 Oznetlaw, *Defamation* (2001) Oznetlaw <<http://www.oznetlaw.net/facts.asp?action=content &categoryid=221>> at 10 October 2005.

litigation, the failure of the Australian governments to protect ISPs from liability as publishers of their customers' content has resulted in a chilling of freedom of speech unjustified by principle or equity. It is impractical to expect ISPs to defend their customers' freedom of speech, even if the ISPs were motivated to do so. Internationally-known litigants such as Laurence Godfrey have targeted Australian ISPs knowing full well that there is little likelihood of a regional ISP defending a matter initiated overseas.

While one has some sympathy for a plaintiff seeking to restrain the ongoing publication of a libel, the development of a practice in Australia to procure the takedown of a webpage by threatening the ISP is to be condemned and should be stopped by reform. Apart from the application of extra-judicial pressure on an unconnected party, the absence of any finding of fact or law results in manifest injustice to the content provider. While the abuse of defamation law by politicians and corporations in restraining protected speech is not uncommon, in no other jurisdiction is the price of restraint so affordable as a single letter of demand.

The recent amendments to the *Criminal Code Act 1995* (Cth) (through the Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill 2004) may make the assertion of free speech online more problematic. Section 474.17 replaced the old offence of misuse of a telecommunications service, making it an offence to use the internet: 'in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive'.

'Offensive' is not defined, and the offence (which carries a maximum penalty of three years imprisonment) does not require that anyone actually be menaced, harassed or offended. There is ample opportunity for a plaintiff to complain that an ISP on notice breaches this section by continued publication of a controversial webpage or message, given the paucity of the legislative protection in the BSA.

Freedom of expression is stifled prior to any finding of fact by a judicial body. While the threat to free speech by governments is a matter for constant vigilance, failure by governments to protect internet content from third-party censorship is, and will remain, a problem for freedom of expression in the Australian context. When the whiff of litigation is sufficient to remove internet content from the public's eyes, it is as much a failure of government as an indictment upon the legal profession. It is to be hoped that, in the context of the 45-year debacle over defamation law reform, the Australian practice of shooting the messenger will be recognised as an unjustifiable prior restraint.