

WHO PAYS? ONLINE SERVICE PROVIDER LIABILITY IN THE U.S.

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One of the hottest legal topics in U.S. corporate board rooms is the liability of online service providers (OSPs) for the actions of their subscribers. The issue is of concern not only to companies in the online business, such as CompuServe, but to any firm that maintains a bulletin board on its home page on the World Wide Web or that gives its employees access to the Internet. All these companies -- and non-profit institutions as well -- face the specter of liability for copyright infringement, defamation and indecent speech by the users of their services. This specter looms larger than ever before for two reasons: first, every day more companies become increasingly involved in the Internet; and second, several recent legal developments increase these companies' potential exposure. This article reviews these developments.

I. Copyright

As noted above, many different activities fall under the heading of online services. For example, a firm can operate a bulletin board; it can maintain a server (a computer) which allows other entities to operate bulletin boards or create home pages; or it can serve as a conduit from other firms' servers to the Internet. If the initial copyright infringement -- the uploading of infringing material onto the bulletin board -- is committed by a third party, under traditional copyright principles the OSP could be liable pursuant to theories of contributory infringement or its cousin vicarious liability.

A firm may be liable for contributory copyright infringement if it knowingly induces or materially contributes to the infringing conduct of a third party. In most cases, the OSP would not be liable for contributory infringement at the time the subscriber

uploads the infringing material -- after all, how is the OSP to know that the material is infringing? But what if the copyright owner provides the OSP with notice that infringing material is present in the bulletin board, and the OSP refuses to remove the material and continues to permit Internet access to the bulletin board? A recent decision by a federal court in California, *Religious Technology Center v. Netcom*, suggests that under such circumstances the OSP may be liable for contributory infringement.

OSPs, however, argue that even if they do receive notice from the copyright owner, they have no way of assessing the validity of the copyright owner's claims. The purported copyright owner may have transferred the rights to the subscriber, the material may have fallen into the public domain, or the subscriber may be making a fair use of the work. The OSPs contend that they should not be required to make these difficult judgments about the validity of the purported owner's claims.

Congressman Carlos Moorhead, Chairman of the Subcommittee on Courts and Intellectual Property of the House of Representatives, has initiated a process to seek a legislative compromise on this issue. The parties to the negotiations include content providers, OSPs, and firms that are both content providers and OSPs. It is too early to tell whether these negotiations will result in a compromise acceptable to the competing interests.

In addition to contributory infringement, OSPs worry about vicarious liability. A firm is vicariously liable for another person's infringement if the firm had the right and ability to supervise the person and the firm had a direct financial interest in the exploitation of the copyrighted matters. In some circumstances an OSP will have the right and ability to supervise the infringer -- if, for example, the OSP actually runs the bulletin board. If, on the other hand, the OSP simply serves as a conduit between a server

and the Internet, as a practical matter it has no ability to supervise the activities of the infringer. Either way, it would be extremely unlikely that the OSP would have a financial interest in the exploitation of the copyrighted materials. The *Netcom* court, for instance, found that the infringer's subscription fee did not meet this test.

While OSPs correctly are anxious about contributory infringement and vicarious liability, they are terrified about the possibility of direct infringement liability. Unlike contributory infringement, which requires knowledge, or vicarious liability, which requires an ability to control or a financial interest, direct infringers are strictly liable for their infringement -- that is, they are liable regardless of their knowledge or intent. Among the bundle of rights granted by the U.S. Copyright Act is the right to distribute copyrighted works. The question is whether an OSP is directly liable for infringing the distribution right when an infringing work is transmitted via its system. The argument in favor of direct liability focuses on the fact that the transmission is being accomplished by the OSP's equipment operated by the OSP's employees, and the transmission results in copies being distributed to the public. The argument against direct liability emphasizes that the distribution does not involve a volitional act of the OSP; the only volitional act was that of the original infringer who initiated the distribution. Additionally, if OSPs were directly liable for violation of the distribution right, then the operator of each of the hundreds of servers through which the infringing work passed as it traveled through the Internet would be liable. The *Netcom* decision adopted these arguments against direct liability, much to the relief of OSPs.

This relief was limited, however, because legislation pending in Congress would explicitly treat a transmission as a distribution. This bill, the National Information Infrastructure Copyright Protection Act of 1995, S. 1284 and H.R. 2441, implements the

recommendations of the Final Report of the Clinton Administration's Working Group on Intellectual Property Rights, known as the White Paper. The White Paper's discussion of OSP liability makes clear that the Administration believes that OSPs should be strictly liable for the distribution of infringing works through their systems. Treating a transmission as a distribution appears to be the means of effectuating this result.

The negotiations referenced above concerning contributory infringement are also addressing the issue of direct liability for distribution by transmission. If a solution is reached, the uncertainty about copyright infringement liability that currently is chilling additional investment in online services will be eliminated.

II. Defamation

U.S. defamation law draws a distinction between publishers and distributors. Mere distributors are subject to liability only if they knew or had reason to know of the defamatory nature of the distributed materials. In contrast, publishers are liable even if they did not have actual knowledge of the defamatory nature of the materials they published. This distinction is based upon the assumption that publishers are better placed than distributors to detect and eliminate defamatory remarks.

A decision last year by a New York state court caused consternation in the online service industry when it treated Prodigy, the large OSP, as a publisher rather than as a distributor. The court reached this conclusion because Prodigy paid an agent to monitor the bulletin board where an anonymous subscriber posted the defamatory material. Had Prodigy taken no measures to patrol the bulletin board, the court may have treated it as a distributor. Ironically, Prodigy incurred liability precisely because it tried to behave responsibly.

After the court's ruling, the parties settled the litigation and requested the judge to set aside his decision. In an unusual move, the judge denied this request, leaving the decision as precedent which could have been followed by other courts. The *Prodigy* decision caught OSPs on the horns of a dilemma: if they monitor their bulletin boards in an effort to prevent liability for copyright infringement and indecency, they will be considered publishers for purposes of defamation liability. It appears, however, that Congress has ridden to the rescue. In a section of the Communications Decency Act (CDA) enacted in 1996, Congress specifically provides that no OSP will be treated as the publisher of any information provided by another person, and that an OSP will not incur any liability on account of attempting to restrict the availability of indecent or objectionable material. The legislative history of this "Good Samaritan" provision explicitly states that the provision is intended to overturn the *Prodigy* decision because it interferes with the federal policy of encouraging OSPs to police their bulletin boards for objectionable content.

III. Indecency

While the CDA includes a "Good Samaritan" provision which seems to reduce the potential liability of OSPs for defamation, it increases OSPs' exposure with respect to indecent materials. The CDA criminalizes the transmission of obscene or indecent material knowing that the recipient is under 18 years of age. The CDA catches OSPs by extending criminal liability to a person who knowingly permits a telecommunications facility under his control to be used for any activity prohibited by the CDA. Because the terms "knowing" is not defined, the CDA could reach an OSP who permits a third party to operate an adult bulletin board on its server when the OSP knows that minors can access the bulletin board.

The CDA does provide several statutory defenses. First, an OSP will not violate the CDA if it simply provides access or connection to a facility containing indecent material if that facility is under another person's control. Thus, CompuServe for example could be liable for an adult bulletin board maintained on its server, but not for providing access to an adult bulletin board on someone else's server.

Second, an OSP will escape CDA liability if in good faith it has taken reasonable, effective, and appropriate measures to prevent access by minors. The Federal Communications Commission has responsibility for determining which measures are "reasonable, effective, and appropriate."

Shortly after its enactment, the CDA was the target of numerous lawsuits by civil liberties organizations and OSPs. These suits focus on the vagueness of the term "indecent." A federal district court judge in Pennsylvania issued a temporary restraining order against enforcement of the CDA's indecency provisions. Such court challenges were anticipated by the CDA, which provides for expedited review by a three-judge panel.

The good news of this restraining order was balanced by a recent decision by the U.S. Court of Appeals for the Sixth Circuit affirming the conviction of the operators of a California based adult bulletin board service. The Thomases ran the bulletin board from their house near San Francisco. A prosecutor in Memphis, Tennessee, accessed the bulletin board and its adult materials, and charged the Thomases under Tennessee obscenity laws. In the U.S. whether material is obscene is determined with reference to prevailing community standards, and one of the issues in the case was whether the material on the bulletin board should be assessed by the liberal standards of San

Francisco or the more conservative standards of Memphis, which is in the Bible Belt. The Sixth Circuit ruled that it was appropriate to consider the standards in Memphis.

The global reach of the Internet makes the issue of varying local standards for obscenity and even defamation particularly problematic for OSPs. Several months ago, CompuServe suspended access to adult bulletin boards by subscribers worldwide in response to a German prosecutor's suggestion that CompuServe may be violating Germany's obscenity laws. CompuServe restored access to these bulletin boards by all subscribers outside of Germany once it developed the software capable of excluding only German subscribers.

IV. Conclusion

The extent of OSP liability is ultimately a policy debate about who should bear the cost of preventing socially undesirable activities. If OSPs are liable for the actions of their subscribers, the OSPs will take a variety of measures to limit this liability. They may close certain bulletin boards, monitor others more closely, and employ software to detect and exclude problematic material. The cost both in resources and less robust communication will ultimately be borne by the public at large.

Alternatively, if OSPs are not liable for the actions of their subscribers, then the costs are borne more narrowly. With copyrighted material, the content providers will employ encryption technology to prevent unauthorized copying, which will increase costs for consumers of that content. With defamatory material, the target of the defamatory remarks may never receive complete compensation for his injury. With indecent material, the government may expend resources on preventing its dissemination to minors, or minors may simply have relatively easy access to indecent material.

In the United States, the debate over who pays has begun in earnest. Similar debates will soon began in Europe and throughout the world.