



Regulating the unregulated

Internet anarchy is exposing the vacuum from a lack of law on censorship and copyright in cyberspace. *CU* asked Stephen Peach and Phillip Reynolds from the law firm, Gilbert & Tobin to analyse the pitfalls of electronic bulletin boards.

ELECTRONIC interactive services such as bulletin boards, electronic mail and online information services are rapidly becoming one of the most efficient and prevalent forms of communications.

As a result of advances in technology, one single physical means can carry all the formerly discrete modes of communication.

Because of the convergence of the modes of delivery, the law in defining and regulating the media has become extremely complicated. Nowhere is this more starkly illustrated than in the case of electronic bulletin boards.

Bulletin Boards

The use of electronic bulletin boards (BBS) is likely to result in major disputes between competing public and private interests. Access to bulletin boards involves the creation of a separate database that is accessed by subscribers. Bulletin board operators rarely exercise any editorial control over the content of the bulletin board and, indeed, maintain that such editorial control is practically impossible to exercise.

Recently, the use of BBSs has raised questions about the role and legal liability of the BBS operator.

The difficulty concerning BBSs is that they have never been legally defined as belonging to any one type of communications disseminator. In fact, computer information services have attributes similar to several different media as well as characteristics unique to themselves.

The situation is aggravated by the fact that no two BBSs are exactly the

same. Some service providers offer news articles and editorial columns which are more like magazines, while others are more like open discussion forums.

Large national networks like CompuServe are undoubtedly mass public media, but a small bulletin board run out of a system operator's basement with only a dozen or so members is a much more private arrangement. All these variations make an explicit categorisation applicable to all BBSs quite difficult.

Another complicating factor is that most of the analysis of the role and characteristics of BBSs has been undertaken in the context of a specific legal problem. This has, in some respects led to problems of proper description akin to the blind men describing an elephant. One grabs the tail, one grabs a leg and one grabs the trunk. As a result, all describe the elephant differently.

Perhaps a better way to consider and analyse the liability of BBS operators is to first 'describe the elephant' and see whether there is any existing comparison which would provide an indication as to how the various legal rights and remedies are to be adjusted.

Comparisons can be made with:

- publishers,
- broadcasters,
- telecommunications carriers, and
- secondary publishers.

Publishers

BBSs are often likened to electronic publishers. Some BBSs openly claim to be electronic magazines and exer-

cise a publisher's right to censor and reject postings to the BBS.

It is not clear when and under what circumstances a BBS or information service provider is a publisher. In some cases, it might be argued that a BBS is merely a transparent medium of the means of publication, but not in a legal sense a publishing house or facility. Again, the confluence of technologies into one service makes it difficult to apply a single definition to all of the information services BBS provides.

Broadcasters

It is also possible to view BBSs in the context of broadcasting. The classification of broadcast media which encompasses such entities as television and radio stations is probably the least advantageous legal classification for a BBS.

However, some BBS services are analogous to broadcast station programming. For example, many bulletin boards have regularly scheduled, live chat sessions hosted by a subscriber, an employee or even on occasions a guest celebrity. Users type in their comments and questions and the result is very much like a call-in radio program.

It is worth emphasising that in Australia radio stations are liable for the broadcast of defamatory material of participating callers in a talkback program, regardless of whether the interviewer endorses the remark or not. This is why broadcasters have a seven second time delay and a 'kill' button in talk-back programs.



Carriers

The legal treatment of telecommunications carriers differs markedly from publishers and broadcasters. Many commentators suggest that this is an appropriate model for analysis of BBS operator liability. Of course, telecommunications carriers enjoy significant immunities which would be attractive to BBS operators.

The main reason for supporting this model is the desire to make quick and efficient communications services available to everyone. If the BBS operator was obliged to monitor or censor communications, not only would this necessitate a potential invasion of privacy, but communications would be slowed almost to a standstill. This immunity granted to telecommunications carriers recognises the practical reality that the carrier does not control or endorse the content of communications, but merely provides a message conduit. Many see parallels to BBS operators.

Republishers

If recent US precedents are followed in Australia, the classification of BBSs as republishers is the most likely legal identity to be accorded to BBSs and computerised information service providers. Printers and distributors, libraries, news stands and book stores are all secondary publishers. In the context of defamation, disseminators and distributors of publications must take care not to cross over the line and become republishers. So if a distribution service recopies or alters original material it will become a primary publisher for legal purposes.

Operator liability

While the present approach of law reformers in Australia has been to largely avoid any recommendations for a particular legal regime to be applied to BBSs, this approach is un-

likely to be satisfactory in the longer term. It is arguable that a more wholistic approach to the characterisation of BBSs is required before any clear guideposts can be established.

One of the fundamental policy issues is whether or not the creators of unregulated databases should be subject to some form of liability. That needs to be considered in light of the fact that it will be the bulletin board operator who, in most cases, will be the only person profiting from the activity. Introducing some form of liability for bulletin board operators must be a real possibility. Having created the 'Frankenstein monster' should the creators of a system which has the potential to significantly undermine the laws of copyright, censorship and the like be allowed to avoid any liability whatsoever? When put in those terms, there is a real argument for some level of regulation and liability.

Perhaps the American lateral thinker, Edward de Bono could provide some guidance. During an interview, discussion turned to a factory that was discharging pollutants into a river. The factory drew clean water from upstream and discharged polluted water downstream. The polluted water was a matter of great concern to those living downstream. De Bono was asked how he would deal with that problem. His answer was typically simple - pass a law requiring the factory to discharge the polluted water upstream and draw the water from downstream. With that incentive in place, the factory would soon find a way of removing the pollutants from the water.

The same solution may be imposed for bulletin board operators. Governments may take the straightforward option of turning the problem back on the bulletin board operators, thereby providing them with an incentive to introduce adequate control mechanisms. □

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Electronic shopping mall or commons?

THE COMMUNITY and Public Sector Union (CPSU) is undertaking a major research project into the implications of the InfoBahn.

The report, *The Information Superhighway: Implications for Australia, its Labour Movement and Public Sector* is an impressive compendium of information, data and trends which Mark Aarons and others have prepared for the union's national executive. The union's concerns include equity of information access, job displacement, the effect of home-based work on unionism and privatisation by stealth of government communications corporations.

For the CPSU the debate centres on the balance between private and public uses of networks. The report juxtaposes two models of the InfoBahn, the electronic shopping mall versus the electronic commons - commerce as opposed to free exchange of information.

The Government's Employment White Paper announced a pilot community information network so that the already disadvantaged are not left further behind. The Broadband Services Expert Group also addressed a range of information equity concerns and predicted that the Government would be a leading edge user and developer of services and applications. The union will seek wider alliances with community, consumer and special interest groups to discuss the emerging trends. □

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