Net escape: the new immunity for internet hosts

The new online content legislation has generated a lot of bad press. An overlooked aspect of it is a powerful new defamation defence for those who carry or host Internet. Julie Eisenberg reports.

To those who have witnessed the limp trajectory of national defamation law reform, it may come as a surprise that the fate of a uniform defamation law for Internet service providers and content hosts now rests in the hands of one person: the Minister for Communications, Information Technology and the Arts.

A possibly unintended, but powerful consequence of the new online censorship legislation (the *Broadcasting Services (Online Services) Amendment Act 1999)* arises from a broad immunity provision in section 91. As the legislation sets up a complaint driven regime for "offensive" content and co-regulated industry codes, the immunity provision appears at first glance to be directed at avoiding overlap by State classification laws. In fact, it goes further. It gives those who disseminate (but are not directly involved in the creation of) Internet content a defence to State and Territory civil and criminal actions, such as defamation and contempt. But what the legislation gives, it can take away: in a curious provision, the Minister may declare that a particular area of the law is exempt from the broad immunity.

This article looks at the particular implications of section 91 for defamation law.

Who's on the hook for Net content

Traditionally, anyone who *publishes* material has been on the hook for whatever defamatory material it contains, even if they didn't know the content was problematic and didn't participate directly in its creation.

The flipside of this has been the defence of *innocent dissemination*, available to newsagents, libraries and the like who can prove that they were not a "primary publisher" *and* that they did not know or have reason to know that the publication they were distributing was defamatory and their ignorance was not due to negligence.

The courts are fairly strict about who gets away with the innocent dissemination defence: in *Thompson v Australian Capital Television Pty Ltd* [1] the TV station that broadcast a live, instantaneous relay transmission of another network's current affairs program couldn't rely on it. Although the High Court said that "in the right circumstances" electronic publishers might be protected, it treated this broadcaster as a "primary publisher" because it chose not to delay the broadcast, despite knowing that the type of program was likely to contain defamatory material.

The big question for ISPs has been whether Australian courts would treat them like the relay broadcaster in *Thompson* or regard them as just "subordinate distributors."

There is no decided case directly on point, but two US cases involving ISPs Compuserve and Prodigy are often cited for guidance. While Compuserve successfully argued it was not a primary publisher because the volume of traffic on its server made it impossible to vet content, Prodigy failed because it marketed itself as "family friendly" and reserved the right to remove content. The choice for Australian ISPs has been difficult: if they monitor, they might be treated as "primary publishers" but if they don't they might be considered negligent. A further twist is that the new Act requires that industry codes address content monitoring. Screening for R, X or RC rated content is a far cry from screening defamatory material, but the worry has been that it might be enough to transform ISPs into "primary publishers". For those who "host" rather than just carry large volumes of content (eg sites with chat rooms), the prospects of relying on the common law defence have seemed even more slim.

The new immunity

The context for section 91 comes from the structure of the new legislation . The Act is directed at the activities of two categories of content providers - Internet Service Providers and Internet Content Hosts. (Proposed state legislation will regulate content creators). Section 91 immunises these two categories, in very broad terms, by providing that State and Territory >

laws cannot make an ISP or ICH:

- be civilly or criminally liable for content of which it was not aware;
- monitor or keep records of content carried or hosted.

"ICH" is only vaguely defined in the legislation, but is likely to include anyone who provides a platform for content but isn't involved in creating, editing or supervising it.

Although the Act confines itself to two types of content - "prohibited" and "potential prohibited" content, section 91 is not so limited. There is also no apparent constitutional restriction, as it is directed at communication providers, rather than the content itself.

The net effect is broader than the common law: assuming an ISP or ICH is treated as a subordinate distributor, its innocent dissemination defence will fail if, for example, its ignorance of problem content was negligent. In contrast, section 91 does not look beyond mere lack of knowledge.

Of course, once aware of problem content, ISPs and ICHs will still be liable if they don't remove it.

Against the big picture

The new Australian immunity sits comfortably with overseas approaches.

Since 1996, the English *Defamation Act* has protected "the operator of or provider of access to a communications system" where it transmits a defamatory statement authored by someone over whom it lacks "effective control". The operator/provider must take reasonable care and not know it contributed to the defamatory publication .

The English High Court this year[2], rejected the ISP's argument that it was not the "publisher" of a defamatory comment on one of its bulletin boards. The defence was also unavailable once the ISP had been notified of the defamatory posting and failed to remove it. (The plaintiff only sued for the publication *after* that date, as the immunity protected the ISP prior to notification).

The US immunity is even wider. After the Compuserve and Prodigy cases, the US enacted Section 230 of the *Communications Decency Act*, which exempts a "provider or user of an interactive computer service" from liability for information provided by another content provider. It enabled America Online to escape liability for hosting problem material, even after notification..3. More recently, AOL ducked liability for a defamation contained in the Drudge Report, even though it had an exclusive agreement with Matt Drudge to publish on its service, had marketed his gossip and rumour rag as a drawcard for new subscribers and had reserved the right to remove certain content.[4]

Section 91(1) falls somewhere in between the two. Unlike the US provision, an Australian ISP or ICH will be liable for content they know about, but in contrast to England, they won't have to show they took "reasonable care".

Give and take

Section 91 has a small but significant sting in its tail.

In an unusual provision, the Minister can issue an instrument declaring a particular area of State or Territory law exempt from the operation of section 91. The Second Reading Speech and Explanatory Memorandum do not expressly address the intended breadth of the immunity but suggest that the declaration provision is there for "fine tuning".

Given that section 91 is very broad, it is hard to see what exactly needs to be fine tuned. If Parliament had wanted to limit the provision to the area of censorship and classification, it could have done so.

What it has done is leave a very significant issue - liability for defamation and other content on the Internet - entirely up to the discretion of one Minister.

Both in the international context and locally, the clear and certain formula of the new Australian immunity provision makes a lot of sense. The tangled web of state defamation laws has long put the national media in the ludicrous position of assessing pre-publication liability on a state by state basis or going for the "lowest common denominator". In an Internet context this seems even sillier. Uniformity seems less and less likely as the States and Territories go their own way - the latest example being the ACT Defamation Bill introduced on 9 December 1999.

Against this complicated backdrop, section 91 provides a breathtakingly simple way of uniformly regulating the vexed area of online defamation liability.

It remains unclear whether the Minister will see the need to "fine tune" the new defence out of existence. What a lost opportunity that would be.

Footnotes

1 (1996) 71 ALJR 131
2 Godfrey v Demon Internet Limited unrep High Ct of Justice, Morland, J, 26 Mar 1999 www.courtservice.gov.uk/godfrey2.htm
3 Zeran v America Online [1997] 129F3d327
4 Blumenthal v Drudge, US District Ct, DC, 97CV-1968