The strong implication is that free access constitutes a "socially desirable" purpose, but the report is bereft of any explanation of why it is "socially desirable" for users to be given this free ride.

In the context of any other property right in our society, there would be considerable resistance. It would be, for example, "socially desirable" to allow the use of one's car for social services such as meals on wheels, but as the owner of that vehicle you may want some say in this.

CONCLUSION

In conclusion, I don't know the answer to the question I have posed in this paper, namely, whether the user pays principle is being threatened under the *Copyright Act*. The answer must wait until we see the Government's response to the CLRC's report.

The Government certainly appears to be committed to creating more opportunity for Australian creators in the digital age and should be congratulated for doing so. The creation of the ministerial Council of Information Technology is strong evidence of the Government's commitment in this area. However, without an appropriately supportive copyright environment, these content creation initiatives will be difficult to sustain.

And if there was any doubt as to the need of an appropriate copyright environment to fully participate in the digital economy, one only has to refer to the recently created WIPO industry advisory committee, which is comprised of top-level representatives of industry.

Chris Gibson, a member of the committee who is a WIPO expert on Internet-related issues was quoted as saying:

> *"Intellectual property issues are at the very core of electronic commerce...Protection is necessary to create a stable and positive environment for the continuing growth of electronic commerce."* [5]

If the Government did decide to carve out copyright owners' rights, it would be very difficult if not impossible to reverse.

If the potential market for a copyright owner's work is to be arbitrarily cut out through the adoption of the proposed fair dealing regime, strong proof should be provided of the failure of the licensing system to facilitate access whilst ensuring fair payment. Strong proof ought to also be provided, failing agreement between the parties, that the Copyright Tribunal is not the best forum for the debate over price and conditions of access to be decided.

If intellectual property is to remain "hot property" in the 21st Century, we collectively have to make sure that we do not undermine its value and cave in to the demands for no payment for use unless it is clearly justified. The CLRC's report on exceptions should be regarded as an important starting point for this debate.

At the end of the day all we are asking is for the Government to undertake the considered consultative approach that it undertook when considering the re-transmission issue to ensure that it makes a fully informed decision.

In that way, Australian creators and copyright owners can be confident that their investment in the "currency of the 21st century" is not being devalued.

1 "Royalty revamp hits raw chords with musos" by Brendan Pearson, *Australian financial Review*, 27 /1/99 pg.3

2 *New York Times*, August 4 1996

3 Senator Alston, Minister for Communications Information Technology in *The Australian* 9/2/99 p.32.

4 *Smith Kline and French Laboratories (Australia) Limited and Ors v Department Of Community Services and Health* (1990) 22 FCR 73 at 111.

5 "WIPO Director-General Creates New Industry Advisory Group" - *Washington File*, Washington DC: US Information Agency; and "E-commerce hottest topic at first meeting "by Wendy Lubetkin, USIA European Correspondent, 7/2/99

Simon Lake is the CEO of Screenrights. This paper is from a speech by Simon at the "Copyright Futures Seminar" hosted by the Australian Key Centre for Cultural and Media Policy, on 12 February, 1999

Liability for Electronic Communications

Karen Knowles outlines some relevant issues regarding liability for defamatory electronic communications and some practical guidelines for developing an internal e-mail policy.

Some of the many legal issues raised by a consideration of e-mail message content include defamation, breach of copyright, breach of the *Trade Practices Act* 1974 (Cth), breach of confidence, breach of privacy, breach of equal opportunity and racial discrimination laws and potential criminal activity.

This paper will primarily focus on:

- defamation via online services;
- some progressive measures being made in order to adapt to the new world of electronic media; and
- suggested guidelines for constructing an e-mail policy for staff.

DEFAMATION ON THE INTERNET

Libel is a defamatory statement made in some permanent form. Although there was initially some doubt as to whether an e-mail message amounted to a 'permanent form' this has now been confirmed by the courts.

Print-outs of e-mail messages are admissible in evidence and may be discoverable in legal proceedings. As such, when communicating via e-mail one should be conscious of the need to express oneself with the same clarity and reserve as for other written communications.

The widespread transmission offered by the Internet raises important issues of jurisdiction and governing law.

JURISDICTION

The Internet has no regard for national borders but the defamation laws in each jurisdiction can vary significantly. A

foreign individual or trading corporation may be subject to the jurisdiction of the courts in another country if there are sufficient connecting factors within the forum. As such, the publisher in cyberspace is liable to be sued in any country where the material is accessed.

Decisions on jurisdiction in the US are somewhat complicated by constitutional issues. In determining jurisdiction US courts have distinguished between passive and interactive web sites. The court considers "the level of interactivity and commercial nature of the exchange of information that occurs on the web site" to ascertain whether there is sufficient contact to invoke a particular State's jurisdiction. A passive web site would not give a State jurisdiction and it has been held that a web site does not amount to a virtual office in a foreign jurisdiction.

An agreement that a sale of goods be governed by a particular State's law would give that State jurisdiction but may not be a sufficient bar to foreign proceedings in relation to tortious claims.

This is the case for defamation according to the High Court in *CSR Ltd v Cigna Insurance Australia Ltd.*[1] Cigna brought proceedings in Australia seeking an anti-suit injunction to restrain CSR's proceeding in the US. In the US, CSR sought damages for tortious interference with CSR's business, misrepresentation and violation of the *Sherman Act* and a New Jersey statute. An important consideration in the majority's decision to dissolve the injunction and stay the NSW proceeding was the fact that CSR could not rely on the US statutes in NSW. When this circumstance was applied to the 'clearly inappropriate forum' test in *Voth v Manildra*, NSW was shown to be a clearly inappropriate forum.

US courts have held that a court in a country where the loss occurs can claim jurisdiction if any part of the transaction occurred within that country.

US courts have also given weight to a number of factors such as:

(i) how many hits are received by residents in a particular state;

(ii) whether income is derived from the state; and

(iii) actual transactions with a person in the state.

Jurisdiction will arise where a foreign defendant has contracted to sell goods or services to a resident of the State.

Jurisdiction is to be distinguished from the governing law or choice of law. Whereas jurisdiction involves considering whether a particular court has power to deal with a dispute, choice of law rules apply once jurisdiction has been resolved.

GOVERNING LAW

The question here is which law will govern a defamatory statement published world wide via the Internet?

The US approach is to favour the law of the place which has the most significant relationships with the occurrence and the parties. In England, an assessment is made of the combined effect of the law of the country where the act is done (lex loci) and the law of the country in which proceedings are brought (lex fori). The key English authority on choice of law in torts provides that the allegation must be actionable under both the law of the place where the tort occurred and the law of England.

Australian case law relating to cross-border defamation has supported the view that the defamation occurs where the defamatory statement is published and not where uttered or sent from.

In order to provide certainty for an e-commerce transaction, parties should specify the jurisdiction and governing law of any dispute arising from the transaction.

LIABILITY OF SYSTEMS OPERATORS

The extent of potential liability varies according to the facts from case to case. According to US case law, liability will depend largely on the extent of the editorial control exercised by the 'sysop'. This is often determined by the structure of the service through which the tort is committed. In the UK, and to some extent in Australia, the extent of liability is not yet decided.

A 'sysop' provides the medium for electronic communication. Each type of 'sysop' poses similar questions of liability.

INTERNET SERVICE PROVIDERS

The Internet is a network of networks. While the user perceives the system to be a uniform network, the Internet is decentralised with no central hub through which all messages must be routed and no central governing entity.

Most users access the Internet via Internet Service Providers (ISPs). In the decentralised Internet system, these ISPs are the 'systems operators' who are potentially liable for the on-line torts of their users.

The essential issue is the categorisation of the service provider and whether they should be considered as primary publishers (ie: equivalent to newspapers); secondary publishers (ie: equivalent to booksellers or newsagents) or facility providers (ie: equivalent to telephone companies).

In the US case of *Cubby Inc v CompuServe*[2] CompuServe ran special interest 'fora', including electronic bulletin bards, interactive on-line conferences and topical databases. One forum, regulated and controlled by Camerson Communications Inc (**"CCI"**) focused on the journalism industry. CCI's control was exercised 'in accordance with editorial and technical standards established by CompuServe'. Don Fitzpatrick Associates (**"DFA"**) was the publisher and on-line provider of Rumorville USA, a daily newsletter providing reports about journalism and journalists.

When Rumorville published allegedly defamatory statements about Cubby Inc, Cubby brought a law suit against CompuServe under NY libel law. CompuServe argued that it acted as a distributor and not as a publisher and could not be held liable because it did not know and had no reason to know of the statements.

The court held that CompuServe carried the publication as part of a forum that was managed by an unrelated company CCI. Also, DFA could upload the text of Rumorville into CompuServe's library and make it available to its users instantaneously. Because CompuServe had no more editorial control over the publication's contents than does a library, newsstand or bookstore and because a computerised database is the functional equivalent of a more traditional news vendor, the court held that a standard of liability higher than that imposed on those categories would impose an undue burden on the free flow of information.[3]

In *Stratton Oakmont Inc v Prodigy Services Co*,[5] an unidentified user of

Prodigy's "Money Talk" computer bulletin board accused plaintiff Stratton Oakmont of criminal and fraudulent conduct. Stratton sued Prodigy as the owner and operator of the computer network on which the statements appeared. The plaintiff relied on:

> (i) Prodigy's guidelines where users are requested to refrain from posting notes that are insulting and are told that harassing notes will be removed when brought to Prodigy's attention; and
>
> (ii) Prodigy's use of software which automatically pre-screens all bulletin board postings for offensive language.

The critical inquiry was whether Prodigy exercised sufficient editorial control over its computer bulletin boards to render it a publisher. Distinguishing the facts here from those in CompuServe, the court noted that Prodigy held itself out to the public and its members as controlling the content of its bulletin boards. The court held that 'by actively utilising technology and manpower to delete notes from its computer bulletin boards', Prodigy screened the content of messages posted on its boards, and this constituted editorial control. Thus, Prodigy was a publisher and not a distributor.

The Australian cases offer a different perspective. In *McPhersons Limited v Hickie*[6] the court held that newsagents, booksellers and libraries had succeeded in a defence of innocent dissemination if they were able to show that they were unaware that the publication contained defamatory material. The court noted that such persons have been regarded as having a more subordinate role than traditionally played by the printer in the publication of libel.

Following the decision in *Thompson v Australian Capital Television Pty Ltd*,[7] to be an innocent distributor in Australia it must be shown that:

> (i) the distributor did not know that the material contained defamatory matter;
>
> (ii) the distributor had no reason to conclude that the material was likely to contain defamatory material; and
>
> (iii) the distributor was not negligent in its lack of knowledge.

The Federal court held that a regional TV station relaying programmes instantly was not a subordinate participant in the distribution chain and therefore was not entitled to rely on the defence.

COMMERCIAL ON-LINE SERVICES

These services can be held liable as sysops for the on-line torts of their customers either within their own system or, like the ISPs, for torts committed on the Internet through the gateway they provide.

Both ISPs and commercial service providers often offer a combination of services such as e-mail and public messaging services, software collections, recreational forums and electronic publication libraries.

A user may subscribe to a mail list to participate in discussions of a particular topic, receive a copy of every message sent to the list, read messages publicly posted on an electronic bulletin board or to join a newsgroup.

CARRIERS

Common carriers are services such as telephone, telegraph and satellite communications.

Carriers, as facility providers exercising no control over content, will not be liable for defamatory material transmitted over the Internet. Liability is only shown where the carrier knows that the material is defamatory, provided the message is not privileged.

It has been argued that bulletin boards, networks or on-line services are common carriers, and should be protected as such. Yet the common carrier argument does not seem to apply to most sysops. While common carriers offer unlimited access to anyone who asks for it, sysops are free to limit access to their systems.

BULLETIN BOARD PROVIDERS

Bulletin boards are not necessarily synonymous with the Internet. Users may access bulletin boards via the public telephone network as opposed to the Internet. Some BBSs are connected to the Internet yet many are strictly private. Bulletin Boards are similar to commercial on-line services except they are often free of charge.

In the US, operators of those BBS's associated with the Internet have created USENET, a system by which the messages posted on local USENET site BBS's are organised into topical newsgroups and distributed to Internet sites. The sysop of a BBS could be held liable for torts committed within the BBS itself and if a defamatory message is posted through USENET to the wider Internet newsgroup , the sysop could be liable for this as well.

An important difference between commercial on-line services and BBSs is that activity on the BBS is often controlled or moderated by the sysop, when they receive the message and decide which ones to post to a given newsgroup. This difference is a crucial factor in determining a sysop's liability for users' torts.

Where a service is used for the private distribution of information such as personal e-mail, it has been suggested that such a service provider should be categorised as a mere facility provider and, consequently, not be held liable for any defamatory material transmitted.[8]

USERS

The potential liability of users was demonstrated in an Australian case, *Rhindos v Hardwick*.[9] The court found that Dr Rindos, an anthropologist and Senior Lecturer at the Department of Archaeology at the University of Western Australia, had been defamed by another anthropologist by an entry on DIALx Science anthropology computer bulletin board. Approximately 23,000 people worldwide had access to this BBS. The court awarded $40,000 damages to Dr Rindos.

DILEMMA FOR SYSOP WITH KNOWLEDGE OF THE DEFAMATION

In an old US case, *Fogg v Boston & L. R. Co.*,[10] a newspaper article defaming a ticket broker was posted in the defendant's railway office on a bulletin board maintained for public view. The court held that:

> (i) a jury could have decided that the defendant had knowledge of what was posted in its office; and
>
> (ii) the article was placed in the station in an area related to the defendant's business and had not been removed in a timely manner.

The court held that even if the company was not responsible for posting the article in the first place, the failure to remove it could amount to constructive authorship, endorsement or ratification.

In an Australian case *Urbanchich v Drummoyne Municipal Council*[11] Hunt J found the Council liable for the defamatory content of posters on its property. The court found that the Council:

> (i) had been notified of the existence of the posters and the plaintiff's complaint concerning their contents;
>
> (ii) had been requested to remove the posters;
>
> (iii) had the ability to remove those posters or to obliterate their contents; and
>
> (iv) had failed within a reasonable period to do so.

The Fogg and the Urbanchich cases pose a dilemma for service providers in circumstances where they become aware of defamatory material that has been transmitted via their forum, bulletin board or service. Once the service provider possesses this knowledge the issue is then how to respond appropriately.

On the basis of Fogg and Urbanchich, if they choose to act and impose some editorial control in order to be seen to refute or distance themselves from the statement, sysops have the potential problem that imposing such editorial control may provide evidence of their status as a primary publisher. If instead they choose not to act they may be seen to have acquiesced to or ratified the defamatory statement.

Where action is able to be taken swiftly, an appropriate response may be to seek an apology in appropriate terms from the person who has sent the defamatory statement. A better and more effective preventive measure is to have appropriate guidelines in place that are conditions of use of the service.

Service providers will need to make conscious choices about certain areas of their services or bulletin boards where they do exercise editorial control and accept responsibility, and others where they do not and where they remain merely a post box.

SOME PROGRESSIVE MEASURES

In the UK, the *Defamation Act* 1996 (UK)[13] ("**ACT**") has created a statutory defence of innocent dissemination in the U.K. It allows employers to show that they were not responsible for an employee's e-mail by establishing that the message was sent outside the scope of their employment. Section 1 states "in defamation proceedings a person has a defence if he shows that:

> (a) he was not the author, editor or publisher of the statement complained of;
>
> (b) he took reasonable care in relation to its publication; and
>
> (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement".

In the Act, the definition of "author" does not include a person who did not intend that his statement be published at all. Section 1(3) provides that a person shall not be considered the author, editor or publisher of a statement if he is only involved:

> (a) in printing, producing, distributing or selling printed material containing the statement;
>
> (b) in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
>
> (c) as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

ADMA CODE OF CONDUCT

The Australian Direct Marketing Association ("**ADMA**") has produced a code of conduct for electronic junk mail (known as 'spam'). ADMA is to work with its US equivalent, the Direct Marketing Association ("**DMA**") to create and promote a global database of e-mail addresses that would be spared from unsolicited e-mails.

A visitor to the ADMA web site would be able to fill in a form with their e-mail address and subsequently that address would be excluded from mail outs by DMA and ADMA member companies. There have been suggestions that this code would be ineffective because ADMA members account for approximately less than 1 per cent (1%) of junk mail received in Australia.

To help solve this problem ADMA is to approach Internet service providers next year to try to persuade them to limit the extent to which spammers are allowed access to ISP subscribers. Australian firms participating in the code of conduct would have a compliance sticker on their web sites. Consumers would be able to look for such stickers before handing out personal information.

SUGGESTED GUIDELINES FOR CONSTRUCTING AN INTERNAL E-MAIL POLICY

Employers should take the following steps:

- Make express prohibitions and regular warnings to staff against:

  - the transmission of defamatory statements;

  - infringement of equal opportunity policies, such as communicating any form of discrimination, harassment etc which is targeted at race, sex, religion, national origin, age, sexual preference, physical or mental handicaps; and

  - transmission of obscene or pornographic material on the employer's e-mail system.

As an example, in a recent UK case *Western Provident Association v Norwich Union Health-Care and Norwich Union Life Insurance* Norwich Union was ordered to pay £450,000 in damages and costs and an apology to Western Provident Association after admitting its staff had used their internal e-mail system for making libellous comments.

If an employer fails to act to protect employees from the receipt of unsolicited material, it may be arguable that the employer has assisted in the creation of a hostile workplace for the purposes of Section 102 of the *Equal Opportunity Act* 1995 (Vic) and Section 18A of the *Racial Discrimination Act* (Cth) 1975.

- Employers should advise and regularly warn staff that e-mail should not be used as a conduit for confidential information imparted to staff in the course of their employment.

- Employers should advise and regularly warn staff that the use of e-mail should not in any way violate policies, guidelines and procedures and refer to any appropriate employee manuals or guidelines.

- Employers should advise and regularly warn staff that they are not to distribute employee e-mail messages to third parties without the employer's consent.

- Employers should be aware of the risks involved if they are to create an external e-mail link. Once released such information will often be accessible worldwide and as such material may be received in various jurisdictions with different defamation laws. Depending on which jurisdiction an action is brought in, different standards of liability, different defences and different approaches to awarding damages often apply.

Finally businesses should note the capacity of e-mail to bring its authors undone. It will become the big issue for the demon of discovery in litigation. Bill Gates knows all about cyberspace but his own e-mails are providing the ammunition for his many opponents. Alan Kohler gave this warning to business on the dangers of e-mail:[14]

> *"Gates, who was recently feted in Australia like a visiting Head of State - even making an address to Federal cabinet - has been exposed as an unscrupulous dissembler, possibly a perjurer, and definitely not a nice man.*
>
> *Clinically and methodically, Justice Department lawyer David Boles destroyed Gates' credibility by playing videotaped depositions, in which the head of Microsoft twisted and sparred absurdly with Government lawyers over semantics and fine legal meanings, before being presented with e-mail messages – often written by himself – which contradicted his own evidence and that of others...*
>
> *Who in business would want their private correspondence raked over in a public courtroom? In fact, compared with what you'd probably turn up in the e-mail storage folders of most chief executives' hard disks, the material that Gates has been caught out on might even look tame".*

1 (1997) 71 ALJR 1143.

2 776 F Supp 135 (S.D.N.Y. 1991).

3 Ibid at p183.

4 *Berkeley Technology Law Journal*, 1996 vol11 no 1.

5 No 31063/94, 1995 WL 323710 (N.Y. Sup Ct May 24, 1995) (unreported).

6 (NSW Court of Appeal, unreported, 26 May 1995).

7 (1994) 127 ALR 317.

8 "Internet : The Legal Tangle", *Tolley's Communications Law*, Vol 11, No 4, 1995, p 110-114 p111.

9 Ipp J WA Supreme Court N 940164, delivered 31 March 1994.

10 148 Mass. 513 (1889).

11 1991) AustTort R81-127.

12 1995 *Computer Law and Practice* at p106.

13 The Act came into force on 4 September 1996.

14 *Australian Financial Review* 21-22 November 1998 at p24.

Karen Knowles is a lawyer in the Melbourne office of Blake Dawson Waldron. The views expressed in the article are her own and not necessarily those of the firm or its clients.