

# The Internet and Defamation

by Associate Professor Francis Auburn

The Internet is a global system of networked computers. A current estimate is that 20,000,000 people from 125 countries access its components (J. Button, 'Around the World in Eighty Seconds', *Time Australia*, 13 December 1993). Mailing lists on a large variety of subjects, including many on specialised areas of the law, are expanding rapidly. The Network News consists of more than 2,500 groups on many topics including law, politics, ethnic groups and various types of recreation. FTP enables large texts to be downloaded from computers on the other side of the world. These are only some examples of the vast and varied possibilities of the Internet.

The Internet is generally seen as a free or cheap means of communication and access, especially useful for the speed with which information can be obtained. Some estimate there will be 100,000,000 users in 1998 (M. B. Rizik, 'The Internet and the Law' (1993) 1(3-4) *The Internet Business Journal* 12). Furthermore, commercial uses are also expanding rapidly (R. Tetzeli, 'The Internet and your Business' *Fortune*, 14 March 1994, 6 at 9). Of special interest to lawyers are the large number of law-related mailing lists (L. Louis-Jacques, *Law Lists* (1994)).

The Internet is experiencing very fast growth of between 6 and 14% per month in 1992: 'An incredible growth rate for any industry' (D. Ingvarson, D. Marinova and P. Newman, 'Electronic Networking: Social and Policy Aspects of a Rapidly Growing Technology' *Workshop 93*, Melbourne). However, the Internet is an example of distributed computing. There is no single central controlling computer or governing body. Many con-

tributions are made directly, without any intervening examination. The popularity of some mailing lists means that there are a large number of messages each day. Even where there is a moderator to check whether messages should be permitted, the large number of messages and the fact that the moderator is usually a volunteer, may make it difficult to carry out that detailed legal scrutiny which is standard for newspapers.

There have been defamation actions arising out of mistakes in commercial databases (*Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 254 (1985)). But there do not appear to have been such actions based upon the widespread non-commercial uses of the Internet. Therefore the case of *Rindos v Hardwick* (Ipp J., WA Supreme Court, No. 940164, delivered 31 March 1994) is of considerable interest to the large numbers of Internet users around the world.

Dr Rindos claimed that he had been defamed, inter alia, by an entry on the DIALX science anthropology computer bulletin board in 1993. The action was not defended and damages of \$40,000 were assessed based, in part, on the bulletin board message. It was stated that approximately 23,000 people worldwide, mostly academics and students, have access to this bulletin board (*Rindos v Hardwick* (supra) 4).

The case was not defended because of the defendant's lack of resources (ibid., p.2). However, *Rindos v Hardwick* must be seen as a clear warning to the millions of people having access to the various services in the Internet. 'Computer users who use these worldwide bulletin boards should be aware that they could be exposing themselves to defamation

actions.' (R. Castiglione, counsel for Dr Rindos, quoted in M. Lang, 'Computer libel wins academic \$40,000' *The West Australian*, 2 April 1994).

However, this case is only the beginning of the issues raised by defamation and the Internet. Some further issues may be raised which did not arise in *Rindos*. Users of the Internet usually enter their messages informally, similar to speech and differing from the drafting of a letter. Often this is in reply to another message. Where, as is often the case, the message is immediately posted to a bulletin board, mailing list or other service, the potential for defamation is much larger than with a conventional letter. A glance at some of the messages, even on some of the more staid services, clearly shows the large potential for defamation actions.

*Rindos v Hardwick* involved two parties in Western Australia, with the plaintiff relying solely on Western Australian law. Future cases may well offer plaintiffs a worldwide choice of fora, with a bewildering range of possibilities. Unmoderated mailing lists may not involve the 'owner' of the list on the ground that he could not have screened the message. But a moderated list could well open the moderator to being sued.

In *Rindos v Hardwick* (p.7) the message denigrated the plaintiff's competence as an anthropologist. The plaintiff is well known in academic circles and is a person of high standing in those circles (ibid., pp. 8-9). For future Internet cases this raises the question, in US courts, of the application of the public figure defence (*New York Times v Sullivan* (1964) 376 US 254 at 271-272). 'Public figure' is extremely broad,

having been applied to a state college football coach (*Curtis Publishing v Butts* (1967) 388 US 130 at 149).

The House of Lords has recently made great changes to the law of defamation, ruling that governmental institutions may not sue for libel as it is contrary to the public interest (*Derbyshire County Council v Times Newspapers* [1993] 2 WLR 449 at 458, per Lord Keith). In some respects this goes beyond the United States' *Sullivan* test. Australian defamation law is also undergoing rapid change (eg. *Toyne v Everingham*, Angel J, Supreme Court, Northern Territory, delivered 29 July 1993). In particular, the High Court is currently considering two cases argued on the basis of the constitutionally implied freedom of communication (*Stephens v WA Newspapers*, Supreme Court, WA, No. 522 of 1993 and *Theophanous v Herald and Weekly Times*, County Court, Victoria, No. M110 of 1993). If this freedom is applied to defamation some form of public figure or public interest doctrine may well emerge in due course.

Applying the law of these three jurisdictions to Internet defamation, it is possible that an Internet message may, in the future, offer a choice of forum to suit the plaintiff's need to avoid a public figure defence. The circulation of the same message on

several mailing lists (not uncommon on the Internet) could expose the sender to different and cumulative defamation liability in different jurisdictions. ✎

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