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A Bulletin Board is a Bulletin Board (Even if it is Electronic) – Certain Intermediaries are Protected From Liability After All

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Abstract

There is a range of technical possibilities for providing electronic bulletin boards on the Internet, such as for example, Internet Relay Chats (IRC) archives, Usenet, website 'guest books', some forms of Weblogs and the classic Bulletin Board Services (BBS). The question whether the provider of such electronic bulletin boards are to be held liable for defamatory content, placed on the bulletin board by a third party, has been the subject of several cases, some legislation and sparked a long-running international debate. Australian commentators have mainly pointed to two possible defences – that provided to so-called innocent disseminators, and that provided under section 91 of Schedule 5 of the Broadcasting Services Act 1992 (Cth). Both of these defences, however, arguably represent very modest comfort for bulletin board operators.

This article suggests that there might be another possible approach providing a more direct protection for the operators of online bulletin boards, acting in a responsible manner.

KEYWORDS: internet law, electronic bulletin boards, liability, defamation

A BULLETIN BOARD IS A BULLETIN BOARD (EVEN IF IT IS ELECTRONIC) – CERTAIN INTERMEDIARIES ARE PROTECTED FROM LIABILITY AFTER ALL

By Dan Jerker B. Svantesson[*]

Introduction

There is a range of technical possibilities for providing electronic bulletin boards on the Internet, such as for example, Internet Relay Chats (IRC) archives, Usenet, website 'guest books', some forms of Weblogs and the classic Bulletin Board Services (BBS). The question whether the provider of such electronic bulletin boards are to be held liable for defamatory content, placed on the bulletin board by a third party, has been the subject of several cases[1], some legislation[2] and sparked a long-running international debate[3]. Australian commentators have mainly pointed to two possible defences – that provided to so-called innocent disseminators, and that provided under section 91 of Schedule 5 of the *Broadcasting Services Act* 1992 (Cth)[4].[5] Both of these defences, however, arguably represent very modest comfort for bulletin board operators.

This article suggests that there might be another possible approach providing a more direct protection for the operators of online bulletin boards, acting in a responsible manner.

Innocent dissemination

Under the common law, the defamation defence of innocent dissemination is available to 'subordinate distributors'[6]. While the typical subordinate distributor

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1 See e.g. *Godfrey v. Demon Internet Limited* [1999] EWHC QB 244 (26th March, 1999).

2 See e.g. *Defamation Act* 1996 (UK), s. 1.

3 See e.g. John Kahn, *Defamation Liability of Computerized Bulletin Board Operators and Problems of Proof*, CHTLJ Comment/ Computer Law Seminar (February, 1989).

4 Hereinafter: *Online Services Act*.

5 See e.g. Julie Eisenberg, *Safely Out of Sight: The Impact of the New Online Content Legislation Defamation Law*, [2000] University of NSW Law Journal 7, and, Matt Collins, *New twist to liability for defamation on the internet*, Law Society Journal, July 2000.

6 I.e. 'those who are not the author, printer or "first" or main publisher of a work and who have only taken a subordinate part in disseminating it' Butler/Rodrick, *Australian Media Law* (Sydney: LBC Information Services, 1999), at 83, referring to

would be, for example, newspaper vendors and libraries, the definition of subordinate distributor seems wide enough for a bulletin board operator to fit squarely within it. In order to invoke this defence, the subordinate publisher would have to show that:

- he or she did not know that the publication contained defamatory matter;
- that this ignorance was not due to any negligence on his or her part; and
- that there were no grounds for supposing that the publication was likely to contain defamatory matter.[7]

All this would seem to indicate that a bulletin board operator could rely on this defence in a range of situations. However, a 1996 High Court decision has severely limited its usefulness. A little simplified, the court in *Thompson v Australian Capital Television*[8] held that, while the defendant did not have any real control of the defamatory material (in that case a near-instantaneous re-transmission of a TV program), the technical setup causing this lack of control was the defendant's own choice, and the defence of innocent dissemination was therefore not applicable. Following this line of reasoning many, not to say most, operators of electronic bulletin boards would seem to be excluded from relying on the defamation defence of innocent dissemination.

Furthermore, the common law relating to defamation has been replaced by legislation in Queensland and Tasmania. The *Defamation Act* 1889 (Qld)[9] and the *Defamation Act* 1957 (Tas)[10] do not provide the same wide scope for innocent dissemination as the common law does. Instead, the defence of innocent dissemination is only enjoyed by 'sellers' of periodicals and books. This would certainly seem to exclude protection for bulletin board operator.

The section 91 defence

The first thing to note in relation to the possible existence of a defamation defence in section 91 of the *Online Services Act* is that the Act never aimed to regulate defamation. Thus, there is a possibility (or risk) that a court, faced with the question of whether the operator of an electronic bulletin board is liable for defamatory third party content, would conclude that section 91 is irrelevant.

Vitzetelly v Mudie's Select Library Ltd [1900] 2 QB 170 and *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574.

7 Butler/Rodrick, *Australian Media Law* (Sydney: LBC Information Services, 1999), at 83, referring to *Emmens v Pottle* (1885) 16 QBD 354, *Vitzetelly v Mudie's Select Library Ltd* [1900] 2 QB 170 and *McPherson Ltd v Hickie* (1995) Aust Tort Reports 81-348.

8 (1996) 186 CLR 574.

9 ss. 25-26.

10 s. 26.

Secondly, even if section 91 could be applied in a defamation dispute, the unclear definitions in the *Online Services Act* make it difficult to predict whether all forms of electronic bulletin boards would be covered. For example, 'ordinary electronic mail' is not included in the definition of 'Internet Content'[11] and thus the status of any bulletin board system involving e-mails would have to be seen as uncertain. In addition, the possible section 91 defence is only available to Internet Service providers (ISPs)[12] and Internet Content Hosts (ICH)[13]. The definition of ISP certainly excludes bulletin board operators, and whether the operator of an electronic bulletin board would fit into the definition of ICH is also questionable. For example, a person might operate a bulletin board in the form of a 'guest book' on his/her website. If that person is a private individual, he/she would ordinarily not be physically hosting any material because, more often than not, he/she would have contracted with a specialised ICH company to host his/her website.

Furthermore, it is not uncommon for Internet actors to fit into more than one category. For example, ISPs frequently also operate their own websites. In such a situation, focus must be placed on the relevant activity of the company/person in question. Regulations that apply to an ISP do so only in relation to activities carried out by a company/person, operating as an ISP, in its capacity as an ISP. If, for example, the same company that operates as an ICH also operates a website with a 'guest-book', and defamatory material appears in that section of the website, the company cannot rely on section 91 to protect them in their capacity as a website operator. This is no different from that an off-duty police officer cannot enjoy the same privileges as he/she does in his/her capacity as a police officer.

Not a publisher, no need for defamation defences?

If I have absolutely nothing to do with a certain publication, I cannot be held liable for its defamatory content. That lack of liability does not stem from section 91 of the *Online Services Act*, the defence of innocent dissemination or any other defamation defence; it is simply a result of my not being a publisher under the law of defamation. But what if, for example, a defamatory message is painted on my wall, for all to see? Would I then be held to be liable as a publisher? While, I have not actively taken part in the publication of the defamatory material, I have, in a sense, contributed to making the distribution of the defamatory material possible (it is, after all, my wall). The Supreme Court of Western Australia held a person liable as a publisher of material painted on her wall.[14] However, in that case, the woman in question had arranged for the painting to take place and, with a minor

11 *Online Services Act*, cl. 3.

12 For the purposes of this Schedule, if a person supplies, or proposes to supply, an Internet carriage service to the public, the person is an '*Internet service provider*' *Online Services Act*, cl. 8.

13 '[A] person who hosts Internet content in Australia, or who proposes to host Internet content in Australia' *Online Services Act*, cl. 3.

14 *Darrell Bruce Arnett & ORS v Janina Roper* [1999] WASC 1030 (26 March 1999).

exception, decided the text written on her wall. The conclusion to be drawn from that case is that one is not excluded from liability simply be outsourcing the publishing, but the case cannot be read to mean that a person is automatically held to be a publisher simply by having control over the medium in which the defamatory material is published. In fact, as was made clear in *Urbanchich v Drummoyne Municipal Council*[15], for a passive person to be held to be a publisher of a third party's statement 'the plaintiff must establish in one way or another an acceptance by the defendant of a responsibility for the continued publication of that statement'[16], and must prove that the defendant:

> (i) had been notified of the existence of the [material] and of the plaintiff's complaint concerning [the material],
> (ii) had been requested to remove the [material],
> (iii) had the ability to remove [the material] or to obliterate [the] content, and
> (iv) had failed within a reasonable period to do so.[17]

If the plaintiff manages to prove all of these circumstances, the acceptance of responsibility, mentioned above, *may* be inferred (if such an inference is accepted by the jury).

In light of this, an important distinction can be drawn between a situation where it can be inferred that the defendant accepts responsibility for the published material, and situations where such an inference is not warranted. While a situation where a third party independently paints a defamatory message on a person's wall would seem to fall into the latter category, it seems reasonable to suggest that a person providing a bulletin board to the public, or a group of people, would expect messages being published on that bulletin board. Thus, in a sense, the provider of the bulletin board could be said to have accepted responsibility for the publication of those messages. The question would then be when such an acceptance occurs; could it be said that the very fact that a person provides a bulletin board means that that person automatically accepts responsibility for any kind of material being posted on the board from the moment of posting and onwards? Even if this question were to be answered in the affirmative, a passive person could not be held to be a publisher unless it was also proven that he/she had been notified of the existence of the material and of the plaintiff's complaint concerning the material, had been requested to remove the material, had the ability to remove the material or to obliterate the content, and had failed within a reasonable period to do so.

There will, as noted by Hunt J, of course, 'always be issues […] as to whether the defendant had the ability to remove the defamatory statement and whether the

15 (1991) A Torts R 81-127.
16 Ibid. at 69,193.
17 Ibid. at 69,195.

time given before the commencement of the action was a reasonable one in which to do so.'[18] However, the key point here is that the operator of a bulletin board, be it electronic or not, becomes a publisher only at the expiry of the time period during which he/she should reasonably have removed the defamatory material – until then, the operator cannot be held liable because he/she simply is not a publisher for the purpose of defamation law.

In the UK case *Godfrey v Demon Internet*[19], the provider of an electronic bulletin board, Demon Internet, argued that it 'were not at common-law the publishers of the Internet posting defamatory of the Plaintiff'[20]. The judge did not agree:

> In my judgment the Defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.[21]

This statement seems to conflict with the opinion expressed by Hunt J in the *Urbanchich* case, and its significance must not be overstated. First, it must be remembered that, the plaintiff in this case sued only in relation to publications taking place after the defendant had been informed about the existence of the defamatory material and the plaintiff's disapproval of that same material.[22] Thus, anything said, by the judge, on a general level, such as the statement quoted above, is obviously *obiter*. In addition, while carrying some value, an Australian court is not bound by any English decision. Interestingly, Justice Morland, in the *Godfrey* case, relied, in part, on the same case that Justice Hunt drew heavily upon in the *Urbanchich* case – that is, *Byrne v Deane*[23]. That case, inaccurately referred to as a 'notice board case' by Morland J,[24] concerned an allegedly defamatory note being attached to the wall in the premises of a golf club, by a third person. The statement relied upon by both Morland J and Hunt J was:

> The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?[25]

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18 Ibid. at 69,194.
19 [1999] EWHC QB 244 (26th March, 1999).
20 Ibid.at para 2.
21 Ibid.at para 33.
22 Ibid.at para 15.
23 [1937] 1K.B. 818.
24 *Godfrey v. Demon Internet Limited* [1999] EWHC QB 244 (26th March, 1999), at para 32. As was clearly pointed out by Greer L.J. at 828, the case did not involve any notice board.
25 *Byrne v Deane* [1937] 1K.B. 818, per Greene L.J. at 838.

There are several interesting things to note in relation to the *Byrne* case. First, while Morland J makes reference to it, he can certainly not rely on that case in coming to his wide *obiter* conclusion as to when a bulletin board operator becomes a publisher of defamatory third party content. Further, while Hunt J expands slightly on the requirements in demanding proof that the defendant had been informed about the plaintiff's complaint and actually been asked to remove the material, his conclusion is considerably more true to Greene L.J.'s 1937 opinion in *Byrne v Deane*. Finally, it is also interesting to note that in the *Byrne* case, the operators of the golf club at which the defamatory material had been placed had expressly provided that no notes were to be placed in the golf club without the prior consent of the secretary. This is highly interesting as it may be said to distinguish the case from one involving a public notice board. If people are aware that only material to which the secretary has given her (in this case it was a woman) consent will be placed on the premises, people will, when they see a posting on the wall, assume that she has in fact given her consent to that posting; particularly so if the note remains on the wall over a time period during which it could be assumed that she has noticed the posting. In other words, the secretary's consent can reasonably be inferred as soon as a time period has elapsed during which she should have noticed the posting. Such inference is more difficult to make in relation to a public bulletin board.

In summary, at least under the law of New South Wales, a bulletin board operator, be it electronic or not, may only be held liable as a publisher in the event that he/she has been notified of the existence of the material and of the plaintiff's complaint concerning the material, has been requested to remove the material, has had the ability to remove the material or to obliterate the content, and has failed within a reasonable period to do so, and from these facts it can be inferred that he/she has accepted a responsibility for the continued publication of that statement. This, it is submitted, should provide a bulletin board operator, acting responsibly, with an effective protection.

Some thoughts on the future

In contrast to many, not to say most, other legal conundrums that have arisen out of the Internet's characteristics, it would seem that the question of liability of bulletin board operators could be addressed fairly easily. It simply cannot be fair to make a bulletin board operator liable as a publisher, for material posted by a third person, at the very instant the material is posted. In addition to the fairness concern, such a liability might cause a widespread closing down of electronic bulletin boards, and since the operator of a physical bulletin board would not have such an immediate liability, it would further be contrary to the internationally valued principle of functional equivalence (i.e. that online behaviour should, to the extent possible, be treated as its offline equivalent). On the other hand, the operators should not, as arguably is the case in the US, be given an almost

unlimited protection.[26] If a complaint is made to the operator, he/she will risk being seen as having accepted the responsibility for the publication if he/she does not take appropriate measures within a reasonable time. This burden is lessened by the fact that bulletin board operators have excellent enforcement possibilities (i.e. a bulletin board operator can rather easily remove defamatory material).

In light of this, it would seem desirable that bulletin board operators are viewed as publishers only under the circumstances outlined in the excellent reasoning of Justice Hunt in the *Urbanchich v Drummoyne Municipal Council* case, discussed above. Further, a bulletin board operator must be protected against suits claiming breach of contract in relation to removed material. This would seldom be a real concern, particularly as it seems that the defamatory material leading to disputes often are posted anonymously. Further, the operator could suitably place conditions on the use of the bulletin board (e.g. limiting what sorts of postings are allowed and stating how inappropriate postings will be dealt with). Finally, it would be suitable for either an existing or a specifically designed, governmental agency to offer to provide advice and dispute resolution means in relation to self-censorship by bulletin board operators.

26 *Communications Decency Act* 1996 (US) s. 230.