various articles like Article XIV on General Exceptions of the GATS should be modified to recognize the cultural specificity of the audiovisual sector. The US probably in time will see its vision of trade in culture come to pass. Its National Information Infrastructure initiative (released by the Clinton Administration 15 September 1993) is being imitated by other countries.

The presence of a global information infrastructure will facilitate trade in culture and in any case the WTO can be expected to pursue the matter. A global trade in culture raises many issues, but if the theory of comparative advantage is right, then one can expect some countries to dominate this trade with the result that there will be a progressive homogenization of national cultures. Australian visual artists along with creators of all kinds may find themselves awash in a king tide of cultural and artistic imports.

property in expression and a US experience

The strong copyright protection which TRIPS implements and which *Creative Nation* promises to build on may have some unexpected effects on artists. To begin with, as copyright protection increases the cost of creativity also rises. Artists, like all creators, play a dual role in the creative process. They are both users and producers of material. In all areas of artistic life there are traditions, genres, ways of doing things that constitute the artist's raw materials. The greater the copyright protection of these raw materials, the greater the cost of expression and therefore, somewhat, paradoxically the less incentive to produce new works.

Artists will have to think long and hard about the degree of protection they want for images in the emerging global economy. Property in expression, it should be remembered, sets limits on the freedom of expression. The US case of *Rogers v Koon* illustrates the kind of problem that artists will have to confront. A photographer who had taken a photo of a husband and wife holding a litter of puppies brought a copyright action against an artist who had used the photo to create a wooden life-sized sculpture called "String of Puppies". The argument was that the sculpture was an unauthorized copy of the photograph and this succeeded.

Koons, the artist, never denied that he had used the photograph to create the sculpture, but argued that he had a defence under the fair use doctrine. One of Koons' central arguments was that he belonged to a tradition of postmodern art, a tradition which deliberately took popular broadly circulating images and relocated them in an artistic context. This method of work has as its goal the parody and criticism of a society that is thought by its artist critics to be full of banal, mass produced images that reinforce a shallow production line culture. Andy Warhol is one famous exemplar of this artistic method.

No First Amendment ("Congress shall make no law ... abridging the freedom of speech...") issue was raised in the case, showing the almost automatic priority that property principles have over free speech principles. (However, there are a number of copyright cases in which the First Amendment argument has been raised. See, for example, *Harper & Row Publishers v. Nation Enterprise; Sid & Marty Krofft Television Productions v McDonald's Corp; Triangle Publications v Knight-Ridder Newspapers; Pacific & Southern Co. v. Duncan).*

The property economic perspective totally dominated the court's analysis. Essentially they saw Koons as an individual "sailing under ... the flag of piracy", rather than the representative of a distinctive kind of artistic tradition that was seeking to communicate a critical and unsettling message. The fact that Koons stood to make a considerable profit from the sculpture counted heavily against his claim of fair use.

free speech and protection

The free speech issue is not so remote in this case. If we accept that art is a form of speech, then the restrictions that intellectual property places on that speech at least require that the free speech issue be faced. Had the issue been raised in a First Amendment context, the outcome in the case would almost certainly have not been different, for the court would probably have found that Koons was not prohibited from using some similar image or the idea behind the photograph. In a balancing exercise, free speech interests would not have won here.

As visual artists enter a global economy which has a global information infrastructure, they will have to think creatively about their place in it. Amongst other things they will have to ensure that they receive meaningful moral rights protection rather than just symbolic protection, and they will have to reflect on how the balance of copyright protection is to be struck to accommodate their different interests.

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Insults on the Internet

Recent UK defamation cases may change the nature of Internet discourse permanently - a report from Denton Hall, Solicitors

The Internet, which has rapidly become an anarchist's playground, may soon be reverting to its original purpose: exchange of information between academics. The reason is that in both the US and the UK some users are abandoning the traditional Internet method of responding to defamatory comments - posting a reply on Internet - and are instead issuing proceedings for libel. Observers put this down to the increased numbers of users who are not versed in Internet protocol.

Either way it seems that the effect of the recent batch of libel cases will be to change the nature of Internet discourse permanently. Users in future may need to exercise more caution when sending criticisms and opinions.

how does Internet work?

Internet is, broadly, the result of interconnected regional computer networks. It does not exist as an independent body and has no central governing board or constitution.

Internet can be accessed via access providers such as CompuServe or Demon. A user may interconnect to Internet via an access provider's network and the access provider may also give access to online databases. When an E-mail message is sent, it passes from the sender's terminal to his/her access provider on to a destination access provider and finally to the destination E-mail address. A message can also be sent to bulletin boards (either open to all Internet users or just to subscribers of a particular access provider). These bulletin boards operate like a conventional notice board so

that any user who has access to it can read all the messages on the board. Bulletin boards have been described as "the lowest entry-barrier mass-media system in history".

who is liable?

It is clear that the author of a libellous Internet message is potentially liable to the victim. However, the author might be unidentifiable, untraceable, outside the jurisdiction of the victim's courts or, if traceable, have insufficient funds to meet a claim. The victim may therefore look for somebody else to sue.

In the UK everyone who has taken part in the publication of a libel is theoretically liable, subject to certain defences which are discussed later. In the case of a newspaper this includes the author, editor, printer, publisher and vendor. It is not clear, however, against whom, apart from the author, a person libelled in an Internet notice is entitled to bring proceedings.

Since the Internet itself is not an independent entity but merely a series of interconnected networks, there is no one to sue apart from the author of the libel and the access provider.

Applying the laws of defamation to Internet's access providers (and this could include the sender's access service provider or the destination access provider) presents clear difficulties. The access providers will argue that they operate a "telematic" service, i.e.: a communications system for the exchange of information, equivalent to a telephone company or the Post Office, but simply using a different medium. On this basis, access providers should no more be liable for delivering a libellous message than the Post Office is for delivering a libellous letter or British Telecom for defamatory comments made over the phone or sent by fax. For E-mail, since it is a form of person-to-person communication, the analogy seems valid.

Sending a message to a bulletin board is more akin to print publishing in that the message is disclosed to a section of the public, but the analogy ends here since the access providers merely set up the system and do not take an active part in the placing of a message on a bulletin board.

From a practical perspective, it would be impossible for an access provider to vet the vast number of messages appearing daily on these bulletin boards and, even if the access provider did check the bulletin boards, how could it know or find out (as a print publisher usually has to do) whether or not a message is defamatory? Any decisions of the access providers' liability could have implications for British Telecom and other telecommunications access providers.

In the US, where different libel laws apply, the US access service provider CompuServe was held not to be liable for defamatory statements made by its network users. This was on the basis that CompuServe had exercised no additional editorial control and had neither knowledge nor reason to know of the comments or their defamatory nature.

defences

The access providers' liability will depend on where they fit into the traditional categories of publisher, printer, distributor or vendor. If the Courts decide that the access providers should be treated as publishers then they will only have the same defences as the author - which relate to the truth of the message or fair comment. It seems that the access provider's role corresponds best to a distributor since it does not arrange or edit the text.

However, there is a further defence for a person who has only taken a "subordinate part in disseminating" the item. In newspaper and book publishing this has been held to apply to distributors and sellers but not to printers. What is more, this defence can only apply to a distributor or seller if they can show that:

- they did not know that the book/paper contained the libel complained of;
- they did not know that the book or paper was of a character likely to contain a libel; and
- this lack of knowledge was not due to any negligence on their part.

The access providers have a strong argument that this defence should be extended to them. If access providers are held to fit into this category then can they argue that they did not know that the message was of a character likely to contain a libel? The access providers undoubtedly do know that there are likely to be libels on the Internet, but they could argue that they did not know that a particular message contained a libel. If this argument succeeds then how do they show that they were not negligent? How can an access provider possibly check all messages and avoid negligence?

Unlike other forms of publication, the Internet system allows the aggrieved party a very simple immediate right of reply and access providers could argue that this should be taken into account when considering the damage done by a libel published in this way.

conclusions

While it seems unfair to hold the access providers liable for messages which they cannot possibly vet, it is likewise wrong that an individual should have no effective remedy for libellous allegations made against him/her which could have a profound effect on his/her reputation.

There are wider problems: even if it is decided that Internet should be regulated, how could this be done, given its non-centralised international nature? If access providers are expected to control their users' comments, this will also create problems in relation to censorship and breach of privacy, but that is another story....

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APPLICATIONS for EDITOR

After this edition (Vol.14 No.3), Anthony Mrsnik will retire from the editorship of the Communications Law Bulletin. CAMLA is therefore calling for applications for a new editor.

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