

The Legal Frontier of the Internet II

David Stewart critiques the US decision in *Religious Technology Centre v Netcomm On-Line Communication Services Inc* (1995) 33 IPR 132 and sees a tough road ahead for plaintiffs claiming copyright infringement over the Net.

The Case

The Religious Technology Centre (RTC) and Bridge Publications Inc held copyright in various works by L. Ron Hubbard, founder of the Church of Scientology. Dennis Erlich, a former minister who has since become a critic of the Church, copied sections of those works and posted those files on the Internet (to a specialist newsgroup, alt.religion.scientology, which he accessed via a bulletin board system (BBS) operated by Thomas Klemesrud. Klemesrud's BBS was not directly connected to the Net, relying instead on a connection to Netcomm On-Line Communications Inc (Netcomm), one of the largest Internet service providers (ISPs) in the US. The entire BBS-Netcomm structure was used to support Internet access for about 500 users other than Erlich. Neither Netcomm nor Klemesrud attempted to or did control the information passing through their computers, although Netcomm had, in the past, denied access to users (eg. for failure to pay subscription fees).

After failing to silence Erlich by approaching him directly, the RTC contacted Klemesrud and Netcomm and demanded that Erlich be denied access to their computers, informing the providers that the RTC and Bridge Publications Inc owned the copyright in the works which had been posted by Erlich. Both Netcomm and Klemesrud refused, on the basis that Erlich had legitimate uses he could make of the BBS, posted non-infringing as well as infringing material, and there was no way they could prescreen his posted material for copyright violations. Klemesrud took the position that he would not act until (at least) the RTC had proven to him that they were the copyright owners of the works posted. Netcomm pleaded technical difficulties, suggesting that it would be impossible to screen material before it was posted, and that Netcomm could not isolate Erlich's connection from the rest of Klemesrud's BBS (and hence denying Erlich access meant denying access to hundreds of users who

had not participated in any way in the alleged infringement).

The RTC sought a preliminary injunction to restrain Netcomm and Klemesrud from permitting Erlich continued access to their computers, while Klemesrud and Netcomm sought summary judgment on the copyright claims.

The Result

The application for the injunction failed, as did the application for summary judgment.

The court (appropriately) deferred a definitive examination of the issue of infringement until a full trial. Nevertheless, the consideration of the application for an injunction restraining Netcomm and Klemesrud from granting Erlich access to the Internet demonstrated quite clearly the likely approach of American courts to the issue

The Court's approach featured:

- a broad definition of copying, which includes impermanent copies of documents or applications created internally within a computer system where those copies are capable of being retransmitted or perceived, reproduced, or otherwise communicated for a period of more than transitory duration (*MAI Systems Corp v Peak Computer Inc* 991 F 2d 511 at 518);
- use of the public facility analogy as a model for ISPs and other network providers role in the process of copying via a network (this is the photocopier for public use model which places facility providers as passive and non-involved in the copying process, appearing in Australia as the rationale for s.39A of the *Copyright Act*);
- a lack of enthusiasm for actions against service providers founded on 'public distribution' and display. Despite the fact that the American courts have already sustained an action for infringement by public display over computer networks

(*Playboy Enterprises Inc v Frena* 839 F Supp 1552), the court in RTC was not entirely convinced that the mere possession of a digital copy on a BBS that is accessible to some members of the public constitutes direct infringement by the BBS operator. Only the subscriber should be liable for causing distribution of plaintiffs work, as the contributing actions of the BBS provider are automatic and indiscriminate;

- a focus on 'control' as the nexus for copyright liability;
- an exploration of the use of contributory liability (specific to US law) as a vehicle for placing ISPs under certain responsibilities to ensure they do not 'induce, cause or materially contribute' to the infringing conduct of another (*Gershwin Publishing Corp v Columbia Artists Management Inc* 443 F 2d 1159 at 1162); and
- a recognition of the validity of public policy arguments, most notably the sustenance by the Internet of a free environment for public debate - although in the US, such issues are far more explicitly dominated by constitutional issues than a common law public policy platform.

Ultimately, the court was not satisfied that the RTC was likely to succeed, and since there was no evidence that granting an injunction would be sufficient to avoid further harm to the plaintiffs copyright, the motion for an injunction was refused against both parties. The court in reaching this decision recognised that granting the orders requested would require Netcomm and Klemesrud to prescreen all material posted with them for copyright infringements, and 'chill the process of communication they provided'.

Commentary

Although only a preliminary hearing, and containing much which is specific to US law, the case gives a glimpse of the ways in which the adaption of copyright theory to network-based information technology can serve to protect ISPs and

network providers by characterising their role as passive players in the copying process. The issues of contributory infringement and vicarious liability find their closest match in Australian courts with the concept of 'authorisation' of the creation of infringing copies. Whether an ISP's role as a facility provider would be construed as 'authorisation' under Australian law remains an open issue.

Naturally, in an area like this, an interlocutory hearing is rarely able to do more than demonstrate the need to proceed to a full hearing sooner rather than later. Nevertheless, a clearer judicial position seems to be emerging regarding copyright liability on the Net. That position is unlikely to be encouraging to copyright owners, since it seems that the courts are increasingly willing to adapt the analogies of legal reasoning used to describe ISPs (the publisher, the photocopier in the library, the tollbooth on the highway, and so on) in order to accommodate a more detailed technological understanding of the Internet's structure. This is particularly difficult for copyright theory, which depends on liability arising at the moment of copying (compared to, for example, defamation, which depends upon communication of imputations to another person and thus manages to remain, in a sense, 'technology neutral'). Network architecture, exemplified by the Internet itself, is suffused with redundant 'copies', a hallmark of the Net's military origins and a source of its remarkable stability in the face of disruption of component computers. There are many (and constantly moving) infringing copies of copyright material on the Internet, made automatically and without the intervention of the proprietors of the network components - a situation which the court recognised could (if RTC's arguments has been sustained) leave any person who sets up a server as a Net domain or analogous network component liable for material simply 'passing by their door'.

The court held that Netcomm and Klemesrud, as service providers, were not liable for breaches of copyright which took place using facilities that they had set in place. Part of this conclusion derives from the impractical nature of any alternative conclusion, which could leave the proprietor of each link in the Internet system liable for breaches of copyright which are, by the technological nature of the Net, repeated in sequence across a variety of computer platforms. Rather than begin chasing down the infringing copies through a mirror maze of iterations

across Usenet (the Internet system over which the infringing copies were posted) the court focussed on the issue at hand for the plaintiff establishing a static target for a claim:

'Where the infringing subscriber is clearly directly liable for the same act, it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet. Such a result is unnecessary as there is already a party directly liable for causing the copies to be made'.

This leaves open the issue of what options are open to a copyright owner who can not identify the source of an infringing copy. But this is only part of the court's rationale. The recognition that the court gives to the technological structure of the Internet (for example, by accepting the practicality arguments of Netcomm and Klemesrud) is matched by a judicial recognition of the social (self-) importance that the growing 'Internet lobby' ascribe to the Net as a source of a free domain of public debate: the court concluded that Internet access was deserving of at least an arguable public policy shield ('Netcomm and Klemesrud play a vital role in the speech of their users'). This argument is, of course, less powerful when marshalled on behalf of more limited or functionally specific computer networks (such as stand-alone BBSs or corporate WANs and LANs).

In comparison to the *Prodigy* defamation case, ISPs have not been shoehorned into an awkward 'secondary publisher' model of the Internet. In that case, an on-line content provider was held liable for defamatory material published via their server (essentially because that provider held itself out as editing the available material and producing a 'family friendly service'). In taking responsibility for information content (and seeking market advantage by offering an enhanced product to subscribers) Prodigy interposed itself between subscribers and the Net. In shifting from access provider to editor, Netcomm specifically distanced itself from this approach, at one stage arguing that its role was akin to a common carrier. Forced upon cross-examination to admit that it could and did cut off access for subscribers under certain circumstances (for example, where copyright software had been posted or subscriber fees not paid), Netcomm argued that technical considerations (the speed and volume of

postings) prevented this from being a practical constraint on infringement. The issue remains open, and will be crucial if any action against Netcomm based on the US vicarious liability law is to succeed. The wider ramifications of a possible 'duty to screen' remain unclear.

The plaintiff's dilemma

The case is important for copyright owners and providers of computer facilities in two significant respects.

First, it suggests that the development of copyright protection (or lack thereof) for material on the Net is likely to be anchored firmly to original sources of infringing copies, rather than secondary sources (such as ISPs). For ISPs and other parties with an interest in maintaining high-volume traffic over the Net or LAN/WAN systems (that is, most major organisations in both the public and private sector), the good news in that message is that the party providing the information infrastructure is one more step removed from liability for the conduct that takes place on that infrastructure. The courts seem willing (at this stage) to assess the legal role of the ISP or network proprietor in a way which matches their technological role. The test, in essence, is control: can (or does) each party exercise editorial control over content moving through 'their' BBS, domain or server? (The down side to this type of liability model is the difficult position it places an organisation or ISP which attempts or partially succeeds in regulating content within its systems. The effect of that type of 'half-hearted' regulation will be full exposure to liability for defamation (and possibly copyright) - which would suggest that regulated editorial control over networks and Net domains will look fairly unattractive to proprietors who do not control content *before* it makes it onto the screen).

Secondly, the case starkly documents the diminishing options for parties which wish to protect their interests in copyright or reputation on the Net. While the development of addressing protocols and other forms of 'authorship' and authentication continue, RTC found that even with an identifiable offender within a single jurisdiction (thus negating two of the most problematic issues in Internet-based copyright infringement or defamation) the battle was far from over. Notwithstanding that there may have been unknown reasons for not pursuing Erlich more directly, RTC's difficulty in preventing further infringement must

seem a bleak signpost of difficult days in court for copyright owners. Keep in mind that economic recovery was not even contemplated: all RTC wanted was the prevention of further postings of their material. Where once the smallest defendant in a copyright-infringement action was likely to be a small business

in the retail or publishing sector, computer networks open access to distribution technologies to a new range of participants who (one suspects) will be difficult to identify, (potentially) outside any useful jurisdiction and futile to prosecute. The continued attempts by plaintiffs to place ISPs and network

providers at the heart of infringement actions is a reflection of the awkwardness with which these 'small operators' fit into established patterns of protection and enforcement.

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"The Brave New World of Telecoms"

Andrew Lambert advances some ideas on the future structure of the telecommunications industry.

The End of the World As We Know It

The structure of the telecommunications industry is radically altering from a global structure of traditional state monopoly carriers in an interconnected web of networks. The nature of the structure it will evolve into is difficult to predict. However the processes that are determining it are clearer and involve factors including:

- technological advances;
- artificially high costs;
- accounting imbalances and interconnect pricing;
- deregulation and the introduction of competition;
- globalisation and the growth of multinational corporations.

This has enabled carriers to commence selling capacity to other carriers in an increasingly competitive environment. Carrier refile is becoming widespread and relevant International Telecommunications Union (ITU) rules are often observed more in their breach than their observance. As a result it is becoming possible for entrants to gain some of the benefits of return traffic without formal correspondent relations, by dealing with PTOs which have them.

Factors in the Decline

Technology and the decline of real usage costs

Massive changes in cost capacity ratios gained from new optic fibre integrated circuit technologies have largely removed cost from distance in telecommunications. However many PTOs are able to maintain higher

telecommunications charges based on a market distortion. A number of factors including the legacy of monopolist past practice and international interconnect arrangements support telecommunications tariffing at artificially high levels.

The price of international calls is determined through the interconnect and settlement arrangements between PTOs and international carriers. The technical reality is that sending a call down an international line costs PTOs little more than sending one through a long distance national network. However interconnect arrangements mean that the price of a call from New York to London is nearly four times that of a domestic call from New York to Los Angeles. Calls between EEC countries in Europe cost up to six times as much as long distance national calls.¹ *The Economist* estimates that the world's telephone users in 1993 were paying around \$US10 billion more each year for international calls than they would in a completely free market.

Artificially high interconnect pricing

Interconnect arrangements between PTOs for international calls are based on ITU rules that give recognised "carriers" a right to interconnect with other carriers' networks. However, although the incremental cost of carrying each call is minor, PTOs attempt to secure an adequate return (on call services, international and domestic) to cover their publicly funded fixed capital investment in infrastructure. If international call services were charged on a strictly incremental basis these PTOs would not generate sufficient revenue to recoup their fixed capital costs.

In competition between a PTO with common carriage obligations and a private contract carrier or service provider, the former is at an inherent disadvantage because it may not be able to use differentiated pricing due to

universal service non-discrimination obligations, it cannot prevent arbitrage of pricing differentials by service providers and it cannot select customers on a normal commercial basis. As a result service providers and resellers can "cherry-pick" customers and provide services more cheaply.

One response of PTOs who are common carriers has been to establish their own operational systems as service providers where they can price differentiate. Overseas markets in deregulating telecommunications industries offer an ideal opportunity to do this.

International interconnect and accounting imbalances

As stated above the pricing of international telecommunications bears little relation to usage costs. Accounting rates are generally far larger than the longest trunk tariff for a country.

This accounting rate system benefited monopoly carriers in the past at both ends of international calls. Although the cost possibly lowered demand, PTOs' profits were maintained at high levels through high accounting rates at the expense of subscribers. These high accounting rates also encouraged co-operative construction and sharing of infrastructure, whether by satellite or undersea cable.

However the accounting rate system meant countries with developed telecommunications technology and lowered costs (from competition and liberalisation) developed a growing traffic imbalance with the rest of the world, in turn creating an increasing financial deficit.² The United States with its large population, a high level of multinational business activity and significantly lower end user charges, has developed a deficit with most other countries (including those in the OECD).