Information Wants to Be Free: How Cyberspace Challenges Traditional Legal Concepts of Information Use and Ownership

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It is only a matter of time before all aspects of information management move on-line. Whilst there are currently no Internet related cases dealing specifically with archives and records management, relevant principles can be drawn from the existing case law in other areas. This article will examine the various ways in which attempts have been made to extend existing legal concepts to the changing nature of information on the Internet, focussing on issues arising from defamation, copyright, hypertext linking and content regulation. By examining a number of cases which have arisen both in Australia and overseas, it will assess the varying success that the law has had in accommodating the ever increasing range of issues created by the Internet and the impact that technology has had on information providers.

This is a refereed article.

> The Internet is a unique and wholly new medium of worldwide human communication.[1]

Lawyers have a professional concern with the use and ownership of information and, in particular, accountability for its authenticity, preservation and integrity. This is a concern they share with recordkeeping professionals such as archivists and records managers who have a responsibility for managing evidence to ensure societal and organisational accountability. Both professions share a common and legitimate interest in the implications of the emerging digital communications network, most clearly represented by the Internet, for their mission and both are significantly challenged by the novel characteristics of this new medium. For recordkeepers, the nature of this challenge is to do with the fact that most computer systems and networks have been designed as information systems, rather than recordkeeping systems. This article does not explore this issue directly, but that of the law more generally in cyberspace. The recordkeeping implications of what is discussed are something lawyers and recordkeeping professionals need to develop in the spirit of cross frame dialogue, with potential benefits to both groups.

Much has been written about the Internet and the opportunities that it creates for bringing people from around the globe together in one virtual community, whether for purposes of recreation, education or commerce. Similarly, a great deal of attention has been directed towards the problems that this new environment creates with respect to the treatment of information and questions of whether the disembodiment of information brought about by digital technology will require a total overhaul of existing legal and regulatory frameworks. For those involved in the management, storage and retrieval of information, the digital age offers incredible opportunities as well as challenges to the legal framework that has traditionally governed information use.

Some commentators, such as John Perry Barlow, in his widely disseminated and influential article 'Selling Wine Without Bottles',[2] have already declared that existing laws ceased to be of relevance once information could be reduced to bits and transmitted across the borderless frontier of the Internet. Others have adopted a wait and see attitude.

Early regulatory attempts, largely by the US government, have encountered difficulties in adopting a workable approach which encourages the growth of the medium whilst still imposing a degree of control[3] and there is now a move away from government imposed controls to industry self regulation.

One of the real obstacles to developing a workable administrative and legal framework has been the failure to recognise the attributes that distinguish the Internet as a medium from television, telephone and broadcasting. These attributes include:

1. ***The disembodiment of information:*** As John Perry Barlow has noted 'digital technology is detaching information from the physical plane, where property law of all sorts has always found definition'.[4] By reducing information to a series of noughts and ones, digital technology disembodies information from the 'containers' in which it has been conveyed and homogenises it into a series of bits, so that stories, music, films, data, personal records and other forms of information can be transmitted via the Internet around the world, copied, manipulated and erased in a matter of seconds.[5] The traditional approach to regulation has been to control the physical transmission of those containers through the application of laws dealing with intellectual property, censorship, customs regulations and taxation. Existing laws, such as the *Copyright Act,* are built around technologically restrictive concepts such as transmission by cable, broadcast and print publication.[6] Digital technology removes these distinctions and renders such concepts obsolete;

2. ***Lack of central control:*** The Internet is not controlled by one centralised authority, with the ability to monitor traffic and block access.[7] Once information is openly disclosed on the Internet, such as on a public access Web site or as part of a posting to a newsgroup, it is almost impossible to prevent any further dissemination of that information or to retrieve it;

3. ***Everyone is a publisher:*** The Internet gives individuals the power of mass communication. Through an e-mail, a posting to a newsgroup or a Web site, individuals have the power to disseminate information as widely as commercial news providers. The effect of this on the

quality of the information available on the Internet is difficult to quantify. On the one hand it may lead to a reduction in the quality and accuracy of information as there is no requirement for it to be checked. Furthermore, there is a greater scope for bias and deception. A solo Internet 'publisher' is not accountable to any employment standards or journalistic code of ethics. A commercial operator can equally easily parade as an unbiased 'consumer' praising a particular product or service on a Web site or by a posting to a newsgroup. Questions regarding the quality of Internet 'journalism' have been raised recently in relation to the gossip column site[8] operated by Matt Drudge.[9] Drudge broke the Bill Clinton/Monica Lewinsky story, a story which had been known but ignored by the large print news providers. On the other hand, by facilitating the formation of communities interested in specific and unusual issues, the Internet provides the opportunity for direct access to expertise on a particular topic. There is always the possibility that one of the 'lurkers' on a newsgroup may be an expert in the field.[10] Moreover, e-mail provides a means of access that is often less formal and more accessible than traditional forms of communication.[11]

4. ***A borderless world:*** The Internet is a truly global phenomenon. As the court noted in *Digital Equipment Corp v Altavista Technology Inc:*

> The Internet has no territorial boundaries. To paraphrase Gertrude Stein, as far as the Internet is concerned, not only is there perhaps 'no there there', the 'there' is everywhere where there is Internet access. When business is transacted over a computer network via a Web-site accessed by a computer in Massachusetts, it takes place as much in Massachusetts, literally or figuratively, as it does anywhere.[12]

Governments are becoming increasingly conscious of the fact that to be successful, any attempt to regulate the Internet will require global co-operation.

The Internet

The Internet is the network of networks, linking together computers all over the globe. Although it evolved from the work done for the US Department of Defense in the sixties, the Internet has now become an open

system, with the fastest growth in the area of commercial applications. No one government or authority retains the authority or ability to control the whole Internet.[13] Governments who have sought to control Internet access and content can only do so by physically controlling the 'line' connecting that particular country to the rest of the world.[14]

How then can we characterise the nature of the Internet? Is it anything more than a giant repository of information and what is the quality of that information?

The Internet evolved from a US Department of Defense project known as ARPAnet.[15] The intention of the project was to create a system that could transmit information via a number of routes rather than sending it via a central exchange like the telephone. This meant that if one part of the network was blocked, damaged or otherwise inaccessible, an alternative route would always be available. When a message is transmitted via the Internet, it is broken up into 'packets'. Each packet may reach the ultimate addressee by a different route, to be reassembled into the complete message by the recipient computer. These packets travel through the various computer networks that make up the Internet and it is not possible to determine which route a packet will follow.

Management of the Internet infrastructure was originally vested in the National Science Foundation (NSF), a US government-funded research organisation, which maintained the backbone of the Internet. The Internet was not opened to commercial applications until 1990; however, it was not until the development of the World Wide Web and the Mosaic browser that such applications really took off. Now commercial use is the largest Internet growth area. The NSF ceased funding the network in 1995 due to the fact that the overwhelming demand upon the network had become commercial.

Through science fiction writers such as William Gibson, the author credited with coining the term 'cyberspace', we have an image of the Internet as some kind of disembodied consciousness or 'consensual hallucination'[16] that contains all of the answers if only we knew how to find them.[17] This notion of a giant brain has had a long association with computers. It has been the main metaphor for describing computers since the 1950's[18] and

exists still in books such as *The Hitchhikers Guide to the Galaxy*. The development of the World Wide Web further completed this analogy. Developed at CERN (the European Laboratory for Particle Physics) by Tim Berners-Lee, the World Wide Web enabled the open sharing of information by different users on different computers in remote locations, even using differing computing platforms. It facilitated the creation of hypertext links between documents, allowing the user to move seamlessly through a series of pages, following items of interest, through the click of a mouse.

The history of the Internet demonstrates that in its earliest incarnations, the very nature and function of the Internet were opposed to traditional concepts of information use and dissemination. The Internet became an avenue for the free and open sharing of information between academics and researchers. It was not concerned with proprietary interests or rights of use. It was a world of its own, open only to a community of peers, people dedicated enough to put up with the clunky and difficult interface and spending hours sitting at a screen. The development of the user friendly graphical user interface of the World Wide Web and the relatively cheap availability of personal computers and modems in the home and office have changed all this forever. The Internet has become a mainstream source of information, giving rise to all of the legal issues encountered in the mainstream world. The applicability of legal regimes affecting ownership and use of information will determine the willingness of people to participate in this global revolution. It will only be if people and businesses feel comfortable in entrusting their words, creations, property and reputation to the medium that the Internet will ever reach its full potential.

Defamation

These early academic origins of the Internet influenced many users' perceptions of its nature and function. It was perceived as being something 'different', separate from the real world. Most of the legal battles arising from the context of the Internet have been coloured by issues of freedom of speech. As Barlow has pointed out, this arises naturally from the blurring of the distinction between ideas and their form of expression that is the consequence of digital technology. More recently, the United States Supreme

Court has recognised that the fact that the Internet makes every back room commentator a mass media publisher means that it is a medium worthy of the highest form of protection.[19]

The inapplicability of the metaphor of the Internet being a closed room of your peers for open, frank and free discussion is well demonstrated by the case of *Rindos v Hardwick*.[20] The defendant, Gil Hardwick made a posting to ANTHRO-L, a computer bulletin board dedicated to the discussion of science anthropology. That posting related to the dismissal of Dr Rindos from the University of Western Australia and was made in response to a posting critical of the actions of the University by an American academic.

The posting raised questions about Dr Rindos' professional ability, his personal behaviour and allegations of racism. The court accepted that the posting gave rise to defamatory imputations that Rindos' career was not built on research but rather his ability to 'berate and bully' his colleagues and that he had been engaged in sexual misconduct with a local boy and that this was 'seriously defamatory of the plaintiff'.

The matter was not defended by Hardwick and is notable only for the findings that the court made about the extent of dissemination of the message via the bulletin board. In the assessment of damages, Mr Justice Ipp noted that the main users of the bulletin board were academics and students, including 'most major universities throughout the world.' The board had a 'wide international readership' with approximately 23,000 persons having computers with access to the board. Ipp J also noted that:

- Messages could remain on the computer of the subscriber for a number of days or weeks;

- Messages can be printed out in hard copy and further disseminated; and

- People viewing the messages would be people working or studying in the field of anthropology i.e. the audience most likely to know the plaintiff's reputation and therefore cause him the most damage.

Damages were assessed at $40,000.

No issue was raised in this case regarding the nature of the publication of the statement or if anyone other than Dr Hardwick was responsible for the defamatory publication, such as the operator of the bulletin board or the service provider. In the US cases, the courts have reached different conclusions regarding liability of service providers for defamatory publications.

In *Cubby Inc v CompuServe*[21] the plaintiffs claimed that defamatory remarks regarding them had been published on 'Rumorville USA', a daily newsletter operated as part of CompuServe's *Journalism Forum.* The court found that CompuServe was a distributor rather than a publisher of the defamatory statements. The *Journalism Forum* was managed and controlled by an independent company, Cameron Communications Inc, 'in accordance with editorial and technical standards and conventions of style to be established by CompuServe.'[22]

The court found that:

> CompuServe's CIS product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications. CompuServe and companies like it are at the forefront of the information industry revolution. High technology has markedly increased the speed with which information is gathered and processed; it is now possible for an individual with a personal computer, modem, and telephone line to have instantaneous access to thousands of news publications from across the United States and around the world. While CompuServe may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents.[23]

The opposite result was reached in *Stratton Oakmont Inc v Prodigy.*[24] In that case, comments regarding the plaintiffs posted by an unidentified user were published on Prodigy's 'Money Talk' bulletin board.

The court based Prodigy's liability on the fact that Prodigy exercised sufficient editorial control over the bulletin board to make it a publisher

rather than a distributor of that information. The court accepted that bulletin boards 'should generally be regarded in the same context as bookstores, libraries and network affiliates'.[25] However, by publicising that it was a family oriented network, creating an editorial staff to monitor transmissions in accordance with established content guidelines, using screening software and likening itself to a newspaper in terms of the control it exercised over content appearing on its services, Prodigy has distinguished itself from other service providers. The court concluded that it was Prodigy's 'own policies, technology and staffing decisions which had altered the scenario and mandated the finding that it is a publisher.'[26]

In the US the issue of service provider liability for defamatory material made available via their services has now been settled by the introduction of s230 of the *Communications Decency Act 1996* which provides:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[27]

The effect of s230 on service provider liability has been considered in two recent cases. In *Zeran v AOL*[28] the court noted that s230 had been enacted to promote free speech and to encourage self-regulation by removing the effect of *Stratton Oakmont v Prodigy*.[29]

The most recent case in this area, *Blumenthal v Drudge and America Online,*[30] involved none other that the notorious gossip columnist Matt Drudge. Drudge has produced an online gossip column focussing on gossip from Hollywood and Washington DC since 1995. The column is disseminated via his web site and via email to subscribers. In May/June 1997 Drudge entered into an agreement with America On Line (AOL) to provide his column to all AOL subscribers for one year. Drudge was to receive a $3000 per month royalty fee. The terms of that agreement stated that Drudge would create, edit, update and manage the contents of the Report and that AOL reserved the right to remove content which violated AOL's standard terms of service.

'The Drudge Report' of 10 August 1997 stated that Sidney Blumenthal,

who had recently been appointed Assistant to the President of the United States, had a history of abusing his wife and that stories of that abuse had been effectively covered up by White House officials. Following contact from Blumenthal's lawyers, Drudge issued a retraction of the story by posting a special edition to his Web site and by emailing all subscribers. The retraction was also emailed to AOL for posting on the AOL service.

The court granted AOL's motion for summary judgement, effectively removing them from the case on the basis that they were protected by s230 of the *Communications Decency Act.* The action against Drudge is continuing. Judge Friedman was clearly uncomfortable in excusing AOL from liability in a situation where they had actively promoted the scandalous nature of Drudge's column. He noted that the AOL agreement provided Drudge's sole source of income and provided AOL with the right to edit the contents of his column as they saw fit. Nevertheless he was bound by the legislation which was intended to promote the use of the Internet as a medium for the free exchange of news, views and information. [31]

Australia has no equivalent of the *Communications Decency Act* and, given the difficulties that have been encountered in trying to create uniform Australian defamation laws, it is unlikely legislation in such form could be successfully introduced. However, it is interesting to note the approach taken by the US government in introducing legislation in this area. The US government has recognised the importance of the Internet as a communications medium and its role in the protection of freedom of speech. In order to further encourage service providers into the market, it has provided them with an indemnity from liability in respect of defamatory communications conveyed via their service, regardless of strict legal precedents from other areas of the law. A similar approach appears to be being taken by the Australian government with respect to amendment of the *Copyright Act.*

Copyright

Another area in which the Internet's perceived role as a guardian of free speech has come into conflict with traditional legal concepts is copyright.

The technologically specific terminology of the Australian *Copyright Act* makes it difficult to apply to the on-line environment. The Australian government has announced that it will be making significant amendments to the *Copyright Act* in order to accommodate the emergence of digital technology.[32] This will include a new technology neutral right of transmission. Further, the Act will provide that Internet service providers and communications carriers will not be liable for any infringement of copyright on the sites that they carry simply because such infringement occurs on the facilities of that provider. This is in line with US development in online defamation law. However, a more practical problem still exists in terms of enforcing such rights.

In the English city of Nottingham in 1988, in what later became known as the 'Broxtowe case', allegations of ritualistic satanic abuse of children surfaced during a major criminal investigation into claims of incest and abuse. In 1989, concerned by ongoing claims of a highly organised satanic cult network operating in the area, the Chief Constable of Nottinghamshire and the Director of Social Services co-operated in the establishment of a Joint Enquiry Team, to reconsider evidence presented during the case and the methods by which that evidence was obtained. The resultant report, (the JET Report) which contained an exhaustive listing of all of the parties involved in the case, ranging from children and parents, to social workers, police and court officials, was completed by the end of that year. Clearly a report in this format, containing confidential information was unpublishable, and one of the team was commissioned to prepare a revised report, excluding confidential details which could be circulated to police and social workers for information.

The JET Report challenged the findings of the Nottinghamshire Social Services Department that satanic ritual abuse had been found in the Broxtowe case. The Report not only cast doubt on the methodology used in the case and the conclusions reached, it also warned that if such allegations were allowed to flourish it may result in a witch-hunt which would adversely affect the health and well-being of the children involved in such investigations.

However, once the shorter version of the Report, sanitised for public

release, had been prepared, a decision was taken by the Nottinghamshire County Council not to publish the Report. The authors were prohibited from publicising the results of their investigation in any way. A number of copies of the revised report had already been made available to the Government and had also been leaked to the media.

In the following years, a number of new allegations were raised regarding satanic cults and abuse of children. Despite a large amount of media attention and removal of children from their families, none of the allegations of Satanism were established.

In the light of continued allegations of satanic networks operating in Britain, three journalists decided to make the JET Report available on the World Wide Web in May 1997.

The Nottinghamshire County Council responded swiftly, obtaining an injunction on 3 June 1997, in the English High Court of Justice, which prohibited the journalists from reproducing, publishing or disseminating the JET Report or any information contained in the Report relating to the children or their case histories in any manner. This was interpreted as requiring not only that the Report be removed from the page but also the removal of any hypertext links from that page to other sites which contained the Report, at that stage, located on servers in Belgium and the United States.

Given the nature of the Internet, this was not to be the end of the matter. On 5 June 1997, after having read about the silencing of the Report by the High Court injunction in an article on the *Hotwired* site, Jeremy Freeman, a 21 year old Canadian student created a mirror site.[33] The next day he received an e-mail from the Nottinghamshire County Solicitor stating that the publication of the Report on his web site was an infringement of the Council's copyright and potentially in contempt of court on the basis that some of the children named in the Report may still be the subject of wardship orders. Not having the resources to contest such a legal battle, Mr Freeman removed the Report leaving links to other mirror sites containing the Report. This was still not sufficient for the Council, which responded:

> Whilst I note that you have removed the text of the JET Report from

> your website, you hold on your website a hypertext link from which the full text of the report may be accessed.
>
> This is still publication on your website and for so long as the hypertext link remains it will continue to be an infringement of Nottinghamshire County Council's copyright by you.
>
> Unless the link is removed forthwith the Nottinghamshire County Council will issue Court Proceedings as stated in my letter of 6th June 1997 without further notice to you.[34]

This was just one of many mirror sites that sprang up around the world supporting the dissemination of the Report.[35] The case received extensive coverage in the Internet media, the issue of freedom of Internet speech eclipsing the original issue regarding satanic cults. Most of this commentary took a libertarian stance, simplistically summarised as big government trying to stifle freedom of speech and expression on a matter of legitimate public concern.

On 31 July 1997, the Nottinghamshire County Council announced that it had discontinued legal action regarding publication of the JET Report on the Internet. The press release stated that the council could no longer justify spending taxpayers' money on a long running legal dispute. Councillor Tim Bell was quoted as saying 'We have been faced with a technology running at a pace which exceeds the law's ability to adapt to deal with it and the best interests of Nottinghamshire people would not be served by running up large bills in difficult areas of law.'[36]

As was pointed out by one journalist:

> Try as it may, the Nottinghamshire County Council, which owns the copyright on *[sic]* the report in question, probably will never be able to completely cleanse the Internet of the offending document, simply because the Net is too big, too disparate, and ever changing.[37]

One interesting side issue is the fact that all of the information regarding the dispute, including letters of demand and court documents has been made available on the Internet. This is becoming increasingly common in

Internet related disputes and ironically has meant that the publicity so shunned has multiplied over the Internet.

So the fact remains that even if the law changes to accommodate new concepts of information use and dissemination, the Internet still creates practical difficulties in terms of administration and protection of information. It may be a breach of copyright but how do you detect and prevent further copying, particularly if that occurs in a different jurisdiction? Legal avenues may be very slow, expensive and ultimately a waste of time. This is an area which requires technological intervention. For information managers, practical as well as legal issues should be considered and dealt with in any new online information management system.

Hypertext linking

One of the key issues left unresolved by the Council's withdrawal from the case was the validity of the Council's claim that the inclusion of hypertext links to a mirror of the Report was an infringement of the Council's copyright.

This was not the first time that the issue of legality of linking had been raised. In October 1996 the issue of whether hypertext linking constituted an infringement of copyright had been raised before the Court of Sessions in Scotland in the case *Shetland Times Limited v Dr Jonathan Wills.*[38] The plaintiffs published *The Shetland Times* newspaper and had created a website providing electronic access to items appearing in the newspaper. The defendants operated a website offering a 'news reporting service' which contained hypertext links to news stories published on the plaintiffs' site.

The plaintiffs claimed that the inclusion by the defendant of the headlines as the hypertext link to the stories appearing on the plaintiffs' site was an infringement of copyright. Lord Hamilton granted an interim injunction prohibiting linking to the plaintiffs' website. This finding was highly controversial as there was doubt that the headlines were sufficiently substantial to be the subject matter of copyright, and the outcome of the final hearing was eagerly anticipated.

The case was settled out of court on 11 November 1997, during a delay in court proceedings due to a failed attempt to connect the court to the Internet to demonstrate to the judge the issues under consideration. The terms of settlement[39] included that *The Shetland News* would be entitled to link to stories on *The Shetland Times'* website, provided that each link to a story included an acknowledgment that it was 'A *Shetland Times* story' and that adjacent to the headline link there would appear a button depicting the masthead logo of *The Shetland Times*, each of these devices to operate as a link to *The Shetland Times* headline or front page.

This issue has also been raised in the US in cases such as *The Washington Post v Total News Inc*[40] and *Ticketmaster v Microsoft.*[41]

Total News, like *The Shetland News,* operated a news service which provided links to news stories offered by major news providers, such as Reuters, CNN, Time and Dow Jones, on their own sites. Such news was presented in a 'frame' surrounded by the *Total News* banner and URL and by advertising sold by *Total News.* The news providers commenced proceedings against *Total News,* claiming copyright infringement, trade mark infringement, false and misleading behaviour and false advertising.

Again, the case has been settled without a resolution of the substantive legal issues. However, the settlement agreement, published on the Web,[42] provides that *Total News* may link to the plaintiffs' sites only via straightforward named links and that *Total News* may not imply any endorsement or affiliation with the news providers. The agreement is revocable by the news providers on fifteen days notice.

In the *Ticketmaster* case, Ticketmaster took issue with the inclusion of a link to a page on the Ticketmaster site from Microsoft's *Seattle Sidewalk* site. This linking to an innerpage means that visitors bypass pages on which Ticketmaster sells advertising. Ticketmaster has claimed that Microsoft's linking diminishes the value of Ticketmaster's site and business and has brought an action in respect of trade mark infringement, unfair competition and damage to Ticketmaster's name, goodwill and business. The trial has been set down for 10 November 1998.

This group of cases has obvious ramifications for information managers. Is linking parasitising off another information provider's hard work and effort or is it an essential part of the nature and character of the World Wide Web? If linking changes from an encouraged and welcome part of Web culture to a commercial activity requiring agreements and the possibility of fees, this will influence the structure, design and content of Web based information resources.

Content regulation

Governments worldwide are struggling to come to terms with a powerful new communications medium that is anarchic, decentralised and resistant to all traditional forms of government control such as regulation of importation, bandwidth, territoriality and licensing. It is also a medium notorious for its content ranging from pornography to recipes for making bombs to hate speech.

In the US, President Clinton signed the *Communications Decency Act* into law on 8 February 1996. Certain provisions of that Act intended to restrict the transmission of indecent or offensive material to minors[43] immediately became the subject of a successful constitutional challenge lead by the American Civil Liberties Union.[44]

The Supreme Court affirmed the decision of the District Court that the provisions of the Act prohibiting indecent transmission and patently offensive display were in breach of the First Amendment to the US Constitution as they were overbroad in their scope. The Court recognised that the Internet is a unique form of communication, worthy of the broadest form of First Amendment protection, because it provides low-cost access for communication of all kinds available to a broad range of people. The overly vague provisions of the CDA could only have a chilling effect on this new forum for communication.

Australia places a different value on information than the US. Australia has no constitutional equivalent of the First Amendment protecting freedom of speech. However, given the move away from further attempts at legislative

intervention in the US, Australia has also adopted a softer regulatory approach. In September 1997, the Government announced that the Australian Broadcasting Authority was to begin negotiating with the Internet service provider industry regarding the development of industry codes of conduct.[45] Again this indicates that it is likely that responsibility for content will be attributed to content providers rather that service providers and that in developing information services this should be a prime legal consideration.

Conclusions

Until now, courts have tended to shy away from the more difficult questions raised by the Internet. For example, in Australia the High Court failed to take the opportunity to consider issues relating to copyright and the Internet in *Telstra v APRA*.[46] This is placing increasing pressure on legislators to act to fill the regulatory vacuum.

Australia is a relatively small player in the international field regarding Internet related issues. Until now, the lead has largely been left to the US. However, as the promise of electronic commerce increases, so too does international interest. The European Union is now adopting a more aggressive approach to Internet regulatory issues and has issued stern warnings to any potential trading partner not prepared to follow its strict electronic privacy guidelines.[47] Extensive consideration has been given to issues arising from electronic commerce by both the Commonwealth and Victorian State governments. This is likely to have significant impact on record keeping requirements. The Electronic Commerce Expert Group recently completed a review of the UNCITRAL Model Law on Electronic Commerce.[48] On the basis of the findings of the ECEG, the Commonwealth Attorney-General has announced that the Government will develop a uniform model law based upon the UNCITRAL Model Law for enactment in all Australian jurisdictions. The Victorian Government has also foreshadowed legislation dealing with electronic commerce, the Data Protection Bill, dealing with the privacy issues relating to electronic transactions, and the Electronic Commerce Framework Bill, which will deal largely with the effect of electronic signatures.[49]

With regard to information content issues such as copyright and defamation, it appears that liability will be attributed to the content providers rather than the service providers. Currently there are no specific Australian laws dealing with information management in the online environment and it has largely been a matter of applying existing law by analogy. This will change as the foreshadowed amendments to the *Copyright Act* and the codes of conduct are developed.

In the meantime, it should be remembered that the Internet is a unique medium with a lot of promise and a great deal of peril for the content provider. Practical as well as legal issues of enforcement, should be considered. In particular, difficulties of enforcing Australian law in a foreign jurisdiction should be considered. The Internet will remain an unruly environment for some time to come until there is global co-operation in taming its frontiers. Content providers should exercise caution in the treatment of information in this context until the regulatory difficulties are settled.

As far as recordkeeping professionals are concerned, functional requirements for conducting business online such as laws regarding authenticity, integrity, confidentiality and non-repudiation of electronic transactions, suggest the corresponding need for attention to recordkeeping requirements. It is anticipated that, given the intense interest in fostering electronic commerce, the next couple of years will see these issues enshrined into law.

Endnotes

1. *Reno v American Civil Liberties Union* (1997) 117 S.Ct. 2329 at 2334.
2. John Perry Barlow, 'Selling Wine Without Bottles; The Economy of Mind on the Global Net' in *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace,* edited by Peter Ludlow, MIT Press, 1996, pp. 9-34 (and widely circulated elsewhere, including the World Wide Web).
3. For example, the *Communications Decency Act 1996.*
4. Barlow, *op.cit.*, p.10.
5. See Nicholas Negroponte, *Being Digital,* Hodder & Stoughton, Rydalmere, 1996, pp. 11-20.

[6] See *Copyright Act 1968* (Cth). Section 31 grants owners of copyright in a literary, dramatic or musical work the exclusive right to exercise or authorise the exercise of the following rights: to reproduce the work in a material form, to publish or broadcast the work, to perform the work in public, to transmit it to subscribers to a diffusion service and to make an adaptation of the work. In respect of an artistic work the owner may reproduce it in material form, publish it, include it in a television broadcast or cause a television programme that includes the work to be transmitted to subscribers to a diffusion service. Note that the Australian Government has announced that reforms will be made to the *Copyright Act* to accommodate emerging digital technologies and to accommodate Australia's obligations under the Berne Convention, see Press Release, Senator Richard Alston, Minister for Communications, the Information Economy and the Arts, and The Hon. Daryl Williams, Attorney-General, *Copyright Reform and the Information Economy*, 30 April 1998, available at http://www.dca.gov.au under media releases. This will include a new technology neutral distribution right. See discussion below.

[7] The Internet developed from a Cold War initiative of the Department of Defense, ARPAnet. It was intended to operate as a communications system which could continue to function even if parts of the line were damaged or destroyed. Information is not routed through one central point, but rather through a series of redundant links. If information cannot get through one way it will be routed via an alternative path, see further below.

[8] See http://www.drudgereport.com Drudge operates his business of writing, publishing and disseminating the Report from an office in his apartment in California.

[9] Denise Caruso, 'The Law and the Internet: Beware', *Columbia Journalism Review*, May/June 1998, http://www.cjr.org/html/98-05-06-ilaw.html.

[10] A poster to a newsgroup devoted to programming for Apple computers was able to get help with his Apple problem from none other than Steve Wozniak, one of the founders of Apple, who happened to be reviewing the messages on the newsgroup.

[11] John Seabrook devotes a chapter to his e-mail exchanges with Bill Gates (and his amazement at being able to contact Gates directly) in *Deeper: A Two Year Odyssey in Cyberspace*, Faber and Faber, 1997, pp. 44-66.

[12] 960 F.Supp. 456, at p. 462, (1997).

[13] *ACLU v Reno* 929 F. Supp. 830 at 838.

[14] For example, China, which restricts Internet access to a select group of academics and Government officials and Singapore, which has licensed only a small number of Internet Service Providers, who, in return for their licence are required to censor certain content.

[15] See *Reno v ACLU* 117 S. Ct. 2329, 1997 U.S. Lexis 4037, *11.

[16] William Gibson, *Neuromancer*, Harper-Collins, London, 1984, pp. 12-13.

[17] See also John Seabrook, *op cit.*, p. 54.

[18] Mark Stefik, *Internet Dreams: Archetypes, Myths and Metaphors*, MIT Press, Cambridge, Mass., 1996, pp. xvi-xvii. Stefik notes the inappropriateness of the metaphor, in that computers are no longer 'big' and they do not 'think' in the way that we associate with a brain.

[19] *Reno v ACLU* 117 S. Ct. 2329 (1997).

[20] *Rindos v Hardwick* (31 March 1994) unreported decision of Ipp J, Supreme Court of Western Australia.

[21] United States District Court, S.D. New York, 776 F. Supp. 135 (1991).

[22] *Ibid,* at p.137.

[23] *Ibid.,* at p. 140.

[24] Supreme Court of New York, 1995 23 Media L. Rep. 174, 1995 WL 323710 (NY Supp.).

[25] *Ibid.* at *5.

[26] *Ibid.*

[27] 'Information content provider' is defined as 'any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service', section 230(e)(3) *Communications Decency Act* (US).

[28] 129 F. 3d. 327 (1997).

[29] 'The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.' 129 F. 3d. 327, at 330-331.

[30] 992 F. Supp. 44; 1998 US Dist. LEXIS 5606.

[31] 'It is undisputed that the Blumenthal story was written by Drudge without any substantive or editorial involvement by AOL [...] AOL was nothing more than a provider of an interactive computer service on which the Drudge Report was carried, and Congress has said quite clearly that such a provider shall not be treated as a "publisher or speaker" and therefore may not be held liable in tort', *ibid* at *16.

[32] See note 6.

[33] A 'mirror' site is a site that reproduces entirely and in the same format the contents of a site hosted on another server. It is often used as a device to ensure greater access to the site as too much traffic to the one site can cause the server to overload and 'crash'.

[34] http://www.jeremy.bc.ca/main5.htm.

[35] The British cyberliberties organisation, Cyber-Rights and Cyber-Liberties (UK) claimed that at the peak of the battle there were some 35 mirror sites of which they had received notification. See http://www.xs4all.nl/~yaman/jetrep.htm.

[36] Nottinghamshire County Council Media Information, *County Ends Internet Action,* 31 July 1997, http://www.users.globalnet.co.uk/~dlheb/feedback.htm.

[37] J. Kornblum, *Britain Pursues Banned Report,* c/net news, June 13, 1997, http://www.news.com/News/Item/0,4,113355,00.html#top.

[38] [1997] FSR 604.

[39] http://www.shetland-news.co.uk/headline/97nov/settled/settled.html.

[40] No. 97 Civ. 1190 (PKL).

[41] No. 97-3055 DDP (C.D. Cal. 1997).

[42] http://www.ljx.com/internet.totalse.htm.

[43] s223(a) Whoever-

(1) in interstate or foreign communications-

[...]

(B) by means of a telecommunications device knowingly-

(i) makes, creates or solicits, and

(ii) initiates the transmission of,

any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

S223(d) Whoever:

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age,

or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,

any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by cotemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(1) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,

shall be fined under Title 18, or imprisoned not more than two years, or both.

[44] *ACLU v Reno* 929 F. Supp. 830.

[45] Senator Richard Alston, Media Release, *ABA to assist development of online content codes of practice*, 5 September 1997, available at http://www.dca.gov.au. under media releases.

[46] (1997) 146 ALR 649.

[47] The European Data Directive will come into effect on 25 October 1998. Article 25 prohibits the transmission of personal information to countries that do not maintain adequate standards of privacy.

[48] *Electronic Commerce: Building the Legal Framework*, Report of the Electronic Commerce Expert Group to the Attorney-General, 31 March 1998, available at http://www.law.gov.au/aghome/advisory/eceg/single.htm.

[49] The Victorian proposals are available at http://www.mmv.vic.gov.au. Given the case law approach of this article, a detailed consideration of proposed reforms in the electronic commerce sphere is beyond the scope of the article.

Note: All internet citations were accurate on the 26 October 1998.