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Legal Liability and the Web: A Tour of the Problem Areas

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by Larry Savell

Nearly a century ago, Leo Tolstoy wrote: "Art is a human activity having for its purpose the transmission to others of the highest and best feelings to which men have risen."

Today, through the technological artistry of the Internet, men and women have the power to transmit to unseen others pictures, sounds, and information virtually instantly and anywhere across the globe.

But with this power comes responsibility. Like more traditional forms of media, and, in some ways, unlike them, those who use and do business on the Internet must be careful not to run afoul of a broad range of legal restrictions. This article will briefly identify and discuss some of the most significant legal concerns as they have arisen under U.S. law.

Copyright infringement

As is the case with traditional print media, one of the most common areas of potential liability for Internet users and Web site operators is copyright infringement. The ease of copying, downloading, uploading, and further distributing copyrighted materials such as text, pictures, music, and application software increases the opportunity for infringement. U.S. law enforcement authorities reportedly estimate that online infringement and theft of material and data currently exceeds \$10 billion annually.

Copyright owners need to monitor and take action against the unauthorized use of their property on the Internet, including making sure that works they disseminate in electronic form bear the requisite copyright notice. Internet users and publishers need to make sure that their use or distribution of materials owned by others does not contravene the rights of those owners. Rights to use copyrighted material should be carefully and consistently obtained.

One "hot" issue in the publishing business is whether and to what degree print publishers have the right to disseminate electronic versions of articles prepared by freelance writers and originally published in printed form.

The case of *Tasini vs. New York Times Co.*, currently pending in federal court in New York, raises this precise issue. The case, brought by 12 freelance writers against several publishers, claims that "freelance authors own the electronic rights in their own work unless they have expressly transferred or assigned those rights in accordance with the Copyright Act."

The plaintiffs seek money damages, measured by the profits defendants derived from their alleged infringement, an injunction barring further infringement, a declaration that the incorporation of their articles into an electronic database and placement of their articles on CD-ROM without their consent constituted copyright infringement, and court costs and attorney's fees.

The defendant publishers obviously disagree, and view these rights as having been conveyed to them with the initial purchase, with the compensation including payment for conveying such rights. (Note that this case only involves freelance writers, as opposed to employees of publishers, whose efforts should be covered by "work-for-hire"

agreements.)

To a degree, this is an issue of contract interpretation, and suggests that, for one contemplating online publication, the safest course is to obtain the broadest rights possible, often described as a grant of "all rights."

A key limitation on copyright protection is the doctrine of "fair use," which is defined as the privilege that others than the copyright owner have to use copyrighted material in a reasonable manner without the owner's consent. To determine whether fair use has been made of copyrighted material, courts will consider and balance a number of interests between the owner and the user.

These include: (1) the purpose and character of the use (the right to use for review, comment, or educational purposes is broader than for a purely commercial use); (2) the nature of the copyrighted work (creative works are more protected than purely factual works); (3) the proportion that was "taken" (the more, the more dangerous); and (4) the economic impact of the taking (the extent to which the use may diminish the value of the original work).

Some recent cases have assessed whether an Internet access provider or computer bulletin board operator may be held liable for a subscriber's unauthorized posting of copyrighted material. Last year, in Religious Technology Center vs. Netcom On-Line Communications Services, a federal court in California ruled that an Internet access provider and bulletin board service operator were not directly or vicariously liable for copyright infringement, based on a subscriber's posting of writings of the Church of Scientology founder.

(The court allowed to proceed to trial the issues of whether the provider and operator should have known that the subscriber infringed the copyrights, whether they substantially participated in the infringement, and whether the provider had a fair use defense.)

However, in the 1993 Florida federal case of Playboy Enterprises Inc. vs. Frena, the court ruled that a subscription bulletin board service which displayed photographs from Playboy magazine, which were then downloaded by the service's subscribers, infringed the magazine's copyright.

That court specifically rejected the defendant's claim that subscribers had uploaded the images, stating that it did not matter that the defendant claimed he did not make the copies himself, as he had supplied a product (the service) containing unauthorized copies of a copyrighted work.

Efforts are reportedly being made to develop technology (such as embedding copyright information in the code of a picture) that will facilitate the detection of plagiarized images or text.

Trademark infringement

As in the case of copyrights, Internet users and publishers may risk liability if they infringe on the trademark rights of others. Such infringement may consist of unauthorized use of word or picture marks.

Another currently "hot" Internet law issue is whether trademark holders have the exclusive right to use their word marks as their "domain" names -- the addresses of their Web sites (such as "chadbourne.com").

Domain names are registered, basically on a "first come, first served" basis, with an organization known as InterNIC. Some enterprising companies and individuals have attempted to appropriate well-known marks of others by registering domain names containing them.

Trademark owners have begun complaining about such practices and registration authorities have become more receptive to such complaints. To avoid such hassles, trademark owners should consider promptly registering their critical marks as domain names, and/or regularly performing searches on the Internet for use by others of their trademarks as domain names.

Those contemplating registration of a domain name that is not a trademark they own should consider having a

traditional trademark clearance check run beforehand.

Libel/defamation

Libel is generally defined as: (1) a false and defamatory statement about another, (2) which has been disseminated to a third party without a defense or "privilege" allowing such publication, (3) where the requisite level of responsibility or "fault" has been demonstrated, and (4) where the plaintiff has suffered resulting harm or injury. As in the case of print communications, one can libel another through electronic communications, including over the Internet.

In a recent and widely debated decision, a New York state trial court in *Stratton Oakmont Inc. vs. Prodigy Services Co.* indicated that a provider of computer online services may be considered a "publisher" for purposes of a libel lawsuit, such that it may be held liable for defamatory statements made by subscribers and uploaded onto the system.

Traditionally, such operators had been considered merely distributors of material such as newsstand vendors and bookstores and thus generally not liable for allegedly defamatory statements contained in publications they distribute, unless they knew or had reason to know of such statements.

In this case, the court focused on evidence that Prodigy had marketed itself to the public as exercising editorial control over the content of messages posted on it, in an attempt to appeal to the home/family market. The court concluded that "with this editorial control comes increased liability."

The Prodigy decision, which was recently reaffirmed, has serious implications on those considering establishing online systems or Web sites. Site operators may be better off not undertaking (and not representing they are undertaking) any exercise of editorial control. ("Indecency" and related legislation may ultimately make that position untenable, however.)

If such a policy of control is set up, operators should make sure it is followed and enforced fully, and should consider stating up front what control is and is not being exercised. It may also be advisable to post a notice to make it clear that the operator is not endorsing the accuracy of any statements made and that posting should not be interpreted as an endorsement; it may be worthwhile further to require users to acknowledge this understanding. The safest course would be to not let users post material or messages on the site.

Invasion of privacy

Of the various forms of invasion of privacy, three major forms can easily be seen as the basis for potential claims (bear in mind that not all forms may be recognized in a given jurisdiction).

The most common "appropriation of name or likeness" could be violated through the use in electronic form of a person's name or photograph without their prior consent.

Note that there is a recognized "newsworthy" exception to such claims, such that if the person's picture bears a reasonable relation to, and is used to illustrate, a matter of public interest, the unauthorized use may be allowed.

Another recognized exception is for "incidental advertising" in recognition that it may be necessary in advertising an online service or site to illustrate samples of the content found there. This was the ruling in the recent New York case of *Stern vs. Delphi Internet Services Corp.*, which allowed the use of controversial radio personality Howard Stern's name and (physically revealing) picture in advertising an electronic bulletin board on which subscribers could debate Stern's aborted run for governor of New York.

Other forms of invasion of privacy to keep in mind in this context include: (1) "public disclosure of private or embarrassing facts," which requires that the publicity would be considered "highly offensive" to a reasonable person and not be of legitimate concern to the public; and (2) portrayal of a person in a "false light," which is similar to libel.

Other infringement of rights

In addition to the rights delineated above, unauthorized use and/or dissemination of confidential or proprietary material owned by other individuals or businesses can constitute violations. One example would be the unauthorized posting of a company's valuable trade secret information, such as a closely guarded product formula or marketing plan. The potential damage to the owner from such improper dissemination, and potential liability to the wrongdoer, could be monumental.

Obscenity

As the Internet does not discriminate among users by age, there arise issues of (and potential liability for) children's access to materials intended for adults only. The Communications Decency Act of 1996, which President Clinton signed into law on Feb. 8, among other things makes it a crime to make indecent material available to children over computer networks.

However, the act was promptly challenged as an overly broad and unconstitutional infringement of free speech. On June 12, a federal district court in Philadelphia upheld that challenge, and declared parts of the act unconstitutional as a "profoundly repugnant" affront to the First Amendment, blocking its enforcement. The Justice Department is determining whether it plans to appeal the ruling; it is expected to do so.

With the worldwide scope of the Internet, materials posted reach foreign jurisdictions whose acceptance of freedom of expression may vary. There have been reports, for example, of online services facing possible sanctions for disseminating materials whose publication contravenes the laws of countries where subscribers reside.

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