

MATTHEW D FARRINGTON

**CHANGE BEGETS CHANGE:
INTERNET TECHNOLOGY AND FREE
SPEECH**

LLB(HONS) RESEARCH PAPER

LAWS505 – ADVANCED PUBLIC LAW

**LAW FACULTY
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CHANGE RIGHTS CHANGE:

INTERNET TECHNOLOGY AND FREE

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WORD LENGTH

The text of this paper (excluding contents, footnotes, bibliography and annexures) comprises approximately 1,000 words.

ABSTRACT

This paper considers the effect that internet-related changes bring to the realm of free speech. A brief consideration of free speech as it currently exists in New Zealand is followed by an outline of the law relating to some of the accepted restrictions on such a right. Although there are definite free speech concerns with some of these limitations owing to a lack of in-depth analysis by the judiciary, it is nevertheless maintained that most do reflect contemporary community standards and are hence justifiable. The heart of this paper's goal lies in the discussion of how internet-related technologies affect many of the considerations that must be taken into account when considering the correct approach to a free speech question that arise in an on-line context. Although it has been attempted to maintain the status quo by applying existing law via analogy, it is submitted that this type of "force-fit" application leads to even more extreme change. Either free speech will become too extreme, undermining the values protected by limitations to such a right, or insufficient, and manifest breaches of the right will follow. In order to maintain the present status of the law it is actually necessary to apply the law differently, taking into account the unique changes the internet presents.

WORD LENGTH

The text of this paper (excluding contents, footnotes, bibliography and annexures) comprises approximately 15,000 words

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- Broadcasting Services Amendment (Online Services) Act 1999 (Aust) ss 22, 30, 40(4) – 40(6), 60(3) – 60(6)
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In the year 1450, a German goldsmith named Johann Gutenberg is credited with one of the most fundamental changes to the ability of humanity to communicate en masse since writing itself - the invention of the printing press. 1876 brought an equally fundamental breakthrough in terms of person-to-person interaction with Alexander Graham Bell's telephone. However, in 1969 few of the academics at the Advanced Research Projects Agency of the United States Department of Defense could have predicted that their contribution to the world of human communication would both combine and surpass these momentous events. Their technology of communicating would develop into today's internet, and the changes it brings carries with it need to fundamentally reconsider the way that notions of "free speech" are considered.

The internet raises questions about the nature of speech and expression themselves, but also about how we place limits on these rights. Notions such as defamation, copyright and suppression of views all need reconsideration in light of internet-era factors. It may seem as though the internet is the ultimate forum for free speech, a lawless frontier where even the long arm of the law cannot intrude upon a supreme freedom of expression. However deeper reflections lead to the reasonable conclusion that freedom of speech can be harmed by the internet in two ways: firstly the application of existing, accepted law in certain ways might have a negative effect. A unique problem the internet presents is that in many instances the ultimate application of the rules law can also produce an equally undesirable outcome. Secondly, excessive freedom of speech may have a negative effect in itself, rendering either itself or other, equally important rights meaningless, and hence contributing to its own downfall.

This paper will first consider free speech as it currently exists in New Zealand. Although there are clear issues with free speech in itself, it will be necessary to make certain assumptions in order to evaluate internet-driven change. It will then go on to consider the status of some of the accepted limitations of the freedom of speech as they exist today. In order to fully evaluate the changes that the internet

I INTRODUCTION

In the year 1450, a German goldsmith named Johann Gutenberg is credited with one of the most fundamental changes to the ability of humanity to communicate en masse since writing itself – the invention of the printing press. 1876 brought an equally fundamental breakthrough in terms of person-to-person interaction with Alexander Graham Bell's telephone. However, in 1969 few of the academics at the Advanced Research Projects Agency of the United States Department of Defence could have predicted that their contribution to the world of human communications would both combine and surpass these momentous events. Their technique of communicating would develop into today's internet, and the changes it brings carries with it need to fundamentally reconsider the way that notions of "free speech" are considered.

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This paper will first consider free speech as it currently exists in New Zealand. Although there are clear issues with free speech in itself, it will be necessary to make certain assumptions in order to evaluate internet-driven change. It will then go on to consider the status of some of the accepted limitations of the freedom of speech as they exist today. In order to fully evaluate the changes that the internet

brings, it will be necessary to give a brief outline of the internet and some of its relevant technologies. This paper then hopes to show how these changes affect the concepts of free speech as they presently exist in New Zealand. It is this paper's contention that traditional methods of applying old laws to new by way of analogy are inadequate, and new methods are required in order to meet the change that the internet brings to a resolution that we desire.

II FREE SPEECH IN NEW ZEALAND

In order to fully evaluate the impact of the changes the internet brings, it is first necessary to examine both the right to free speech and the limits on such a right as they currently exist in New Zealand without internet influences.

Free speech in the New Zealand legal system has a long history, stemming back into common law origins well before New Zealand was even discovered. Blackstone traces one form of free speech, that of absolute parliamentary privilege, back to the reign of Edward the Confessor.¹ This right was most significantly endorsed in the Bill of Rights (1688) where it was stated "the freedom of speech, and debates, and proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."²

The concept of a wider form of liberty was born in 1644 when John Milton addressed the Lords and Commons with his famous essay "Areopagitica," arguing that there should be no restrictions on the freedom of the press: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."³ Milton's desire was fulfilled in 1694 when Parliament refused to renew the Licensing Act, creating, by default, a common law right of freedom of the press.

¹ 1 BI Com (9th Ed) 164; Edward the Confessor reigned circa 1042-1066

² 1 W & M ft 2 c 2, Part I, paragraph 8

³ John Milton "Areopagitica" in *Milton's Prose Works* (London, 1806) vol I, 325

John Stuart Mill emphasised the worth of free speech when he stated that real truth would only emerge through “the collision of adverse opinions.”⁴ It is necessary to have dialect between competing ideas, ultimately with the superior winning out. Oliver Wendell Holmes expressed this same idea as “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁵ It would thus be wrong to suppress freedom of speech.

Free speech has been associated with various concepts in its history: Parliament’s freedom from interference, free press and media, and the ability to evaluate and criticise one’s elected officials, as well as the more general freedom entitling someone to hold their own views. The White Paper to the Bill of Rights stated that a free speech provision is “of central importance in a democratic state...”⁶ and identifies four functions of free speech: of individual fulfilment through self expression, democratic self government, to advance knowledge and reveal truth, and finally to achieve a more adaptable hence more stable community.⁷

Free speech has found a place today in section 14 of the New Zealand Bill of Rights Act 1990:

14. Freedom of expression— Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

However, unlike many jurisdictions, rights enshrined in the Bill of Rights are not supreme law in New Zealand. A contrary legislative act does not result in the invalidity of the competing statute. Furthermore, despite this long history, there is comparatively little jurisprudential thought or a legal framework upon which to pose questions in regards free speech. New Zealand’s developing independent

⁴ John Stuart Mill *On Liberty* (Originally published 1859, this edition published by Hackett Publishing Co. Inc., New York, 1978) 50

⁵ *Abrams v United States* (1919) 250 US 616, 630

⁶ *A Bill of Rights for New Zealand: A White Paper* (1985), para 10.54

⁷ above n 6, (1) – (4)

jurisprudence⁸ is at odds with the reliance on comparative international precedent, such as that based on the European Convention on Human Rights and Fundamental Freedoms 1950 (the "European Convention") and the Canadian Charter of Rights and Freedoms 1982 (the "Canadian Charter"). Reflecting the growth of independent jurisprudence, and in conflict with purported reliance on overseas authority, the New Zealand Court of Appeal has rejected some overseas precedent for issues that have arisen before it. For example, in *R v Grayson*⁹ the Court of Appeal rejected the Canadian approach to evidence that results from unreasonable searches.¹⁰

Many of the limitations that currently exist in regards abrogating the right to free speech have not received New Zealand judicial scrutiny, and the precedent value of other comparative jurisdictions is questionable. For example, free speech rules in the United Kingdom following the adoption of the European Convention domestically have resulted in significant changes to the rules relating to defamation. Although not expressly stated, *Reynolds v Times Newspapers Ltd*¹¹ basically introduces a reasonableness requirement for reporting.¹² This approach has been rejected by the New Zealand Court of Appeal, maintaining a more traditional qualified privilege defence.¹³

In addition to a lack of analysis on most of the limits surrounding free speech, many issues that are even more fundamental that have been considered internationally have received no judicial contemplation in New Zealand. For example, what is "speech?" Does it require an expressive, innovative aspect, or are mere functional instructions sufficient? In what mediums does "speech" take place? Does it make a difference if one is "speaking" to an adult or a minor? In regards the internet, does all data that is transferred count? Or merely data that appears as words on the screen? Or something wider, data that conveys tangible concepts in

⁸ For example, New Zealand defamation and copyright law, and most notably New Zealand's Treaty of Waitangi jurisprudence (among other areas of law) are quite distinct from other jurisdictions

⁹ (1996) 3 HRNZ 250

¹⁰ above n 9, 256

¹¹ [1999] 3 WLR 1010

¹² Although not express, the fifteen (or more) principles seemingly amount to reasonableness

¹³ *Lange v Atkinson* [2000] 3 NZLR 385

the form of words or images? There is no New Zealand jurisprudence on this threshold question. For the purposes of this paper, it will be assumed that "speech" includes all forms of communication, and will ignore distinctions that have been drawn in overseas jurisdictions.¹⁴ In any event, in light of section 5 (see below), it is unlikely that New Zealand law would require as rigorous an intellectual foundation as the United States. In the United States if one is seeking to abridge free speech in regards content, the Supreme Court has stated that there must be a compelling state interest to overcome the Constitutional protection.¹⁵ This is necessary in order to justify overruling supreme law. New Zealand only requires a demonstrably justifiable limitation, and is expressly permitted to override rights guarantees. Furthermore, although the Courts have yet to rule firmly in regards the "state action" requirement,¹⁶ indications seem to be that the courts are willing to be bound (or at least influenced) by the Bill of Rights, even when developing common law actions that are between two private parties.¹⁷

Free speech can perhaps best be currently described as a noble ideal that should be considered wherever possible. It has been stated that the principle "must be given full weight"¹⁸ and that there is a "prima facie presumption in favour of [free speech]."¹⁹ Any limitations that "cannot be demonstrably justified in a free and democratic society"²⁰ breach the Bill of Rights. However, reducing the worth of the positive statements is the fact that many prima facie breaches of the right to freedom of expression will be justified under this heading as the competing values that are protected by such limitations "are seen as predominating over freedom of speech."²¹ Despite the fact that this almost presumption in favour of competing rights, the New Zealand statutory scheme goes on to reduce the value of a right that "is as wide as human thought and imagination"²² even further: section 4 (the

¹⁴ For example, between the content and functional aspects of speech. See generally *Universal City Studios, Inc. et al v Corley and 2600 Enterprises Inc.* (2001) 273 F 3d 429, 445-455 (2nd Cir) and

¹⁵ *Miller v California* (1973) 413 US 15

¹⁶ New Zealand Bill of Rights Act s 3

¹⁷ For example, see cases below: in regards defamation *Lange v Atkinson* below n 32 and in regards intellectual property *PC Direct v Best Buys* below n 44

¹⁸ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16

¹⁹ *Lewis v Wilson & Horton Ltd* (2000) 6 HRNZ 1, 16

²⁰ *Moonen* above n 18, 16, explaining the s 5 test of the Bill of Rights

²¹ *Moonen* above n 18, 15-16

²² *Moonen* above n 18, 15

“inferiority” provision) states that contrary laws are to prevail, even where they breach guaranteed rights. Thus the freedom of speech would seem to become a mere principle of interpretation as

section 6 of the Bill of Rights requires that where an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning shall be preferred to any other. Thus if there are two tenable meanings, the one which is most in harmony with the Bill of Rights must be adopted.²³

This mere interpretation approach would lead to very little rights enforcement if the rights involved were treated “strongly” or as close to absolute. Laws that appear to infringe rights would inevitably do so if the right was given wide expanse or scope. Since any conflict would see the contrary law prevail, it is perhaps counter-productive to define rights broadly.

Section 5 of the Bill of Rights states:

5. Justified limitations— Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

It is clear then that the rights contained in the Bill of Rights are not absolute. However the true significance of section 5 does not lie in its express acknowledgment of the ability for the abrogation of rights. The United States Constitution contains no equivalent provision, yet none consider the rights contained therein as totally absolute.²⁴ The true worth to New Zealand of section 5 lies in its relationship with sections 4 and 6, the “inferiority” and “interpretation” sections respectively. Section 4 provides that even where other enactments are contrary to guaranteed rights, the contrary enactment prevails. In light of this, section 6 states that when there is an ambiguity in the language of another enactment, the interpretation that infringes guaranteed rights the least is to be preferred. It would therefore

²³ Moonen above n 18, 16

²⁴ For example see *Miller v California* above n 15

seem as though ambiguity in other enactments is required before the Bill of Rights would have any effect: if no “fuzzy” interpretations are available then contrary rights-infringing sections must prevail. However, section 5 provides the courts with the ability to give the Bill of Rights a more expansive application: by limiting a right to the degree where it is no longer contradictory with the infringing provision it is then possible to read in a more limited form of the right without triggering section 4. An absolute right would be contrary to many other statutes, and hence have no effect on the infringing law. A more limited form of the right may not be contradictory to the opposing statute, and hence is able to be “interpreted” in. Thus in *Ministry of Transport v Noort*²⁵ the Transport Act 1962 provided for immediate breath and blood testing in the case of drink driving.²⁶ These are clearly inconsistent with the potentially time consuming right to consult a lawyer.²⁷ The Court of Appeal acknowledged that an absolute right to consult would be defeated by the Transport Act, however, by limiting the right to consult a lawyer within a reasonable time, a reasonable limit that is demonstrably justified in a free and democratic society (section 5), the right is apparently no longer inconsistent. Some rights protection is thereby afforded.

The net result is that New Zealand law remains largely unaffected in a purist sense: concepts such as defamation and censorship have not been fundamentally altered as in other jurisdictions with more robust protections, as ultimately they are seen as justified limitations. However, there is a strong undercurrent of rights protection. With recent emphases on alternate remedies,²⁸ and the potential of declarations of inconsistency,²⁹ the New Zealand courts have paved the way for a greater consideration of free speech in the New Zealand context.

²⁵ [1992] 3 NZLR 260

²⁶ ss 58B, 58C, 58D

²⁷ New Zealand Bill of Rights Act s 23(1)(b)

²⁸ *R v Shaheed* [2002] 2 NZLR 377

²⁹ *Manga v Attorney-General* (1999) 5 HRNZ 177; *Dunlea v Attorney-General* [2000] 3 NZLR

III ACCEPTED LIMITATIONS TO FREE SPEECH

There are various doctrines that are accepted limitations to the concept of free speech. This is of fundamental necessity to prevent the abuse of such a right, allowing it to be used to attack other, equally fundamental rights. Not even the most fanatical free speech proponent would argue that anyone should be able to say absolutely anything about anyone at any time. Although doing so may abuse other equally important rights, to extend free speech this far would also render it meaningless. If journalists and tabloid-mongers were free to print anything they wanted it would soon become difficult to tell what is true and what is false. Those using the right for their own ends could swamp those who wish to make genuine use of the guaranteed right. Furthermore, truth in itself has its own conceptual worth.³⁰

A Defamation

The tort of defamation is perhaps one of the oldest restrictions on the general right to speak one's mind. It is not permissible to damage the reputation of another by means of false and malicious communications that expose that person to contempt, ridicule, hatred, or social ostracism by right-thinking members of the community.³¹

There has recently been some agitation to acknowledge the role that free speech has to play in defamation. Formerly, it did not matter what role the person defamed occupied. However, recent developments have acknowledged that there may be a greater need to accept that there is a legitimate public interest in some (especially political) figures. This has taken place in New Zealand with the *Lange v Atkinson*³² decisions, where the defence of qualified privilege was extended. On the facts of the case, the Court of Appeal accepted that there may be a legitimate wider public interest in regards the activities of high political officers, even

³⁰ See, for example, Immanuel Kant's moral philosophies: *Grundlegung zur Metaphysik der Sitten* (*Grounding for the Metaphysics of Morals*) (1785) and the *Kritik der praktischen Vernunft* (*Critique of Practical Reason*) (1788).

³¹ *Parmiter v Coupland* (1840) 6 M & W 105; 151 ER 340; *Sim v Stretch* [1936] 2 All ER 1237; Defamation Act 1992 (NZ)

³² [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257 (PC); [2000] 3 NZLR 385 (CA)

though it was outside the traditional *Watt v Longsdon*³³ duty-interest correlation. The Court of Appeal has not definitively answered the exact role that free speech has to play in defamation.³⁴

B Intellectual Property

Intellectual property occupies a peculiar place in the legal hierarchy. Property rights are the strongest form of rights known to the common law,³⁵ yet in this particular instance they are assigned to very much intangible ideas, ideas that can be expressed via "speech." Since property rights are so very strong, they constitute among the greatest limitations upon the freedom of speech.

1 Copyright

The Copyright Act 1994 grants copyright in original works of certain types³⁶ for the duration of the author's lifetime, plus fifty years.³⁷ This means that the author has exclusive rights during that period to copy, perform, play, show, broadcast or adapt the work.³⁸ Admittedly the limitation on the freedom of speech is restricted to the scope of the specific work, however, within that scope, the limitation is almost total (unless there is a specific narrow exception, for example, sections 41, 42 and 43).

Despite this there has been some movements to acknowledge a role for free speech in regards copyright. In the English case of *Hyde Park Residence Ltd v Yelland*,³⁹ a case that arose out of the media interest subsequent to the death of Princess Diana and Dodi Fayed, the English Court of Appeal were willing to take into account a "public interest" defence in an action for breach of copyright. In the past this has taken place in the courts refusing to enforce copyright if the works in

³³ [1930] 1 KB 130

³⁴ See especially the first Court of Appeal decision [1998] 3 NZLR 424 (CA)

³⁵ "Ownership" consists of a bundle of innumerable rights over property, and not to be conceived as existing separately, but as one general right. Ownership is among the greatest forms of control the common law can grant over an item. (Halsbury's Laws of England (4th Ed Reissue) vol 35 para 1227 and following).

³⁶ Copyright Act 1994 s 14

³⁷ Copyright Act 1994 s 22

³⁸ Copyright Act 1994 s 15

³⁹ [2000] RPC 604 (UK)

question were defamatory, immoral, obscene, scandalous or irreligious.⁴⁰ The judges in the Court of Appeal were unwilling to define the public interest defence fully, and indeed thought that the circumstances in which it may arise were incapable of precise categorisation.⁴¹ Although this is seemingly more focused on the notion that enforcing the copyright will cause actual injury to the public well-being, it seems possible to conceive of an instance where the public may suffer some harm to their right to free expression (and its concomitant right to be informed, at least in regard certain matters) by enforcing the copyright. It may therefore develop along the lines of the defamation qualified privilege defence. An obvious example is where a politician is trying to prevent the press releasing a document on the basis of breach of copyright. A court may refuse to uphold the copyright if there is a legitimate public interest in the contents of the document.

2 Trademarks and Passing Off

The Trademarks Act 1953 gives the registered proprietor of a specific trademark the exclusive right to use such a trademark in the course of the trade for which it is registered.⁴² Thus no one else is entitled to infringe upon that trademark – which basically amounts to any use of that specific mark. Related to trademarks is the tort of passing off, which prohibits misrepresentations in the course of trade that are such that harm to the trade of another is reasonably foreseeable.⁴³ Under this tort it is not possible, for example, to say things that are likely to make customers believe that your goods are the goods of another.

There is less scope for freedom of speech in relation to trademarks than copyright, since by definition a trademark is a far more limited form of “speech,” usually consisting of a simple “mark.” Nevertheless, the right to free speech has been invoked in the course of trademark actions. In the High Court case of *PC Direct v Best Buys*⁴⁴ the defendant company had conducted a “comparative advertising”

⁴⁰ *Hubbard v Vosper* [1972] 2 QB 84. However this case was dealing with an interlocutory injunction application and hence may be of limited precedent value.

⁴¹ *Hubbard v Vosper* above n 40, per Aldous LJ (Stuart-Smith LJ concurring), para 66; per Mance LJ, para 83

⁴² ss 8 & 9

⁴³ *Warnick v Townend & Sons* [1979] AC 73 (“The Advocaat Case”)

⁴⁴ [1997] 2 NZLR 723

campaign, whereby they presented their own product in comparison with that of the plaintiff. They compared the two products in terms of performance and price, with the result being a favourable impression of the defendant's goods. However, in doing so they used the plaintiff's trademark, who subsequently brought an interlocutory injunction claim, seeking to prevent the defendant's from further use of their trademark. Elias J (as she was then) declined to grant the injunction on the basis that an interim relief application requires the balance of convenience to clearly favour the plaintiff.⁴⁵ However she went on to state that the Bill of Rights free speech guarantee adds extra weight in favour of the defendant when considering where the balance of convenience lies.⁴⁶

Censorship

In addition to the competing rights of other individuals as have been outlined above, there may be a general right on the part of society not to have some particular sorts of things "expressed." In New Zealand, the Films, Videos, and Publications Classification Act 1993 (FVPCA) governs the control of objectionable material. Unlike the United States, where the community-based *Miller*⁴⁷ test applies, New Zealand has a statutorily defined meaning of objectionability.⁴⁸ The Act also sets up central Classification Office that is able to give exclusive ratings to publications. The Classification Office is able to decide whether any given material meets the section 3 definition, and such decisions are decisive.⁴⁹ Hence judicial or individual opinion is irrelevant.

Section 3 states that material is deemed to be objectionable if certain criteria are fulfilled,⁵⁰ while certain other criteria are to be given great weight in determining

⁴⁵ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140

⁴⁶ *PC Direct v Best Buys* above n 44, 733

⁴⁷ *Miller v California* above n 15; this test allows individual communities to determine their own standard for obscenity or objectionability. Thus the standard of obscenity will vary from place to place.

⁴⁸ s 3 Films, Videos, and Publications Classification Act 1993

⁴⁹ s 4 Films, Videos, and Publications Classification Act 1993

⁵⁰ s 3(2), for such grounds as bestiality (para (e)), necrophilia (para (c)) and sexual exploitation of children (para (a)).

objectionability,⁵¹ and still other criteria are to be considered.⁵² Furthermore, a restricted publication becomes treated as if it were objectionable if it breaches its restrictions.⁵³

The Act then goes on to make various acts dealing with objectionable material (including making, or for the purpose of supply, copying, distributing, displaying, exhibiting, advertising or otherwise making available⁵⁴) illegal. A further factor is that it does not matter whether the person dealing in objectionable material actually knows that it is objectionable. It is possible for material to be submitted to the Classification Office after someone has been arrested for possession of it. Since the Classification Office is given the exclusive power to classify a document, if a person appears before a court on charges for potential breach of the FVPCA, the court is obliged to refer any previously unclassified material to the Classification Office. Hence knowledge of objectionability is not required to breach the Act. However, if the person does (or ought reasonably to) know that the material is objectionable, he becomes subject to harsher penalties. Finally, to round out the seemingly draconian measures of the statute, section 131 makes it an offence for simple possession of objectionable material, and moreover, like the other offences, one is not required to have knowledge of its objectionability. The combined effect of a long and reasonably convoluted section and potentially "retrospective" classifications lead to a very difficult scenario in regards free speech.⁵⁵

Thus it may seem as though free speech is held in very little esteem in New Zealand, at least in regards censorship. This would seem to be reinforced by some recent decisions in regards classifications. The French film *Baise-Moi* was banned from New Zealand screens following an appeal of its R18 classification, despite

⁵¹ s 3(3), factors such as degrading or dehumanising sexual conduct (para (c)) or encouraging criminal acts (para (d)).

⁵² s 3(4), factors such as the "dominant effect of the publication as a whole" (para (a)) and whether the publication has any redeeming social features (para (c)).

⁵³ ss 125 & 126

⁵⁴ ss 123 & 124

⁵⁵ For further discussion of the problems with this legislative framework see Dean Knight "An Objectionable Offence: A Critique of the Possession Offence in the Films, Videos, and Publications Classification Act 1993" (1997) 27 VUWLR 451

some critical acclaim.⁵⁶ Two Eminem albums, "The Slim Shady LP" and "The Marshall Mathers LP" were given R18 classifications owing to the nature of the lyrics despite the fact that

[t]he recording undoubtedly has artistic merit. Critics praise Eminem for its dark humour, deft rhyming and metaphorical dexterity... Even critics who deprecate the violence and misogyny in the lyrics admit they are clever and infectiously humorous... Eminem... has some claim to cultural merit and social importance...⁵⁷

and

"[t]he album has artistic merit. The lyrics are clever and inventive. Reviewers praise Eminem as a "deft wordsmith," "a strong storyteller and master of the metaphor." The album is a work of self-expression... It does have musical worth. Critics generally praise its musical qualities..."⁵⁸

Despite the endorsements of artistic merit, both albums were subject to restriction. This means that it is an offence punishable by up to \$10,000 for an individual or \$25,000 for a body corporate⁵⁹ to supply, distribute, exhibit, display, or otherwise deal with a restricted publication otherwise than in accordance with the classification.⁶⁰ Thus a parent whose under-eighteen child is a budding musician would be potentially liable if they wish their child to hear the album, and so buy (or even play) it for them.

In both decisions, merely a token reference is made to the Bill of Rights Act, simply stating the relevant sections without any true analysis. However, the Court of

⁵⁶ "Perverts and censors have a great deal in common" New Zealand Herald, 22 July 2002; available at the New Zealand Herald's web-site:

<<http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=209875>> (last accessed 26 September 2002)

⁵⁷ *Eminem: The Slim Shady LP* (10 September 1999) unreported, Film, Video and Publication Classification Office, OFLC Ref: 9900817, 13

⁵⁸ *Eminem: The Marshall Mathers LP* (6 December 2000) unreported, Film, Video and Publication Classification Office, OFLC Ref: 1281, 13

⁵⁹ Films, Videos, and Publications Classification Act s 126(2)(a) and (b) respectively. It would be an offence under this section (requiring knowledge) as an effect of this classification is that all albums must be sold with an "R18" sticker. Even without the sticker, the publicity surrounding the album is such that a reasonable person ought to know of its classification.

⁶⁰ Films, Videos, and Publications Classification Act s 125(1)(a)

Appeal has reinforced the need for the right of freedom of expression to be taken into account when determining what is objectionable. Thus the Court of Appeal placed particular emphasis on "promotes or supports" for the purposes of subsection (2), stating that "[t]here must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity."⁶¹ Thus an Act that seeks to limit freedom of speech (via an objectionable classification) is construed as narrowly as possible so as to create the least possible restriction on the right.

D Court Ordered Suppression

This is possibly one of the most topical free speech issues in New Zealand at the moment. It has recently come to prominence in the "American Billionaire"⁶² and "Mr X Kidnapping" cases.⁶³ The power of the court to order name or detail suppression is found in section 140 of the Criminal Justice Act 1985:

140. Court may prohibit publication of names—

(1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

Anecdotal evidence suggests a high incidence of name suppression in New Zealand.⁶⁴ Furthermore, names are suppressed on an interim basis even if a judge declines to apply section 140 pending appeal of that decision. This is perhaps too

⁶¹ *Moonen v Film and Literature Board of Review* above n 18, 19

⁶² Ultimately decided in the Court of Appeal as *Lewis v Wilson & Horton Ltd* above n 19

⁶³ "Wellington lawyer facing attempted kidnap charge" *New Zealand Herald*, 25 July 2002; available on the *New Zealand Herald's* web-site:

<<http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=2197095>> (last accessed 29 September 2002)

⁶⁴ Recent figures for name suppression were unable to be obtained. However a search of the *New Zealand Herald* web-site (<<http://www.nzherald.co.nz>> (last accessed 29 September 2002) revealed that in the last year (28 September 2001 – 27 September 2002) 537 newsworthy cases featured names or reasons that were suppressed. Although some of these stories feature the same case, other cases in which name suppression has been granted would not have been deemed newsworthy. This amounts to approximately two suppressions per day of court sittings.

ready an application. Open justice demands freedom of speech, and suppression should be for worthy cases, either where the victim or accused (if acquitted) would face social stigma from court proceedings.

In the two above cases, and in several other high-profile instances, suppression orders have sought to be challenged by parts of the media. In *Lewis v Wilson & Horton Ltd*,⁶⁵ (the American Billionaire Case), the New Zealand Herald challenged the suppression and the Court of Appeal ultimately ruled that the suppression order could not have been justified on the facts before the District Court (hence an error of law occurred), and so quashed the suppression. However, they also emphasised that although there is a prima facie presumption in favour of openness of reporting, this presumption can be displaced if there is sufficient weight in favour of suppression. Factors to be considered include the ultimate determination of the case, the seriousness of offending, adverse impacts on the prospects for rehabilitation, the public interest and personal circumstances.⁶⁶ These factors do not only apply to accused, but to any persons involved in court proceedings.

It can be considered the scope of court ordered suppression is too wide. Granting suppression too readily undermines the cases that genuinely require suppression. Furthermore, the fact that the Court of Appeal ruled that there was a fundamental error in law in granting the suppression only when someone (and that a newspaper) was sufficiently concerned to challenge it. How many cases must pass with suppression where it is not challenged? This is quite in contrast to the American scenario, where bodies such as the American Civil Liberties Union routinely challenge acts that are seen to infringe on human rights guarantees.

Although there are some definite anomalies, the current state of free speech law in New Zealand generally is inclined toward the maintenance of traditional limitations, as they are justifiable in a free and democratic society. Nevertheless there is

⁶⁵ above n 19

⁶⁶ *Lewis v Wilson & Horton Ltd*, above n 19, 16

a strong undercurrent of the promotion of free speech. However, this present situation is under serious attack from the internet and its developing technologies.

IV WHAT IS THE "INTERNET?"

The internet is a worldwide system of interconnected computer networks – a network of networks. Users of any one computer can, if they have permission, get information from any other computer (and sometimes talk directly to users at other computers). The United States government Advanced Research Projects Agency (ARPA) first conceived of the idea in 1969 and hence the internet was first known as the ARPANET. This was originally designed to allow communication between the military, defence contractors, and universities. Until this point, communications had been limited to "peer-to-peer" contact, a direct line the same as a phone call. The new system on the other hand connected many different computers at once.⁶⁷

This was made technologically feasible through the use of "packets." Although the internet uses the currently existing public telecommunication networks, the data travels fundamentally differently. In existing telecommunications, the data travels as a continuous stream. If the stream is interrupted or unable to flow in its intended route, it will fail. However, using the internet, any given file that is sought to be transmitted is divided into many of these small packets, transmitted, and then reassembled at the other end.⁶⁸ Packets can be transmitted via a multiplicity of routes, and automatically be routed and rerouted. Hence the network could continue to function even if parts of it were malfunctioning or destroyed in the event of a military attack or other natural disaster (hence its value to the military). It was designed to be a "decentralised, self-maintaining series of redundant links between computers and computer networks."⁶⁹ As a result, no user of the internet necessarily knows the location of another, even if they are in

⁶⁷ *Reno v ACLU* (1997) 521 US 844, 850; 117 S Ct 2329, 2334; 138 L Ed 2d 874, 884

⁶⁸ [whatis?com <http://www.whatis.techtarget.com>](http://www.whatis.techtarget.com) "packet" definition
<http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212736,00.html> (last updated 31 July 2001)

⁶⁹ *ACLU v Reno* (1996) 929 F Supp 824, 831 (ED Pa)

“direct” contact. Furthermore, nobody would (perhaps even could) know the route any given piece of data had travelled.

Non-military networks following similar principles began to emerge, linking businesses, universities, and individuals worldwide. Eventually these combined, to become what we know as the “internet.” Although these various networks contain communications links, they all operate independently of each other. There is “no centralized storage location, control point, or communications channel for the internet, and it would not be technically feasible for a single entity to control all of the information conveyed on the internet.”⁷⁰

Given this, how is it possible for the internet to function at all? There is a diverse number of networks, all doing different things. The answer lies in the use of “protocols.” These are commonly accepted methods of data exchange, voluntarily adopted by the various networks in order to make the internet functionally viable. The division, transmission and reassembly of packet data is governed by the use of these protocols.⁷¹ The fundamental protocol of the internet is the TCP/IP Protocol Suite (Transmission Control Protocol/Internet Protocol), a derivation from two of the original protocols.⁷² Without this accepted method, the internet simply would not function.

The most widely used part of the internet is the World Wide Web. Literally millions of people “surf” or “browse” the “web” every day. Its popularity lies in its simplicity and intuitive nature, which is enabled by the use of hypertext. Information appears in web “pages,” and virtually all of these pages contain hypertext “links” (often differentiated by colour or the like), which when “clicked” provide instant access to the location of the information or file desired. This method of

⁷⁰ *ACLU v Reno* above n 69, 832

⁷¹ *whatis?com* <<http://www.whatis.techtarget.com>> “protocol” definition <http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212839,00.html> (last updated 10 September 2002)

⁷² *whatis?com* <<http://www.whatis.techtarget.com>> “TCP/IP” definition <http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci214173,00.html> (last updated 29 August 2001)

instant cross-referencing of pages is enabled by the use of another protocol, the Hypertext Transfer Protocol (HTTP).⁷³

Although the internet is often thought of synonymously with its most widely used application, the World Wide Web, it has also has many others. The use of e-mail (governed by another set of protocols, the Simple Mail Transfer Protocol (SMTP) and Post Office Protocol 3 (POP3) for sending and receiving respectively) has largely replaced hard copy mail.⁷⁴ It is also possible to “chat” using the Internet Relay Chat (IRC) protocol, carrying on real time conversations with other users.⁷⁵ Usenet is a collection of user-submitted messages on various subjects (known as “newsgroups”) that are posted to servers on a worldwide network. For this the Network News Transfer Protocol (NNTP) is used.⁷⁶

V *INTERNET FEATURES THAT AFFECT FREE SPEECH*

The internet presents fundamental changes to the way we must consider freedom of speech and the accepted limitations that have been placed upon it in our society.

A *Technological*

The first change that the internet presents stems from the fundamental way it operates. Data travels in tiny packets, consisting often of little more than binary code (ones and zeroes). In transit, this packet data makes no discernable sense. It is only once the data has been reassembled at its destination that it becomes coherent. Furthermore, even inspecting all the packets and reassembling them before

⁷³ whatis?com <<http://www.whatis.techtarget.com>> “HTTP” definition <http://searchsystemsmanagement.techtarget.com/sDefinition/0,,sid20_gci214004,00.html> (last updated 5 October 2000)

⁷⁴ whatis?com <<http://www.whatis.techtarget.com>> “e-Mail” definition <http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci212051,00.html> (last updated 5 November 2001)

⁷⁵ whatis?com <<http://www.whatis.techtarget.com>> “chatting” definition <http://searchwebservices.techtarget.com/sDefinition/0,,sid26_gci211777,00.html> (last updated 12 June 2001)

⁷⁶ whatis?com <<http://www.whatis.techtarget.com>> “Usenet” definition <http://searchnetworking.techtarget.com/sDefinition/0,,sid7_gci213262,00.html> (last updated 3 July 2001)

they reach their destination may be impossible as the various packets may travel by various routes as parts of their path become inaccessible. Thus unlike "real" or physical information or content that is being sent, it is largely impossible to inspect en route. Thus any controls or limitations that are sought to be put in place must occur either at the source or at the destination. This is somewhat like having the postal services inspect mail at its point of departure and arrival, rather than the customs services that inspect packages entering the country for local compliance.

Furthermore, although some technical control measures for content presently exist, they are largely inadequate. "Filters" are programs that run automatically, checking data that is attempted to be downloaded.⁷⁷ There are two main ways in which a filter may operate: firstly, in screening for specific words. Typically these filters are designed to combat objectionable content such as pornography, rather than for other issues identified in this paper such as defamatory or copyright-infringing data. Therefore, this type of filter will typically prevent web pages being displayed that contain the words such as "sex."⁷⁸ However, this type of filter, although simple in execution, suffers from some serious flaws. Firstly, and most obviously, it cannot scan pictures. This is often seen as the most objectionable form of content, and so pages that do not contain the screened-for words may be accessible. Secondly, the system has problems of overbreadth. Although it will block adult sites, it may also block the tourist looking for information on Essex. Furthermore, it will also block some sites that are seen as socially redeeming. For example, a site that seeks to promote safe sex.

The second sort of filter blocks specific web-sites. Each site contains a specific address called a Uniform Resource Locator (URL), and this filter works by preventing access to any page with that URL.⁷⁹ Although again simple, it also has some serious flaws. Firstly, it is reliant on the filter program remaining up-to-date with all objectionable URLs. It was estimated in 1998 that there were 60,000 adult web-sites in the United States, with a growth in revenue in the vicinity of 40 per

⁷⁷ whatis?com <<http://www.whatis.techtarget.com>> "Filter" definition

<http://whatis.techtarget.com/definition/0,,sid9_gci212121,00.html> (last updated 18 April 2002)

⁷⁸ above n 77

⁷⁹ above n 77

cent annually (although growth is predicted to decline).⁸⁰ With this program being reliant on the user constantly up-dating the software, it is obvious that not all objectionable sites will be blocked. There is also the problem of older URLs being reassigned to other web-sites that people may wish to have access to. Finally there is an issue that arose in *Mainstream Loudoun v Board of Trustees of the Loudoun County Library*⁸¹ of some URLs being wrongly blocked.

Filters are also only effective (and even here questionably) in regards adult content. They are really only designed to prevent minors from accessing restricted material. It does not matter whether it is what we would class as totally objectionable, or merely catering to an adult market for titillation. Obviously filters have no effect on copyrights, other intellectual property or suppression orders.

Finally, like all "self-help" measures, the effectiveness of filters depends on people installing and maintaining them. Popular culture tends to state that it is children that predominantly use the internet, while their parents remain computer-illiterate. A computer-savvy child could quite easily disable any filter and look at anything they want to. While this may be overstated, it does rely on parents being proactive and continuing to monitor their children's computer use.

B Jurisdictional Issues

Perhaps one of the greatest challenges the internet poses to the regulation of "speech" is the fact that it is truly international in nature. Obviously New Zealand laws will only apply to people within New Zealand's jurisdiction. If a foreign web-site has material on it that would be contrary to New Zealand law, but perfectly within the realms of its domestic law, there is little that New Zealand authorities can do about it unless someone within New Zealand accesses it. Even at this point the only action that can be taken is against the New Zealand individual who accesses it, assuming such access is against the law (like in the case of

⁸⁰ "Online Porn Industry Facing Crisis" Broadcasting & Cable Online, 5 November 1998; <<http://www.broadcastingcable.com>>; also available at <http://www.nua.com/surveys/index.cgi?f=VS&art_id=905354484&rel=true> (last accessed 28 September 2002)

⁸¹ (1998) 24 F Supp 2d 552 (ED Va)

ensorship). This makes control difficult as it is virtually impossible to monitor the flow of data into the country (see above). Prosecutions are on an individual basis, and occur either from informants or active police "under-cover" operations.⁸² Even when laws are not in conflict and the activities of a web-site breach the law of both New Zealand and the domestic country in which the service is based, New Zealand law enforcers have no jurisdiction in foreign countries. Hence preventing the illegality continuing relies on informing the other nation and relying on them to take appropriate actions.

C "Distributor-less" nature of the internet

The internet is distinct from the off-line world in that large quantities of material can travel efficiently from source to ultimate destination without a network or chain of distributors. In the case of other unlawful activities that originate off-shore, for example, drug-trafficking, there is typically a New Zealand "source" who acts as the first receiver for the goods as they enter the country. He or she will then typically pass on the goods to others who act as distributors. On the other hand, using the internet the unlawful product moves directly to its destination. For other forms of importing it is possible to "cut the head off the snake," attacking the problem at its (local) origin. This is not possible for the internet, and as a result any prosecutions or actions must be brought at a highly individualised and diversified level.

D Size

Although not a problem unique to the internet, problems that relate to the sheer size have been taken to a new level. The internet is currently estimated to have 580.78 million users,⁸³ up from only an estimated 26 million in 1995,⁸⁴ and will only grow further.

⁸² For example, as occurred in the *Merry* case – see below n 89

⁸³ http://www.nua.com/surveys/how_many_online/index.html

⁸⁴ http://www.nua.com/surveys/how_many_online/world.html

E Anonymity

As a result of the packet form of data transfer, it is very easy to use the internet anonymously. It is hard for someone to trace the source (or the destination) of any particular piece of information. This makes traditional after-the-event prosecutions or civil actions difficult, as there may be no way of locating the potential defendant.

F Dichotomous Nature

The previous problems outlined relate to free speech issues in regards difficulties with limitations upon the right. The dichotomous nature of the internet can also attack the notions of free speech directly. At one level the internet is associated with a vast boundary-less sea of information out in cyberspace, and this is accurate to a degree. However, at another distinct level this vast ethereal sea is contained physically on computers, located in various countries. Although free speech is generally recognised (in the West at least) as a universal right, the scope of that right differs enormously. Local service providers are subject to local laws. When foreign users of the internet access sites subject to differing laws from their own, they are importing that law to a degree to their own country. As has been stated, it is difficult for authorities to control internet data as it flows in. However, it is not so difficult to control the data contained on machines within one's country, as prosecution for breach of domestic laws is possible. Thus the laws of the jurisdiction that contains the server a user is accessing become by default the laws of that user, at least for as long as that data is being accessed.

Suppose a New Zealander accesses material on an Australian web-site, material that is illegal in both countries. Although New Zealand authorities cannot prosecute the Australian site, they can notify the Australian police, who will take their own action. On the other hand, if the material were contained on an American web-site, and owing to the broader American free speech protection is not illegal there, nothing could be done except to prosecute any New Zealander who was caught with such material. The web-site itself would be immune from liability or

sanction. They are acting within the law in their own locality, and are outside the jurisdiction of New Zealand law. Therefore, American free speech law has a significant bearing on the laws of New Zealand too.

This problem is further compounded by the fact that free speech is a constitutional-type guarantee. Similar arguments to that made above could also be made in regards tort, criminal law and contract. Suppose America and New Zealand had different rules for contract acceptance. A New Zealander accepting an American contract would be "importing" American law temporarily. However, it is probably ultimately possible to reach a form of consensus internationally over what constitutes various forms of (non-constitutional) actions and laws. This has occurred in such areas as contract.⁸⁵ However, constitutional matters are more fundamental. There is little chance that America would be willing to adopt a lesser form of free speech protection than currently exists, and equally unlikely is the possibility that New Zealand would accept a much stronger right. Thus there is a fundamental schism between the laws of the nations that govern the web-servers, and the international, boundary-less realm of cyberspace.

VI DEFAMATION ON THE INTERNET

Turning now to how the internet and its technologies alter the presently existing law. The data transfer technology of the internet does not play a significant role in defamation, since the objection is generally not the fact that a defamatory statement has entered a particular jurisdiction, rather that it has been made at all. The distributor-less nature of the material is also not of particular relevance, since it is the defamer that is subject to a lawsuit.

On the other hand, jurisdiction and anonymity are important issues. Obviously it is impossible to sue for a defamatory statement if the defamer is unknown, and the internet provides wide scope for this. It is very easy to post anonymous defamatory statements on a variety of internet provided services. On the other hand, it is

⁸⁵ For example, the Unidroit Principles of International Commercial Contracts ((1995) BDIEL AD LEXIS 87) and the Convention on the Law Applicable to Contracts for the International Sale of Goods ((1985) 24 ILM 1574; (1991) BDIEL AD LEXIS 29)

sometimes possible to sue the provider of such a service, the web-site itself, as the “publisher” of the statement. This has occurred in the *CompuServe*⁸⁶ line of cases. This case was a landmark decision being one of the first to consider on-line liability. In this case, defamatory material was posted on the defendant’s message system. However, owing to the lack of control by the defendant, there was no liability. The court described the defendant as a mere distributor, not a publisher. The later *Netcom*⁸⁷ case developed this idea into what became known as the “passive conduit” approach. This remains the law today, and is the nominal basis on which file trading sites such as Napster operate: if the site does not breach the law itself, merely its users, it should be exempt from liability. On the other hand, although it has not occurred specifically in the defamation context, if the defendant plays any active role, such as copying data itself,⁸⁸ or cataloguing or censoring (inadequately) material.⁸⁹

This shows the paradoxical nature of current laws as distorted by the internet. If a web-site takes precautions to try and prevent offending material of this sort, then it may be liable under the mantra of playing an active role (also known as “assumed responsibility”). On the other hand, if a web-site becomes a “free-for-all” forum, then the site itself can have no legal liability as a mere distributor. This is a problem peculiar to the common law, and has arisen elsewhere. For example, the common law traditionally imposed no obligation to stop and help the injured person on the road-side, but if you did stop and attempt to help, but did so inadequately, then liability may result. However, the use of this method of thinking is particularly unsuited for the internet. The need to scrutinise every message before it is published is physically unnecessary on automated message sites – a user simply types a message, presses enter, and it is posted for the entire world to see. This contrasts to traditional print media, such as “Letters to the Editor” in newspapers, where at bare minimum it is necessary to re-enter the letter for printing.

⁸⁶ *Cubby Inc. v CompuServe Inc.* (1991) 776 F Supp 135 (SD NY)

⁸⁷ *Religious Technology Centre v Netcom On-Line Communication Services Inc.* (1995) 904 F Supp 1361 (ND Cal)

⁸⁸ This is the basis for Napster’s liability, see *A & M Records v Napster* (2002) 284 F 3d 1091 (9th Cir)

⁸⁹ This first occurred in *Playboy Enterprises Inc. v Webworld Inc.* (1991) 991 F Supp 543 (ND Tex) in regards copyright infringement. It has occurred in New Zealand in the criminal sphere in *Department of Internal Affairs v Merry* (2000) NZDCR LEXIS 28

Furthermore, the ease and popularity of such a service (related to the sheer size of the internet) inevitably leads to a massive increase in the volume of messages. Hence it might be impracticable to screen every message for defamatory statements. But if a web-site decides to be responsible and install a filtering system (that may, for example, censor messages with swear words), but the system for checking does let defamatory messages through, then liability may result. Thus it is more logical for a provider of internet services simply not to have any screening program whatsoever. Not only does this prevent potential liability in lawsuits, but also avoids the need for the mundane expense of filter software. However, although it would be impossible to prevent everything, most modern filter programs are capable of preventing at least *some* content. This has been reflected in the United States with the Communications Decency Act (CDA)⁹⁰ that provides a "Good Samaritan" defence, exempting from liability web-sites that take all reasonable steps to prevent breaches of law.⁹¹

These issues would seem to encourage free speech generally, since someone can say anything they want without fear of consequence. This sort of free-for-all is not "freedom of speech" as a fundamental human right, rather meaningless rumour-mongering that occurs beyond the boundaries of a lawful society. Free speech is not designed to allow a person to defame anyone at any time they wish, but rather promote certain other ideals society wishes to encourage, such as free and frank political discussion and advancing knowledge and truth.

However, a problem that affects freedom of speech more specifically is the dichotomous nature of the internet and the related issue of jurisdiction. As stated above, the internet really exists on two distinct levels, a localised physical reality and a boundary-less cyberspace etherealness. The determination of which conceptual level to use ultimately affects the entire course of internet free speech thought. The notion that cyberspace imports with it the laws of its locality is something of a problem for free speech law as we understand it in New Zealand. United States defamation law is significantly different from its New Zealand

⁹⁰ (1997) Pub L No. 104-104, tit. V, 110 Stat 56, 133

⁹¹ 47 USCS § 230(d)(3)

counterpart: *New York Times v Sullivan*⁹² requires either actual malice or a reckless disregard for the truth on the part of a defamer, a far higher standard than New Zealand. Assuming an American company publishes a document that defames a New Zealander, it will be difficult for that New Zealander to recover. If the document was published in the United States, it has the full benefit of American defamation test. If it is published in New Zealand, New Zealand law will apply in the domestic suit, but (assuming the publisher has no presence locally that actually did the publishing, and hence directly subject to suit within the jurisdiction) in order to have binding effect on the defendant, the judgment needs to be enforced by a United States court. This only occurs when the foreign law sought to be enforced corresponds with United States law. This occurred in the case of *Yahoo! Inc v La Ligue Contre Le Racisme Et l'Antisemitisme*⁹³ the plaintiff (Yahoo!) sought (and received) an order that a French judgment finding Yahoo! in breach of a French law outlawing traffic in Nazi memorabilia (which had been placed on Yahoo!'s on-line auction site by a user) was unenforceable in the United States as contrary to United States domestic law. The Federal District Court refused to enforce the French judgment as it was contrary to United States law, and to do otherwise would be to import foreign limitations on free speech. Although actually an example specifically relating to censorship law, it also shows the general problems with jurisdictional issues.

Unlike the "real" world, when defamation occurs on the internet, it is debatable where "publication" occurs, hence it is arguable which law to apply. It may occur when the article is made available on its web-server. On the other hand, it does not exist in a readable form until downloaded in the local jurisdiction, hence publication may not occur until then. Hence the decision on publication, and flowing from this, liability, can have profound impacts on the notions of internet-related free speech:

Suppose Foreexample.com is an American based web-site that, as a part of its services, publishes news articles about famous people. One of these articles is about

⁹² (1964) 376 US 254

⁹³ (2001) 169 F Supp 2d 1181 (ND Cal)

Mr Illustration, a New Zealander living in Wellington, but with some notoriety in the United States (hence the article). Although Foreexample.com is largely based in America, placing its articles on servers based there, it also has a related subsidiary, Foreexample.co.nz (hence it is directly within the jurisdiction of the New Zealand courts). Foreexample.com thinks it is secure in its *New York Times v Sullivan*⁹⁴ constitutional protection. Assuming that the article is defamatory for New Zealand purposes, but not for American, ultimately the success or failure of Mr Illustration will depend on where (or perhaps when) "publication" occurred.

If publication is completed when the article is made available on the American server, then American law will apply. An off-line analogy that supports this contention is the idea of buying a book in one jurisdiction, taking it to your home in another jurisdiction and reading it there, then complaining of the defamation under your local law. In the alternative, if publication is not completed until the requested article is displayed on screen in New Zealand, then New Zealand law will apply. This is somewhat analogous to the cross-border letter. If someone knowingly sends letters trans-jurisdictionally then they cannot complain about being subject to the laws of that foreign jurisdiction. It is at least arguable that both analogies apply to the internet. If you place a document on a web-server, then it is potentially available to anyone, like a bookstore. In order to view the article, the "customer" is required to take active steps to access it – "purchasing" the "book." On the other hand, by making the article available to the world, the author must also be aware that people in foreign jurisdictions with foreign laws will access it. Furthermore, the article does not exist in any readable form until the reader on their computer opens it for display – the "envelope" is "opened."⁹⁵

⁹⁴ above n 92

⁹⁵ This scenario has occurred and been considered along these lines in Australia in *Gutnick v Dow Jones*. The plaintiff (Mr Gutnick) brought proceedings in Australia for defamation. The defendant sought to strike the case out. The relevant arguments for these purposes was that there was no jurisdiction for a Victorian court to hear an action against an American plaintiff and (in a similar vein) that Victoria was "forum non conveniens," or not the most appropriate place for the action to be brought. The Supreme Court of Victoria (as *Gutnick v Dow Jones* [2001] VSC 305) and the Supreme Court of Victoria Court of Appeal (as *Dow Jones v Gutnick* [2001] VSCA 249), largely adopting the Supreme Court's reasoning, rejected these arguments, principally by adopting a letter analogy, allowing the suit to continue. Dow Jones has subsequently appealed to the High Court of Australia. The decision has been reserved (transcript of arguments: *Dow Jones v Gutnick* (14 May 2002) unreported, HCA, M3/2002).

Since both alternatives are at least arguably open, the decision of the courts should come down to policy. If the court opts for the bookstore analogy, then Mr Illustration will have no recourse. Publication occurred in America, and there the requirements for defamation are not fulfilled. This affects free speech in the manner that is described above. Since defamation is an accepted limitation to free speech, the failure to recognise it also has implications for the right itself. The internet becomes a lawless frontier, where you are free to slander anyone, so long as they would not be able to bring a suit in your jurisdiction.

On the other hand, if the judge accepts the letter analogy, then serious consequences may flow for Forexample.com – they will potentially be liable in any country with internet access. This leads to some potentially important free speech implications. Forexample.com will wish to avoid defamation suits in the future, and so have two potential options: Firstly, they can make sure that they follow the most generous international defamation laws: if anyone in any country can access the site, and potentially sue in domestic defamation, then the only way to avoid liability will be to increase the level of self-censorship to excise any statement that could possibly be construed as defamatory in whichever country grants the most protection for reputation. This is reasonably unpalatable for free speech advocates as it will amount to an inversion of the dichotomous nature problem the internet presents: instead of exporting American free speech laws, the result will be the import of foreign defamation law. In the alternative, it is possible for Forexample.com to erect a “firewall,” a technological measure (basically a filter in reverse) that prevents access without permission. These firewalls can be set to exclude users from specific countries, and so would be set to exclude any user in a nation with lower standards of defamation (and are willing to hold foreign web-sites liable) than the United States. This would affect New Zealand free speech, as not only the defamatory article would be prevented, but also any other article published at Forexample.com. Furthermore, other United States web-sites that become aware of potential international liability would also move to erect similar blockades, seriously infringing the right of New Zealanders to receive information.

Ultimately both outcomes are equally unpalatable, and the only true method would be to strike out in a new direction. Rather than use analogies such as books and letters to try and force-fit existing law to a new and unsuitable scenario, with potentially serious consequences for free speech regardless of the way the policy question is ultimately decided, it may be better to create a new internet law specifically tailored to the situation. Perhaps the best way is to take an entirely new approach. The most likely method seems to be that of catering to the web service providers' self interest, for example, the "Good Samaritan" defence provided by the CDA.⁹⁶ If internet services can exempt themselves from potential liability by introducing approved controls, then they will typically do so. By encouraging web-sites to monitor the content that users post (rather than being mere "passive conduits") at least some law infringing material will be prevented. This "encouragement" could stem from legislative action, or simply by court process rejecting the passive conduit approach as inappropriate for the internet, despite its traditional common law standing.

In the alternative, it may be possible for web-sites to absolve themselves of liability contractually. Most web-sites already (prominently) display their terms and conditions of use, typically stating such things as the material is copyrighted and so on, and that continued usage of the web-site constitutes acceptance. This could be adapted to other spheres. For example, stating that although the web-site's articles comply with United States defamation law, if you are accessing them from foreign jurisdictions you may be breaching your local defamation law. Furthermore, stating that by continuing to use the web-site you agree to contractually assume liability for "publishing" the article within your jurisdiction.

If either of these alternatives were adopted, the decision on policy would need to come down on the side of web service liability, at least in the individual case. Holding web-sites not liable would not provide any rationale for them to adopt measures of this sort.

⁹⁶ above n 91

VII INTELLECTUAL PROPERTY ON THE INTERNET

A Copyright

The internet has caused serious problems for copyright law. Digital technologies (such as compact disc music and DVD (digital versatile disc) movies) are easily copied onto computers, and with the increasing prevalence of high-speed internet connections, allegedly exchanged without undue difficulty or cost.

The technology of the internet allowing data transfer via the packet method is important: not only is data reliable and of reasonable quality, but it is also not able to be monitored in transit, although admittedly, even if it could be, it would be very difficult to distinguish between copyright and non-copyright works. The dichotomous nature plays a lesser role than in defamation, largely owing to greater international accord in copyright law. Jurisdiction also plays a role in that copyright infringers that are foreign to the jurisdiction may be far more difficult to prosecute. However, by far the greatest problems are in the distributor-less nature, the size, and the anonymity features of the internet.

In the off-line world, copyright infringement is only possible on extremely small scales (for example, between friends) unless there is some form of organised network of distribution, such as large scale "pirates" who on-sell mass copied works. Typically the former, although difficult to combat, is not of particular concern to copyright holders. On the other hand, the latter scenario is of much greater concern, but is far easier to prevent, and where prevention fails, prosecute. It is possible to eliminate the entire problem by targeting the source of the copies, the original "pirate" – it is possible to "cut the head of the snake."

This would be the situation on the internet if there were a web-site that offered infringing works for download. It would be possible to attack the web-site directly.⁹⁷ However, the ingenuity of some led to "Napster" and its clones. Someone

⁹⁷ Assuming there was jurisdiction and a defendant to sue. Although not a problem to the same degree as defamation, there are some international difficulties. For example, the website

using the Napster (or equivalent) software is able to search the hard-drives of others that are also on-line and using the program. Users are able to copy files that are of interest to them to their own computers. These files can be virtually anything – including music and video. Thus Napster itself did not infringe copyright – it is merely a “passive conduit,” not attempting to monitor the files that flow via its service. Thus instead of the web-service breaching copyright, individuals using the service were doing so. However, the internet enabled this to become a massive problem: the sheer size of the internet created the potential for many users of the service, which in turn led to more files being available. Hence the average user was able to download large amounts of copyright infringing works, and to do so largely anonymously. Rather than one large prosecution, it would be necessary to conduct thousands (if not tens of thousands) of small prosecutions to eliminate the problem.

Although the highly publicised *Napster*⁹⁸ case ultimately ended in liability for the web-service, it was due to the nature of the programming: in order to make Napster run more efficiently, the program created a central database of all the files that users who were logged onto the Napster service were prepared to trade. Thus instead of searching every other hard-drive individually, a user could search a central directory. Thus there was sufficient active participation to take Napster beyond being a mere passive conduit. Other similar services do exist that seemingly fall outside the law.⁹⁹ Although copyright is breached, it is done so by individual users, the pool of which is enormous and largely anonymous. The web-sites themselves are seemingly outside the law.

Although the fact that there is seemingly no limit on “speech” would apparently favour the right to freedom of expression, the reverse is true. As stated above, ex-

“Listen4Ever.com” was based in China, and consequently various record labels, unable to find a defendant and with difficulty of a lawsuit under Chinese law, have sought to recover from ISP providers (“Giants of music sue internet service providers” *New Zealand Herald*, 19 August 2002, available on the *New Zealand Herald*’s web-site:

<<http://www.nzherald.co.nz/storydisplay.cfm?thesection=technology&thesubsection=&storyID=2350023>>)

⁹⁸ *A & M Records v Napster* (2002) 284 F 3d 1091 (9th Cir)

⁹⁹ For example “Aimster” (also known as “Madster”) was within the passive conduit approach. However, recent changes to its service have seemingly allowed the chance of liability – see *In Re: Aimster Copyright Litigation* (2002) US Dist LEXIS 17054 (ND II)

ceeding the boundaries of free speech can impair the right almost as much as falling short of said boundaries. A lawless frontier where there are no rules would favour very few. However perhaps of greater concern to free speech arises out of the actions of the owners of copyright. Copyright holders are taking ever-more elaborate measures to protect their valuable intellectual property, measures that are undoubtedly breaching general free speech rights. For example, music studios are introducing deliberate "flaws" to their compact discs, flaws that prevent them being used on computer CD-ROMs, but should play without problems on the supposedly more robust stereo compact disc player. But, what happens to the user who uses their computer as their stereo?

This is a comparatively minor infringement, however. Copyright holders have also recently begun encrypting their data. The information is recorded in unreadable form, and is only able to be decoded by an approved appliance, sometimes with the decryption "key" hard-wired (part of the physical construction). Furthermore, to combat "hackers," those that attempt to decipher the data, often for illicit purposes, the United States Congress enacted the Digital Millennium Copyright Act (DMCA).¹⁰⁰ This basically makes it an offence to attempt to subvert copyright protection codes. Thus not only is the work itself protected through copyright, but also the previous "step," the encryption of the copyrighted work. Thus even accepted exceptions to copyright protection (in the United States, fair use, and in New Zealand (for example) sections 41, 42 and 43) are prohibited, since in order to make use of these the encryption would have to be breached, an offence in itself.¹⁰¹

This breach of the right to freedom of expression was evidenced by the extremely high-profile United States case of *Corley*.¹⁰² Movie studios had been reluctant to release films in digital format (on DVD) until there was a way of protecting their copyright. In mid-1996 the Content Scramble System (CSS) was developed. This is a method of encryption that prevented DVDs being played on anything except approved players. Subsequently DVDs were widely released and became very

¹⁰⁰ (1998) Pub L 105-304, § 101, 112

¹⁰¹ Called the "anti-circumvention" provision, 17 USC § 1201(a)(1)

¹⁰² *Universal City Studios, Inc. et al v Corley and 2600 Enterprises Inc.* above n 14

popular. However, the only computer-based DVD players (as opposed to stand-alone players) ran on the Microsoft "Windows" operating system. In 1999, Jon Johansen, a Norwegian teenager purchased a DVD, but it could not operate on his "Linux" (an alternative to Windows) system. He therefore created a program that would decrypt the code on the DVD and allow it to be played (and also copied) without a licensed player. This program was (appropriated) entitled "DeCSS," and word of DeCSS soon spread. The program was posted on the "hacker" web-site of Mr Corley known as "2600.com." A case was brought by eight movie studios against the web-site under the anti-trafficking provisions¹⁰³ of the DMCA. Not only was Corley enjoined from posting copies of the DeCSS program itself on his web-site, but also from linking from any other site that contained a copy of the program. At any level this must be considered a large breach of free speech, since Corley can now no longer link to any site with copies of DeCSS (no matter how much other information it contains), and may be liable for contempt of court if any site he does have existing links to subsequently posts copies.

B Trademarks and Passing Off

Trademark law and passing off on the internet has taken an unusual twist. The practice of "deep linking" has recently been the subject of litigation in the United States. Linking is enabled through the use of hypertext (see above), creating instant cross-references to various other pages on the internet. Deep linking is where one web-site creates a link to another, but the target page is not the "home" page (the introductory page of a web-site), rather "deep" within the hierarchy of the linkee-site.

This is a problem as virtually all revenue for web-sites that do not charge for access stems from the ability to sell advertising. Sites offer a service or information that is useful or desirable among internet users, and reap their own commercial reward by selling advertising that is incidental to the web-site itself. High traffic sites that receive a lot of "hits"¹⁰⁴ are able to charge more for others to advertise.

¹⁰³ 17 USC § 1201(a)(2) & (b)(1)

¹⁰⁴ A "hit" occurs each time a user accesses that site, hence a measure of popularity

Most of this advertising occurs on the home page; hence by-passing the home page can cost a web-site valuable advertising revenue.

Deep linking is not illegal in itself (since there is no direct damaging effect on the linkee-site), but is nevertheless deemed objectionable (due to the loss of revenue) by linkee-sites. Since the links often contain material of the linkee-site that is trademarked or likely to lead to confusion in the course of trade, breach of trademark or passing off can be plead. Breach of copyright is also sometimes alleged – in *Shetland Times v Willis*¹⁰⁵ the defendant ran a news site, but rather than write its own news articles it merely linked to those of the plaintiff's news site, using the headlines as the links. The defendant was liable for breaching the copyright that existed in the headlines. However, in all these scenarios the true complaint is not so much the intellectual property infringement, rather the fact that the deep link costs advertising revenue.

This is obviously a unique feature of internet technology (none of the other internet factors are really relevant). Without the use of the HTTP protocol it would not be possible to link in this manner. Furthermore, the notion that trademark can be used to limit "speech" outside that of the actual trademark would be largely impossible in a non-internet context. There is no obvious off-line analogy.

The most obvious solution (to copyright infringement problems at least) would be simply to jettison the "passive conduit" approach. Alternatively, it may be possible to cater to the self-interest of internet users in other ways. It was predicted that the photocopier would spell the end to the book. Admittedly, it probably would be cheaper to photocopy an entire book rather than purchase it. However, the issue is ultimately one of convenience and quality, something that photocopying does not offer. Although digital formats potentially identical in terms of quality, in reality the sheer size of the files means that even with the growth of high-speed internet connections, files are compressed, and even the size of the movie playback on screen is reduced. Those that want the full experience in terms of quality will still pay for it. Although this is not a real solution in terms of smaller compact disc

¹⁰⁵ (1997) 37 IPR 71 (UK)

audio files, the current trend seems to be toward releasing music on DVD as well, including extra features such as video. In regards compact discs, it may be necessary to offer additional features that will attract purchasers into buying, rather than copying. For example, Bon Jovi's latest release is to have a code embedded on it that will allow owners preferential booking for concerts and so on.¹⁰⁶ It is perhaps possible to overstate the problem. On the other hand, it is not possible to overstate the free speech implications that have flowed from legislative efforts such as the DMCA.

VIII CENSORSHIP ON THE INTERNET

Censorship of objectionable content is a highly publicised issue. Although adult related material dominates, there are other forms of censorship – for example, the French anti-Nazi laws in *Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemitisme*.¹⁰⁷

There is probably not a single feature of the internet that does not affect traditional controls on content. Firstly, as stated above, methods of self-control (for example, for parents wishing to control their children's access) are largely inadequate. However, the main area of concern is truly objectionable material, rather than restricted material that becomes objectionable if the viewer is in breach of the restrictions. In this respect, the technology of the internet (the use of packets to transfer data) renders content largely unreadable in transit. The only way to monitor this is basically to target a specific computer and check all packets, and hence reassemble them to discern the content. Since data in the realm of cyberspace is virtually uncontrollable there is no way as such to prevent objectionable material entering the country.

This is compounded by the size and anonymity of the internet. It may be possible to have a large-scale operation in contraband pictures without any authority

¹⁰⁶ "Offline" Dominion Post Infotech Supplement, 30 September 2002, 6

¹⁰⁷ above n 93

detecting it. This is clearly evident from a recent New Zealand case¹⁰⁸ where a major child-pornography ring was apparently operating out of Auckland.

Additionally, as for copyright infringement, the distributor-less potential of the internet makes it difficult to combat directly. There are no doubt many exchanges of prohibited material, and the only way to eliminate the problem would be to prosecute individually.

Finally the problems of jurisdiction and dichotomous nature of the internet create serious issues. New Zealand law, as stated many times, obviously does not apply internationally. Thus a breach of the FVPCA by an offshore server cannot be prosecuted. Furthermore, if the site is not breaching its domestic law, they can virtually do as they wish in regard content.

With an inability to control the source and transit of objectionable material, New Zealand authorities have fallen back on prosecuting individuals who access such prohibited material. However this is a difficult task in itself. It is extremely difficult to apprehend such people due to the anonymity the internet provides. Most prosecutions that do eventuate seem to come either from tip-offs or covert police action. For example, in *Department of Internal Affairs v Merry*¹⁰⁹ prosecution resulted from undercover action by an Inspector of Publications within Internal Affairs. The Inspector entered an internet "chat room" where he found a user with the name "Jo 90" who ran automated advertisements stating that in return for uploading one file to his system, a user would be able to download another ten images. He did so, and some of the pictures he received he deemed clearly objectionable. In the ensuing course of events a search warrant was executed and a computer that contained several objectionable pictures seized. The possessor of the pictures was prosecuted.

¹⁰⁸ "Inquiry tracks international child porn ring to Auckland" New Zealand Herald, 2 August 2002; available on the New Zealand Herald's web-site:
<<http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=2347519>> (last accessed 29 September 2002)

¹⁰⁹ *Department of Internal Affairs v Merry* above n 89

In addition to the already stated problems in regard free speech becoming potentially meaningless, like copyright there exists the potential that legislative action could be taken to combat the problem directly. Such action is almost inevitable to result in overbreadth, and have the end result of preventing material that would otherwise be permitted as well as the genuinely objectionable material. This is evidenced by United States and Australian efforts to achieve control of content.

Australia has introduced compulsory standards in the Broadcasting Services Amendment (Online Services) Act 1999. Traditional attempts at control target the providers of content. In an effort to combat the problems the internet poses, Australia has legislated for Internet Service Provider (ISP) controls. Thus the actual company you pay for your internet access suddenly finds itself subject to controls. If a complaint¹¹⁰ is made to Australian Broadcasting Authority (ABA) about overseas content that is justified (if it is Australian based content, steps can still be taken directly¹¹¹), then the ABA issues notices to all ISPs stating that they must take steps to prevent access to such a site. This is very difficult for an ISP to do, but the Act also provides that the ISP may disregard this notice if there is a recognised alternative access prevention arrangement.¹¹² These alternative access prevention arrangements can be determined by the adoption of industry codes and standards, as approved by the ABA.¹¹³ Thus self-regulation is encouraged. However, the only currently accepted alternative arrangement is the free provision by ISPs to customers of filter software, with all the inherent problems of this self-control method (see above). It is thus possible for ISPs to divest themselves from any liability by making a program available to its subscribers, leaving it to them to install and monitor. Thus although there is potential overbreadth in the actual operation of the filter programmes themselves, there is also the problem that the legislation may be "toothless," since for it to be effective, it relies ultimately on the active participation of individuals, installing and maintaining the filter software. ISPs, so long as they make the software available, are immune from sanction.

¹¹⁰ s 22

¹¹¹ s 30

¹¹² s 40(4) – (6)

¹¹³ ss 60(3) – 60(6)

Although Australia's constitution contains very few civil liberties provisions, some have been implied into it by the High Court of Australia. Most notably there is an implied right of free speech.¹¹⁴ This right may be limited to a political context however, since it is implied from the sections dealing with "free" elections and government. In order for these express freedoms to have effect, it is also necessary to have free speech. However, reducing this somewhat is the later decision of the High Court in the Australian *Lange* case.¹¹⁵ This case refused to allow an extension to the constitution-based defence to a defamation action, since the common law defence of qualified privilege (as modified by statute and the High Court in this case) provided free speech protection sufficient to meet the constitutional guarantee. Although this was a case on defamation, and there is no corresponding common law defence toward censorship, it does leave Australian free speech guarantees in a somewhat ambiguous position as both potentially limited to political free speech and by paying deference to pre-existing common law protections. However, within its narrow ambit, as a product of a supreme law, it does provide stronger protections than New Zealand's subservient protections. There is therefore the potential for the Broadcasting Services Amendment (Online Services) Act 1999 to be struck down as unconstitutional. If the filter software were limiting people's ability to discuss and evaluate their elected representatives and the political climate, then the Act would be unconstitutional. It is also possible that there is a wider right to free speech to be implied, but this is not clear.

The United States of America has had a rather more torrid time of trying to control internet content. The first attempt was the Communications Decency Act. This act made illegal a wide range of activity, including the dissemination of sexually explicit material on the internet. Section 502(a) of the CDA, commonly known as the "indecent transmission" provision, criminalized "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age." Section 502(d), called the "patently offensive display" provision, made

¹¹⁴ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v Western Australian Newspapers Ltd* (1994) 182 CLR 211

¹¹⁵ *Lange v Australian Broadcasting Corporation* (1997) 71 ALJR 818; 145 ALR 96

illegal “the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.”

However, the Act was never going to pass constitutional scrutiny,¹¹⁶ and in *Reno v American Civil Liberties Union*¹¹⁷ the Supreme Court struck down the statute as unconstitutional. Some reasons (among others) were that it was overbroad, failing to adequately define “indecent” and removing the traditional requirement that “patently offensive” material must utterly lack serious literary, artistic, political, or scientific merit. The CDA would also have a “chilling effect” on adults using the internet. For example, it was made an offence to communicate patently offensive material to minors. However, knowledge that someone under 18 may receive it was not a requirement under this provision. Hence adults would have to adapt all communications to the level appropriate for a minor, since it is always possible that a minor may receive them. If the material did happen to be received by a minor, the sender would be subject to prosecution. This is a severe curtailment of the right to free speech. Furthermore the provisions designed to ensure adulthood were technically unfeasible or discriminatory towards some users. A similar effort followed in the Child Online Protection Act (COPA),¹¹⁸ which, although addressing some of the objections to the CDA, was still struck down, ultimately as the provisions would also infringe the right of adults to free speech, and largely for the same reasons as its predecessor.¹¹⁹

The most recent effort, the Children’s Internet Protection Act (CIPA)¹²⁰ made it compulsory for public libraries that provide internet services to install filters. However, owing to the problems with filters (outlined above), and in light of *Mainstream Loudoun v Board of Trustees of the Loudoun County Library*,¹²¹ where filters in one library were deemed to be unconstitutional, the statute has again been struck down as contrary to free speech.¹²²

¹¹⁶ See Mark C. Alexander “The First Amendment and Problems of Political Viability: The Case of Internet Pornography” [2002] Harvard Journal of Law and Public Policy (Summer) 977

¹¹⁷ above n 67

¹¹⁸ (1998) Pub L No. 105-277, 112 Stat 2681-736

¹¹⁹ *ACLU v Ashcroft* (13 May 2002) unreported, US Supreme Court, No. 00-1293

¹²⁰ (2001) Pub L No. 106-554, tit. xii, 114 Stat 2763, 2763A-335

¹²¹ above n 81

¹²² *American Library Association v United States* (2002) 201 F Supp 2d 401 (ED Pa)

Although free speech laws in both countries are very much different to New Zealand (America has greater protection, and Australia has narrower, but stronger guarantees), it is clear that neither solution is entirely satisfactory. Australian efforts are narrowly targeted at children and leave great scope for abuse in both the technical difficulties and a presumption of individual involvement. American endeavours, although they would be law in New Zealand, show the potential abuses toward free speech that could conceivably result.

A telling example is that of China. Unwilling to allow its citizens free access to foreign media that may detract from the approved "Party" line, China has frequently blocked access to many sites that contain officially condemned data. Mass blocking or filtering of this sort is known as a "firewall," and its critics have dubbed the Chinese version "the Great Firewall of China" or "the Red Firewall." The most recent example was that of Google, a search engine that contained a very popular Chinese-language service, but also offered access to other sites that contained data that was critical of China, in addition to various other information that was deemed contrary by Chinese officials. Users that attempted to access Google were rerouted to other less efficient, but officially sanctioned, Chinese-based services.¹²³ This sort of censorship certainly has clear significant free speech implications.

An interesting side-effect had developed from this sort of action: "Hactivismo," an association of "hackers" (independent programmers), has released a program called "Camera/Shy" that allows users to conceal messages within image or picture files, bypassing filtering methods that search for certain text and allowing people living in highly censored nations (especially China) to access this sort of data. Furthermore, "Mixer," an internationally known German hacker and member of Hactivismo, announced the creation of a new internet protocol called "Six/Four." Named in honour of the anniversary of the Tiananmen Square Massacre (June 4 1989 in its American format), the protocol allows the creation of

¹²³ "Google back online in China" BBC News, 12 September 2002; available on BBC's online news service: <<http://news.bbc.co.uk/1/hi/technology/2254622.stm>> (last accessed 27 September 2002)

“Virtual Private Networks” (VPNs). These are basically networks fenced off from the wider scope of the internet, similar to those used by businesses. Anyone operating this protocol is able to bypass traditional internet inspections and barriers, hence allowing access to controversial web-sites. It also allows the users to operate anonymously, and disguise content that would otherwise be subject to censure as innocuous data. However, although nominally in the name of free speech, Camera/Shy and Six/Four also allow people in “liberal” countries to trade material that is subject to other censorship (for example, child pornography) without fear of detection.¹²⁴ Thus it is possible that even with legislation and viable prevention methods, censorship will still be able to be bypassed.

IX SUPPRESSION ON THE INTERNET

Really the only two internet related features that have a bearing on this limitation of free speech are that of jurisdiction and the dichotomous nature, however the combination is such that it may render the entire concept of court ordered suppression futile. The typical penalty for breach of a court order is to hold the person in breach in contempt of court. This may result in a fine, or even imprisonment in extreme cases. It is an action in personam, acting against the person him or herself. However, for an in personam action to work, the person must be within the reach of the court’s powers. Thus a person in contempt of a New Zealand court order in America or the United Kingdom is likely to suffer very few consequences.

This was manifestly demonstrated in the “American Billionaire”¹²⁵ and “Mr X Kidnapping”¹²⁶ cases. In the former, the high profile nature of the offender, in addition to the nature of the offence (drug related) combined with the person in question’s views on the subject (he is an ardent supporter of decriminalisation or marijuana) led to the story being reported in the United States. Similarly in the

¹²⁴ “Hactivismo hatches plot to sneak through censorship gaps” New Zealand Herald, 6 August 2002; available on the New Zealand Herald’s web-site:
<<http://www.nzherald.co.nz/storydisplay.cfm?thesection=technology&thesubsection=&storyID=2347986>> (last accessed 26 September 2002)

¹²⁵ *Lewis v Wilson & Horton Ltd* above n 19

¹²⁶ above n 63

latter scenario, the sensational nature of the intended offence, again combined with the British nationality of the alleged offenders led to the story being reported in the United Kingdom. Without the internet, this sort of scenario still may have occurred, but would not carry with it the same degree of consequence. Even if the lead story of an English newspaper breached the most severe suppression order there would still be few in New Zealand that would know of it. The coverage is simply insufficient. However, inevitably that English paper will make it available on its web-site, a web-site that is very accessible to any New Zealander with a cursory interest. Thus although technically any New Zealander who disseminated the information gleaned from such a source in contempt of the suppression order would be potentially subject to proceedings in New Zealand, like copyright and objectionable content, it does not address the source of the problem.

Free speech is clearly implicated in the context that New Zealanders (especially news providing services) have less of a right to impart information that more directly concerns them than those off-shore, who do have such an ability. Furthermore, the recipients of such information cannot receive the information from domestic services, but can do so from international sources. In reality it does not really make any difference to the internet user whether they type in "news.co.uk" or "news.co.nz," yet in the latter scenario they cannot receive particular types of information whereas in the former they can. Not only is there discrimination in the expression of such information, but there may also be discrimination in the receipt too. Anyone with the internet can access the data, but those without cannot. Moreover, those with the internet cannot inform their neighbours without it of the information, since to do so would be in contempt.

However, for an overseas news agency to get information of court proceedings, someone who is present in court at the time of the proceedings must have committed contempt him or herself by informing others. Hence in a similar vein to the potential ways forward for defamation and copyright, it is necessary to pander to the interests of those that may be in breach. If people in court (especially journalists) do not start taking more responsible attitudes, proceedings may be closed to the public entirely so as to protect the sanctity of court orders. If journalists are

excluded then reporting on court activities will suffer. Furthermore, prosecuting those that do breach court orders is necessary.¹²⁷

X FURTHER INTERNET CHANGES

A Trespass to Chattels

In addition to these accepted limitations on free speech, the internet has also developed some limitations unique to it. One in particular that has been used to prevent what we may regard as free speech is the ancient tort of trespass to chattels. Although it may seem somewhat anachronistic to use a tort that was originally designed to compensate for interference with goods short of conversion to prevent free speech, the vagaries of the internet have allowed it. The modified internet tort has stemmed from advertising revenue and the use of "robot aggregators."

Robot aggregators are automated programs that search through pre-programmed web-sites looking for data of interest to the user of the aggregator. The most common example is search engines. When someone is unsure of the web-site they desire, most will use a service such as Yahoo! or Google to search for their object of interest. However, it would take far too long for a search engine to search every page on the internet for the terms of interest, so search engines constantly visit every page on the internet, recording their address and content in the search engines' own databases. Although these are the most common, other forms of aggregator visit web-sites and remove certain information of interest to the aggregator user. This occurred in *e-Bay Inc v Bidder's Edge Inc*¹²⁸ and *Ticketmaster Corp. v Tickets.com Inc*,¹²⁹ where the defendants sent robot aggregators into the plaintiffs' sites and automatically copied data of interest. In the first case, it was

¹²⁷ For example, a New Zealand journalist, Jane Clifton, allegedly breached the "Mr X" suppression order in an article written for an overseas newspaper ("Decision over prosecution of columnist delayed" New Zealand Herald, 20 August 2002; available at the New Zealand Herald's web-site:

<<http://www.nzherald.co.nz/latestnewsstory.cfm?storyID=2350207&thesection=news&thesubsection=general&thesecondsubsection=latest>> (last accessed 30 September 2002)

¹²⁸ (2000) F Supp 2d 1058 (ND Cal)

¹²⁹ (August 10 2000) United States District Court (CD Cal) Case No CV99-7654-HLH (BQRx); (2000) US Dist LEXIS 12987; Copy L Rep (CCH) P28,146

the items for sale, price and so on, while in the latter the information copied was the date of concerts and event, the price of tickets and where tickets were available. In this situation it is not necessary to visit the plaintiff's site at all – potentially a large loss in terms of advertising revenue.

The use of robot aggregators as search engines causes difficulties for web-sites as frequently the word searched for is not on the home page, rather a page “deep” within the hierarchy of the web-site (hence it is known as “deep linking”). Clicking on the link the search engine produces does not take a user to the home page with its advertising, rather to the page with the term of interest. The advertising is therefore bypassed, with a corresponding decrease in the number of “hits” and hence the advertising revenue for the web-site.

The *e-Bay Inc v Bidder's Edge Inc*¹³⁰ and *Ticketmaster Corp. v Tickets.com Inc*¹³¹ situation is a difficulty unique to the United States owing to its distinct copyright laws. Copyright does not arise in mere compilations of facts that lack a “creative spark.” This is known as the “sweat of the brow” doctrine, where recovery is prevented when only labour and no originality has gone into the creation of a work.¹³² Thus in the United States it is not possible to use copyright to protect facts posted on a web-site. Robot aggregators are hence entitled to copy data. If the information is posted elsewhere, there is a decrease in the revenue available to the original web-site as users access the data elsewhere.

If it is not illegal to deep link, and not possible to prevent extraction using copyright, then the innovative plaintiff will naturally try an alternative method. The tort that was hit upon is that of trespass to chattels. This tort “lies where an intentional interference with the possession of personal property has proximately caused injury.”¹³³ As discussed above, the internet exists on two distinct levels, the ethereal level of cyberspace, and the physical reality of circuits and magnetic particles. By targeting the latter, the plaintiffs in these cases constructed an

¹³⁰ above n 128

¹³¹ above n 129

¹³² *Feist Publications v Rural Telephone Service Co* (1991) 499 US 340; 113 L Ed 2d 358; 111 S Ct 1282

¹³³ *Thrifty-Tel v Bezenek* (1996) 46 Cal App 4th 1559, 1566

argument that the defendants' programmes interfered with and harmed their "chattels." The harm alleged is a loss of system resources. Any person who has used a computer knows that the larger the size or number of programs being run, the slower the computer operates. Hence the plaintiff's alleged the presence of others' programs harmed their system resources, and the ability of their chattels to operate effectively.

Although this form of action does not formally attack free speech itself, rather targeting the acts that lead up to the "speech," nevertheless the true goal of the tort is to control the actual content the defendant posts. If the plaintiff's web-site is the only one with that information, then it must receive more hits and hence more advertising revenue. One may go on to say however, that there is no problem with this action in the New Zealand context: actions of this sort would (probably) be covered under our copyright law.¹³⁴ However the tort has been extended to actions that are very much against the tenets of free speech protection.

It is estimated that 200 billion e-mails will be sent this year.¹³⁵ This equates to over 6,300 every second. An e-mail may consist of a few hurried lines to a distant relative, a mundane query to a work colleague, or poor-taste jokes to a group of friends. Another form of e-mail is "spam," unsolicited junk mail. Most find this very annoying, most especially ISPs who provide e-mail accounts. They are required to deliver it, using system resources. The ability to find people who occupy system resources liable was eagerly seized upon by ISPs to combat the "spammers." In *America Online Inc v National Health Care Discount Inc*¹³⁶ AOL, the plaintiff, obtained an award of US\$337,500.00 and a permanent injunction against the defendant for the loss of system resources following 150 million unsolicited e-

¹³⁴ *Ladbroke (Football) Ltd v William Hill* [1964] 1 All ER 465; *Telecom v Colour Pages* (14 August 1997) unreported, High Court, Wellington Registry, CP142/97. The *Ladbroke* case expresses the orthodox view of copyright law, that originality (and hence copyright) stems from "skill, judgment and labour" of the creator. The "and" is treated as "or" in most situations, hence labour alone is sufficient to give rise to copyright. The *Telecom* case is the most recent New Zealand endorsement of the principle. However, the *Telecom* case is merely interlocutory, and hence not definitive. Canada, for example, cites *Ladbroke* for the opposite, that mere "sweat of the brow" is insufficient, and skill, judgment and labour is required (*Tele-Direct v American Business Information* (27 October 1991) unreported, FCA, A553-96)

¹³⁵ <<http://www.waller.co.uk/web.htm>> (last accessed 28 September 2002)

¹³⁶ (2001) 174 F Supp 2d 890 (ND Iowa)

mails sent to AOL subscribers – seemingly a laudable outcome (except for the spammers).

However, if you are a person who sends the odd e-mail to a relative, work colleague or friend, each and every one of these recipients could potentially have a cause of action in trespass to chattels against you, the sender. In the cases that established the potential for an action in trespass to chattels, the element that the defendant's actions must lead to harm to the plaintiff's chattels is emphasised. In *e-Bay Inc v Bidder's Edge Inc*¹³⁷ this claim had some basis, with the plaintiff alleging that up to 10 per cent of its system resources were being used by the defendant. In the following case, *Ticketmaster Corp. v Tickets.com Inc*,¹³⁸ an interlocutory injunction application, relief was denied on the basis that a lack of significant harm led to the balance of convenience favouring the defendant. However, shortly following the AOL¹³⁹ case, in *Intel Corporation v Hamidi*,¹⁴⁰ the defendant, Hamidi, was enjoined from sending e-mails to Intel Corporation e-mail addresses, following six e-mails, although to a large portion of the Intel mailing list.¹⁴¹ This seemingly reduces the harm requirement and greatly expands the breadth of the tort – something that must severely infringe the freedom of speech.

B The Criminal Law

Not specific to the internet, but of computers generally, is a similar New Zealand development to the tort of trespass to chattels in the criminal sphere. Section 298(4) of the Crimes Act 1961 provides for an offence of wilful damage to property. In the case of *R v Garrett*,¹⁴² damage was defined to include alterations that either cause harm to the property or cause it to perform in an unexpected way, requiring intervention to restore the property to its original state. Alteration was in

¹³⁷ above n 128

¹³⁸ above n 129

¹³⁹ *America Online Inc v National Health Care Discount Inc* above n 136

¹⁴⁰ (2001) 94 Cal App 4th 325; 113 Cal Rptr 2d 244

¹⁴¹ It has been estimated that it costs an ISP US\$2.50 per 1,000 e-mails (*America Online Inc v National Health Care Discount Inc* above n 136, 899). Even if Hamidi sent each of his six e-mails to the few thousand people on the Intel mailing list, at most the harm is caused is less than US\$50.00

¹⁴² (2001) NZDCR LEXIS 103

turn defined to include the alteration of the magnetic particles on the hard disk of a computer. Since any sent e-mail is stored on the hard disk, and deleting it (hence restoring full functionality in terms of available space) requires effort, in New Zealand it may be possible to be found criminally liable for sending someone an e-mail.

C Other Areas Affected

In addition to the laws that are described above that are directly changed by internet-related concerns, other areas of law may also be affected, simply by the ease and safety with which one can breach the law. Any crime that involves "speech" of any kind, such as breaches of patent law, privacy and even anti-espionage and some treason laws are made much easier and safer by the anonymity and ease of communication the internet provides.

In terms of a way forward, the courts must recognise that even though some actions can be analogised to internet related factual scenarios, such analogies are not always appropriate. Courts need to feel free to add additional elements where the interests of justice demand, although also on a principled basis. The extended *Hamidi*¹⁴³ version of trespass to chattels provides a good example: although receiving e-mails does technically impair the performance of a chattel, this must be viewed in light of the fact that the same action is done willingly 6,300 times a second. A requirement that the damage be more than de minimis is perhaps required.

XI CONCLUSION

It is eminently clear that the internet makes fundamental changes to the way that we consider free speech and free speech-limitation law. In many ways the internet is the new "Wild West," a lawless frontier where anything goes. However it is a frontier that extends across the globe and is one of, if not the, most pervasive influence in the 21st Century. It is necessary to entirely reconsider the way we con-

¹⁴³ *Intel Corporation v Hamidi* above n 140

sider and emphasise free speech, and in different ways in different contexts. If we desire to maintain the status quo, or at least not introduce radical changes, it is necessary to go beyond the traditional approach of using analogies to adapt older laws to new situations. In most situations the analogies are simply inadequate when applied to internet scenarios. It may be necessary to apply the law differently in order to achieve the same result. Ultimately it may prove impossible to apply traditional legal methodologies, and a better approach is to cater to the self-interest of the internet community.

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