

Why internet firms can breathe easy - ISPs cannot be held liable as publishers of defamatory material as long as they have no control over the content of message boards

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Five years ago, the internet service provider Demon Internet had to pay out on a claim brought by Laurence Godfrey, who was the subject of defamatory statements on internet message boards that were being hosted by Demon. Godfrey told Demon the messages were there, but Demon failed to remove them promptly. Since then, ISPs have routinely been the recipients of complaints about material on websites hosted by them.

Sigh of relief

Three weeks ago, three other ISPs, AOL, Tiscali and BT, were in court on a related issue, and successfully applied to have the claim in libel against them struck out. ISPs can breathe a collective sigh of relief following this most recent decision (*Bunt v. Tilley & Others*), which decided that ISPs could not be held liable as publishers of defamatory material when their only involvement was as the provider of a service through which defamatory postings were transmitted.

The gist of the complaint against the ISPs was that they had enabled a number of individuals to publish allegedly defamatory statements on a Usenet message board. Of the three ISPs sued, only BT had hosted the Usenet sites. AOL and Tiscali did no more than provide the individuals with internet access and an email account.

Not only has the court confirmed what ISPs had always believed - that in the right circumstances they could benefit from the statutory protection provided to them by the "innocent dissemination" defence and the exemptions under the Electronic Commerce Regulations 2002 - but even more important, the court has found that unless a person can prove that the ISP knowingly participated in a defamatory posting made by a customer, then the ISP should not even be said to be a publisher of the posting. So, where an ISP has performed only a passive role in enabling someone to make postings on the internet, it cannot be liable for defamation. There is no need to even consider any other defences.

The court also said that the injunction sought in the case (to prevent the ISPs providing services to the individuals) would be "draconian and pointless" since the individuals could easily obtain internet services elsewhere. Even the usual form of injunction in libel actions (to prevent repetition of the defamatory words) would have been pointless as the court accepted that the ISPs had no way of ensuring compliance with its terms. This provides a useful precedent for ISPs who are concerned about the practicalities of injunctions sought against them in libel actions.

This is a valuable decision for ISPs and other service providers, which are often seen as soft targets in claims for unlawful activity on the internet. Where ISPs do no more than provide internet access, or where they host material but have no knowledge of unlawful activity, they will not be liable for libel.

File sharing

This, of course, is to be contrasted with ISPs which host websites or message boards over which they do have some control. In these cases, as before, ISPs may still be liable as publishers. So, for example, ISPs hosting material about which someone had specifically complained would, in order to avoid liability, still have to show that they had complied with any request to remove such material (if

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that material is indeed defamatory). Otherwise, they may be held responsible for any post-notification defamatory publications.

Since the regulations apply to any claim against ISPs in respect of activities carried out on their networks, ISPs may also gain some comfort from the ruling in the wider context of liability for other activities taking place via their services, such as file sharing and other intellectual property infringements.

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