

9-1-1998

Legal Issues on the Internet: An Analysis and Comparison of Law and Policy Relating to the Use and Regulation of the Internet in Great Britain and Australia

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Recommended Citation

McNamara, James B. (1998) "Legal Issues on the Internet: An Analysis and Comparison of Law and Policy Relating to the Use and Regulation of the Internet in Great Britain and Australia," *Penn State International Law Review*: Vol. 17: No. 1, Article 5.
Available at: <http://elibrary.law.psu.edu/psilr/vol17/iss1/5>

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Legal Issues on the Internet: An Analysis and Comparison of Law and Policy Relating to the Use and Regulation of the Internet in Great Britain and Australia

I. Introduction

Although skeptics among us continue to assert that the Internet,¹ and the concomitant promises of a global information superhighway and electronic marketplace, is of overstated significance and at best a technological achievement far from fruition, the reality of the matter is that the Internet is being used to exchange information and goods, and the users are not just Americans. As of October 1997, one in twenty-five British homes were connected to the Internet.² Furthermore, in just 12 months, ending in June 1997, 6 million British adults had used the Internet and that group was projected to have increased to 9 million in 1998.³ A survey of Internet use in Great Britain also found that of those who had used the Internet, 96% said they would use the Internet again in the future.⁴ The survey also reported, perhaps surprisingly for the Internet skeptic, that use of the Internet for educational purposes was the fastest growing area of use, with 49% of British users in 1997 using the Internet for that purpose, compared with 39% in 1996.⁵ Currently, just 7% of British firms are doing business on the Internet, but 82% of British companies said that they expected

1. See generally Richard Zaitlen & David Victor, *The New Internet Domain Name Guidelines: Still Winner-Take-All*, 5 COMPUTER LAW. 12, 13 (1996) (discussing the origin and development of the Internet); see generally Mark A. Kassel & Joanne Keane Kassel, *Don't Get Caught in the Net: An Intellectual Property Practitioner's Guide to Using the Internet*, 13 J. MARSHALL J. COMPUTER & INFO. L. 373, 375 (1995) (discussing the historical development of the Internet and a description of the resources provided by the Internet, including the World Wide Web).

2. See *UK Homes to Get Wired*, NEW MEDIA AGE, Oct. 23, 1997, at 2.

3. See *id.*

4. See *id.*

5. See *id.*

to use the Internet as a business tool, particularly for advertising and trading, in the next five years.⁶

Similarly, it is estimated that there are 1.35 million Australian users of the Internet.⁷ This level of usage, one researcher argues, makes Australia the largest user of the Internet, on a per capita basis, in the world.⁸ Furthermore, the number of Internet users in Australia is sure to increase in the near future if the information service company America Online (AOL) follows through on its plan to “attack” the Australian Internet market with a marketing campaign backed with \$41 million in financing.⁹ Even without the help of marketing from AOL, there have been efforts in Australia to bring senior citizens on-line through organized and non-confrontational training programs at “Seniors Internet Centers” in community libraries.¹⁰ In addition, of those Australians who currently use the Internet, 6% have actually used the Internet to do an online transaction with a bank.¹¹ Hence, it may not come as a surprise to learn that one Australian survey of 500 Australian chief financial officers found that by the year 2002, 25% of all business transactions would occur over the Internet.¹² Furthermore, an Australian Taxation Office study found that as of January 1997, 88% of the total Internet World Wide Web sites in Australia were commercial in nature.¹³

6. See Maxine Frith, *All Life—and Death—on the Internet*, PRESS ASS'N NEWSFILE, Sept. 22, 1997, available in LEXIS, News Library, Wires File.

7. See *Asia Pacific Internet Growth Soars*, NEWSBYTES, Jan. 22, 1997, available in LEXIS, News Library, Wires File.

8. See *id.*

9. David Frith, *Online Has \$41M for Attack on Aussie Market*, THE CANBERRA TIMES, Oct. 13, 1997, at A21. Jack Davies, President of AOL International, said at a Sydney press conference in October 1997 that AOL saw a great opportunity in Australia and would offer sign-up enticements such as a free trial and affordable pricing, pushed by a “heavy-duty” marketing campaign. *Id.*

10. Jonathan Granger, *Age No Barrier to Learning How to Surf the Net*, THE CANBERRA TIMES, Oct. 6, 1997, at A4. The article reports that while only one center had opened as of the time of the writing of the article, three more centers were already planned to be opened in other libraries in the future. *Id.*

11. See *Tax and the Internet, Discussion Report of the Australian Taxation Office Electronic Commerce Project*, § 5.2.3 (Aug. 1997) <<http://www.ato.gov.au/ecp>>.

12. See Daniel Morrissey, *Aust. Banks Step as World Leaps Ahead on Internet*, AAP NEWSFEED, Oct. 21, 1997, available in LEXIS, News Library, Wires File.

13. See *Tax and the Internet*, *supra* note 11, § 5.4.8; see generally Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 311 (1997) (explaining the World Wide Web); see generally Mark A. Kassel & Joanne Keane Kassel, *supra* note 1 (discussing the World Wide Web).

Consequently, given the level of use of the Internet by both businesses and individuals in Great Britain and Australia, the question arises: how, if at all, have the two countries addressed the legal issues which result from the use of the Internet as a medium for the exchange of both information and consumer goods and services? In an effort to answer this question, this Comment will analyze and compare the laws and policies that relate to, or have developed around, the use and regulation of the Internet in Great Britain and Australia. Specifically, Part II of this Comment will address the British and Australian approach to copyright infringement on the Internet. Part III will then examine the application of the defamation laws of Great Britain and Australia to the Internet. In Part IV, British and Australian attempts to regulate obscene content on the Internet will be analyzed. Part V of this Comment will then identify the current law and philosophy in Great Britain and Australia regarding the taxation of electronic commerce on the Internet. In Part VI, the overall approach to the issues taken by Great Britain and Australia will be compared. Part VII will then proffer a conclusion as to which nation's approach offers Internet users the most certainty as to the legal ramifications of their Internet related activities. First, however, the copyright laws of Great Britain and Australia, as they relate to the Internet, must be examined.

II. Copyright Infringement on the Internet

If a person in London or Sydney one Saturday afternoon decides to design and launch a World Wide Web "page"¹⁴ containing a copy of the designer's favorite poem as well as an audio segment in which a visitor to the web page can select to hear the designer's favorite song, has the person infringed a copyright license in violation of the law of Great Britain or Australia? Before this question can be answered, the copyright laws of both countries, as they relate to the Internet, must be analyzed.

A. Copyright Law in Great Britain

The Copyright, Designs and Patents Act of 1988 (the "CDP Act") states that a copyright subsists in original literary, dramatic, musical or artistic works, sound recordings, and films.¹⁵ Furthermore, a "copyright work," according to the statute, is a work in

14. See generally Chin, *supra* note 13 (explaining World Wide Web pages).

15. Copyright, Designs and Patents Act, 1988, ch. I, § 1(1)(a)-(b) (Eng.).

which a copyright subsists.¹⁶ In addition to the requirement that the work be original, a work qualifies for copyright protection under the CDP Act if the author of the original work is a qualifying person: a British citizen.¹⁷ However, if an author of an original work is not a qualifying person, according to Section 159 of the CDP Act, the protections of the Act can nevertheless be extended to those persons who are citizens of other countries but whose works are published in Great Britain.¹⁸

Therefore, applied to the hypothetical situation involving the Internet web page designer outlined at the beginning of this section, it would appear that the CDP Act would operate to include under its protection the text of the web page designer's favorite poem and the recording of the designer's favorite song, provided the authors of the original works were British citizens, or, as citizens of other countries, had applied for protection under the CDP Act. Yet, the question remains whether the web page designer could be held liable for having infringed copyright protected work by using the work as described above in his web page. In order to answer this question, it again becomes necessary to analyze the text of the CDP Act.

Section 17 of the CDP Act states that the copying of a copyright protected work is an act which can amount to the infringement of a copyright.¹⁹ "Copying" of a literary, dramatic, musical or artistic work is defined by the CDP Act as reproducing the work in any material form.²⁰ The Act further states that reproducing the work in any material form includes "storing the work in any medium by electronic means."²¹ Furthermore, Section 18 of the CDP Act states that the issuing to the public of copies of a protected work is an act capable of being considered an infringement of copyright.²² Hence, it would seem that the CDP Act would directly address the actions of the web page designer in the example outlined above.

Presumably, under the CDP Act, the web page designer would be held to have infringed the copyright of the author of the poem used by the designer, if the designer reproduced the poem on the

16. *Id.* at (2).

17. *Id.* § 154.

18. *Id.* § 159(1)(c).

19. Copyright, Designs and Patents Act § 17.

20. *Id.* at (2)

21. *Id.*

22. *Id.* § 18(1).

web page without the authorization of the author. This conclusion is supported by the fact that the designer copied the original work in violation of Section 17 when he reproduced the text and stored it by electronic means on his web page. Arguably, this conclusion is also supported by the fact that the web page designer issued copies of the protected work to the public in violation of Section 18 of the CDP Act when a visitor to the web site opened the designer's web page. The CDP Act, however, might serve, surprisingly, to support a conclusion that the web page designer did not infringe a copyright by reproducing his favorite song on the web page.

According to Section 5 of the CDP Act, "copyright does not subsist in a sound recording which is . . . a copy taken from a previous sound recording."²³ Consequently, if the web page designer had recorded his favorite song from a radio broadcast, and then used the tape of the radio broadcast to provide the sound clip on his web page, arguably, the designer might be found to not have infringed the original author's or performer's copyright. However, if the web page designer attended a concert and recorded the performance of his favorite song, and later used that recording as the sound clip on his web page, then it is likely that the web page designer would be held in violation of Section 183 of the CDP Act. Section 183 provides that "a performer's rights are infringed by a person who, without his consent . . . shows or plays in public the whole or any substantial part of a [protected] performance."²⁴

Although a court would first have to find that the opening of a web page by a visitor to a web site constituted a public showing under Section 183 of the CDP Act before the web page designer could be held to have engaged in copyright infringement, the above analysis, nevertheless, seems to indicate that the CDP Act provides the courts of Great Britain with a legal framework through which to address issues of copyright infringement on the Internet. In fact, there has already been a lawsuit before a British court involving copyright infringement on the Internet.²⁵

In *Shetland Times Ltd. v. Wills*, the publishers of a newspaper, *The Shetland Times*, sought a declaratory judgement²⁶ and an

23. *Id.* § 5(2).

24. Copyright, Designs and Patents Act § 183.

25. See generally *Shetland Times Ltd. v. Wills*, 1997 FSR 604 (O.H. 1996).

26. A declaratory judgement is a "statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights." BLACK'S LAW DICTIONARY 409 (6th ed. 1990).

interim interdict²⁷ against the managing director of an Internet newspaper, *The Shetland News*. The *Shetland Times* argued that the *Shetland News* had infringed the copyright of the *Shetland Times* under Sections 7, 17 and 20 of the Copyright, Designs, and Patents Act of 1988 (the "CDP Act").²⁸ The dispute arose over web sites that the two newspapers had established on the Internet.²⁹

First, the *Shetland Times* established a web site that made available to visitors of the site, articles and photographs that appeared in the regular printed editions of *The Shetland Times*.³⁰ It was the hope of the *Shetland Times* in establishing the web site that by requiring visitors to the site to view a "front page" screen before accessing the articles they were interested in, the *Shetland Times* could eventually sell advertising space on the "front page" once the web site had become known.³¹ *The Shetland News*, however, then established a web site in which a number of news headlines on the "front page" of their web site were verbatim reproductions of headlines used in *The Shetland Times*.³² Furthermore, the *Shetland News*' web site enabled visitors to select one of the *Shetland Times*' headlines and then view the text of the related article on the *Shetland News*' web site, by accessing, through a

27. An "Interim Interdict" in British courts is equivalent to an "Interlocutory Injunction." See *Shetland Times*, 1997 FSR 604. Interlocutory injunctions in the United States are "those issued at anytime during the pendency of the litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the time that the court will be in a position to either grant or deny permanent relief on the merits." BLACK'S LAW DICTIONARY 784 (6th ed. 1990).

28. *Shetland Times*, 1997 FSR 604. Section 7(1) of the CDP Act states that a "cable programme" is an item included in a "cable programme service." Copyright, Designs and Patents Act § 7. A "cable programme service," according to the CDP Act, is a service which sends visual images, sounds or other information for reception to members of the public. *Id.* Section 7(2) of the CDP Act excepts from the definition of a "cable programme service," a service which will or may send from each place of reception, information for reception by the person providing the service. *Id.* Section 17 of the CDP Act states that the copying of a work is an act restricted by the copyright in a copyright protected work. *Id.* § 17. Copying, according to the CDP Act, is defined as reproducing the protected work in any material form, including storing the work in any medium by electronic means. *Id.* Section 20 of the CDP Act states that the inclusion of a protected work in a "cable programme service" is an act restricted by the copyright in a "cable programme." Copyright, Designs and Patents Act § 20.

29. See *Shetland Times*, 1997 FSR 604.

30. *Id.*

31. *Id.*

32. *Id.*

hyperlink,³³ the *Shetland Times*' web site.³⁴ Through this accessing method, the visitor to the *Shetland News*' web site could read articles on the *Shetland Times*' web site without having to first go through the "front page" screen of the *Shetland Times*' web site, thereby defeating the potential for the *Shetland Times* to earn advertising revenue from its web site.³⁵

In granting the interim interdict against the *Shetland News*, Lord Hamilton of the Outer House Court reasoned that the *Shetland News*' incorporation of the headlines from the web site of *The Shetland Times* could arguably be an infringement of copyright in violation of Section 17 of the CDP Act.³⁶ The CDP Act could be held to have been violated, according to Lord Hamilton, since it was conceded by the *Shetland News* that a headline could be a literary work and because the headlines in question involved words put together for the "purpose of imparting information."³⁷ Additionally, Lord Hamilton reasoned that Section 20 of the CDP Act could also have arguably been violated by the *Shetland News*' web site because the web site, in his opinion, constituted an infringement of Section 20 by the "inclusion in a cable programme service of protected cable programmes."³⁸ Yet, perhaps most importantly, Lord Hamilton reasoned that in his view the web site could be seen as a service that involved the sending of information.³⁹ Lord Hamilton stated, "although in a sense the information, it seems, passively awaits access being had to it by callers, that does not, at least prima facie, preclude the notion that the information, on such being taken, is conveyed to and received by the caller."⁴⁰

Although Lord Hamilton stated in his reasoning that the ultimate resolution of the above issues would "turn on technical material not available to [him] at the hearing on interim interdict," he granted the interim interdict because the "balance of convenience" favored the grant.⁴¹ Nevertheless, the *Shetland Times* case, once again, seems to indicate that Great Britain, through the CDP Act, has a viable legal mechanism through which to address

33. See generally Chin, *supra* note 13 (discussing hyperlinks in World Wide Web pages).

34. See *Shetland Times*, 1997 FSR 604.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. See *Shetland Times*, 1997 FSR 604.

40. *Id.*

41. *Id.*

the issue of copyright infringement on the Internet. This conclusion will not be tested by the resolution of the *Shetland Times* case, however, because following the grant of interim interdict the parties settled the case out of court.⁴²

The only other British case which has dealt with the subject of copyright infringement on the Internet is *Nottinghamshire County Council v. Gwatkin*.⁴³ In *Nottinghamshire*, a report produced by the Nottinghamshire County Council containing allegations of satanic abuse of children in the United Kingdom was posted in June 1997 on an Internet web site by a group of British journalists.⁴⁴ The County Council sought and won an interlocutory injunction⁴⁵ in an ex parte proceeding⁴⁶ from a High Court which required the journalists to remove the report from their web site and eliminate any hyperlinks from their web site to other web sites containing the same report because the web site report infringed the Council's copyright in the report under the CDP Act.⁴⁷

Despite the injunction, however, over twenty other web sites continued to operate on the World Wide Web containing the same report that the British journalists were required to take off their web site.⁴⁸ These "mirror sites," though, were outside the jurisdiction of the British courts.⁴⁹ Consequently, the efforts of the County Council to enforce their copyright in the report was being frustrated by the Internet, principally because British copyright law had never been required to address such a problem.⁵⁰ The problem presented by the "mirror sites" was whether links to web sites outside of the jurisdiction of the court could, by court order, be removed from a web site within the court's jurisdiction when the

42. See David M. Mirchin, *Intellectual Property*, CORP. LEGAL TIMES, Oct. 1998, at 22. The agreement provided that the *Shetland Times*' masthead logo would appear next to each *Shetland Times* headline on the *Shetland News*' web site, along with a hypertext link to the *Shetland Times*' web site. *Id.*

43. See *Hyperlinks and Copyright—Nottinghamshire County Council v. Gwatkin and Others—Garretts*, BUS. MONITOR, Aug. 1, 1997, available in LEXIS, News Library, Non-US File [hereinafter *Hyperlinks and Copyright*].

44. *Id.*

45. See *supra* note 27 and accompanying text.

46. An "ex parte" proceeding is a proceeding "taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." BLACK'S LAW DICTIONARY 576 (6th ed. 1990).

47. See *Hyperlinks and Copyright*, *supra* note 43.

48. *Id.*

49. *Id.*

50. *Id.*

sites contained material that infringed a copyright within the court's jurisdiction.⁵¹

This problem was not resolved by the British courts, however, because in August of 1997 the Nottinghamshire County Council issued a press release which stated that although "bringing [the] action was the right thing to do," the Council had "been faced with a technology running at a pace which exceeds the law's ability to adapt to deal with it and the best interests of Nottinghamshire people would not be served by running up large bills in difficult areas of law."⁵² The Council, therefore, did not pursue the injunction against the journalists' web site to full hearing, but did pay the legal costs of one of the defendants in the case.⁵³

Hence, although it can be argued, based upon the *Shetland Times* case, that the CDP Act can be extended to web sites on the Internet, the question remains whether the Act can extend to hyperlinks on a web site which direct a visitor to other web sites containing an infringing use of protected work. It would seem, then, that although British law currently can be adapted to address some of the copyright infringement issues presented by the Internet, there are uses of copyright protected work on the Internet which still must be tested against the scope of the CDP Act.⁵⁴ Therefore, the question arises whether Australia has gone further than Great Britain in extending copyright protection to the Internet.

51. *Id.*

52. Cyber-Rights & Cyber-Liberties (UK), *UK JET Report Controversy Over -Notts CC Backs Down* (last modified Nov. 8, 1997) <<http://www.xs4all.nl/~yaman/jetrep.htm>>.

53. *See id.*

54. Another case might yet be in the making in British courts that may at least partially address the scope of the Copyright, Designs and Patents Act. *See* Jackie Burdon, *Web Pirates May Face Oasis legal Onslaught*, PRESS ASS'N NEWSFILE, June 5, 1997, available in LEXIS, News Library, Wires File. Fans of the British rock music group "Oasis" have defied a deadline imposed by the band's management to rid web sites maintained by the band's fans containing unauthorized songs, lyrics and photographs of the band. *Id.* The band's management has threatened that if fans do not comply with the request to remove the material from their web sites, they may face legal action. *Id.* Since record companies stand to lose from such web sites as web site sound quality improves, it is likely that well financed record companies, unlike the Nottinghamshire County Council, may see a significant benefit in fighting a law suit in such a difficult area of the law. *Id.*

B. Copyright Law in Australia

Again, if a person in Sydney were to create and launch onto the World Wide Web a web page containing lines from his favorite poem, novel or film and an audio segment of the designer's favorite song, could the web page designer be held to have infringed a copyright license in violation of Australian law?

The Australian Copyright Act of 1968 (the "Australian Copyright Act") directs that copyright is the exclusive right in the case of literary, dramatic or musical work, to reproduce the work in a material form, publish the work, perform the work in public, broadcast the work, cause the work to be transmitted to subscribers to a diffusion service, or to make an adaptation of the work.⁵⁵ Furthermore, the Australian Copyright Act provides that copyright "subsists in an original literary, dramatic, musical or artistic work that is unpublished."⁵⁶ The Australian Copyright Act, though, also extends copyright protection to original work which has been published, if copyright subsists in the work or if copyright in the work subsisted immediately before its first publication.⁵⁷ Additionally, Section 85 of the Australian Copyright Act states that copyright in sound recordings is the exclusive right to make a copy of the sound recording, cause the recording to be heard in public, or to broadcast the recording.⁵⁸ Finally, the Australian Copyright Act provides for the application of the provisions of the Act to citizens of other countries.⁵⁹

Therefore, applied to the hypothetical situation outlined at the beginning of this section, it would appear that the Australian Copyright Act would operate to include the text from the designer's favorite poem, novel, or film and the recording of the designer's favorite song within copyrightable works, if the original authors of the works were Australian citizens or, as citizens of other countries, had applied for protection under the Australian Copyright Act. Yet, it is not clear whether the web page designer would be held liable for an infringing use by using the work as described

55. Copyright Act, 1968, ch. 63, § 31 (Austl.). The Act defines the transmission of work to "subscribers to a diffusion service" as a transmission of the work in the course of a service of distributing broadcast or other matter over wires, or over other paths, to the premises of subscribers to the service. *Id.* § 26.

56. *Id.* § 32(1).

57. *Id.*

58. *Id.* § 85.

59. Copyright Act § 184(1)(c).

in his web page. In order to answer this question, it again becomes necessary to analyze the text of the Australian Copyright Act.

As previously discussed, Section 31 of the Australian Copyright Act asserts that copyright is the exclusive right to cause, inter alia, a work to be "transmitted to subscribers to a diffusion service."⁶⁰ A "diffusion service," according to the Australian Copyright Act, refers to the "transmission of work in the course of a service of distributing broadcast or other matter... over wires, or over other paths..., to the premises of subscribers."⁶¹ Hence, it would seem that the Australian Copyright Act could be applied to address the actions of the web page designer in the hypothetical above, if there was, first, a ruling by an Australian Commonwealth Court that "diffusion services" included transmissions over the Internet. Such a ruling would not require loose interpretation of the statutory language, for the definition of "diffusion service" already incorporates the language of transmission of work to subscribers over "other paths."

Only one Australian case, however, has rendered a ruling dealing with the subject of copyright infringement in a manner that can be applied to Internet transmissions. In *Telstra Corp. v. Australasian Performing Rights Ass'n*, the High Court of Australia affirmed a Federal Court of Australia decision holding that Telstra, an Australian telecommunications carrier, had infringed copyrights in music which the Australasian Performing Right Association (APRA) held under Section 31 of the Copyright Act of 1968.⁶² In affirming the decision, the Court reasoned that when Telstra enabled callers, who were placed on hold after calling a business or government organization, to hear music while on hold, Telstra caused the transmission of the works to subscribers to a diffusion service within the meaning of Section 31 of the Copyright Act.⁶³ The Court further reasoned that although the transmissions were to individuals in private circumstances, the transmissions still could be considered to have been made to the public because the transmissions were made in a commercial setting.⁶⁴ The Court stated that "callers on hold constitute[d] the copyright owner's public, not because they themselves would be prepared to pay to

60. *Id.* § 31(1)(a)(v).

61. *Id.* § 26(1).

62. *Telstra Corp. Ltd. v. Australasian Performing Right Ass'n. Ltd.* (1997) 146 A.L.R. 649.

63. *Id.*

64. *Id.*

hear the music, but because others are prepared to bear the cost of them having that facility.”⁶⁵ For these reasons, the Court held that the unauthorized playing of music to callers on hold constituted a transmission within the meaning of Section 31 of the Australian Copyright Act and therefore a violation of a copyright holder’s right to cause the work to be transmitted to subscribers of a diffusion service.⁶⁶

Although the *Telstra* case does not directly involve copyright infringement on the Internet, the decision is relevant to the matter. First, the case held that transmissions to individuals in private circumstances could be considered transmissions to the public. This ruling is significant for it seems to open the possibility of a finding in a subsequent case that a transmission of music from a web site over the Internet and into an individual’s personal computer is in fact a transmission to the public. Such a finding might then enable a plaintiff to establish a claim of copyright infringement over the Internet.

Second, the *Telstra* opinion is significant because it holds the carrier of a telecommunications service liable for copyright infringement that results from the carrier’s transmissions.⁶⁷ This ruling would seem to open the possibility for a future finding by an Australian court that material transmitted over the Internet by an “Internet Service Provider,” a carrier of Internet services, could result in the Internet service provider being held liable for copyright infringement. In fact, such a ruling might have been imminent in Australia.

In addition to suing Telstra, APRA also filed a suit in an Australian federal court against OzEmail, an Australian Internet company.⁶⁸ APRA alleged that OzEmail infringed APRA’s copyrights when OzEmail transferred music files over the Internet to subscribers of its Internet service.⁶⁹ The resolution of this case would be of great significance not only because it would likely

65. *Id.*

66. *Id.*

67. See Christie Eliezer, *Australian Music Fee Ruling Has Global Scope*, BILLBOARD, Sept. 6, 1997.

68. See Christie Eliezer, *OzEmail Target of Court Action Over C’rights*, BILLBOARD, April 12, 1997.

69. See *id.* APRA argued that Internet service providers can be held liable under section 26 of the Copyright Act of 1968, because the section provides that the person operating the service transmitting material over wires, or other paths, “shall be deemed to be the person causing the work or other subject-matter to be so transmitted.” *Id.* (citing Copyright Act, 1968, ch. 63, § 26(2)(a) (Austl.)).

determine the liability of Internet service providers for what they transmit to Internet users, but also because it would determine the scope of the Australian Copyright Act in cases involving allegations of copyright infringement over the Internet. Unfortunately, the case was settled out of court in June of 1998.⁷⁰ A ruling in the OzEmail controversy, though, might have been premature.

In the spring of 1998, reforms to the Australian Copyright Act were proposed which are aimed at making Australia "a leader in the Internet world."⁷¹ A draft of the proposed reforms, referred to as the "Digital Agenda Copyright Reforms," is scheduled for release for public comment in the Fall of 1998.⁷² It is expected that the reforms will include a "right of communication" to the public which would apply to literary, artistic and musical works transmitted over the Internet.⁷³ The scope of copyright protection that will be afforded to creative works under the proposed right of communication, however, is not clear at this time; a determination must await the release of the proposed reforms to the public. It is apparent at this time, though, that the Digital Agenda reforms will propose amending the Australian Copyright Act so as to insure that Internet service providers will not be held liable for copyright infringements discovered on web pages belonging to the customers of Internet service providers.⁷⁴

Although it is clear that the Digital Agenda reforms have the potential to dramatically tailor Australian copyright law to the demands of the Internet, it is not certain that these reforms will be adopted. Assuming, *arguendo*, that the Digital Agenda reforms are not adopted, it remains possible to conclude, based upon the *Telstra* decision and the express language of Sections 26 and 31 of the Australian Copyright Act, that Australian courts have an existing legal framework through which questions of copyright infringement over the Internet can be addressed.

70. See *OzEmail Pays Performers' Organization*, COMPUTERGRAM INT'L, June 11, 1998, available in LEXIS, News Library. The settlement, however, is only good for a period of one year. *Id.* Thus, this case might yet be litigated in the future.

71. See *Web Sites, Net Tool, Net News*, COMPUTERS TODAY, June 19, 1998, at 84.

72. See *FED: Law Must Keep Up With Technology for Archives*, AAP NEWS-FEED, Aug. 7, 1998, available in LEXIS, News Library, Wires File.

73. See Mike Taylor, *Digital Copyright Changes in the Air*, THE CANBERRA TIMES, Aug. 31, 1998, at 13.

74. See *id.*

C. Comparison of the British and Australian Approach

As the above discussion reveals, both Great Britain and Australia have existing statutory law which can be interpreted to address the issue of copyright infringement on the Internet. Both countries, though, presently lack settled common law addressing the question. In the absence of such common law, it would appear that Great Britain is better able to address copyright infringement on the Internet since Section 17 of the CDP Act specifically prohibits the unauthorized copying of a protected work by electronic means.⁷⁵ Until the Australian Copyright Act is amended to include such a provision, or interpreted to provide that a transmission over the Internet constitutes transmission over a "diffusion service," there will be much uncertainty as to whether the Australian Copyright Act is applicable to the Internet.⁷⁶

Having examined the Australian and British approach to copyright infringement on the Internet, defamation law in the two countries should now be discussed given the potential for defamatory conduct on the Internet. Such conduct is likely since the Internet is a medium that lacks direct personal interface but reaches a mass audience of individuals with immediacy.

III. Defamation on the Internet

If one day a person in Manchester or Perth decides to enter a "bulletin board"⁷⁷ or "chat room"⁷⁸ on the Internet and proceeds to join a discussion about the immorality of psychiatrists and writes: "Dr. John Doe is perhaps the most immoral psychiatrist in the world today, not only because he has cheated on his wife with

75. Copyright, Designs and Patents Act, 1988, ch. I, § 17(2) (Eng.).

76. This conclusion, though, might likely be found to be nonsensical if Australia adopts the Digital Agenda Copyright Reforms. If the Digital Agenda is adopted, a better conclusion would be that Australia possesses the statutory ability to address copyright infringement on the Internet and, consequently, can provide a high degree of legal predictability to Internet users. Additionally, it might be concluded, following Australia's adoption of the Digital Agenda, that Australia may now serve as a model for Great Britain and the rest of the world in their efforts to adapt existing copyright law to the questions raised by the Internet.

77. See generally Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 338 (1997) (discussing generally the functioning of "bulletin boards" on the Internet).

78. See generally *id.* at 343 (discussing "chat rooms").

at least four of his patients, but also because he is completely insolvent and overcharges patients in order to pay off his business debts;" would John Doe be able to bring a suit against the author for defamation in Great Britain or Australia? Before this question can be answered, the defamation laws of both countries must be examined.

A. *Defamation Law In Great Britain*

Whether or not words complained of are capable of conveying a defamatory meaning is a question of law in British courts.⁷⁹ In deciding whether or not words are capable of a defamatory meaning, the court will examine the ordinary and natural meaning of the words in question.⁸⁰ If a court determines that the words complained of could be regarded by a reasonable man as defamatory, then the question will be submitted to a jury to decide whether or not the words involved did bear a defamatory meaning.⁸¹ Furthermore, in a defamation suit in Great Britain, a person has a defense if he can show that he was not the author, editor or publisher of the statement out of which the complaint arises.⁸² Section 1(3) of The Defamation Act of 1996 (the "Defamation Act"), moreover, declares that a person shall not be considered the author, editor or publisher of a statement if the person is only involved "in processing, making copies of, distributing or selling any electronic medium in which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form."⁸³

Therefore, applied to the hypothetical Internet situation outlined at the beginning of this section, it would appear that British defamation law would be able to address the matter. First, the question of whether what was written in the "chat room" about

79. *Jones v. Skelton*, 3 All ER 952 (P.C. 1963) (appeal taken from Eng.).

80. *Id.*

81. *Morgan v. Odhams Press Ltd.*, 2 All ER 1156 (H.L. 1971) (appeal taken from Eng. C.A.).

82. Defamation Act, 1996, ch. 31, § 1 (Eng.). The Act states that: "author" means the originator of the statement, but not a person who did not intend for his statement to be published; "editor" means a person having editorial responsibility or the decision making power to publish the statement; "publisher" means a person whose business it is to issue material to the public. *Id.* § 1(2).

83. *Id.* § 1(3)(c). The Act also states that a person shall not be considered the author, editor or publisher of a statement if the person is only involved in the matter as a broadcaster of a live program containing the statement and in which the person has no control over the person who made the statement. *Id.* § 1(3)(d).

the psychiatrist even amounts to a "statement" for purposes of British defamation law is addressed by Section 17 of the Defamation Act.⁸⁴ Section 17 directs that for purposes of the Defamation Act, "statement" means, *inter alia*, words, pictures, or visual images.⁸⁵ Therefore, it is likely that a British court would find words typewritten on another person's computer screen to be a statement within the scope of the Defamation Act. Second, although it cannot be said that the statements made by the Internet user were defamatory until a court evaluates the ordinary and natural meaning of the words used, it would appear that if the words were found to be defamatory, the Internet user, as the author of the statement, could be held liable for the damages suffered by the psychiatrist under the Defamation Act. From the language of Section 1(3) of the Defamation Act, however, it would appear that an Internet service provider would have an automatic defense to a suit by the psychiatrist, because the Internet service provider could argue that he is only an operator of a system by means of which the statement is made available in electronic form.⁸⁶ The above analysis, though, need not be based entirely on speculation.

A settlement was recently reached in Britain in a case involving e-mail messages containing allegedly defamatory comments.⁸⁷ The plaintiff in the case, Western Provident Association, brought a libel action against Norwich Union Healthcare seeking to hold Norwich Union responsible for defamatory messages sent by and between employees of Norwich Union through the company's internal e-mail system.⁸⁸ The e-mail messages allegedly reported false rumors that Western Provident was "in severe financial difficulties and was being investigated by

84. Defamation Act, 1996, ch. 31, § 17(1) (Eng.).

85. *Id.*

86. *Id.* § 1(3)(c). As a second line of defense, the Internet service provider could also argue under section 1(3)(d) that since a "chat room" is essentially live, the Internet service provider is a broadcaster of a live program in which he has no control over the maker of the statement. *Id.* § 1(3)(d).

87. See *Insurer Counts the Legal Cost of Unguarded E-Mailings—Paula Mullooly and Michael Kealy Examine What the Recent Court Decision in Britain About Libel Through E-Mail Means for Users of the Technology*, THE IRISH TIMES, Sept. 1, 1997, at 21. The controversy arose between a private medical insurance company, Western Provident Association, and Norwich Union Healthcare, a marketer and administrator of private medical insurance policies. *Id.*

88. *Id.*

the British Department of Trade and Industry.”⁸⁹ In a settlement reached between the parties, Norwich Union agreed to pay Western Provident £450,000 (\$700,000) for damages and costs resulting from the defamatory statements made in the e-mail messages.⁹⁰ Yet, perhaps most significantly, before the settlement between the parties had been reached, Western Provident had obtained a court order requiring Norwich Union to preserve and deliver hard copies of the e-mail messages in question.⁹¹ Before settlement, Western Provident had also received a court order enabling the company to search the e-mail records of Norwich Union.⁹²

Consequently, given the language of the Defamation Act which specifically addresses statements (words, pictures or visual images) made in electronic form and the court rulings in the *Western Provident* case requiring Norwich Union to allow Western Provident to search the company’s e-mail records and to preserve and deliver copies of any potentially defamatory e-mail messages to Western Provident, it seems clear that British law is quite capable of addressing the issue of defamation on the Internet.⁹³

89. *Id.* Western Provident believed that these messages could be used by Norwich Union to damage the reputation of Western Provident in the marketplace. *Id.* The e-mail messages also contained rumors that Western Provident was unable, or unwilling, to write new insurance policies. See Steve Gold, *First Major UK E-Mail Libel Case Settled*, NEWSBYTES, July 21, 1997, available in LEXIS, News Library, Wires File.

90. See *First Major UK E-Mail Libel Case Settled*, *supra* note 89. Norwich Union was also required to apologize to Western Provident. See *Insurer Counts the Legal Cost of Unguarded E-Mailings—Paula Mullooly and Michael Kealy Examine What the Recent Court Decision in Britain About Libel Through E-Mail Means for Users of the Technology*, *supra* note 87.

91. See *Insurer Counts the Legal Cost of Unguarded E-Mailings—Paula Mullooly and Michael Kealy Examine What the Recent Court Decision in Britain About Libel Through E-Mail Means for Users of the Technology*, *supra* note 87; see also *Cyberlibel Becomes a Reality*, THE LAW., July 29, 1997, at 10 (discussing the court order).

92. See *Insurer Counts the Legal Cost of Unguarded E-Mailings—Paula Mullooly and Michael Kealy Examine What the Recent Court Decision in Britain About Libel Through E-Mail Means for Users of the Technology*, *supra* note 87.

93. See Defamation Act, 1996, ch. 31, §§ 1(3), 17(1) (Eng.). It should be noted, though, that questions of jurisdiction might still arise when the author of a defamatory statement is outside the jurisdiction of the court, but the defamatory statement is made within the court’s jurisdiction. This very question, however, is currently before London’s High Court of Justice. See Jay Tokasz, *University Sued Over Student’s Internet Posting*, GANNETT NEWS SERVICE, June 13, 1998. The controversy in this case involves Laurence Godfrey, a British scientist who has filed a defamation suit in Britain against Cornell University as a result of statements made and posted on the Internet about Godfrey by a Cornell student in 1994 and 1995. See *id.* Godfrey is representing himself and is seeking \$80,000

Therefore, defamation law in Australia should be examined to determine if Australian law is equally capable of affording similar protections to those defamed on the Internet.

B. Defamation Law in Australia

To determine the ability of Australian law to address defamation on the Internet, once again it must be asked: if a person in Perth were to enter into a discussion on the Internet and state that "Dr. Doe was the most immoral psychiatrist in the world today, not only because he has cheated on his wife with at least four of his patients in the past year, but also because he is completely insolvent and overcharges his patients in order to pay off his business debts;" would Dr. Doe be able to bring a defamation suit against the author in Australia?

A New South Wales law reform commission report states that "perhaps the major problem with defamation law in Australia is its lack of uniformity."⁹⁴ The report further states that while all the jurisdictions in Australia have codified the common law of defamation, "in no two jurisdictions is the law identical."⁹⁵ The Federal Court of Australia for the Australian Capital Territory has ruled, however, that a statement may be considered defamatory if it "tends to lower the plaintiff in the estimation of right-thinking members of society generally."⁹⁶ Additionally, as an example, the defamation statute in New South Wales states that when a person publishes a letter, picture or oral utterance which makes an imputation defamatory of another person, the person defamed has

in damages from Cornell. *Id.* Godfrey has also sued a British Internet service provider, Demon Internet Limited, for allowing the allegedly defamatory statements to remain on the Internet. See *Special Report: Major Problems and Legal Challenges Hit UK Internet Service Provider*, CORP. IT UPDATE, June 1, 1998. Although this case remains to be addressed by a British court, section 1(3)(c) of the Defamation Act would seem to provide a defense for the Internet service provider. See Defamation Act, 1996, ch. 31, § 1(3) (Eng.). Because of the obvious significance of these cases to the determination of the applicability of Britain's defamation law to the Internet, developments in both these cases should be followed closely.

94. New South Wales Law Reform Comm'n, *Defamation Discussion Paper*, ch. 1, § 1.6 (visited Oct. 22, 1997) <<http://www.austlii.edu.au>>.

95. *Id.*

96. *In re John Fairfax & Sons Ltd.*, (1983) 72 FLR 190. In determining whether a statement was defamatory, what the defendant meant by the statement or how the words were understood by the plaintiff are irrelevant factors in the determination. *Id.* Rather, the meaning that will be given to the words within the statement in question is their "natural and ordinary" meaning. *Id.*

a cause of action for defamation against the publisher.⁹⁷ Publication, according to the New South Wales statute, is evidenced where “a document appears to be printed or otherwise produced by a means adapted for the production of numerous copies.”⁹⁸ Presently, however, there is no case law in New South Wales applying that territory’s defamation law to the Internet. Furthermore, there is no significant case law in Australia dealing with the subject of defamation on the Internet. A recent case in Western Australia might, however, be of some value for future cases dealing with this issue.

In *Rindos v. Hardwick*, Rindos, an internationally known US anthropologist, sued an Australian anthropologist, Gil Hardwick, for writing and displaying a defamatory message about Rindos on an anthropology related “bulletin board” on the Internet.⁹⁹ Rindos had worked with Hardwick at the University of Western Australia from 1989 to 1993, when Rindos was denied tenure and subsequently fired by the University.¹⁰⁰ Hardwick wrote his message about Rindos based upon his impressions after having met Rindos at the University.¹⁰¹ Rindos argued that Hardwick’s message contained five defamatory imputations: 1) that Rindos engaged in sexual misconduct; 2) that Rindos had no genuine academic ability in his field; 3) that Rindos was against Aboriginal people; 4) that Rindos was not a genuine anthropologist but a tool of mining corporations; and 5) that Rindos drank to excess.¹⁰² However, Hardwick did not appear before the court to defend

97. Defamation Act, 1974, § 9(1) (N.S.W. Stat.) (Austl.).

98. *Id.* § 54(2).

99. David Rindos v. Gilbert John Hardwick, No. 940164, W.A.S. Ct. (Mar. 31, 1994); *see also* Rindos v. Hardwick (1994) 1 Media L. Rep. 67 (reporting excerpts from the *Rindos* decision). The bulletin board in question is used mainly by students and academics of universities throughout the world. *Id.* Approximately 23,000 people have access to the bulletin board on which Hardwick’s message was placed. *Id.*

100. *See Rindos*, 1 Media L. Rep. at 67.

101. *See id.* The message stated specifically, “my impression is that [Rindos’] career has been built . . . on his ability to berate and bully all . . . in the local public pub, drinking and chain smoking all the while.” *Id.* The Internet message also stated that Hardwick had heard by rumor from reputable Australian anthropologists that Rindos had “puppy parties focused . . . on a local boy they called ‘puppy,’” which Hardwick characterized as “strange dicey behaviour indeed.” *Id.* Finally, Hardwick’s Internet message stated that “there are extremely serious questions . . . concerning an ongoing political campaign . . . most notably targeting the department’s long standing support for Aboriginal land rights against powerful international mining lobbies,” and suggested a connection to that campaign and Rindos. *Id.*

102. *See Rindos*, 1 Media L. Rep. at 68.

himself and judgement by default was granted to Rindos.¹⁰³ Therefore, the *Rindos* case is of little value in determining the extent to which Australian defamation law can be applied to defamation on the Internet. Yet, at the very least, the case represents that the Supreme Court of Western Australia is willing to recognize a cause of action for defamation on the Internet.

Consequently, in light of the *Rindos* case, it would seem that in the hypothetical Internet defamation scenario outlined at the beginning of this section, the psychiatrist might have a cause of action against the Australian Internet user for defamation under the law of Australia, if the Internet user was a citizen of the Australian state of Western Australia or New South Wales. This conclusion would be possible in New South Wales because the defamation law of that territory defines "publication" of a defamatory statement in terms which are broad enough to include the Internet; since arguably the Internet reproduces words and pictures "by a means adapted for the production of numerous copies."¹⁰⁴ This conclusion, however, may not apply in every Australian territory, and remains to be tested by the courts of New South Wales. Therefore, under current defamation law in Australia, it is not clear whether a person who has been defamed on the Internet would have a cause of action for defamation against an Australian Internet user who did not reside in Western Australia.

C. *Comparison of the British and Australian Approach*

Since the law of defamation in Australia is not uniform, it cannot be said that Australia has effectively adapted the law of defamation to address the legal issues raised by defamation on the Internet. By contrast, the recent case law in Great Britain regarding Internet defamation informs the Internet user that British courts recognize a cause of action for Internet defamation, and perhaps more importantly, will require computer files relating to the Internet defamation to be preserved and delivered to the

103. *See id.* In a letter to Rindos's lawyer, Hardwick stated that "let this matter be expedited and done with . . . I can do nothing to prevent it lacking any resources whatsoever to defend myself from whatever charges." David Rindos v. Gilbert John Hardwick, No. 940164, W.A.S. Ct. (Mar. 31, 1994). The court then awarded Rindos \$40,000 (Australian dollars) in damages stating that Hardwick's defamation caused serious harm to Rindos' personal and professional reputation. *Id.*

104. Defamation Act, 1974, § 54(2) (N.S.W. Stat.) (Austl.).

defamed in a court action.¹⁰⁵ Furthermore, Great Britain, through Section 1(3) of the Defamation Act of 1996, seems to have effectively addressed the potential for a defamation action brought against an Internet service provider by creating a statutory defense for the provider in a defamation suit.¹⁰⁶ Since the British statutory and common law approach to the issue of defamation on the Internet appears to present a framework for which expectations regarding liability for defamation over the Internet can be formed by Internet users and providers, it would be wise for legislative and judicial bodies in Australia, and elsewhere, to consider Great Britain's approach to the issue when adapting their own defamation law to the Internet.

Having analyzed the British and Australian approach to uses of the Internet which might serve to lower the reputation of an individual in the eyes of society, the response by both countries to material on the Internet which tends to offend the eyes of society should now be examined.

IV. Content Regulation—Obscenity on the Internet

If a person in Great Britain or Australia creates a web page on the World Wide Web and uploads pictures depicting adults engaged in graphically detailed acts of a sexual nature, will the person's web page be removed from the Internet? The answer to this question lies in the laws and policies of Great Britain and Australia discussed below.

A. *Great Britain's Approach to Internet Content Regulation*

The Obscene Publications Act of 1959 (the "Obscene Publications Act") states that an article shall be deemed to be obscene if its effect "tend[s] to deprave and corrupt" persons who are likely to read or see the "article."¹⁰⁷ The Obscene Publications Act defines "article" as "any description of article containing or embodying matter to be read or looked at . . . any sound, and any

105. See generally *Insurer Counts the Legal Cost of Unguarded E-Mailings—Paula Mullooly and Michael Kealy Examine What the Recent Court Decision in Britain About Libel Through E-Mail Means for Users of the Technology*, *supra* note 87.

106. Defamation Act, 1996, ch. 31, § 1(3) (Eng.). This conclusion, however, will be tested by the outcome in the Demon Internet Limited action brought by Laurence Godfrey. See generally *supra* note 93 and accompanying text.

107. Obscene Publications Act, 1959, ch. 66, § 1(1) (Eng.).

film or other record of a picture or pictures.”¹⁰⁸ Furthermore, the Act declares that a person will be found to have published an “article” if the person shows or projects the article, or, “where the [article] is data stored electronically, transmits that data.”¹⁰⁹

Therefore, it would seem that in the hypothetical situation outlined at the beginning of this section, the web page designer could be found to have published an obscene article within the scope of the Obscene Publications Act, provided that a court deemed that transmission over the Internet constituted a transmission of electronically stored data for purposes of the statute. Although absent such a ruling, British statutory law may not be able to address the problem of obscenity on the Internet, the following policies may nevertheless serve as the mechanism for achieving the removal of obscene web pages from the Internet.

Following pressure from the police in Britain to rid the Internet of pornographic material, Internet service providers in Great Britain have worked with the police to block access to web pages which the police say contain pornographic material.¹¹⁰ Additionally, the Internet Service Providers Association of the United Kingdom has voluntarily established a “Code of Practice” which governs the conduct of the Association’s members and requires that members use reasonable efforts to ensure decency on the Internet.¹¹¹ In addition to the “Code of Practice,” in order to address the problem of obscenity on the Internet, Internet service providers in Britain have also proposed establishing an industry-run complaints hotline and a rating system for the Internet.¹¹²

108. *Id.* § 1(2).

109. *Id.* § 1(3)(b).

110. See Steve Gold, *British Police Move to Stamp Out Internet Porn*, NEWS-BYTES, Aug. 16, 1996, available in LEXIS, News Library, Wires File; see also Paul Taylor, *Internet Porn May Be Blocked: UK-Based Service Providers Set to Bow to Police Pressure*, FIN. TIMES (London), Aug. 10, 1996, at 20 (discussing the response of Internet service providers to police pressure).

111. Internet Service Providers Association, UK, *Code of Practice*, §1.2 (visited Oct. 22, 1997) <<http://www.ispa.org.uk>>. The Code states that it shall govern the conduct of the members of the Internet Service Providers Association, and that a member may not evade the application of the Code. *Id.* at Preamble. The Code further states that as a general requirement, members shall use their reasonable endeavours to ensure: 1) “members, their services and promotional material do not encourage anything which is in any way unlawful; and 2) “services and promotional material do not contain material inciting violence, sadism, cruelty, or racial hatred.” *Id.* §§ 1.1-1.2.

112. See *Porn Caught in Net: Paul Taylor on the Problem of Illegal Material*, FIN. TIMES (London), Sept. 30, 1996, at 15.

In fact one hotline has already been set-up in Great Britain to address the problem of child pornography on the Internet.¹¹³ The Internet Watch Foundation, an independent organization, was launched in September 1996 to address the problem of illegal material on the Internet.¹¹⁴ The goal of the Foundation is to hinder the use of the Internet for the transmission of illegal material and to develop a rating system for web sites on the Internet.¹¹⁵

As of September 1998, the Foundation had been credited with removing 2,000 pornographic images from the Internet.¹¹⁶ Yet, while only 1,419 of the perhaps hundreds of thousands of web sites in Great Britain had ratings as of July 1997, it would nevertheless appear that Great Britain's public policy, as carried out by the Internet Watch Foundation and the Internet Service Providers Association, can serve to prevent access to obscene material on the Internet.¹¹⁷ Given Great Britain's reliance on such industry self-regulation to insure socially acceptable Internet content, Australian efforts to regulate Internet content should now be examined in an effort to establish if a different approach to the issue is being undertaken elsewhere.

B. The Australian Approach to Internet Content Regulation

Once again the question must be asked, if a person in Australia creates a web page on the World Wide Web and uploads pictures depicting adults engaged in graphically detailed acts of a sexual nature, will the person's web page be removed from the Internet by either Australian authorities or Internet service providers?

In July of 1997, a framework for on-line content regulation was released by the Australian Minister for Communications and the

113. See Tom Standage, *Connected: Net Porn Watchdog Reports Early Success, We Report to the Police and Get Service Providers to Remove Material*, THE DAILY TELEGRAPH, Jan. 7, 1997, at 2.

114. Internet Watch Foundation, *Introduction* (visited Oct. 22, 1997) <<http://www.internetwatch.org.uk>>. The foundation accomplishes the goal of removing illegal material from the Internet by reporting illegal material discovered on the Internet to the police and to Internet service providers so that the providers can remove the material from their Internet servers. See Standage, *supra* note 113.

115. See Internet Watch Foundation, *supra* note 114.

116. See Simon Davies, *Make It Safe, but Keep It Free; Once the Filtering Infrastructure Is in Place the Era of Mass Censorship Will Have Begun*, THE INDEPENDENT, Sept. 4, 1998, at 5.

117. See Charles Arthur, *Internet Could Get Cinema-Style X-Ratings in Purge on Porn*, THE INDEP. (London), July 1, 1997, at 5.

Arts establishing principles for a national approach to the regulation of content on the Internet.¹¹⁸ According to the Principles, the Australian Broadcasting Services Act of 1992 (the "Broadcasting Services Act") should be amended to establish "a national framework of effective industry self-regulation for on-line service providers, supervised by the Australian Broadcasting Authority, in relation to content transmitted through on-line networks."¹¹⁹

Specifically, the Principles declare that the regulatory framework should: 1) encourage on-line service providers to respect community standards; 2) place a high priority on the protection of minors from harmful materials on on-line services; 3) encourage the means for addressing complaints about on-line content; and 4) encourage the development of self-regulatory mechanisms which do not inhibit the growth of the on-line services industry.¹²⁰ Furthermore, the Principles state that "legislation should codify the responsibilities of an on-line service provider" in relation to material on the Internet which is of concern to the communities serviced by the provider.¹²¹

Currently, the Broadcasting Services Act requires that different levels of regulatory control be applied to different types of broadcasting services according to the degree of influence the broadcasting service has in shaping community views in Australia.¹²² However, although the Broadcasting Services Act currently applies to subscription broadcasting and narrowcasting¹²³ services, absent a court ruling that on-line services are broadcasting or narrowcasting services, the Act makes no reference as to having application to the Internet.¹²⁴

Therefore, until the Broadcasting Services Act is amended to incorporate the principles outlined in the proposed national

118. See Minister for Communications and the Arts, *National Framework for On-Line Content Regulation, Media Release* (visited Oct. 22, 1997) <<http://www.dca.gov.au/mediarel/c8197.html>>.

119. *Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992*, § 1 (visited Oct. 22, 1997) <<http://www.dca.gov.au/policy/framework.html>>. The Principles define "on-line service providers" as providers of a carriage service which offers access to an on-line service to a member of the public. *Id.* § 10.

120. *Principles for a Regulatory Framework for On-Line Services in the Broadcasting Services Act 1992*, *supra* note 119, §§ 2-3.

121. *Id.* § 4.

122. Broadcasting Services Act, 1992, ch. 110, § 4 (Austl.).

123. "Narrowcasting" is a transmission aimed at a narrowly defined audience. *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 772 (10th ed. 1995). For example, a pay-per-view program is narrowcasting.

124. See Broadcasting Services Act § 11.

framework for on-line content regulation, it is not clear that the web page designer in the hypothetical situation outlined at the beginning of this section would be required to remove his web page from the Internet. Furthermore, until a uniform, national approach to regulating the publication and transmission of obscene materials by Internet users is developed, it is also not clear whether the web page designer would be convicted in Australia for the publication of obscene material.¹²⁵

C. *Comparison of the British and Australian Approach*

Consequently, as discussed above, both Great Britain and Australia have, to date, relied principally upon self-regulation by Internet service providers to limit and, in some cases, prevent, obscene material from being accessed on the Internet. Unlike Great Britain, though, Australia has placed much more reliance on industry self-regulation to enforce community standards of decency. In fact, according to the proposed framework for on-line content regulation, Australia is prepared to codify the self-regulatory approach to Internet content regulation.¹²⁶ Great Britain's statutory approach to obscenity electronically stored and transmitted, as outlined by the Obscene Publications Act, however, seems to provide a framework more likely to uniformly protect a community from exposure to obscene material on the Internet than does self-regulation by the private sector.

Having discussed the law and policies in Great Britain and Australia relating to non-commercial uses of the Internet, an analysis of the approach taken by the two countries to the use of the Internet as a marketplace for the exchange of goods and services should now be undertaken.

V. Taxation of Electronic Commerce

The Internet is "changing the way companies do business."¹²⁷ For example, a law firm in Great Britain now uses an interactive software that allows lawyers to practice law from a web site by enabling clients to approve documents and lawyers to receive client

125. At the time of this writing, there are no uniform laws in the Australian states and territories governing the publication and transmission of obscene material on on-line services. See *National Framework for On-Line Content Regulation, Media Release, supra* note 118.

126. See *id.*

127. See Philip Manchester, *Impact of the Internet: No Longer Just Another Option*, FIN. TIMES (London), October 1, 1997, at 4.

instructions without having to first wait for the document to arrive in the mail.¹²⁸ Furthermore, some supermarkets in Great Britain have established web sites that allow customers to order groceries through the World Wide Web.¹²⁹ Booksellers have, as well, begun selling books over the Internet in Great Britain.¹³⁰ Even divisions of the British government are considering moving towards online services which would enable people to apply for car tax renewals and other types of government services through their televisions.¹³¹ In fact, the London-based Electronic Commerce Association reports that electronic commerce will involve £100 billion by 2002.¹³² Signs of this predicted growth may also be seen in Australia.

In 1996, "Mick's Whips," a five-year-old company owned and operated by one man in Australia's Northern Territory, began to market whips on the Internet.¹³³ In one year the company's export business increased by several hundred percent, and now the company even sells whips to Alaskan dog sled teams.¹³⁴ The Commonwealth Bank of Australia, furthermore, now enables home loan applications to be made over the Internet and seeks to put the "functionality of a whole bank branch on-line" in the future.¹³⁵ Even the Australian Stock Exchange is engaged in electronic commerce through a new Internet service which enables investors to track share prices and trade stocks live with their brokers.¹³⁶ However, electronic commerce also raises a difficult legal issue for governments.

128. See *Manchester Practice Homes in on Interactive Internet System*, THE LAW., Oct. 21, 1997, at 8.

129. See Giles Turnbull, *Accessing the Supermarket From the Armchair*, PRESS ASS'N NEWSFILE, June 5, 1997, available in LEXIS, News Library, Wires File.

130. See *Sleepy Booksellers Get Wake Up Call: Rapid Expansion of US Superstores and Online Sales Stirs Up the Market*, FIN. TIMES (London), Oct. 10, 1997, at 10.

131. See Amanda Brown, *Electronic Government Points to Armchair Revolution*, PRESS ASS'N NEWSFILE, March 3, 1997, available in LEXIS, News Library, Wires File.

132. See Andy Zneimer, *Say Nothing Till You've Talked to Your Cyberlawyer*, THE TIMES, April 30, 1997, at Features.

133. See *Electronic Trade to Put Us On the New Silk Road*, THE CANBERRA TIMES, Sept. 15, 1997, at A13.

134. See *id.*

135. *CBA Offers Home Loan Applications/Approvals On Internet*, AAP NEWSFEED, Oct. 8, 1997, available in LEXIS, News Library, Wires File.

136. See Rebecca Lang, *New Internet Trading System "Sharelive" Kicks Off*, AAP NEWSFEED, Sept. 4, 1997, available in LEXIS, News Library, Wires File.

If an Australian or British citizen one day decides to go shopping for a new pair of shoes and purchases the shoes through an Italian based Internet shoe company, should the shopper pay a sales tax to their home government for the purchase? Likewise, if a British or Australian clock maker receives 1,000 orders weekly through his web page from Japanese and American customers, should the clock maker collect a sales tax on behalf of his home government?

A. Great Britain's Approach to Taxation of Electronic Commerce

Currently, a "value-added" tax (VAT) must be paid in Great Britain on computer software, for example, that is purchased from outside of the United Kingdom over the Internet.¹³⁷ However, a survey by the European Media Forum declares that the United Kingdom could gain 500 million dollars by the year 2002 if Great Britain removed value-added and other taxes from Internet transactions.¹³⁸ Short of calling for the removal of the VAT from Internet based transactions, the European Union has issued policy guidelines which announce that the Union should avoid introducing new taxes on Internet based transactions.¹³⁹ The guidelines also assert that Internet transactions should be considered services.¹⁴⁰ Accordingly, the guidelines propose that services consumed within the European Union should be taxed within the Union, while services which are provided from within the Union but consumed outside the Union should not be taxed.¹⁴¹ Whether Great Britain will adopt these guidelines, however, remains to be seen.

Great Britain is currently taking part in the drafting of international standards for Internet based transactions at a meeting of the Organization for Economic Cooperation and Development.¹⁴² One of the issues to be addressed at the meeting is taxation of electronic commerce.¹⁴³ Hence, the results of this

137. See *Vatman Says Net Buyers Must Pay*, MAIL ON SUNDAY, Sept. 28, 1997, at 37.

138. See *EMF Argues Case for Tax Free Internet Commerce*, TELECOM WORLD WIRE, Sept. 25, 1997, available in LEXIS, News Library, Wires File.

139. See *A Taxing Problem*, TIMBER & WOOD PRODUCTS, Aug. 8, 1998, at 14, available in LEXIS, News Library.

140. See *id.*

141. *Id.*

142. See *Minister Bae to Attend OECD Talks in Canada*, THE KOREA HERALD, Oct. 6, 1998.

143. See *id.*

meeting should be examined in an effort to glean further evidence of Great Britain's position on the taxation of electronic commerce.¹⁴⁴

B. Australia's Approach to Taxation of Electronic Commerce

Similarly, the Australian Minister for Communications and the Arts has stated that the Australian government's tax reform agenda would include "measures to tax transactions on the Internet."¹⁴⁵ The Communications Minister also stated, however, that Australia should not create new Internet-specific taxes, but rather Australia should adapt existing taxes to Internet transactions.¹⁴⁶ Furthermore, the Communications Minister has announced that the Australian government is "likely to follow the approach recently foreshadowed in the United States that a transaction that would be taxed off-line should be taxed on-line."¹⁴⁷ Additionally, in October of 1997, Australian Prime Minister John Howard "vowed to redouble efforts to reform Australia's taxation system" and to formulate new regulations for electronic commerce.¹⁴⁸ The Australian Tax Office has also stated that it believes that "electronic trading should be closely monitored, so that companies and individuals don't escape paying their taxation dues."¹⁴⁹ Currently, tax law in Australia states that goods entering Australia are not subject to sales tax or import duties if the goods arrive by mail and have a value less than 1,000 (Australian) dollars.¹⁵⁰

C. Comparison of the British and Australian Approach to Taxation of Electronic Commerce

Thus, as the above discussion reveals, policies relating to the taxation of electronic commerce are in the midst of formulation in

144. The meeting began on October 6, 1998 and was scheduled to run for three days. *Id.* At the time of this writing, conclusions from the meeting were not yet available.

145. *Fed: Gov't Looking for Global Net Tax System*, AAP NEWSFEED, Oct. 29, 1997, available in LEXIS, News Library, Wires File.

146. See Mark Ludlow, *Internet-Specific Tax Ruled Out*, THE CANBERRA TIMES, Apr. 17, 1998, at 2.

147. *Fed: Gov't Looking for Global Net Tax System*, *supra* note 145.

148. Steve Connolly, *UK: Howard Pledges Redoubled Efforts to Reform Tax System*, AAP NEWSFEED, Oct. 24, 1997, available in LEXIS, News Library, Wires File.

149. *Interesting Mixture in Internet Tax Report*, THE CANBERRA TIMES, Sept. 1, 1997, at A15.

150. See *Fed: Public Accounts Committee to Examine Internet Commerce*, AAP NEWSFEED, Aug. 7, 1997, available in LEXIS, News Library, Wires File.

both Great Britain and Australia. While both countries have expressed the intention to apply taxes to electronic transactions over the Internet, both countries have yet to determine as a matter of policy the method by which electronic commerce will be taxed. Hence, the questions posed by the hypothetical Internet transactions presented at the beginning of this section are perhaps best answered by reference to the current tax laws of Great Britain and Australia, as if the transactions in question had occurred off-line. Since this issue is currently being deliberated by organizations in both countries, though, it would be prudent to be alert to breaking developments regarding Internet tax policies in early 1999.

VI. Overall Comparison of the British and Australian Approaches

As is true with the taxation of electronic commerce, laws and policies in both Great Britain and Australia relating to the use and regulation of the Internet are not fully developed and for the most part are untested by the courts of both nations. However, in analyzing the approaches taken by the two countries in the area of Internet copyright infringement, defamation, content regulation, and taxation it has become apparent that both countries are moving toward the development of statutory law which will address the legal issues presented by the Internet.

Overall, though, statutory law in Great Britain has gone further and is better equipped than Australian statutory law to be applied to the Internet through judicial interpretation because of the numerous modern statutes in Great Britain which specifically refer to electronically transmitted or stored information. This conclusion is particularly true in the areas of copyright infringement and defamation on the Internet.¹⁵¹

In the area of Internet content regulation, however, while both countries have essentially placed reliance on industry self-regulation to provide content regulation, Australia has seemingly gone further than Great Britain to insure the protection of community standards of decency. This assertion is supported by the Australian efforts, as discussed above, to develop a national framework that codifies the responsibilities of Internet service providers to the communities they service for the content they provide to Internet users.

151. If the Digital Agenda Copyright Reforms are adopted, however, Australian law will have gone much further than British authority in providing copyright holders with modern statutory copyright protection applicable to the Internet.

Finally, since both countries lack extensive case law interpreting relevant statutes, presently neither country offers much guidance to the Internet user as to what is prohibited behavior on the Internet. However, as evidenced by the discussion in this Comment, both countries are beginning to develop the legal framework through which the legal issues presented by the Internet can be addressed in the future.

VII. Conclusion

Although the legal issues presented by Internet copyright infringement, defamation, content regulation and taxation of electronic commerce are seemingly herculean, together Great Britain and Australia can serve as a model for other countries seeking to develop legal mechanisms capable of resolving controversies arising out of the Internet. Both countries, however, must continue to develop the legal frameworks which they have begun before they themselves can effectively address the legal issues presented by the Internet.

Nevertheless, presently, it would appear that based upon the statutory and common law discussed in this Comment, Great Britain provides Internet users and service providers with the most protections. The lack of uniform state and territory law, as well as applicable commonwealth law, offers Australian Internet users and service providers little certainty about the legal ramifications of their Internet related activities. This lack of uniformity is the greatest obstacle that Australia must overcome in the future if it is to effectively address the legal issues presented by the Internet and assist in the realization of a global information highway and electronic marketplace.

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