Nowhere to hide?: Privacy and the Internet

Gordon Hughes

Introduction

There has been an expanding appreciation of the commercial and recreational potential of the Internet in Australia over the past two years or so.

Inevitably, as a result, debate has emerged as to whether the Australian legal framework is adequate to regulate the range of uses and abuses which are becoming more and more frequent.

One of the principal issues has been the effect of the Internet on the privacy of individuals.

Overview of Legal Issues

Some of the more apparent legal questions associated with privacy have included:

- Copyright - *to what extent is there potential for copyright to be infringed by unauthorised transmission or downloading of protected data or programs?*
- Business Liability - *to what extent does the use of the Internet for business transactions expose a party to legal liability which would not arise in more conventional transactions?*
- Confidentiality - *to what extent might privacy be violated by unauthorised intrusion into confidential communications/ information?*
- Defamation - *to what extent might the effects of defamatory comments be exacerbated by widespread transmission over the Internet?*
- Crime - *to what extent might the use of the Internet encourage criminal activity?*

It will be appreciated that, in Australia, there is more to privacy than the *Privacy Act* 1988 (Cth).

Copyright Issues

Inevitably, much attention has been given to the potential of copyright infringement through the transmission of data on the Internet.

In determining whether rights conferred by the *Copyright Act* 1968 are infringed, it may be necessary to consider some of the following:

- whether a screen display of a protected work amounts to a "reproduction in material form";
- whether the provisions of the Act concerning fair dealing, and copying by libraries and educational institutions, apply;
- whether the networking of a database which comprises a copyright work renders the database owner liable to the copyright owner for authorising an infringement by virtue of hard copy printouts by subscribers;
- whether the display of works via the Internet constitutes a public performance by the person operating the terminal which displays the work;
- whether transmissions of protected works via the Internet involve "transmission to subscribers to a diffusion service";
- whether in any event Australian courts have jurisdiction over apparent infringements of copyright on the Internet.

Some of these issues were addressed in Australia by the Copyright Convergence Group. The Copyright Convergence Group was established in January 1994 by the Federal Government. It was asked to make recommendations on the appropriateness of protection under the *Copyright Act* for broadcasts and other electronic transmissions and the underlying copyright materials used in those transmission. Its report ("the CCG Report") was published in August 1994.

The CCG Report recognises the rapid blurring of categories and classifications in communication technology. It stresses the need for future legislative amendments to be "technology neutral", given the "non-linear" nature of technological change.

The report advocates the introduction of a new general "transmission right", focused on the ability to transmit visual images, sounds and other information in tangible form and incorporating both wired and wireless transmissions rather than any specific technology or devices.

If adopted, the "transmission right" would partially answer two of the issues mentioned above:

- whether the display of works via the Internet constitutes a public performance by the person operating the terminal which displays the work; and
- whether transmissions of protected work by the Internet involve "transmission to subscribers to a diffusion service" as provided by the *Copyright Act* s.26.

The "transmission right" would resolve the first issue in favour of the author or creator, whilst in relation to the second issue it would reduce difficulties in deciding what is a "diffusion service" by subsuming it within the new general transmission right.

Implementation of the recommendations could lead to a limited form of transnational jurisdiction being exercised by Australian courts. As discussed by the CCG, foreign authors or creators whose works are accessed by Australians on the Internet and whose

own nations are signatories to the Berne Convention or the Treaty of Rome could benefit through a transnational collective licensing scheme which charges for access to the works in question.

Business Transactions

Electronic commerce has been promoted by Australian governments, State and Federal, for some time and its potential is increasing as the public awareness of the Internet expands.

Business risks arise in circumstances where data is transmitted between two parties in the absence of a written EDI (Electronic Data Interchange) agreement. Potentially contentious issues may include the following:-

- the technical standards, and responsibility for network performance;
- the consequences of, and responsibility for, unauthorised access to the system, breaches of privacy and other breaches of security;
- the circumstances in which an agreement can be regarded as "executed' in the absence of conventional seals and signatures;
- the implications of the absence of copy documents, proof of transmission and a visible audit trail;
- identifying and determining the implications of force majeure events;
- identifying the governing law;
- in relation to on-line ordering, determining when the ordering process is to be regarded as complete for contractual purposes and the extent to which orders can be cancelled, rejected, acknowledged or verified?

In this regard, the EDI Council of Australia's "Model Electronic Data Interchange Agreement" has achieved some prominence. EDICA published the agreement in 1990, followed by a user-friendly short-form version, and it is now viewed as the most appropriate format for electronic commerce on the Internet.

Confidentiality

The ability to access information inevitably raises questions about confidentiality and infringements of privacy.

It is trite that the law does not recognise a tort of violation of privacy. It is also trite that equity will enforce a right of confidentiality if it can be established that the information in question is inherently confidential, has been disclosed by one person to another in confidence and is then the subject of actual or threatened disclosure by the confidant.

The real issue, however, is the extent to which a right synonymous with privacy may be enforced in circumstances where an intruder obtains unauthorised access to a communication between two Internet subscribers which is intended to remain confidential. Issues in this context include:

- whether the unauthorised accessing of confidential communication between the two other parties forms the basis for a remedy in equity;
- whether any other remedies are available in certain circumstances where unauthorised disclosure occurs or is threatened - remedies might include breach of contract, breach of fiduciary obligation, negligence, trespass, conversion, nuisance and deceit;
- whether, in cases involving Commonwealth government departments or agencies, an infringement of the Information Privacy Principles contained in the *Privacy Act* 1986 is involved;
- whether, in the case of credit reporting agencies or credit providers, a breach of the *Privacy Act* 1986 is involved.

The increasing public use of the Internet has heightened awareness in some sectors of the limitations of Australian privacy laws. The laws are limited in application largely to the Commonwealth public sector and there is no specific privacy legislation in operation in any of the States or Territories, although there are proposals circulating in New South Wales for the introduction of a form of data privacy or protection in that State.

In June 1995, the Report of an Inquiry into the Protection of Confidential Personal and Commercial Information held by the Commonwealth was published by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The report made a number of recommendations about a variety of Commonwealth Acts and the examination embraced legislation such as the *Public Service Act* 1922, the *Freedom of Information Act* 1982, the Archives Act 1983, the *Privacy Act* 1988 and the *Data-Matching Program (Assistance and Tax) Act* 1990.

The fact remains, however, that any strengthening of the federal legislation may still prove inadequate to regulate privacy infringements at State or Territory level or in the private sector generally, given the constitutional limitations imposed on the federal government's legislative powers. Privacy law remains, therefore, an area which is likely to attract considerable scrutiny in Australia in the ensuing years as a direct result of the influence of the Internet.

Defamation

Users of e-mail or the Internet relay chats sometimes adopt a style of language which they might avoid in conventional business communications. Sometimes there are comments passed which, if not obscene, could at least be regarded as intemperate.

Perhaps this phenomenon reflects a misguided notion of privacy or secrecy between users - a belief that

the conversation is "in club". Whether or not this is the case, the fact remains that the audience might be widespread and hence the consequences of any defamatory comments might be extremely severe.

This was demonstrated in a recent Western Australia Supreme Court case, *Rhindos -v- Hardwick* (W. A. Supreme Court, 31 March 1994, Ipp J).

The case involved a claim for damages for libel arising out of two publications by the defendant, one in a letter and one in an entry on the DIALx science anthropology computer bulletin board.

The plaintiff was an anthropologist employed at the University of Western Australia. He was a person of some international standing and when the University denied him tenure in March 1993, this attracted a significant amount of international interest. A message appeared on the worldwide computer network bulletin board from an American anthropologist criticising the University for their actions.

It was estimated that the computer bulletin board, which was devoted to science anthropology, had subscribers or participants in most major Universities throughout the World. It was estimated that approximately 23,000 academics and students would have access to the bulletin board.

In response to this message, the defendant replied with a lengthy message indicating that he supported the decision not to grant the plaintiff tenure. In the course of making this point, he accused the plaintiff of sexual misconduct and imputed that the plaintiff lacked genuine academic ability.

The Court agreed that these comments were defamatory. The effect would have been to seriously undermine the plaintiff's academic competence. The consequence of circulating the comments on a bulletin board was that the defamatory remarks had been published in academic circles throughout the world. The nature of the remarks was such that they were likely to be repeated and that any rumours of a like kind that had circulated previously would most likely gain strength from their publication.

The Court concluded that the plaintiff had endured serious personal suffering as a result of the defamation. There was evidence from a consultant psychiatrist that the publication was the cause of a marked exacerbation of symptoms of major depression and anxiety.

As a result of the defamatory bulletin board statement, together with a defamatory letter of like content to the Anthropological Association of Western Australia, the Court awarded the plaintiff the sum of $40,000 plus interest.

The issues raised for Internet users include:-

- the need for management and control over employees' communications;
- jurisdictional issues, particularly the possibility on the one hand that defences (such as the public figure defence) may be available in some jurisdictions but not others, and on the other hand that publication in a number of jurisdictions may result in multiple liability.

Crime

Of the many ways in which the Internet might facilitate criminal activity, one area of particular concern in Australia involves the use of the Internet for the dissemination of illegal or offensive material. In this regard, a number of documented examples have arisen:

- the transmission of pornography;
- sexual harassment;
- the distribution of offensive literature (such as neo-Nazi propaganda);
- circulation of stolen credit card details;
- the publication of access code for protected databases;
- the use of other persons' credit card numbers for on-line purchases.

To the extent involvement in this type of activity is already proscribed, conventional criminal charges can of course be laid. There are major difficulties, however, in relation to prosecution and enforcement; more significantly, situations are being identified in which traditional laws are proving to be inadequate. Being often beyond the scope of the federal legislature, a co-operative approach amongst the States and Territories is required in order to ensure effective regulation.

A useful example was the prosecution in June 1995 of a person who downloaded pornographic material from the Internet. He was charged under State legislation, the *Classification of Films and Publications Act* 1990 (Victoria), with possession of photographs of children depicted in an indecent sexual manner. The prosecution was successful, but there has been speculation as to whether the defendant could have been charged at all if the material had simply been displayed on his screen and not downloaded.

Some specific laws have been introduced to combat electronic crimes committed through the Internet. For example, the Internet has spawned a proliferation of electronic mail and this has given rise to concerns about the lack of protocols and the lack of general regulation in this area. The *Crimes Act* 1958 (Victoria) was therefore amended, effective from 23 January 1995, by the insertion of a new clause 21A ("Stalking").

In Australia, censorship of publications, films and computer games is a co-operative scheme involving the Commonwealth, States

and Territories. The current legislative scheme is being extensively revised and the Commonwealth's contribution to the new scheme, the *Classification (Publications, Films & Computer Games) Act 1995*, commenced on 15 March 1995 (although the substantive sections have not yet commenced). The Commonwealth, through the Censorship Board and the Office of Film and Literature Classification ("OFLC"), classifies publications, films and computer games on behalf of the States and Territories. State and Territory legislation contains offences for the possession of refused classification material and there are also offences relating to publication of restricted material contrary to the conditions attached to the classification recorded to that material.

These classification guidelines formed the basis for the classification codes for material and other media, such as free to air television and Pay TV. This is designed to achieve consistency in the classification of similar material across different media. Against this background, the question has arisen as to how the current system can be utilised in relation to on-line information services.

In August 1994, a Report on the Regulation of Computer Bulletin Board Systems was published by a task force which had been set up in November 1993 following a decision of Commonwealth, State and Territory censorship Ministers to regulate the sale, hire and arcade use of computer games. Concern had been expressed that children could gain access to material, which was unavailable to them because of their age via sale, hire or arcade use, by means of computer bulletin board systems.

The inquiry into bulletin boards has led to a further inquiry in relation to on-line information services generally. On 7 July 1995, the Commonwealth Attorney General's Department in conjunction with the Department of Communications and the Arts issued a "consultation paper on the regulation of on-line information services". The consultation paper was a response to concerns over the availability of offensive material from on-line information services including, specifically, the Internet.

The consultation paper recognised the objectives involved, including:

- freedom of expression;
- protection of children;
- development of new services;
- avoidance of unnecessary regulation costs;
- aligning censorship regimes for new services with existing regimes for other media.

The consultation paper proposes a strategy involving three key elements:

- a self-regulatory framework incorporating a code of practice and a complaints handling procedure;
- an education component; and
- the introduction of offence provisions to provide sanctions against persons who deliberately breach community standards.

Conclusion

The Internet is a phenomenon which demonstrates immense recreational and commercial potential. Like any technological phenomenon, it raises a number of diverse legal issues. Like any technological phenomenon, the legal issues which are raised today may be different from those which emerge tomorrow.

The Internet has a great capacity to enhance the practice of law and the business of lawyers' clients. It also promises to create opportunities for technology lawyers.

Gordon Hughes is a partner in the Melbourne office of Hunt & Hunt, Lawyers