

THE DEVELOPING LAW OF CYBERSPACE

The use of modems and on-line services to transmit, locate, and store information and to purchase and sell goods and services is growing exponentially. If you are not soon doing business electronically, you may soon be out of business altogether. "Cyberspace," the electronic "place" between computer terminals, is so new that the law that rules it has yet to catch up fully. This article will discuss the state of the law, such as it is, regarding the electronic transmission, storage, and retrieval of information.

The law of cyberspace has, to date, been concerned with three issues--defamation, copyright, and trademark. Defamation is the legal term for making false statements about someone. Copyright law governs the right to protect and use original works containing information or artistic expressions. Trademark law governs the right to protect and use unique words or symbols that identify the owner's goods or services.

Defamation, copyright, and trademark issues in cyberspace have posed challenges for the law, particularly with respect to determining liability. In order to understand this issue, you first need to understand how the "information superhighway" works.

The electronic transmission of information between two parties requires at least two computers, one sending information and one receiving information. However, a third party is often involved, a "middle-man" if you will. These third parties are, in effect, "cyber vendors." They include CompuServe, Prodigy, America Online, and the operators of bulletin board services (of which there are probably more than 100,000). The computers of these cyber vendors store information placed there by the cyber vendor, by someone working on the cyber vendor's behalf, or by the cyber vendor's customers. At least on large systems, the amount of information flowing onto and off of the cyber vendor's computer is so copious that the cyber vendor is simply unable to keep track of it all.

Cyber vendors make their living by providing their customers with access to information and with places to post information so that others can see it. Defamation can occur in cyberspace when someone posts defamatory statements in an area within a cyber vendor's computer to which the cyber vendor's customers have access. Copyright infringement can occur in cyberspace when someone other than the copyright owner places copyrighted information in a public area within the cyber vendor's computer. Trademark infringement can occur in cyberspace when someone uses another's trademark to sell their own goods or services within the cyber vendor's "electronic mall."

The question for the law is this: Is the cyber vendor liable if someone is defamed or if someone's copyright or trademark is infringed by information placed on a cyber vendor's computer without the cyber vendor's prior knowledge? The challenge for the law in determining liability is due to the fact that cyber vendors did not even exist until a few years ago.

Defamation In Cyberspace

Two defamation cases have been brought against two of the major cyber vendors, CompuServe and Prodigy. CompuServe was found not liable, while Prodigy was found liable. Why the difference?

To understand the difference between the CompuServe and Prodigy cases, we must first discuss the law of defamation as applied to bookstores and newspapers. Bookstores contain hundreds of publications, each of which contains hundreds of pages. The law has already recognized that bookstores could not possibly read the entire contents of all those publications before placing them on their shelves. Therefore, the courts relieve bookstores from liability for defamation unless the bookstore clerk or librarian actually knows that a publication contains defamatory statements.

Newspapers, on the other hand, write most of their contents themselves and are well able to screen the remaining copy written by others. The courts, therefore, do not allow newspapers to claim their lack of knowledge as a defense to defamation.

CompuServe argued that, like a bookstore or library, it was unable to read the entire contents of the thousands of messages posted each day by its customers in advance of their posting. The judge accepted that analogy. Prodigy, however, faced a different fate.

Several years before it was sued, Prodigy had held itself out as a cyber vendor suitable for family viewing. Prodigy promised its customers that it carefully screened every message before it was posted for public viewing. Prodigy, which now has around two million members, made that claim in the early days of cyberspace, perhaps never fully anticipating the onslaught of what is now roughly 60,000 messages posted on its computer daily or fully appreciating the difficulty in screening them all.

Like CompuServe, Prodigy also argued that it was similar to a bookstore or a library. Unlike with CompuServe, however, the judge rejected the analogy. Prodigy's promise that it would screen all messages distinguished it from a bookstore or a library. Instead, the court determined, again by analogy, that Prodigy was like a newspaper. Therefore, the "lack of knowledge" defense was unavailable to Prodigy.

Whether the bookstore/newspaper analogy makes sense in cyberspace remains to be seen. For example, unlike books, computers have programs available to screen many types of objectionable verbiage posted on a cyber vendor's computer. Also, unlike even the smallest bookstore, activity on the smaller cyber vendors' computers may be so minimal as to make screening fairly easy. Finally, bookstores' products, books and magazines, are made by identifiable and usually solvent producers. In contrast, messages in cyberspace may be anonymously posted on a cyber vendor's computer by an individual whose solvency may be in doubt.

Copyright and Trademark Violations In Cyberspace

In 1993, Playboy Enterprises sued George Frena, a cyber vendor, after one of Frena's customers transmitted digitized images of Playboy photographs onto Frena's computer for viewing and downloading by other Frena customers. Frena claimed that he removed the photos whenever he knew that they had been transmitted onto his computer. In the Playboy case, the court followed traditional copyright law and held Frena liable. Under the traditional law, intent to infringe is irrelevant and one can be liable even for innocent infringement.

Frena was also held liable for infringing on Playboy's trademark. Playboy's registered "Playboy" and "Playmate" trademarks were used to identify many of the computer files containing the photographs.

Another major case involved Sega Enterprises Ltd., in which Sega sued a cyber vendor who had copied Sega's games onto its computer for use and copying by the cyber vendor's customers. In that case, the court ordered the seizure of the cyber vendor's computer memory chips that contained Sega's games.

The Future

Despite the emerging law of cyberspace found in the CompuServe, Prodigy, Playboy, and Sega cases, the United States Patent and Trademark Office (PTO) recognizes that the law is still lagging far behind the growing cyber community. The PTO has recommended that the Copyright Act expressly prohibit the unauthorized dissemination of copyrighted works. However, this would still leave cyber vendors similar to Prodigy at risk for the misconduct of their customers.

The next few years will witness the continuing explosive growth of cyberspace. Will the law keep pace? Fire up your modem and stay wired.