

Liability: The Web's Big Worry

by Jonathan Band

We've all seen those Westerns where a vast horde of settlers dash madly across the Great Plains in an effort to stake a claim on a parcel of land. A couple of scenes later, some sort of hardship befalls the settlers, typically in the form of harsh weather, hostile Indians, or greedy ranchers.

The same sort of mad rush is now occurring on the Internet, where businesses are establishing Web sites at a dizzying pace in hopes of reaching new customers with attractive demographics. And just like in the old West, hardship may soon befall these new settlers. The hardship, however, may come from an unexpected direction: liability for copyright infringement or defamation committed by their customers.

Businesses that are establishing Web sites are learning that one of the sites' most popular features is a bulletin board. People like to post messages and read other people's messages. If a business wants repeat visits to its Web site -- if it wants its Web site to succeed -- it must provide an interactive forum. But the moment it permits this sort of interactivity, the business runs the risk that one of its customers will post material that infringes someone's copyright or is defamatory.

Under current copyright principles, the business may be found liable for its customer's copyright infringement, even if the business was completely unaware that the material the customer up-loaded onto the bulletin board was infringing. Ironically, the more the business monitors the bulletin board in order to prevent this sort of copyright infringement, the more the business exposes itself to liability for defamatory remarks by its customers. In one of our wonderful common law distinctions, a "distributor" is not liable for defamatory remarks in material it "distributes," but a "publisher" is liable for defamatory remarks in the material it "publishes." If the business closely monitors the

bulletin board, a court is more likely to treat it as a publisher and hold it responsible for its customer's defamatory statements.

The Clinton Administration recently had the opportunity to propose a liability exemption for bulletin board operators who had no knowledge that material uploaded by their customers infringed copyrighted works. For the past two years, the Working Group on Intellectual Property Rights of the Information Policy Committee of the Information Infrastructure Task Force (how's that for reinventing government?) has been considering what changes are necessary in the copyright laws to hasten the construction of the information infrastructure -- the inside-the-Beltway name for the information superhighway.

The large on-line service providers such as America Online and CompuServe lobbied the Working Group for an exemption, but to no avail. The Working Group argued in its final report released in early September that such an exemption was unnecessary, that the on-line service providers were large enough to handle the potential liability. But the Working Group failed to understand this liability problem confronts not only the large on-line service providers, but all businesses that want to participate actively in the Internet. Instead of accepting this liability, businesses may choose to stay off the Internet altogether, or participate only to a limited extent. By failing to deal with the liability issue, the Working Group left a significant "roadblock" in place on the information superhighway. Indeed, the Administration proposed certain technical changes to the Copyright Act that actually increase the problem.

Interestingly, the on-line service providers had more success in Congress, at least with respect to obscenity. When the Internet obscenity hysteria erupted this past Spring, the on-line service providers convinced the drafters of the House and Senate telecommunications reform bills to exempt them from liability for the offensive activities of their subscribers.

The Clinton Administration has a vision of the Internet as "an electronic marketplace for commerce." This marketplace will not emerge, however, if businesses face liability for the actions of their customers.

Jonathan Band is a partner in the Washington D.C. office of San Francisco based Morrison & Foerster. He specializes in intellectual property law in high technology industries.