ISP Liability and Net Neutrality (1)

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One of the issues that doesn’t seem to get mentioned much in discussions of what has been called “net neutrality” as it affects Internet service providers (ISPs) is the notion that ISPs currently serve as common carriers and are therefore immune to certain types of liability – but only if they keep a hands-off attitude toward the content that they convey.

Some of the readers of this column may not know that before the Internet became a commonplace mechanism for exchanging information, there were services called value-added networks (VANs) that provided some of the same functions as ISPs do today. CompuServe, Prodigy, the early versions of America OnLine and several others offered pay-for-service access to moderated discussion groups (threaded discussion lists), news services (e.g., the original online version of the vast ComputerSelect database that supplied electronic copies of thousands of technical articles a year from respected journals and technical magazines) and commercial sites.

Even as late as 1994, these VANs offered a higher signal-to-noise ratio than some parts of the USENET and of the fledgling World Wide Web. I just located an article I wrote back then that included the following text: “Far from being an _Infobahn_, with that word's overtones of Teutonic neatness and order, the Internet [in 1994] resembles a loose network of paths, some of them rutted with overuse, others infested with vermin. Internet destinations range from the cyberspace equivalent of well-groomed parks and impeccable libraries to unkempt garbage dumps and run-down road-houses.”

In 1991, a landmark case called Cubby, Inc. v. CompuServe, Inc. (<http://tinyurl.com/ruwho>) established a fundamental attribute of ISPs. CompuServe had provided facilities for a Journalism Forum that included a section called Rumorville USA which was created by Don Fitzpatrick Associates (DFA). A competing service called Skuttlebut was developed by Robert Blanchard and Cubby, Inc. that was directly accessible through subscription without going through CompuServe. When defamatory materials were published about Skuttlebut on the Rumorville service, Cubby Inc. and Blanchard sued Fitzpatrick and CompuServe for libel. Judge Peter Leisure of the US District Court of New York ruled that because CompuServe had no involvement in the content of its forums, it could not be held responsible for libelous material posted there. The judge wrote that “…CompuServe is, at most, that of an independent contractor of an independent contractor. The parties cannot be seen as standing in any sort of agency relationship with one another, and CompuServe may not be held liable for any of plaintiffs' claims on a theory of vicarious liability.” Many legal commentators have interpreted this judgement as classifying CompuServe (and by implication other VANs) as equivalent to a distributor (which is not involved in selecting content of what they provide) rather than as a publisher (which does make judgements about content).

I will continue this discussion in the next (and last) column in this series.

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