ISP Liability and Net Neutrality (2)

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In this final article (for now) in my series on net neutrality and Internet service providers (ISPs), I’ll finish up with some classic case law and propose some implications for the current debate over the need for legislation to protect users against possible interference by ISPs in the content users can access on the Internet.

In 1994, someone sent vile, threatening messages via e-mail in Alexander G. Lunney’s name by opening fraudulent accounts on the Prodigy ISP using his identity. Lunney sued Prodigy for allowing him to be placed in a false light (one of the classic legal definitions of defamation) but lost the case and his appeal because, the appeals-court judge wrote in 1999, “Prodigy's role in transmitting e-mail is akin to that of a telephone company, where one neither wants nor expects to superintend the content of its subscribers' conversation. In this respect, an ISP, like a telephone company, is merely a conduit.”<http://tinyurl.com/n65yv>

In the Stratton Oakmont Inc. v. Prodigy Services Co. case completed in the Supreme Court of New York in 1995, an anonymous user of the “Money Talk” bulletin board on Prodigy made libelous statements about the principals of the Stratton Oakmont securities investment banking firm in October 1994<http://tinyurl.com/rkyf3>. Judge Stuart L. Ain ruled that Prodigy’s stated policy of reviewing and censoring postings qualified it as a publisher with respect to its bulletin boards (note the contrast with the judgement about its e-mails from Lunney v. Prodigy).

I bring these cases to readers’ attention because although-I-am-not-a-lawyer-and-this-is-not-legal-advice-(for-legal-advice,-consult-an-attorney-qualified-in-this-area-of-legal-practice), I think these classic cases bear directly on the issue of net neutrality of ISPs. To the extent that ISPs begin to interfere with unbiased, unrestricted access to content from different providers, I think they will fall afoul of the existing case law that specifically protects ISPs that net neutrality and will find themselves qualifying for responsibility for content as publishers.

I doubt that such increased liability for content decisions will provide a good business case for changing accessibility of content to users. ISPs who take money from content providers to increase accessibility to their content or to block access to competitors may forfeit their defensive claims to being content-neutral distributors immune to liability for libel and other legal infringements (I have not discussed other issues such as intellectual property violations). Civil law may provide an excellent tool for preventing abusive interference with access to information on the Internet.

I look forward to a flood of commentary from cyberspace attorneys interested in this issue and will summarize their comments in a later column.

I’m already cringing.

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