

## Google Court loss: Shake-up for online defamation

November 2012

*On 12 November, an Australian court awarded damages against Google, arising out of its search engine presenting defamatory material to viewers. This decision goes against two overlapping UK cases in favour of Google. The Australian decision could end up being applied in multiple Commonwealth countries, including gazumping the UK cases. And it has implications for all that run websites, blogs and ISPs: online providers should at least have a process to take down defamatory material.*

Show-biz promoter, Michael Trkulja was shot in the back by a balaclava-clad gunman in a Melbourne restaurant back in 2004. Online material linked that event to the criminal underworld, with the implication that Mr Trkulja was also tied up with criminals. The court decided this was defamatory. The big legal issue was: is Google liable for defamation when its search engine automatically produces those defamatory results. Yes, said the court.<sup>1</sup>

### ● **Start with the hard copy world**

Important to the judge's approach was his comparison with the hard copy world. Say a newspaper publishes something defamatory. There is a chain of parties liable for defamation including the publisher, the journalist, the editor, the printer, the newspaper distributor, the bookshop selling newspapers and libraries with copies of the newspapers.

In an online world, Google's search engine is, said the court, similarly liable. In fact it is potentially more at risk and liable compared to those parties as it went further than being just a passive provider of defamatory material, in view of its search engine software, described below.

### ● **Innocent dissemination defence**

Without some protection, the width of that liability would be too great. Why should a bookshop be liable when it knew nothing of the defamatory article in the newspaper being sold? So the innocent dissemination defence has been developed in a number of countries including Australia, England and New Zealand. Broadly, if a liable party - other than those closely involved such as the writer and the publisher - can show it had no notice,<sup>2</sup> and acted reasonably, it can avoid liability. Essentially, downstream distributors can get off the hook. Take the newspaper example. If the newsagent becomes aware there may be defamatory material, it avoids liability by stopping selling the paper. If it carries on, it will be liable for defamation from the date it should have stopped selling.

Google in Australia could rely on the innocent dissemination defence, but only if it stopped access to the material when it came to Google's notice. Here, the court said that it didn't.<sup>3</sup> So \$200,000 damages were awarded to Mr Trkulja from the point when it should have stopped access.

**Google Court loss:  
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defamation****● The UK cases**

There are three UK cases on similar issues, all decided by the same judge.<sup>4</sup> Two involve Google. The internet-based provider won each case with the court deciding that the following would not be liable:

- an ISP simply transmitting content;
- search results from a Google search similar to what happened in Australia; and
- Google hosting a bloggers' platform, bloggers.com

The Australian judge said that every case is fact-sensitive and so those cases could be distinguished from Mr Trkulja's predicament. But he also questioned whether the three UK cases correctly stated the law as to Australia. If he's right, there are real prospects the UK and other courts will follow the same line. The issues were far more developed in the Australian court than the UK courts, and in our view, the Australian judge correctly commented on those cases.<sup>5</sup>

The three cases were early pre-trial cases, but the Australian judgement followed a full trial. The judge said he might have received more detailed evidence about Google search engines arising from the full evidence at trial, compared with the UK cases. In particular, underneath the automatic search is complex software enabling the selection of links and search results? This is the well-known complex algorithm that Google has developed and configured over the years. In other words, the Google search is not just automatic and beyond Google's control. Google has some control because its algorithm is a key part of the process and drives choice of search results, based on search key words entered by the user.

Although not yet resolved,<sup>6</sup> the position of an ISP simply carrying traffic may be different,

but there is still a prospect that pure ISPs could be liable too. An ISP is like a bus carrying a passenger's suitcase containing a defamatory document. It can be argued that an ISP is too remote from the defamation chain.

**● What will happen?**

It's likely Google will appeal, but that may be an uphill battle as the Australian court applied long standing principles. There is a legitimate debate around where online defamation liability should start and stop. Should an ISP simply carrying traffic be potentially liable? That can be argued both ways from a legal and a policy perspective. The answer could be to have updated innocent dissemination defence rules to cover the online world. Some are out of date.<sup>7</sup>

What is clear is that it is not just as simple as Google and others saying:

- Cut back the scope for defamation as that has a chilling effect and puts handbrakes on the internet; and
- We're just a conduit and no more.

There are steps that Google can take under the current regime to minimise its exposure including a workable and accessible takedown regime. It already has a regime but it may not be as robust as the Australian case suggests should be the case.

**● Implications for websites, blogs, ISPs, etc**

The Australian case confirms that other online providers remain exposed: often they can't get off by simply claiming they are a conduit. For example, if a blog allows comments from third parties, it is likely that the host blogger, at least, has liability for defamatory statements by the third parties, even though someone uploads a comment without the blogger knowing that has happened. This is similar to a radio station being liable for defamatory statements in live

Wigley+Company

PO Box 10842  
Level 7/107 Customhouse Quay, Wellington  
T +64(4) 472 3023 E info@wigleylaw.com

and in Auckland  
T +64(9) 307 5957

www.wigleylaw.com

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talk back.<sup>8</sup> Under some innocent dissemination regimes, that defence won't be available.

Website hosts and other online providers face exposure too. Even ISPs simply carrying traffic could be in the sights: that is not fully resolved yet.

As to managing risk while still doing business online, a key step is to have a good system for taking down potentially defamatory material, especially after notice from someone else. Content should be reviewed regularly, the more so on sites that are inherently more risky.

Plenty of material we see that is posted on online newspaper sites is defamatory, for example.

There are also legal issues around whether the provider overtly edits or does so behind the scenes.

Like Google, online providers have some judgment calls to make.

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1. *Trkulja v Google* [2012] VSC 533. Here we do not discuss all features of the judgment.

2. There is more detail in the defence.

3. As to images. Google succeeded on the facts as to website material.

4. *Bunt v Tilley* [2007] 1 WLR 1243; *Metropolitan Schools v Designtecnica* [2011] 1 WLR 1743; and *Tamiz v Google* [2012] EWHC 449.

5. There is a recent New Zealand case against Google, but the court largely did not decide issues overlapping with this case. In particular, the court decided that the wrong Google company was sued: it should have been Google Inc and not the local Google company.

6. Save as to one of the three UK cases, but that may be overruled following the Australian case.

7. For example, the New Zealand defence focussing on the old hard copy world and it is a stretch to bring in online exposure.

8. See for example, *Russell v Radio i* (NZ Supreme Court (1976) A590/74).

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