

# Search Engine Liability for Defamatory Snippets

Anne Flahvin notes a UK decision on whether 'snippets' provided by online search engines could give rise to liability for defamation.

In a decision that is likely to provide comfort to online intermediaries in Australia, a UK court has held that a search engine is not a publisher, for defamation purposes, either of material on the original website that the search engine links to, or the "snippets" of content which are included in its search results.

The decision will be of particular interest to Australian intermediaries given that the outcome was reached applying general common law principles, and without apparent recourse to European human rights jurisprudence or to UK statutory defences.

## Facts

*Metropolitan International Schools Ltd v Designt Technica Corporation & Ors*<sup>1</sup> involved a claim for defamation by Metropolitan (trading as Train2Game) with respect to bulletin board publications published by Designt Technica Corporation (trading as **Digital Trends**). As well as suing Digital Trends, the plaintiff, a provider of adult distance learning courses, brought proceedings against Google UK Ltd and Google Inc as second and third defendants. The claim against the Google defendants was based on a snippet which appeared when a search was performed on "Train2Game" using the Google search engine:

*Train2Game new SCAM for Scheidegger...*

Metropolitan claimed that the snippet conveyed an imputation to the effect that its Train2Game course was a scam or fraud intended to deceive.

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The matter came before Justice Eady in an application by Google Inc (**Google**) seeking to set aside an order granting the plaintiff permission to serve it outside of the jurisdiction. Google submitted that the court either had no jurisdiction to try the claim against it, or, if it did, the court should decline to exercise its jurisdiction. The application was made on several grounds, including that Google had no responsibility for publication of the words complained of and thus there were no reasonable prospects of success as required by the Civil Procedure Rules.

## Can the operator of a search engine be liable for publication?

In the absence of any decision which had considered the liability of search engines for content linked to and/or appearing in 'snippets' served up with the search results, Eady J was required to go back to first principles.

Counsel for Google submitted that in light of the automatic nature of a search engine's activities, it could not be held responsible for anything appearing on the site which it directed users to, nor for the content of defamatory snippets appearing on its own website. As a fallback submission, Google submitted that liability could not arise prior to notification from a would-be-claimant as to the spe-

cific URL from which the words complained of originated.

Eady J referred to his earlier decision in *Bunt v Tilley*,<sup>2</sup> in which his Honour had held that an internet intermediary that was doing no more than acting as a passive medium of communication (ie a mere facilitator) could not be characterised as a publisher at common law, and would not therefore need to rely on the defence of innocent dissemination.

The question in this case, according to his Honour, was whether Goggle should be regarded as a mere facilitator with respect to publication of the snippet complained of, and, whether that would remain a proper characterisation of Google's role even after it was notified.

Counsel for Google noted that the common law regarding the liability of internet intermediaries for defamatory publications was unclear and uncertain, and urged the Court to develop the law, in so far as it was necessary to do so, having regard to Article 10 of the European Convention on Human Rights. Of significance for Australian observers, however, is that while Eady J commented briefly on the Strasbourg human rights jurisprudence, his Honour did not appear to have felt it necessary to rely on that jurisprudence in order to reach his finding with respect to Google's potential liability. In this regard it is interesting to note his Honour's reference to *Derbyshire County Council v Times Newspapers Ltd*,<sup>3</sup> in which, it will be recalled, the Court of Appeal relied on Strasbourg jurisprudence to find that a democratically elected governmental body had no standing to sue for defamation, but the House of Lords found that the same result could be reached relying on general common law principles, without the need to rely on European convention rights. Shortly after the House of Lords' decision in that case the NSW Court of Appeal applied the Lords' reasoning in *Ballina Shire Council v Ringland*.<sup>4</sup>

In finding that Google was not a publisher, Eady J appeared to place considerable importance on the automatic nature of the search engine's activities. The evidence was to the effect that both the search results and the snippets were generated by computer algorithms, without any human intervention. In that sense, according to Eady J, Google had "not authorised or caused the snippet to appear on the user's screen in any meaningful sense. It has merely, by the provision of its search service, played the role of a facilitator."

In testing his own reasoning, Eady J compared Google to a library catalogue in a conventional library, and asked why it was that the conventional library might attract liability were its catalogue records to include defamatory snippets. The answer, according to Eady J, was that the compiler of a conventional library catalogue would have had to have consciously, at some point, chosen the wording of any snippet or summary included in catalogue. That was not the case with a search engine.

Eady J next considered whether the position should be different in the event that the search engine was given notice of the defamatory content of a snippet thrown up by a search result. His Honour noted that in *Godfrey v Demon Internet*,<sup>5</sup> a case in which the defendant ISP was sued with respect to information posted to others and transmitted by it to subscribers, evidence that the ISP had

knowledge that the words complained of were defamatory was crucial in determining its liability. According to his Honour, however, search engines are a different kind of intermediary to website hosts. Unlike a website host, for example, they cannot simply press a button to ensure that the offending words will never appear in a search result: they have no control over the search terms typed in by future users. Were Google to have taken steps to ensure that the words complained of did not appear in *any* search, it would have been necessary to “block a huge amount of other material which might contain some of the individual words comprising the offending snippet”.

### **What steps, if any, is a search engine required to take when notified of defamatory material?**

Eady J stopped short, however, of saying that search engines could refuse to take *any* steps to remove offending material and still avoid being fixed with liability as a publisher.

The evidence in this case was that Google did have a “take down” policy in place and had taken steps to disable links to URLs relating to the words complained of. That conduct was clearly a significant factor in Eady J’s reasoning as to why Google could not be fixed with liability as a publisher of the snippets. His Honour noted that Google’s “notice and take down procedure” may not have operated as quickly as the plaintiff would have liked, but said that it did not follow as a matter of law that between notification and take down Google becomes or remains a publisher of the offending material. On the contrary, Google should not be fixed with liability on the basis of authorisation, approval or acquiescence while it was taking steps to achieve a ‘take down’ in relation to a particular URL.

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The unanswered question, of course, is whether a search engine that took *no* steps to remove offending material could be fixed with liability as a publisher. Based on Eady J’s reasoning, it would appear likely that liability *could* arise if a search engine were simply to refuse to take steps to take down offending material.

### **Implications for Australia**

Is the approach adopted by Eady J likely to be followed by an Australian court?

In Australia, broadcasters have been held to be liable as publishers of material broadcast by them even where they simultaneously transmit a broadcast produced by another broadcaster, without ever viewing or considering the content.<sup>6</sup> In *Thompson v Australian Capital Television*<sup>7</sup> the Australian High Court refused to characterise such a broadcaster as a mere facilitator of the content being broadcast for the purposes of the common law defence of innocent dissemination.

Of course, a broadcaster is in a very different position to a search engine. While it may not avail itself of an opportunity to review content prior to transmitting, it *could*, if it chose to do so. It is also knowingly involved in the transmission of the content in the sense that it has a contractual relationship with the party responsible for producing the content.

As was highlighted by this case, the defence of innocent dissemination is likely to be of limited practical assistance to a search engine. That defence, both in its statutory and common law forms, extends

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immunity to certain classes of publisher provided that they were not on notice of the defamatory nature of the material sued on, and that any lack of knowledge was not due to a want of exercise of reasonable care. Eady J noted that it would be difficult to see how a search engine could show that it had exercised reasonable care in circumstances where the “throwing up of the relevant snippet was brought about entirely by the search terms of the web user”. Eady J also noted that a search engine, unlike a web host, cannot simply press a button to ensure that the offending words will never appear in a search result.

While the facts of this case would involve novel questions of law for an Australian court, it is submitted that the approach adopted by Eady J is likely to be highly persuasive.

The other point of interest for Australian observers was the consideration given by Eady J to the circumstances in which the common law defence of innocent dissemination can be relied on. Like Australia, the UK has a statutory defence of innocent dissemination. It had been thought that with the introduction of the UK *Defamation Act* in 1996, the common law defence of innocent dissemination had been abolished. Eady J agreed to hear argument from Google’s counsel to the effect not only that the common law defence was still available to be pleaded, but also that it afforded better protection to internet intermediaries than did the statutory defence in that it could be relied on where a defendant was aware that words in question were defamatory, provided the defendant had no knowledge that the words were indefensible. This submission was based on obiter comments of Denning LJ in *Goldsmith v Sperrings Ltd*.<sup>8</sup> Google submitted that its Article 10 rights (as well as the Article 10 rights of users of search engines) dictated such an approach to the defence of innocent dissemination given that there was otherwise uncertainty as to the appropriate test. Of course, Eady J’s comments with respect to innocent dissemination were obiter, given his finding that Google was not prima facie liable as a publisher, but in any event he rejected the approach contended for by Google and held that notwithstanding that the common law defence did seem still to be available, it “would almost certainly not be available to a defendant who has had it drawn to his attention that the words are defamatory, or at least arguably so”. Given that the common law defence remains available to be pleaded in Australian jurisdictions (notwithstanding the introduction of a statutory defence with the uniform Defamation Act) the argument run by Google in this case might well get another airing in Australia.

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(Endnotes)

1 [2009] EWHC 1765 (QB).

2 [2007] 1 WLR 1243.

3 [1992] 1 QB 770 and [1993] AC 534.

4 (1994) 33 NSWLR 680.

5 [2001] QB 201.

6 *Thompson v Australian Capital Television Ltd* (1986) 186 CLR 574.

7 *Ibid*.

8 [1977] 1 WLR 478.