

Notes for Media Slot Nine To Noon Wednesday 13 March 2013

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1. Today I want to discuss the ongoing issue of how the internet is affecting areas of media law - in this case, defamation law. Many questions have been raised about the issue of publication on the internet and whether it should be treated any differently than publication in any other media, such as hard copy newspapers, broadcasting, on bill boards and the like.
2. There is no doubt that publication on the internet is publication for defamation purposes. In a New Zealand case called *O'Brien v Brown* the judge would not accept an argument that the "culture" of the internet allows more robust comment than elsewhere, and that trading insults is acceptable there. The judge could not see why the developing culture in the use of such communication on the internet would entitle users to greater freedom of expression than in any other method of publication.
3. It has also been indicated in New Zealand that referring in one publication to another's website can amount to publication of defamatory material to be found on that website. However, I discussed last year how doubt may have been cast on that approach of *Crookes v Newton*, where the Supreme Court of Canada refused to find that the inclusion of deep and shallow hyperlinks in an online article to websites containing allegedly defamatory material was publication of the material on those websites. The Court did that by likening hyperlinks to footnotes, listeners will remember. That issue is going to be tested if the Karam claim against Fairfax and two bloggers ever gets to a full hearing.
4. But another question, still unresolved, is how far internet service providers (ISPs) are liable for defamation on the internet, by providing different sorts of access for subscribers. This is what we call the third party publisher issue. ISPs provide different services - providers such as Google may just act as conduits and pass information on without ever knowing what is there (such as when its search engine generates results using a computer algorithm). Or they may host websites which carry all sorts of material, again, without knowing what is there. They may host blog pages on which many blogs appear, or

individual blogs which they actually moderate and monitor. ISPs argue that where they have no knowledge of what they are hosting, they are mere conduits and should not be liable. This has been accepted in at least one English case called Bunt v Tilley. There it was held that to be liable for a defamatory publication a defendant must be knowingly involved in the process of publication, and that an ISP which performed no more than a passive role in facilitating postings on the internet could not be deemed to be a publisher at common law. However, later cases have taken a more nuanced approach focussed on the extent of knowledge by the service provider.

5. Google has been a defendant in a number of recent cases which dealt with the question whether providers of blog platforms can be liable for their content. In *Davison v Habeeb*, which concerned a Google blog, the High Court used the analogy of a giant notice board where the provider has some control over content once notified, making notification relevant to the question of liability.
6. *Tamiz v Google Inc* involved a claim arising from a statement posted by a blogger on the popular Blogger platform on a blog called the London Muslim blog. The bloggers involved were not proceeded against. The comments contained abuse but also serious allegations of criminality. The claimant complained to Google UK using an online 'report abuse' function, and Google Inc were in the process of dealing with the complaint when the blogger removed the material himself.
7. Google will on principle not remove offending material once notified. Instead, the company contacts the blogger concerned. The judge in the High Court in *Tamiz* noted that the Blogger platform contains more than half a trillion words and 250,000 new words are added every minute! He therefore did not think that notification or the ability to remove material should automatically make Google a publisher. He thought much depended on the facts in each case and decided that Google was like an owner of a wall covered in defamatory graffiti where failure to remove does not necessarily make the owner a publisher. The judge saw owners like this as purely passive, and hence not publishers.
8. However, *Tamiz v Google Inc* has been appealed to the Court of Appeal, which held in February this year that although not a primary publisher of

the blog in this case, Google still defined the limits of permitted content and had the power and capability to remove or block access to material which it was notified about. Therefore, liability could follow for the period after which Google was notified of the statement.

9. Now some argue that making ISPs liable in such circumstances is no different from making printers liable in the past. Printers invariably had no knowledge of the content of the material they were publishing and were able to access a defence called innocent dissemination. That excused them from liability for words that they had no knowledge of, but not for words which they knew were there, or ought to have known were there.
10. Media have said to me in response to that argument that in the old days, no one went after publishers like printers except the odd crook. Because ISPs like Google have such huge traffic, there is a much greater likelihood of more complaints which could create an extreme potential burden, and pressure to take material down immediately on notification, which would have a chilling effect on speech.
11. Now there is something in this argument, but I must say, I have reservations about exempting a large group of businesses who publish speech very widely and with very lasting effects from liability just because their speech traffic is so enormous. And I would want real evidence of the possible burdens. Similar arguments were made in relation to the take-down regime established under the infamous s 92 of the Copyright Act, and that regime is established and working. How effectively it is working is, of course, the subject of disagreement between those opposed to the regime and those in favour of it. We need some independent assessment to be carried out on that regime.
12. The answer in defamation law could be to develop a carefully drafted statutory defence, or to statutorily require ISPs to disclose information allowing the identification of online users so they can be pursued by the complainant. That does not answer the point that the ISP can, by taking down material, provide immediate relief for those who are genuinely being damaged because of the use made of its services.
13. More recently, the novel question has arisen whether search engines themselves can be publishers. What is at issue in these cases is

whether, for example, Google can be held responsible for delivering search results when the names of certain individuals are 'googled', the results usually taking the form of reference to defamatory material and a link to third party websites where that information is located. Here it is often argued that because search engines operate using computer algorithms with no human intervention, and therefore, no knowledge at all, there should be no liability. In an English case, *Metropolitan Internation Schools Ltd v Designtecnica Corp* it has indeed been held Google was not a publisher when delivering such results.

14. The issue has been raised in a New Zealand case in the High Court - *A v Google New Zealand Ltd* in 2012. Here the claimant argued he was defamed by the publication of results which pointed to a website in the United States containing allegedly defamatory statements.
15. The High Court noted the matter was novel and therefore declined to deal with it summarily - that is, without a full trial. But the Court did express some interesting views about the issue.
16. The plaintiff in this case lost their application because they could not establish that Google New Zealand Ltd, which had been pursued as defendant, had any ability to control publication, even though it had passed on the plaintiff's complaint to Google Inc, which is incorporated in the USA.
17. The judge did have sympathy for the plaintiff's position, however. The creator of the main website containing the defamatory material was apparently based in the United States, and has a policy of not removing any material even if requested. The defamatory material had been posted by an anonymous person, who apparently lived New Zealand. The judge did not think that person would be tracked down.
18. Even though he rejected the plaintiff's claim, the judge went on to look at the issue. Google argued that a finding of liability would result in a disproportionate chilling effect on internet speech, in breach of s 14 of the NZ Bill of Rights. They also relied on the Canadian case mentioned, *Crookes v Newton*.
19. The plaintiff argued, amongst other things, that search engines are not mere conduits like ISPs, telephone carriers and mail carriers. This is because they *intend* to publish search results. Search engines have deliberately chosen to return "snippets" to make their product more amenable to users and thus increase revenues. So it was argued that it would be better to treat search engine operators as publishers, but with

access to a defence like the existing innocent dissemination defence which allows those who have no knowledge of carrying defamatory content and who have not been negligent to escape liability.

20. The judge stated there may be a need to consider whether there has been 'a stamp of human intervention' in each case, that the way the search engine is written will have to be addressed also and the public policy concerns must be addressed.
21. Associate Judge Abbot also mentioned the argument raised about chilling freedom of expression. He said that whilst the right to freedom of expression in the NZBORA has to be considered when developing the law in this area, it may not in fact be an unreasonable limit upon that right to hold that a search engine is a publisher of both specific URLs and words that appear in snippets. He attached weight here to the fact that these will be words search engine providers have chosen to include and which might take hyperlinks beyond the status of mere footnotes.
22. The judge thought it possible that search engine providers might be responsible where an offending hyperlink is deactivated but the snippet continues to appear because that is still communication of a statement to just one other person as required by defamation law.
23. So this judge thought excluding from the definition of publication the repetition of information where repetition occurs without human input could unnecessarily confuse this area of the law.
24. In *A v Google*, I think the Court indicated a reluctance to create exceptions to the previous law for the internet, and a preference for holding a search engine liable where appropriate, with access to the defence of innocent dissemination or other appropriate defences.
25. One thing is for certain - you cannot generalise about the internet.

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