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Google snippets ruling welcome

ANNE FLAHVIN THE AUSTRALIAN AUGUST 15, 2014 12:00AM

IN a decision that will be welcomed by online intermediaries, the NSW Supreme Court has permanently stayed a "defamation by search engine" claim against Google by former hair regrowth entrepreneur Roland Bleyer.

Mr Bleyer was seeking to hold Google liable for defamation as a result of search results, or "snippets", that automatically appeared on screen in response to a Google search using his name.

Justice Lucy McCallum dismissed the claim on two grounds; each of which breaks new ground for Australian defamation law.

The most significant was a finding that Google could not be treated as a publisher of automatically generated search results about which it had no notice. The potential liability of search engines for automatically generated search results has been a live question for some time.

Victorian Supreme Court judge Justice David Beach was the first Australian judge to consider the question, in 2012. He surprised many by holding that the fact that a search engine plays a passive role was no bar to it being treated as a publisher of automatically generated search results.

In that case, Melbourne man Michael Trkulja claimed to have been defamed when a Google search using his name generated images and text that appeared to suggest that he had criminal links. Justice Beach left it to a jury to decide whether Google could be said to have "published" this content simply by providing the algorithm that directed a search user to hyperlinked content over which it has no control. The jury found Google was responsible, and Mr Trkulja was awarded $200,000.

From the perspective of internet intermediaries, the most troubling aspect of Justice Beach's decision was his rejection of a line of British cases that have taken into account the passive role of intermediaries when considering their potential liability as "publishers" of defamatory content.

In 2009, a British court held that a search engine could not be treated as a publisher of defamatory snippets.

This was on the basis that the search engine plays no volitional role in the search process, and does not host the content.

When it comes to intermediaries that do host content — such as Google's Blogger

service — British courts have held that an intermediary can be treated as a publisher of third party content it hosts only once it has been notified of the content and given an opportunity to consider whether to take it down.

In contrast to this approach — which takes account of the technical realities of the role played by different kinds of online intermediaries — Justice Beach held that a search engine could be treated as a publisher of defamatory snippets, and that it made no difference whether the search engine had been notified of the content and been asked to remove it. That sent a chill down the spines of internet intermediaries, and Justice McCallum's rejection of it is likely to be welcomed.

Left for another day was the question of whether a search engine should be treated as a publisher after it had been notified of a potentially defamatory snippet and failed to take action to prevent the content from appearing in response to searches.

When the question does come up for consideration, as it no doubt will, it is to be hoped that the court hearing it will follow the British courts in taking into account the technical realities of what a search engine actually does: it is simply an automated information retrieval system, with no control over the content that its algorithms direct users to and no ability to determine whether one of the defamation defences such as comment might apply.

The other significant aspect of this decision was Justice McCallum's ruling that a defamation claim can be stayed as an abuse of process if any likely benefit to the plaintiff would be out of proportion to the legal costs and court resources that it would take to hear the claim.

Again, British courts have adopted this approach to internet defamation cases since at least 2005.

They have dismissed cases where the plaintiff can point to only a handful of people who have downloaded the content.

This is the first time an Australian court has taken the same approach. Mr Bleyer's lawyers argued that the fact that he could point to only three people who had downloaded the content he was complaining about should not be a bar to having his claim heard.

Justice McCallum disagreed. The courts should not, she said, be encouraging the practice of commencing proceedings for internet defamation based on such a small number of downloads.

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