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ABSTRACT

When the Internet user keys a search term and clicks "enter", a series of snippets, images and html links will appear typically running into several web pages. In the case of Autocomplete suggestions, the result appearing on the bar changes with each keystroke even before the user clicks "enter". As a result, in the course of finding search results from the original search term, the user is constantly provided with suggestions of other search terms. The search results and Autocomplete suggestions may be defamatory of individuals and businesses by associating them with dishonest and improper activities or conduct. Should search engines be regarded as a publisher of such defamatory search results and/or Autocomplete suggestions? What is the appropriate legal approach for establishing search engine responsibility in such instances? The paper considers the above questions by reference to case precedents drawn primarily from common law jurisdictions and commentaries on the liability of search engines and other Internet intermediaries as well as policy rationales and considerations.

1. Introduction

When the Internet user keys a search term and clicks "enter", a series of snippets, images and html links will appear typically running into several web pages. In the case of Autocomplete suggestions, the result appearing on the bar changes with each keystroke even before the user clicks "enter". As a result, in the course of finding search results from the original search term, the user is constantly provided with suggestions of other search terms. The main factors that influence the search algorithms include the web pages indexed by the search engine, the users' geographical location and their prior search history. The search results may associate a person or business with improper or dishonest activities such as a scam or fraud that lowers their reputation. The defamed party may have suffered pecuniary damages as a result and/or may want to delete the search output. Should the search engine be liable as a publisher of defamatory search output in such cases?

Courts are still divided over the controversial issue relating to search engine liability in defamation. Judicial responses have ranged from denying any legal liability on the part of the search engine in England on the basis that the searches are automated and not dependent on human agency to the developments in Australia and Hong Kong that search engines ought to be responsible where they have received notification of a defamatory search output. Even when the judges agree that search engines should be legally liable, they may differ in terms of the bases and/or scope of liability. One related question is whether the analysis or approach to determine legal responsibility of search engines should vary depending on the types of search output generated by search engines.

The central issues in this essay are: should search engines be liable in defamation for search results such as html links, snippets, images and /or Autocomplete suggestions arising from search terms keyed in by the users? If so, what is the appropriate legal approach for establishing search engine

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liability in such circumstances? The paper considers the above questions by reference to case precedents drawn primarily (though not exclusively) from common law jurisdictions and commentaries on the liability of search engines and other Internet intermediaries in defamation actions, and proposes a framework for finding search engine liability in the 21st century. My starting point would be the existing legal principles in the tort of defamation. Here the prime factors for determining publication and responsibility of search engines for defamatory search results and Autocomplete suggestions would be the existence and level of control exercised by the search engine; the purported acts and/or omissions of the search engines; and finally, the nature and extent of the search engines' knowledge and intention.

This paper will draw upon legal tests and approaches from traditional cases decided even before the Internet era as well as those involving Internet intermediaries (such as website hosts, providers of Internet discussion forums and hyperlinkers) particularly where they concern issues of publication and responsibility for the defamatory search results and Autocomplete suggestions. The analysis would have to be applied in a consistent manner taking into account the different types of search output generated. Policy considerations and rationales relating to search engines which both support and run contrary to the legal principles will also be examined. It remains to be seen whether the new wine of search engines will fit the old bottles of existing defamation laws some of which may even have originated in the 19th century.

2. The legal principles: control, acts and/or omissions

Assuming the search results and Autocomplete suggestions (collectively, the "search output") are defamatory of the plaintiff, and it is shown that the search engine is to be regarded as a *publisher* of the search output, the search engine will be found legally liable for defamation unless it can raise a viable defence in the tort of defamation. Hence, the issue of publication will be one key aspect of this essay. I will analyse the issue of publication by reference to the search engines operator's conduct comprising both the relevant act and/or omission and its state of mind.

To ascertain search engine conduct in relation to the alleged publication of search results and Autocomplete suggestions, we need to first assess the element of control exercised by the search engine operator. The nature of the control and the extent thereof will form the background and context for analysing search engine conduct.

2.1. *Elements of control*

As a preliminary point, there must first be control in the operation of a search engine. In *A v Google New Zealand Ltd*,[1] defamatory statements posted on a website in US hosted by a third party were accessed via a search of the plaintiff's name. The search engine accessed the defamatory postings through www.google.co.nz, a domain name registered by Google Inc with NZ Domain Name Registry Ltd. The plaintiff requested the defendant, an indirect subsidiary of Google Inc incorporated in Delaware, to block access to the website. Google NZ could not remove the URLs from the searches through the New Zealand domain name as the search engine was operated by Google Inc, which also owned and controlled the domain name. The mere forwarding of a request by the defendant to Google Inc to remove the material did not render the defendant a publisher of the material. The subsequent case of *Rana v Google Australia Pty Ltd*[2] has endorsed a similar position in Australia.

In addition to the preliminary requirement of operational control, it is proposed that "control" be analysed as follows:

1) The first element of control involves the overall *design* of algorithms to enable the searches to be performed by users which then generate the search results (links, images and snippets) and Autocomplete suggestions. This includes the degree to which search results or Autocomplete suggestions are dependent on, amongst others, the popularity and currency of Internet inputs, and the key words used. Search engines possess design control based on the search algorithms that operate in an automated manner. Some of the Internet content would have already existed at the point of the implementation of the design rubrics. New content would be added to the Internet from time to time. In such an instance, the design is programmed *ex ante* which means that it takes place prior to the generation of the new content on the various websites from which the search results or Autocomplete suggestions may be derived.
   This first element of design control is of course not static. The search engine operator may modify the overall design rubrics from time to time such as the popularity rankings, key words and indexing.
2) The second element of control is with regards to the *content* on the various websites from which search results and Autocomplete suggestions are derived. First, the search output that are generated reflect the content of third party websites at the point in time the sites were last crawled by the computer robots; this means that subsequent changes in the various sites will not be captured in the search output until the next crawl.[3] When the website owners have made changes to their sites, they may request Google to do a "recrawl".[4] Secondly, search engines have the ability to exclude or filter certain word associations so as to prevent specific search results or Autocomplete suggestions from appearing. This can be done in various ways through robots exclusion protocols and metatags which instruct the search engine (such as Google) *not* to: index certain web pages; follow certain links on a specific web page; store a cached copy of a web page; and show a snippet from the

[1] [2012] NZHC 2352.

[2] [2013] FCA 60 [40].

[3] *Niemala v Malamas* 2015 BCSC 1024 [72].

[4] See Google Search at https://support.google.com/webmasters/answer/6065812?hl=en (accessed on 11 June 2018).

web page in search returns.[5] In this way, the search engines exercise control over the indexing of webpages. This ability to exercise control over the content from time to time overlaps with the first element of design control mentioned above. In addition, since 2014, Google may "prevent specified autocompletions of search queries being presented to a user".[6]

There are nonetheless limits to the search engines' control over content. Though search engines are able to block the URLs, the websites can change their URLs. Further, the search engine operator cannot block a URL containing particular search terms such as a specific name without blocking URLs containing similar names. Such filtering of words associations or blocking of URLs can take place before (*ex ante*) or after (*ex post*) the discovery or receipt of a complaint relating to the alleged defamatory search output.

3) The third element of control pertains to the *absence of control* over the *parties* making the searches. In fact, the search engine operator does not know the identity of the users who would make the searches or when the users would be making the searches. It does not have control over the actions of the party at the time of the posting of defamatory content from which the search results and Autocomplete suggestions may have been derived. In particular, the search engine operator does not have any control over what the third party user would key in as a search term. However, the search engine does possess some knowledge of which search queries have been made in the past.

In summary, the **Input–Output Model** for search engines may be represented as follows:

Inputs (search engine design rubrics or algorithms + the Internet content + user search terms) → (automated process) → **Outputs** (i.e. the search results and Autocomplete suggestions)

The case of *Google Spain SL, Google Inc. v Agencia Espanola de Proteccion de Datos and Mario Costeja Gonzalez* ("*Google Spain*"),[7] though not a defamation case, provided useful pointers on the control element. Some personal data regarding the data subject had been published by a Spanish newspaper, in two of its printed issues in 1998, both of which were republished at a later date in its electronic version made available on the Internet. The data subject argued that this information should no longer be displayed in the search results presented by the Internet search engine operated by Google, when a search is made of his name and surnames. The Court of Justice of the European Union agreed as the initial publication had taken place 16 years earlier and that the links to that information should be removed from the list of results.[8] On the question of control, it was noted by the European Court of Justice (Grand Chamber) that the combinations of the keywords and the URL addresses form the index of the search engine.[9] The search engine controls the index which in turn links key words to the relevant URL addresses. In essence, it determines how the index is structured, and it is capable of blocking certain search results, for example, by not displaying the URL addresses.[10]

In one of the earliest cases on search engine liability in defamation – *Metropolitan International Schools Limited (T/A Skillstrain and/or Train2Game) v Designtechnica Corporation (T/A Digital Trends), Google UK Limited, Google Inc*[11] – the first defendant maintained a website, which contained separate bulletin boards or forums. The claimant alleged that certain forum postings by users contained defamatory materials concerning the claimant and sued the third defendant, which owned and operated the search engine technology, for publishing a search return for the threads containing such defamatory statements. An Internet search performed on 'Train2Game' (the trading name of the claimant) produced the search result 'Train2Game new SCAM for Scheidegger' (which was the former trading name of the claimant). The English court held that as it is the user, rather than the third defendant, who formulates the search terms, the third defendant is not a "publisher" of the defamatory material. This relates to the absence of control over third party searches (third element). Moreover, with respect to overall design control (first element), the court noted that the web-crawling "robots" performed the search and there was no human agent involved in the process.

An analogy was drawn by the English court between the search engine operator and a compiler of a library catalogue which would not be responsible for the *contents* of the books in the physical shelves. Further, the third defendant could not exercise any control over the search terms typed by the *third party users* and hence should not be regarded as having authorised or acquiesced in the process. Eady J also noted that an injunction against the third defendant to restrain the publication would be futile as it would not be able to prevent a person from making searches. Even if it blocked certain URLs, it would not be able to prevent the third party from using a different URL to avoid the block, thereby suggesting there are limits to control over content. Unlike other Internet intermediaries, the search engine operator was not in a position to "take down" the offending material. As Justice Eady in *Metropolitan*[12] noted,

> A search engine, however, is a different kind of Internet intermediary. It is not possible to draw a complete analogy with a website host. One cannot merely press a button to ensure that the offending words will never reappear on a Google search snippet: there is no control over the search terms typed in by future users. If the words are thrown up in response to a future search, it would by no means follow

[5] David Lindsay, "The 'right to be forgotten' by search engines under data privacy law: a legal and policy analysis of the Costeja decision" in Andrew T Kenyon (ed.), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016) p. 203.

[6] *Google v Duffy* [2017] SASCFC 130 para [29], *per* Kourakis CJ.

[7] Case 131/12, *Google Spain SL v Agencia Espanloa de Proteccion de Datos and Mario Costeja Gonzalez* [2014] CMLR 50 (ECJ (Grand Chamber)).

[8] This "right to be forgotten" in respect of personal information is further discussed in Section 5.1 below.

[9] *Google Spain SL* para [73].

[10] *Google Spain SL* para [91].

[11] [2011] 1 WLR 1743.

[12] [2011] 1 WLR 1743 [55].

that the Third Defendant has authorised or acquiesced in that process.

From the discussion above, Justice Eady seemed to have focused on the search engine's lack of control at the point when search results are generated by the user's search inputs. The learned judge did not however specifically consider the existence and level of *ex ante* control exercised by the search engine operator (such as in designing the search algorithms) *prior* to the searches and actual production of search results. In this regard, it would be pertinent to examine the level of human agent involvement in the design of algorithms even if it was the robots which automatically performed the searches. One approach would be to treat the algorithmic programmes as a *tool* used by humans to produce the search output.[13] In such an analysis, the human should remain responsible for the effects or results generated by the tool assuming the latter performs as originally designed.

Similar to *Metropolitan*, in the subsequent Australian decision in *Bleyer v Google Inc*,[14] the Supreme Court of New South Wales took the view that there was no human input in the application of Google's search engine apart from the creation of the algorithm. Hence, Google could not be held liable as a publisher for the results. Again, it is submitted that we cannot exclude human agency from the entire search process which begins in the first place with the overall design control. It is fair to say that though search engines have put in place the automated search process, that automated process is afterall based on algorithms that were originally designed by human agents. There is clearly an element of human autonomy and choice in the way the algorithms are programmed, not to mention the subsequent control that may be exercised over content. This issue will be further explored in the subsequent developments taking place in Australia and Hong Kong.

In summary, the search engine exercises design control in the use of algorithms as well as control over the index and key words and is capable of excluding specific terms. In this regard, the search engine is not a mere conduit. However, the search engine does not have control over the specific contents of postings except indirectly in its indexing of key words and terms, and certainly does not have direct control over the acts of the users in imputing search terms. The huge volume of postings on the Internet also renders the tasks of controlling individual search output onerous. Hence, overall, it does not exercise any editorial judgment (*ex ante* content control) over the allegedly defamatory search output.

2.2. *Acts*

Bearing in mind the control elements, we now examine whether there is any relevant act of publication that may be attributed to the search engines. In this regard, we should be sensitive to the specific types of search output when considering the issue of publication.

One category of search output is the alleged defamatory content found in hyperlinks generated by search engines. In *Crookes v Newton*,[15] the majority[16] held that the act of hyperlinking defamatory material does not constitute publication of the hyperlinked defamatory content. The act of hyperlinking merely makes reference to the *existence* of the hyperlinked material but *not* its *content*. Moreover, there is no control over the hyperlinked material[17] and the hyperlinker did not participate in the creation and development of the content.[18] One relevant question here is whether a selection of hyperlinks generated by the search engine in response to users' search queries should be treated in the same manner.

The snippets, on the other hand, are extracts from Internet content found in various websites. In generating these snippets, the search engine may be repeating defamatory content from those websites albeit in the form of extracts. Such extracts may have the same defamatory meaning as the original content from the websites, or a different defamatory meaning due to the truncated content or may not be defamatory at all. Assuming it has the same defamatory meaning as the original content, the search engine would under the repetition rule be liable for defamation to the same extent.[19] In addition, images matter may be generated by the search engine. The placement of images, for example, in association with the photos of certain well-known and unsavoury characters or in conjunction with some derogatory language may give rise to defamatory imputations.

Autocomplete suggestions are association of words or phrases generated as and when the user keys in the search terms. Unlike the snippets, these word associations are not repeated content from other Internet sources. It has been argued that "the suggested terms constitute more than a mere technical and passive reflection of other users' search queries. Rather, from the perspective of an ordinary reasonable person, the search engine creates and publishes new content."[20] In *Dr Yeung Sau Shing Albert v Google Inc*,[21] the Hong Kong court noted that Google Inc. "recombines" and "aggregates" data from web content, "reconstitutes" aggregations based on what other users have, at one point in time, typed and then 'transforms' that data into suggestions and predictions.

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[13] *Century 21 Canada Limited Partnership v Rogers Communications Inc and Anor* 2011 BCSC 1196 (2 September 2011) para [129]; cited in *Dr Yeung Sau Shing Albert v Google Inc* [2014] 5 HKC 375.

[14] [2014] NSWSC 897.

[15] [2011] 3 SCR 269.

[16] Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ.

[17] [2011] 3 SCR 269 [26,27].

[18] [2011] 3 SCR 269 [28]. Cf the copyright infringement case in *GS Media BV v Sanoma Media Netherlands BV and others* ECLI:EU:C:2016:644, European Court of Justice (8 September, 2016)(that the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' under Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 depends on whether the links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website; and where those links are provided for such a purpose, knowledge must be presumed.).

[19] See *Metropolitan International Schools Limited* [2011] 1 WLR 1743 [52], *per* Eady J.

[20] Jan Oster, "Communication, Defamation and Liability" (2015) 35(2) *Legal Studies* 348 at 359.

[21] [2014] 5 HKC 375.

The descriptors "passive" versus "active" role or involvement – which has been utilised by courts to differentiate a publisher from a non-publisher of defamatory content – are in themselves not sufficient. At times, the language is used in the context of establishing an act or omission to show publication or responsibility or otherwise (such as whether an intermediary is a mere conduit for the defamatory content passing through). In other cases, it appears to refer to the mental elements associated with the publication (such as the test of "knowing involvement" in *Bunt v Tilley*). More analysis would be required to distil the nature and type of acts and/or omissions and the state of mind respectively that would satisfy the "publication" requirement.

2.2.1. *Adoption and endorsement of defamatory search output not a relevant act of publication for search engines*

The search engine operator may generate hyperlinks to defamatory content in response to search queries. McLachlin CJ and Fish J in *Crookes v Newton* – not a case about search engines but a website operator – stated that a hyperlink contained in the text would amount to publication if the text, read contextually, indicates "*adoption or endorsement of the content of the hyperlinked text*".[22] The terms "adoption" and "endorsement" imply some form of agreement whether expressly or impliedly on the part of the search engine with respect to the contents. This means that the defamatory content, if so adopted or endorsed, would be treated as incorporated into the text of the search results via the hyperlink.

For the series of links generated by the search engine operator, it is difficult to regard the search engine operator as having adopted or endorsed the entire set of links. First, some of the links may well be inconsistent in content with each other. Secondly, the list of snippets generated by the search engines, to the extent that they merely repeat the defamatory content in the original postings, do not suggest that the search engine was adopting or endorsing the contents.

Moreover, the adoption or endorsement of defamatory content is a sufficient though not a necessary condition for publication. In *Australian Competition and Consumer Commission v Google Inc*,[23] the Federal Court of Australia held that a sponsored link by an advertiser that is displayed by Google's search engine constitutes a response by Google to the user's search. It is made available to the advertiser by Google's search engine through the use of its algorithms. Nicholas J, the primary judge at first instance, found that Google had only represented the sponsored links as advertisements without endorsing or adopting them and hence decided that Google had not engaged in misleading or deceptive conduct under the Australian Trade Practices Act 1974.[24] The Federal Court disagreed with Nicholas J's holding, stating that Google's conduct cannot be described as "merely passing on the statements of the advertiser". Keane CJ, Jacobson and Lander JJ also opined that:[25]

> … it is an error to conclude that Google has not engaged in the conduct of publishing the sponsored links because it has not adopted or endorsed the message conveyed by its response to the user's query.

The user entered the keyword to seek information about a particular advertiser; Google responded to the search query by providing the user with the URL of one of the advertiser's competitors and therefore Google's response was held to be misleading.

As argued in *Crookes v Newton*, the mere fact that the search engine presents the links as a response to the search query should not be treated as equivalent to the publication of the hyperlinked defamatory content.[26]

For Autocomplete suggestions, Karapapa and Borghi[27] noted that they are based on the automated processing of the users' searches and as such, are not independent and autonomous outputs of the search engine's algorithm. Even though human agents are involved in the design of the algorithms, it would still be a stretch to argue that the search engines adopt or endorse any of the Autocomplete suggestions.

2.2.2. *Drawing of attention to defamatory search output not a relevant act of publication for search engines*

To use an analogy from the traditional non-Internet context, the defendant in *Hird v Wood*[28] who pointed at the placard containing allegedly defamatory words with his finger and attracted attention to it, was taken to have published the defamatory words. The *Hird v Wood* test has been applied to the Internet in *Carter v BC Federation of Foster Parents Association*[29] in which the defendant's printed newsletter made reference to a forum on a website that contained a defamatory comment. The Canadian court held on the facts that the defendant did not take active steps to draw attention to the forum containing the defamatory comments.[30]

Can we say that search engines draw users' attention to search results and suggestions which the users would have not otherwise have found or envisaged? It is argued that *Hird v Wood* may be distinguished from the purported acts of search engine. The act of pointing at the placard was drawing attention to a specific defamatory statement. On the other hand, the acts of search engines in showing the links, images, snippets and Autocomplete suggestions, are drawing the users' attention to the list of possible results and

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[22] [2011] 3 SCR 269 [48] and [50].
[23] [2012] FCAFC 49.
[24] (Cth), section 52.
[25] [2012] FCAFC 49 at [87].

[26] See *Niemela v Malamas* 2015 BCSC 1024 [60] which adopted the position in *Crookes v Newton* and concluded that the search engine is not a publisher of the URLs in the search results.
[27] Stavroula Karapapa and Maurizio Borghi, "Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm" (2015) 23 International Journal of Law and Information Technology 261 at 269.
[28] 38 Sol J 234. Following the termination of business due to the legal action of the plaintiff, a placard was set up which contained a notice that subscriptions might be donated to the former owners of the business "who have been ruined in their business and their living taken away by the animosity of one man" i.e. the plaintiff.
[29] (2005) 42 BCLR (4th) 1.
[30] See also *MacFadden v Anthony* 117 NYS 2d 520 (1952) (that "Winchell's radio broadcast calling attention to the previous publication of Collier's Magazine containing the alleged libel, and without re-uttering any of the defamatory matter contained in said Collier's article, is not a republication or publication of a libel"); and *Klein v Biben* 296 NY 638 (1946).

suggestions that the user may wish to refer to. That is, unlike in *Hird v Wood*, the search engine is not specifically drawing attention to a specific defamatory output as such but merely making reference to the list of possibilities for the users' consideration. Moreover, some of the content in the list of possibilities may not be defamatory to begin with.

2.2.3. Participation in and/or lending assistance to the publication as a positive act of publication for search engines

The test of intentionally lending assistance for the purpose of publication has already been referred to in pre-Internet cases.[31] In *Webb v Bloch*,[32] the test was whether the defendant had "intentionally lent his assistance to its existence for the purpose of being published, his instrumentality is evidence to show a publication by him." Before the Internet era, the distribution of newspapers by the editors, vendors, and retailers would constitute an act of participating in the publication.

With particular regard to search engines, Beach J in *Trkulja v Google Inc & Anor (No 5)*[33] stated that, based on Google's algorithmic processes operating and generating content as intended by them, it had lent assistance to publication. In another Australian decision, *Google Inc v Duffy,*[34] searches for Duffy's name on Google's search engines resulted in the display of snippets from and hyperlinks to the website known as Ripoff Report. Searches for her name on Google resulted in the display by Google's Autocomplete utility of the alternative search term "janice duffy psychic stalker". With regard to the snippets, the court held that "Google participated in the publication of the paragraphs about Dr Duffy produced by its search engine because it intended its search engine to do what it programmed it to do".[35] It was further explained that:

> Google's search results are published when a person making a search sees them on the screen … It is Google which designs the programme which authors the words of the snippet paragraph. Google's conduct is the substantial cause of the display of the search result on the screen.[36]

Hence, the search engine operator had participated in the publication on the basis of its overall design control in programming the search engine which was the substantial cause of the publication of the defamatory search results. There was participation in the publication process notwithstanding the search engines' lack of control over the users and the search terms. Building upon the "substantial cause" requirement, it is possible that certain snippets or images may not have been downloaded or accessed by any person (i.e. published) if it were not for the search engine's algorithmic process. It should, however, be noted that such participation is with respect to the publication of search output generally and does *not* imply knowledge of the search engine concerning any *specific* search output.

The Hong Kong court in *Dr Yeung Sau Shing Albert v Google Inc*[37] had to consider whether Google Inc should be considered the publisher of the Autocomplete suggestions and related searches and decided that there was 'plainly a good arguable case' that Google Inc. was not a mere passive facilitator. The learned judge appeared to have utilised both the bases of Google's participation and lending of assistance to publication of defamatory material:[38]

> … it is plainly arguable that a search engine (including Google Inc) that generates objectively defamatory materials by its automated processes is a 'publisher' within the meaning as explained in *Fevaworks Solutions Ltd*. … they provided the platform for dissemination and/or encouraged/facilitated or actively participated in the publication with intent to assist in the process of conveying the impugned words to publishees…

Whilst the search engine's acts may be described as participation and/or lending assistance to the publication, it is submitted that the reference to the provision of a platform for dissemination and the act of "encouraged/facilitated" in the above quote would be more pertinent to describe the acts of the provider of a discussion forum in *Fevaworks* rather than search engines.

Cheung[39] regarded Google's role in Autocomplete suggestions as neither entirely passive nor active but "interactive". This is because Autocomplete responds to the search query as the user types his or her query without the user completing his search query, it is akin to a "search-in-progress". The search engine may be regarded, according to Cheung, as a "special intermediary processor" following a German Federal Court decision.[40] Further, Google's involvement in Autocomplete suggestions is "unique" in its contribution to defamatory content. On one hand, the Autocomplete suggestions are generated based on the Internet content previously uploaded by third party users. On the other hand, the Autocomplete suggestions are dependent on contemporaneous searches made and are not a repetition of the original content. Based on the interactive nature of the search engine's role in generating the Autocomplete suggestions, the concept of "participation" in the publication of Autocomplete suggestions appears quite apt.

Finally, for the avoidance of doubt, participation in the business of a search engine operator does not necessarily mean participation in the publication. Google Inc's subsidiaries may seek to promote and sell keyword advertising

[31] Eg Webb v Bloch [1928] HCA; 41 CLR 331 (members of the committee confirmed their instructions to a solicitor to publish the defamatory material).
[32] [1928] HCA; 41 CLR 331.
[33] [2012] VSC 533.
[34] [2017] SASCFC 130 (Supreme Court of South Australia).
[35] [2017] SASCFC 130 para [155].
[36] [2017] SASCFC 130 para [181].
[37] [2014] 5 HKC 375.
[38] [2014] 5 HKC 375 para [103].
[39] A S Y Cheung, "Defaming by suggestion: Searching for Search Engine Liability in the Autocomplete Era" in Koltay, A (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest: Wolters Kluwer, 2015 at pp. 467–486.
[40] The German court imposed a duty to monitor, block and prevent predictions of defamatory content on the search engine upon receipt of the notice of complaint. See BGH, 14.05.2013, VI ZR 269/12; and German Federal Court of Justice, "Liability of Search Engine Operator for Autocomplete Suggestions that Infringe Rights of Privacy – "Autocomplete" Function" (2013) 8(10) Journal of Intellectual Property Law & Practice 797.

within the respective jurisdictions[41] but this does not amount to partaking in the operation of the search engine. Google Australia, which is a subsidiary of Google Inc, does not operate or control the Google web search. In *Defteros v Google Inc and another*,[42] Defteros' argument that Google Australia "participated in the business" of Google USA and therefore was a publisher of search results was firmly rejected. The evidence, at its highest, only showed that Google Australia provided sales and marketing support to Google USA, advertised the services, and received payment from Google USA for those services.

2.3. *Omissions*

Apart from search engine's positive acts, we should consider whether publication by omission may be a good justification for search engine responsibility. This doctrine – which is essentially based on the defendant's failure or omission to remove the defamatory material previously posted by a third party in circumstances giving rise to an inference that the defendant had consented to such posting – was enunciated in the English case of *Byrne v Deane*[43] and subsequently applied to the Internet context. The plaintiff was a member of a golf club and the defendants were the proprietors of the club and secretary, respectively. The rules of the club stated that "no notice or placard shall be posted in the club premises without the consent of the secretary". An anonymous person put up an allegedly defamatory verse concerning the plaintiff on the wall of the club. Greer LJ linked the elements of control and knowledge to the act of partaking in the publication:[44]

> In my judgement the two proprietors of this establishment by allowing the defamatory statement, if it be defamatory, to rest upon their wall and not to remove it, with the knowledge that they must have had that by not removing it it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

The acts of participation in the process of publication, if any, should take place prior to or at the time of publication. Here, it is difficult to suggest that the club owners were participating in the publication of the defamatory verse unless there were positive acts by the club owners evidencing such participation. It is artificial to regard the setting up of the notice board per se as constituting the very act of participation.

Slesser LJ[45] observed that control over the posters on the wall had passed to the second defendant (the secretary) and therefore the first defendants (the proprietors) were not responsible for the publication. Greene LJ[46] opined that affixing posters on the wall without permission was an act of trespass and the defendants had ample power to remove them from their property. In contrast with Greer LJ, Greene LJ linked the elements of control and knowledge to the defendant's *consent* to publication:[47]

> Removal of this particular notice was a perfectly simple and easy thing to do involving no trouble whatsoever. The defendants, having the power of removing it and the right to remove it, and being able to do it without any difficulty at all, and knowing that members of the club when they came into the room would see it, I think must be taken to have elected deliberately to leave it there. The proper inference, therefore, in those circumstances it seems to me that they were consenting parties to its continued presence on the spot where it had been put up. That being so it seems to me that they must be taken to have consented to its publication to each member who saw it.

Simpson J in *Frawley v New South Wales*[48] reiterated that consent is the overarching test for publication by omission:

> It is essential that the plaintiff prove that the defendant … consented to the publication. This could be inferred from the fact (if it be the fact) that that person has control over the matter complained of but fails to take any steps to prevent the publication, or to prevent the continued publication.

In similar vein, the Australian court *Urbanchich v Drummoyne Municipal Council*[49] stated that "[t]he complainant must establish in one way or another an acceptance by the respondent of some responsibility for the continued publication of that statement." Hunt J rejected the imposition of a positive duty on an individual to remove defamatory material, except where they have "in fact accepted a responsibility for the continued publication of those posters". Pivotal to the acceptance of responsibility for a publication was the actual knowledge of the existence (but not necessarily the defamatory content) of the publication.

Byrne v Deane was applied in the English Court of Appeal decision in *Tamiz v Google Inc*[50] to Internet intermediaries. Defamatory comments were posted on a blog hosted by Blogger.com which was operated by Google. The court in *Tamiz* stated that if Google had allowed defamatory material to remain on the Blogger.com blog after notification of defamatory material, "it might be inferred to have associated itself with, or to have made itself responsible for, the continued presence of that material on the blog and thereby to have become a publisher of that material".[51] This appears to be an *ex post* analysis of the events in order to give rise to an inference of responsibility for the publication. However, it should be clarified that Google had not, by consenting to the continued presence of the material, committed the act of publication. The fact of publication should be distinguished from the acceptance of responsibility for the publication. The decision, in my view, may be better explained on the ground that Google, in providing the design tools, putting up the notice

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[41] David Lindsay, "The 'right to be forgotten' by search engines under data privacy law: a legal and policy analysis of the Costeja decision" in Andrew T Kenyon (ed.), *Comparative Defamation and Privacy Law*, Cambridge University Press, 2016, p. 207.
[42] [2017] VSC 158 [64] (4 April 2017).
[43] [1937] 1 KB 818.
[44] [1937] 1 KB 818 at 830.
[45] [1937] 1 KB 818 at 836
[46] [1937] 1 KB 818 at 837.
[47] [1937] 1 KB 818 at 838.
[48] [2007] NSWSC 1379.
[49] (1991) Aust Torts Reports 81-127, 69, 193, *per* Hunt J.
[50] [2013] 1 WLR 2151.
[51] *Tamiz v Google Inc* [2013] 1 WLR 2151 [34], *per* Richard LJ. For a similar decision, see *Davidson v Habeeb* [2012] 3 CMLR 6.

boards and enabling the blogger to display advertisements, had lent assistance to the publication. In any event, it should be clarified that the *Tamiz* decision, which is focused on the potential liability of the operator of a blogging platform, did not change the *Metropolitan* position in England which is that a search engine is not a publisher of defamatory search output.

According to the Hong Kong Court of Final Appeal in *Fevaworks*,[52] *Byrne v Deane* should not be applicable to justify the liability of the provider of the Internet discussion forum. The Hong Kong court opined that the provider of a discussion forum is in a wholly different position from that of the occupier of premises who is not in the business of publishing or facilitating publication at all, but who has had imposed on him the defamatory act of a trespasser. Moreover, publications on the Internet involve a qualitatively different process that is characterised by open, interactive, "many-to-many" communications made and accessed on platforms provided by Internet intermediaries.

The purpose of publication by omission[53] is to supplement the absence of a positive act of publication on the part of the defendant by reference to knowledge, control and reasonable care. Such a positive act of publication may be distinguished from publication by omission in two ways. First, the term "publication by omission" should be qualified in that there is no actual act of publication by the defendant. The focus is instead on making the defendant responsible for the prior act of publication of the person who had posted the original content based on the defendant's consent to the continued presence of the content.

Second, the fact of publication must be distinguished from the defendant's consent to or acceptance of legal responsibility for the acts of third parties posting the content. Whilst the fact of publication takes place when the original posting was made, legal responsibility under the doctrine of publication by omission arises only at the point when the search engine operator possesses the relevant control and knowledge of defamatory search output upon receipt of a notification or complaint and it has the ability to remove the output. Thus, the failure to remove the offending output is irrelevant for assessing whether there was (*ex ante*) a positive act of participation in the publication process.

Given the above, the doctrine of "publication by omission" is on the whole not appropriate for assessing search engine liability in defamation. The trespasser context in *Byrne v Deane* is not apt to describe the actions of the Internet user who makes a search using a search query. Further, in the case of Autocomplete suggestions, the generation of new content in the form of the word associations which defame the claimant is the act of the search engine not the primary authors. In the case of the snippets, the search engine generates via its automatic search process the search results derived from the original content in response to a specific search query. Instead of analysing the actions as amounting to consent to the continued presence of defamatory material, it is more apt to describe the search engine as having participated or assisted in the publication of the snippets and Autocomplete suggestions at the point when the search output was being generated. Finally, in terms of control, it is not always easy to remove the search output as the search engines can only block the URLs or remove links unlike the case in *Byrne v Deane*.

3. The mental element: knowledge and intention

The English case of *Metropolitan International Schools Ltd* suggests there needs to be a mental element in connection with the publication, which was absent in that case. The search was performed automatically and did not involve any input from the search engine, 'which had not authorised or caused the snippet to appear on the user's screen in any meaningful sense but had merely by the provision of its search service played the role of a facilitator'[54] (though, as we have mentioned above, there is clearly an element of human agency in the design of the algorithmic search process). The upshot of *Metropolitan* is that even if the search engine was notified of libellous search output, it would nevertheless *not* be responsible as a publisher of the output.

In similar vein, *Bunt v Tilley*[55] established the principle that if the role of the Internet intermediary was merely passive with respect to the dissemination of the material, it should not regarded as a publisher. The Internet service providers (fourth to sixth defendants i.e. AOL, Tiscali, BT) successfully obtained applications to strike out the claims against them as they were not publishers of the postings. To be liable, defendant must be knowingly involved in the process of publication.[56] AOL, Tiscali and BT were not aware of the allegedly defamatory postings. Thus, the "ISPs do not participate in the process of publication as such, but merely act as facilitators in a similar way to the postal services. They provide a means of transmitting communication without in any way participating in that process".[57] Hence, facilitating the transmission of communications *without* any *knowledge* in the process does not give rise to liability for the Internet service providers.

3.1. *Actual knowledge of the fact of publication and intention to publish*

With regard to the knowledge requirement, it is argued that actual knowledge of the operator as to the fact of *publication* of the specific defamatory search output would be required for legal liability. In contrast to the *Metropolitan* position, the

[52] *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2013] HKCFA 47; [2013] 5 HKC 253.

[53] See a similar US concept of "affirmative duty to remove": see Restatement (Second) of Torts, § 581 ("Transmission of Defamation Published by Third Person (1) … one who delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character"); and § 577(2) ("[o]ne who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication") which is reminiscent of the English case of *Byrne v Deane*.

[54] [2011] 1 WLR 1743 at 1757.

[55] [2006] 3 All ER 336.

[56] But it is not necessary for the publisher to be aware that the contents of the postings in question were defamatory.

[57] [2006] 3 All ER 336 [9].

search engine should be legally responsible as a publisher to the extent that it has actual knowledge of the specific search output (namely snippets, images and Autocomplete suggestions) which are generated by the programme that it has intentionally designed and modified.

An interesting question is the precise time at which knowledge or intention on the part of the search engine arises for the purpose of establishing the "publication requirement" in defamation. Beach J in *Trkulja v Google (No 5)*[58] stated that "... Internet search engines, while operating in an automated fashion from the moment a request is typed into them, operate precisely as intended by those who own them and who provide their services". At the point of design of the search algorithm, the allegedly defamatory material may not have been posted. If so, the intention to publish by the search engine would not be relevant for the purpose of assigning legal responsibility for the specific defamatory material. It is only at the point in time when the user types a search query which generates the specific defamatory search output that is accessed by a third party that the search engines' intention to publish would become relevant. However, at this stage, though the search engine has committed an intentional act of publication of search output generally, there may not be any actual acknowledge of any *specific* search output that has been generated.

By actual knowledge, we mean the knowledge acquired by humans of a specific search output not the information embedded in the artificial computer systems. Hence, actual (human) knowledge arises upon the notification or receipt of complaint by the human agents (for example, the engineers of the search engine) in the ordinary course of work on behalf of the search engine company with respect to a particular search output. In *Google Inc v Duffy*,[59] the court stated that, upon notification, the search engine will be attributed with knowledge of subsequent publications its search engine is likely to produce if it does not take steps to block the offending URL. Hence, legal responsibility should only arise when the search engine possesses actual knowledge of the defamatory output and it does not remove the offending links after a reasonable period of time.

This is consistent with the New Zealand Court of Appeal's decision in *Murray v Wishart*[60] that proof of the Facebook host's actual knowledge of the existence of defamatory third party comments on his Facebook page is required for publication. Proof of constructive knowledge, on the other hand, was held to be insufficient to establish publication. This position is correct. Assume that the lower threshold of constructive knowledge were to be accepted. In such a case, the search engine may not know that it has via its automated process generated the relevant snippets, images or Autocomplete suggestions. It cannot therefore be said to have intentionally participated in or lent assistance to the publication of a specific search output. Adopting the constructive knowledge test implies that the search engine would become legally responsible as publisher once the defamatory comments, which the search engine ought to know will likely be posted, has been posted. Accepting constructive knowledge as a threshold would therefore run contrary to the existing requirement that the defendant be shown to have intentionally published the material in question.

Let us apply to the different types of search output. As discussed above, the search engine, in generating the snippets in response to users' search queries, is repeating or re-publishing content from other Internet sources which have already been published. For Autocomplete suggestions, the word associations generated from the typing of search terms by the user are arguably new content.[61]

With regard to responsibility for repetition/republication of the snippets, the repeated/republished content must be the same or substantially similar to that of the original posting.[62] Hence, with respect to the snippets, as long as they adhere to the substance of the original defamatory postings by the original author, that would suffice as a repetition/republication of the defamatory posting. The repetition rule applies to render the search engine liable for repeating defamatory statements even if the source is from the original author unless the search engine has unequivocally denied or disassociated itself from the defamatory posting.[63]

Whether the search engine would reasonably foresee the repetition/republication of the *specific* defamatory output alleged by the plaintiff is less clear bearing in mind the enormous volume of information on the Internet at any given time.[64] The search engine would be hard put to foresee the search terms to be entered by the users. The level of foreseeability on the part of the search engine will have to be assessed by reference to the indexed key words or excluded terms as well as common searches made in the past. If there are certain clearly offensive terms that have not been excluded by the search engine which it would reasonably foresee to lead to the generation of specific defamatory search results, the search engine may be held responsible for those specific search results. The foreseeability of consequences of the overall design is based on the frequency of searches and the available content on the Internet which is subject to content to be uploaded by Internet users in future. Compared to the contents to be monitored by a host of a Facebook page as in *Murray v Wishart*, the materials available for dissemination on the Internet and tracked by the search engine are significantly more voluminous.

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[58] [2012] VSC 533 [27], *per* Beach J.

[59] [2017] SASCFC 130 [185] and [596].

[60] [2014] 3 NZLR 722.

[61] Ghatnekar's reference to Autocomplete as an "algorithm based re-publisher" is therefore not entirely accurate: see Seema Ghatnekar, 'Injury by Algorithm: A Look into Google's Liability for Defamatory Autocompleted Search Suggestions' (2012–2013) 33 *Loyola of Los Angeles Entertainment Law Review* 171 at 201 (the concept lies between a distributor and a typical publisher).

[62] See *The Wellness Group Pte Ltd and another v OSIM International Ltd and others and another suit* [2016] 3 SLR 729 that the defendant would be liable for a republication of the defendant's original statement where the republication adheres to the sense and substance of the statement given by the defendant.

[63] *Bik v Mirror Newspapers Ltd* [1979] 2 NSWLR 679.

[64] See *Delfi AS v Estonia* Application no 64569/09 (Grand Chamber, European Court of Human Rights, 16 June 2015) on the liabilities of an Internet news portal for third party comments based on their constructive knowledge that the portal will generate the offending comments.

Overall, the test of reasonable foreseeability or constructive knowledge of publication would give rise to uncertainty in application and outcomes with regard to search engines. The actual knowledge test is preferred. A useful proxy for determining actual knowledge would be the receipt of notification or complaint of allegedly defamatory search output.

3.2. *Knowledge of defamatory nature of content not necessary for publication*

Proof of knowledge as to the *defamatory nature* of the search output should *not* be required. Due to the strict liability nature of defamation, there is no need for proof of intention to defame.[65] This fundamental nature of the tort of defamation should not be changed as we seek to find appropriate solutions to ascertain the publication requirement.

Beach J in *Trkulja v Google (No 5)*[66] held that "it was open to the jury to conclude that Google Inc was a publisher – even if it did not have notice of the content of the material about which the complaint was made". The court in *Google Inc v Duffy*[67] also decided that it was not necessary to prove that Google had knowledge of or adopted the contents of its search results. Oster[68] provided a different explanation: 'publication', better understood as 'communication', is to be conceptualised as a merely *factual* requirement for the liability of communication intermediaries for defamation; thus, in order to be considered 'publisher', awareness of the *fact* of communication is required, but not knowledge of the publication's defamatory content.

An analogy may be drawn to the repetition rule in defamation already discussed above. A person who repeats a defamatory statement from a specific source is similarly liable as the source. The search engine in generating the snippets from the original defamatory postings, to the extent that they are substantially similar, should be liable as publishers of the snippets even if it did not have specific knowledge that the content was defamatory.

There is a related issue as to what the search engine operator should do when confronted with a notification of defamatory search result. Should it block the relevant URL or take down the posting? Should it remove search results only from websites associated with a specific country's domain name or on a global basis?[69] Should it determine whether the content was in fact defamatory or whether there are viable defences? Taking down defamatory search results without a court order amounts to interference with free speech akin to the granting of an interim mandatory injunction in favour of the complainant without any finding on the merits that the search result was indeed defamatory and that there are no viable defences. However, if search engines do not block the URL or take down defamatory search results, they run the risk of being sued for defamation and may be obliged to compensate for damages and bear legal costs should the court determine they are responsible.[70] To deal with this problem of uncertainty, detailed statutory rules may have to be designed for search engine operators.[71]

Insofar as the common law position is concerned, it is submitted that only proof of the actual knowledge of the *fact* of publication would trigger the search engine's responsibility to remove the offending postings unless the content of the postings was assessed by the search engine to be not defamatory. If the search engine does not take down the offending material upon notification within a reasonable time and the court subsequently finds the search output to be defamatory, the search engine may be liable for the additional damages suffered after a reasonable time period has lapsed. Alternatively, an injunction may be ordered to remove the offending output.

4. Search engines as secondary publishers and defence of innocent dissemination

If the requirement of proof of actual knowledge of the *fact* of publication on the part of search engines is not accepted, it is proposed that the defence of innocent dissemination be available as another layer of protection to search engines. This defence is only available to distributors of defamatory material (secondary publishers) as opposed to the original authors or editors of such content (primary publishers).

The factors of control and knowledge are relevant for determining whether a person based on a given set of facts should be regarded as a primary or secondary publisher. The Hong Kong decision in *Oriental Press Group Ltd v Fevaworks Solutions Ltd*[72] applied both the knowledge and control criteria to determine that the provider of an Internet discussion group was indeed a subordinate publisher. This was because the provider was not aware of the content of the postings and did not exercise sufficient editorial control to prevent their dissemination.

Like newsvendors and distributors, a search engine operator would at the most qualify as a secondary publisher given that it does not exercise any editorial judgment or control prior to the publication of the defamatory search output. In

[65] See *Cassidy v Daily Mirror Newspapers, Ltd* [1929] 2 KB 331 (that the lack of intention or motive of the defendant in publishing is not a valid defence against liability in defamation).

[66] [2012] VSC 533 [30], *per* Beach J.

[67] [2017] SASFC 130 para [156].

[68] Jan Oster, "Communication, Defamation and Liability" (2015) 35(2) *Legal Studies* 348 at 349.

[69] See e.g., *Macquarie Bank Limited v Berg* [1999] NSWSC 526 [13–15] (where injunction to restrain online defamation was refused due to its potential global effect); *Google Inc v Equustek Solutions Inc.* [2017] 1 SCR 824 (worldwide interlocutory injunction granted to stop the use of websites to unlawfully sell intellectual property of another company in breach of court orders).

[70] But see article by Chris Silver Smith on "Google thaws (a little) on defamation cases" on the recent practice by Google not to remove defamatory content upon receipt of court orders in the US though there have been a few cases where Google has responded at https://searchengineland.com/google-thaws-little-defamation-cases-271612 (accessed on 11 June, 2018).

[71] Inspiration may be drawn from the provisions for website operators in the UK Defamation Act 2013, Section 5 (that it is a defence if the website operator did not post the defamatory content but such defence can be defeated in specified circumstances where the claimant proved that it was not possible to identify the original author, the claimant has notified the operator and the operator had not responded in accordance with the regulations.)

[72] [2013] HKCFA 47; [2013] 5 HKC 253.

Google v Duffy, as it was practically impossible for Google to review the contents of the search results before the display on screens, the search engine was treated as a secondary publisher of the search results.[73] Google was a participant in the publication of the snippets. It did not have advance knowledge of the contents of search results. As a result, knowledge of the search results and defamatory contents should not be attributed to it until notice is given.[74] This may be contrasted to the situation for primary publishers (such as authors or editors) who are presumed to be aware of the defamatory contents at the point of publication.

It should also be highlighted that the control element is not evaluated in an "all or nothing" fashion but is measured in degrees. The degree of control may be inversely related to volume of potential search results. To the extent that the volume of potential content relevant to the search index is huge, the search engine would not be able, all other things being equal, to exercise as much control over the content. This factor is dependent on the state of technology. Embedded within the technology is also a conscious desire for greater speed in the generation of search results without the need for prior vetting.

In the case of *Dr Yeung*,[75] Justice Ng referred to Google as a secondary publisher and it could therefore raise the defence of innocent dissemination. Oster argued that publishers may invoke the defence of 'innocent publication' (also known as 'innocent dissemination') as a fault-based concept in that the defence is lost if there is knowledge of the unlawful content. He referred to the fault-based liability of *distributors: Emmens v Pottle, McLeod* and *Vizetelly* which were decided against the backdrop of defamation as a fault-based tort. [76]

The defence of innocent dissemination – which is originally available to secondary publishers such as vendors of newspaper (*Emmens v Pottle*[77]) and proprietors of a library (*Vizetelly v Mudie's Select Library Ltd*[78]) – can be applied to search engines. Traditionally, the defendant is in the ordinary course of business not liable for a publication in the newspaper or book if he can show that he did not know that it contained a libel; his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libel. Hence, the defence is based on the publisher's (lack of) constructive knowledge of the publication containing the defamatory words. In comparison, the UK Defamation Act 1996[79] appears to focus on the defendant's actual knowledge that it caused or contributed to the publication of the defamatory statement (though there is also the alternative ground of the defendant's reasonable belief).[80]

With respect to defamatory snippets and links to defamatory content on the website, Corbett[81] noted that the common law defence of innocent dissemination is available provided the defendant can show that its ignorance was not due to its negligence. One way of demonstrating this would be for the search engine provider to remove search results based on text analysis programs which can identify potentially defamatory material. With the advance of machine learning, the burden would rest on search engines in the near future to show why they could not have used it to detect patterns and potentially defamatory material in the search output.

It should be briefly noted that the EU E-Commerce Directive[82] provides defences for "information society service" which are "mere conduits",[83] or which provide caching[84] or hosting[85] services. These defences exempt the liability of intermediaries whose activities are of a "mere technical, automatic and passive nature"; significantly, the E-Commerce Directive adds that this implies the information society service provider has "neither knowledge of nor control over" the information transmitted or stored.[86] It is argued that search engine operators cannot be regarded as "mere conduits", and their operations extend beyond caching or hosting services. As mentioned above, search engines generate new content with respect to Autocomplete suggestions and they do not merely store, distribute, or facilitate the dissemination of content.[87] For snippets, the search engine repeats the content from the Internet websites though the manner of extraction of third party content may affect the defamatory meaning. Moreover, depending on the evidence, search engines can be shown to have participated in and lent assistance to the publication of the defamatory content with proof of actual knowledge of the fact of publication.

5. The policy arguments

Based on the application of existing legal principles in defamation above, it is clear that liability on the part of search engines remains though the scope should be restricted. First, it must be proved that the search engines have committed an intentional act of publication of the search output (based on evidence of participation in or lending assistance to publication) with actual knowledge of the fact of publication. Secondly, search engines could also avail themselves of

[73] [2017] SASFC 130 para [182].
[74] [2017] SASFC 130 para [184].
[75] [2014] 5 HKC 375.
[76] Jan Oster, "Communication, Defamation and Liability" (2015) 35(2) *Legal Studies* 348 at 355.
[77] (1885) 16 QBD 354.
[78] [1900] 2 QB 170.
[79] Section 1(1).
[80] See *Tamiz v Google Inc* [2013] 1 WLR 2151 (no defence for Google under section 1(1) because, upon notification, Google knew or had reason to believe that their hosting of the defamatory materials would cause or contribute to the publication of those materials).
[81] Susan Corbett, "Search Engines and the Automated Process: Is a Search Engine Provider "a Publisher" of Defamatory Material?" (2014) 20 NZBLQ 200 at 214.
[82] 2000/31/EC, Articles 12 to 14.
[83] Article 12 applies to intermediaries which merely transmit and provide access to third-party content.
[84] Caching is defined in Article 13 as the "automatic, intermediate and temporary storage of information".
[85] Hosting is defined in Article 14 as the "storage of information provided by a recipient of the service".
[86] Recital 42.
[87] Stavroula Karapapa and Maurizio Borghi, "Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm" (2015) 23 International Journal of Law and Information Technology 261 at 274–275.

the defence of innocent dissemination as a second layer of protection.

This brings us to the following questions: are there policy arguments that support or contradict this stance based on legal principles? Are there strong countervailing policy considerations that should override the outcomes arising from application of the abovementioned legal principles? We will discuss three sets of competing policy arguments and rationales.

5.1. *Search engine's freedom of speech versus reputational interests*

Volokh noted that the search engine operator is itself a "speaker"[88] based on the US First Amendment. It possesses the right to choose the content of the speech and what to exclude. The engineer exercises human editorial judgements. In the context of section 230 of the US Communication Decency Act, it has been argued that allowing defamation law suits against interactive computer services (which includes search engines) would run contrary to the policy objectives of promoting diversity of political discourse, generating opportunities for cultural development and preserving the competitive free market and thereby produce a chilling effect on free speech.[89] Furthermore, a search engine should not be expected to adhere to "some hypothetical and undefined expectations of abstract objectivity", and that "change in algorithm design should and would be expected".[90] A related argument is that due to the Autocomplete suggestions being based on popularity as a criterion for the algorithms, the notion of free speech is arguably based on the marketplace of ideas.[91] The same argument should also apply to other search output (snippets and images).

With respect to links provided by search engines in responses to users' search queries, the majority judges in *Crookes v Newton*, in denying the claim to treat the website operator as a publisher of defamatory materials – relied on arguments premised on protecting the freedom of Internet and freedom of expression. Free speech is however not absolute. Deschamps J in *Crookes v Newton* regarded reputation as equally important and advocated that a hyperlinker should be treated as a publisher of hyperlinked content provided the hyperlinker has committed a deliberate act in making the defamatory material readily available to the third party audience.

It is noted that search engines have generated new content for Autocomplete suggestions. As such, defamed parties cannot sue any primary authors in respect of the new content by the search engines. To the extent that these word associations in the Autocomplete suggestions are defamatory, reputation interests are clearly at stake and the only remaining legal avenue is to proceed against the search engine. For repeated or republished snippets, in which the search engines' acts participated in and lent assistance to the repetition or republication of defamatory content to a wider audience, thereby increasing the potential damage to reputation, liability is justified provided the search engine has actual knowledge of the fact of publication of the search output. In many of these cases, the original author of the defamatory postings may be anonymous which increases the level of difficulty and costs in pursuing legal actions against them. Hence, overall, notwithstanding the search engines' freedom of speech, they should nonetheless be subject to legal liability in defamation to protect reputational interests in limited circumstances.

Apart from reputational interests, search engine operations may impinge on an individual's personal information and other interests. According to the European Court of Justice in *Google Spain*, the extent of protection of the individual's "right to be forgotten"[92] – which extends to information which have become "inadequate, irrelevant or no longer relevant, or excessive" in relation to purposes for which they were collected or processed – has to be assessed with reference to and balanced against the economic interests of the search engine operator, the data subject's role in public life and the public interest in having access to the personal information.[93] This significant decision led to numerous requests to Google to block and remove URLs.[94] One important aspect is that the search engine would be responsible for the violation of the "right to be forgotten" regardless of whether the personal information in question consist of third party content or new content generated by the search engine operator.

5.2. *Benefits of search engines to users and the commercial goals of search engines*

Verbeek[95] referred to the hermeneutic or interpretative approach to technological mediation (the obstetric ultrasound) which allows for interpretation of reality (the foetus in the womb). Moral agency, he argues, is a matter of "human-technology hybrids" and not a completely human affair.[96] An analogy may be drawn to the search engines which enable users to access a new reality by displaying the materials which he would otherwise not be exposed to without the search engine facility. Oster[97] argued that "[b]y aggregating and structuring information published on the Internet, search engines render web pages with personal information accessible,

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[88] Eugene Volokh, '*The First Amendment Protection for Search Engine Search Results*', White Paper, 2012, at p. 17.

[89] Kacy Popyer, "Cache-22: The Fine Line between the Information and Defamation in Google's Autocomplete Function" (2016) 34 *Cardozo Arts & Ent. L. J.* 835 at 846.

[90] Eugene Volokkh, '*The First Amendment Protection for Search Engine Search Results*', White Paper, 2012 at p. 19.

[91] Kacy-Popyer, "Cache-22: The Fine Line between the Information and Defamation in Google's Autocomplete Function" (2016) 34 *Cardozo Arts & Ent. L. J.* 835 at 859.

[92] See Parliament and Council Directive 95/46/EC, Articles 12(b) (right to rectify, erase or block data relating to data subject that are incomplete or inaccurate) and 14(1)(a) (right to object to the processing of data relating to data subject).

[93] *Google Spain SL* [97].

[94] Jan Oster, *European and International Media Law* (Cambridge University Press, 2017) at p. 366.

[95] Peter-Paul Verbeek, *Moralizing Technology: Understanding and Designing the Morality of Things* (The University of Chicago Press, 2011) at pp. 8–9.

[96] Peter-Paul Verbeek, *Moralizing Technology: Understanding and Designing the Morality of Things* (The University of Chicago Press, 2011) at p. 17.

[97] Jan Oster, "Communication, Defamation and Liability" (2015) 35(2) *Legal Studies* 348 at 359.

for instance, on the basis of a person's name, which Internet users in many cases would not have found. Search engines thus assist in making statements known to the public that otherwise would have been a needle in a haystack." This coheres with the legal approach for publication based on the search engine lending assistance to the publication process. Hinman, with his slogan "to exist is to be indexed on Google", referred to search engines attempting to help users find the "right piece of information" as well as to avoid "extraneous" information.[98] In the case of *Google Spain*,[99] it was mentioned that search engines provide users with a "structured overview" of the aggregated information about an individual including detailed profiles of the individual.

Volokh noted that the search engines' automated results are necessary for users to gain "quick and comprehensive access to information – both the speech of the search engines expressing their decisions about how to rank and the speech of the sites referenced by the search engines' speech".[100] Kohl referred to search engines as the "light that allows us to see cyberspace" and the "interface through which we interact with the Internet and thereby with the world at large".[101] Hence, it is clear that overall, search engines offers substantial public benefit in facilitating access to a wealth of information.

It is submitted that though the search engines are beneficial to users, they are after all commercial entities. Search engines enjoy commercial benefits and the opportunities for profit-making from users through advertising and sponsored links as well as access to the data sets pertaining to the millions of users. To the extent that they enjoy the commercial benefits, they should also be subject to the risks and burdens of business and attendant legal liabilities arising from defamation.

5.3. *Normative role of search engines: subjective and objective elements*

Hinman refers to search engines as "gatekeepers of the Web".[102] How do or should we describe this "gatekeeping" role? Grimmelmann[103] considers the two roles of search engines: as an "objective conduit or a subjective editor"[104] and finally advocates a middle ground based on the advisor theory of search. Search neutrality under the objective conduit approach suggests that search results are to be treated like maps. Under the editor theory, on the other hand, there is ample room for editorial judgement and discretion which can lead to potential search engine bias. Put in another way, the conduit theory looks at search through the websites' eyes whilst the editor theory looks at search through search engines' eyes. Grimmelmann suggests instead that we enquire what search would look like through users' eyes.[105] This refers to a listener-oriented approach where search engines attempt to empower users to identify for themselves the speech they wish to hear.[106] Thus, the normative theory for evaluating search engine is that it should be a helpful, trustworthy *advisor*.[107]

Search engines have the capacity to shape people's worldview through the use of formulas based on "personalization" which generate search results tailored to a user's profile. Pariser[108] has linked this ideological isolation and propaganda spreading to the workings of the algorithms that operate behind the scenes of Internet giants such as Google and Facebook. He warns that these algorithms, which most people do not know and do not think about, have a great influence on what we see and hear on the Internet, creating a "filter bubble" where we only get to see information that corresponds with our own views (personalised information) or those of the state or the company (propaganda). Sunstein[109] warned that the selectivity of data made possible by Internet filtering can easily trap us inside our "information cocoons." Lessig[110] cautioned that filtering on the Internet is equivalent to censorship because it blocks out some forms of expression.

It is clearly possible for search engines to intentionally and manually lower the ranking for a particular website outside of the automated system. This, as observed by the US court in the case of *Search King Inc v Google Technologies Inc*,[111] can "distort the objectivity" of the ranking system.

Goldman[112] observed that in order to "prevent anarchy and preserve credibility", search engines must unavoidably exercise some editorial control over their systems. Search engine bias is the unavoidable consequence of search engines exercising such editorial control. Ironically, the personalised ranking algorithms may reduce the effects of search engine bias. This is because the use of personalised algorithms will result in "multiple "top" search results for a particular search term instead of a single "winner". Moreover, they will give less weight to popularity-based metrics.[113]

Search engines should not be allowed to unilaterally censor third party content based on what it views as legal or illegal content. Instead, it should be as neutral as possible and such

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[98] Hinman, L. M., 2005. "Esse Est Indicato in Google: Ethical and Political Issues in Search Engines," *International Review of Information Ethics*, 3: 19–25 at 21.

[99] *Google Spain SL* [37].

[100] Eugene Volokh, '*The First Amendment Protection for Search Engine Search Results*', White Paper, 2012, at p. 10.

[101] Uta Kohl, "Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and beyond (part 2)" (2013) 21 *International Journal of Law & Technology* 187 at 193.

[102] Hinman, L. M., 2005. "Esse Est Indicato in Google: Ethical and Political Issues in Search Engines," *International Review of Information Ethics*, 3: 19–25 at 21.

[103] Grimmelmann, James, "Speech Engines" *Minnesota Law Review*. 2014, Vol. 98 Issue 3, pp. 868–952.

[104] Grimmelmann, James, "Speech Engines" *Minnesota Law Review*. 2014, Vol. 98 Issue 3 at 871.

[105] Grimmelmann, James, "Speech Engines" *Minnesota Law Review*. 2014, Vol. 98 Issue 3 at 893.

[106] Grimmelmann, James, "Speech Engines" *Minnesota Law Review*. 2014, Vol. 98 Issue 3 at 894.

[107] Grimmelmann, James, "Speech Engines" *Minnesota Law Review*. 2014, Vol. 98 Issue 3 at 895.

[108] Eli Pariser, *The Filter Bubble: What the Internet is Hiding From You*, Penguin Books, 2011.

[109] *Republic.com*, Princeton, NJ: Princeton University Press, 2001.

[110] *Code and Other Laws of Cyberspace*, New York: Basic Books, 2000.

[111] Case No. CIV 02-1457-M, United States District Court of the Western District of Oklahoma, 13 Jan 2003.

[112] Goldman, E., "Search Engine Bias and the Demise of Search Engine Utopianism" 8 Yale J.L. & Tech. 188 at 195-196 (2005–2006).

[113] Goldman, E., "Search Engine Bias and the Demise of Search Engine Utopianism" 8 Yale J.L. & Tech. 188 at 199 (2005–2006).

decisions on lawful or unlawful content should ultimately be left to the courts and lawmakers. Internet intermediaries are *de facto* gatekeepers but courts and law makers are the gatekeepers *de jure*. When search engines have to make decisions whether to take down content or otherwise in the event of complaints of defamatory search output, they have to take guidance from the courts. These may also involve procedural notice and take-down mechanisms which give parties an opportunity to respond or object.[114] As a matter of practice, it is recognised that search engines bear some risk. It may be difficult for search engines to know in certain cases whether the output generated is defamatory or not. Further, the search engines may be hard put to determine whether the defamatory content is true or false or whether some other defence applies.

Nonetheless, the search engines' role is not completely objective or neutral. They possess discretion in the design of algorithms and in the choice of key terms for inclusion or exclusion. Such discretion should be subject to supervision by the law or courts. Whilst there should be a degree of editorial judgement and discretion afforded to the search engines, there are objective lines which can be drawn.

6. Conclusion

This paper argues that search engine operators should not be automatically immune from legal liability for search results and Autocomplete suggestions. However, the scope of potential liability should be restricted. Policy considerations favour restricting the responsibility of search engines but cannot fully immunise them from legal liabilities. The search engines' freedom of speech is counterbalanced by the need to protect the reputational interests of persons defamed by defamatory snippets, images and Autocomplete suggestions. Whilst the benefits afforded to users in the ease of search and flow of information on the Internet are apparent, the search engines have also profited financially and must bear the risks flowing from their business initiatives. As gatekeepers of the web, search engines enjoy a degree of subjective discretion and editorial judgement with respect to information flow on the Internet and thereby exercise considerable influence on users. As such, this subjective role should be balanced by objective controls to be exercised by the law and courts.

The legal analysis should be sensitive to the different types of search output. The snippets and images are generated by the search engine from the content in various Internet websites. The search engine operators are liable for the snippets and images to the same extent as the original website under the repetition rule. However, Autocomplete suggestions should be regarded as new content generated by the search engines themselves. In order to decide whether search engines had in fact published the defamatory search output, one has to enquire whether those acts amount to either participation in and/or lending assistance to the publication process. This goes towards establishing the fact of publication. The search engine must be shown to have intentionally published the defamatory search output. It is suggested that this should be based on proof of the search engine's actual knowledge of the fact of publication relating to the relevant search output. There is no necessity to prove that the search engine operator knew that the specific search output was defamatory.

On the other hand, it is not conceptually sound to apply the doctrine of publication by omission to determine search engine liability. The concept of publication by omission – which was originally used to determine whether the defendant as an occupier of premises was responsible for defamatory graffiti by third-party trespassers – is based on its consent to the continued presence of the defamatory publication put up by another thereby giving rise to a legal responsibility for the publication. In the case of Autocomplete suggestions, the generation of new content in terms of the word associations is the act of the search engine not the primary authors. In the case of snippets and images, the search engine generates and selects materials via its automatic search process to produce specific search results in response to a specific search query. It cannot be said that search engine, by its inaction, was purely consenting to the continued presence of the offending material put up by someone else on the Internet.

Hence, determining the relevant acts of publication and intentionality as to the fact of publication on the part of search engines is crucial. Based on the lack of editorial control and ex ante knowledge for snippets, images and Autocomplete suggestions, the search engine should be treated as a secondary publisher. Secondary publishers should be entitled to avail themselves of the defence of innocent dissemination provided the lack of knowledge that the search output contained libelous content is not due to the search engines' negligence.

Search engine liability in defamation can indeed be analysed by reference to the existing framework comprising pre-Internet case and the more modern precedents relating to Internet intermediaries. Nonetheless, there are certain nuances in the justifications and explanations peculiar to search engines. New wine can certainly fit into old bottles though this may mean the flavour will change somewhat along the way.

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[114] See, for example, Section 5 of the UK Defamation Act 2013 applicable to website operators and accompanying regulations.