

Web search liability can be reduced

Internet search engine firms will be protected from liability for publishing defamatory material if they remove it once they're on notice, Goldsmith Lawyers principal Barrie Goldsmith says.

Once an internet company was notified some of its content was possibly defamatory it could not say it was "publishing it innocently", Goldsmith told *RR*. He spoke shortly after Melbourne man Milorad (also known as Michael) Trkulja continued his successful legal assault on major internet search engines. Last week the Vic Supreme Court awarded him \$200,000 in damages against Google Inc LLC. Trkulja's claims flowed from a "Melbourne crime" news article published on Yahoo! Inc LLC, Yahoo!7 Pty Ltd, Google Inc and Google Australia Pty Ltd web pages. The article featured a photo of Trkulja after he was shot in 2004. On March 15 this year, Vic Supreme Court Justice Stephen Kaye awarded Trkulja \$225,000 in damages plus interest against Yahoo! Inc LLC and Yahoo! 7 Pty Ltd for publishing the material (*RR 371*). The Yahoo companies subsequently defeated an indemnity costs application (*RR 376*).

Last week, Vic Supreme Court Justice David Beach came to a similar finding to Justice Kaye. Justice Beach's decision came after a jury determined the material Google Inc published between October 11 and December 31, 2009, was defamatory. However, the jury found the defamation claim could only be upheld for the images on Google's image search. Trkulja's claim against Google Australia Pty Ltd failed.

A question of notice

Google Inc (*above*) argued the jury's decision be set aside on the ground its search engine was merely an intermediary of the information. Justice Beach disagreed, saying "Google Inc's submission on this issue must be rejected for {several} reasons, the least of which is it understates the ways a person may be held liable as a publisher". On September 22, 2009, Trkulja sent Google Inc a letter asking the images be removed by September 28. However, in an October 10, 2009, email Google said: "At this time, Google has decided not to take action based on our policies concerning content removal. Please contact the webmaster of the page in question to have your client's name removed from the page." Justice Beach said despite Trkulja's failure to provide Google Inc with a copy of the webpage featuring the article, "Google Inc was well aware of what was being requested of it". "It follows that Google Inc's contention there was no evidence to sustain a finding of publication against it must be rejected. It was open to the jury to conclude that, when the email of October 10, 2009, was written,

Google Inc was aware of the defamatory material which gave rise to the images matter," Justice Beach said. Goldsmith this week told *RR*: "If an internet search company is not aware of the material, then ordinarily they would not be liable for the time before they received notice. But, if they are made aware of it and a case is put to them it is defamatory, the court is more likely to find against them. When we act for parties who have been defamed online, most of the time search engines remove it very quickly and the matter never has to go to trial."

Goldsmith said internet companies could not rely on overseas laws to help them. "Very often the [search engines] are very reluctant to remove material because the companies are based in the US and on US law."

But the landmark High Court *Dow Jones v Gutnick* case, which was settled in Australia (*RR 320, 193*), specifically rejected internet companies might be protected by US laws if material was published in Australia, he said.

Justice Beach awarded Trkulja compensatory damages, but denied his application for aggravated damages. "The misconduct in this case was alleged to be the failure to exclude the relevant URL from Google's search engines after the letter of September 22, 2009. However, the failure by Google Inc to block the relevant URL did not involve any relevant misconduct which might found an award of aggravated damages," Justice Beach said. Costs are yet to be determined. (*Trkulja v Google Inc LLC & Anor (No 5) [2012], VSC 533, 12/11/2012*)

ASIC updates guidance

ASIC has released policy guidance on its power to wind up abandoned companies under new powers in the Corporations Act 2001.

The regulator has also updated its guidance on its approach to, and criteria for, funding liquidator investigations, reports and actions from the Assetless Administration Fund (AAF). ASIC deputy chair Belinda Gibson said the policy guidance provided clarity to insolvency practitioners and those impacted by corporate insolvencies.

Gibson said providing guidance on how ASIC "will use our power to wind up companies is important to assist employees of companies that have gone into liquidation and who are owed employee entitlements. We have also [expanded] our policy to address use of AAF to assist liquidators wishing to pursue a recovery action where they suspect fraudulent or unlawful phoenix activity. This will further increase the transparency of our approach to enforcement".