

# Defaming by Suggestion: Searching for Search Engine Liability in the Autocomplete

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Whilst different jurisdictions have yet to reach consensus on search engines' liability for defamation,<sup>1</sup> Internet giant Google is confronting judges and academics with another challenge: the basis of liability for defamation arising from its Autocomplete function. With Autocomplete, Google no longer merely presents us with snippets, excerpts of relevant webpages originating from third-party websites, after we type in our search queries. Rather, it suggests associated search words and terms to us before we even complete typing the words as originally planned, and before we even press 'Enter'. By constantly altering the query based on each additional keystroke in the search bar, Autocomplete changes the way search queries are generated.<sup>2</sup> In other words, Google anticipates, predicts or even feeds us ideas, and may redirect our interests in the process of our search attempts. For instance, if one searches for Bettina Wulff, the wife of former German President Christian Wulff, terms such as 'escort' and 'prostitute' are automatically paired up with her name in the Google search box. One can only imagine the surprise of the unsuspecting reader who had no idea of the rumour that Wulff had once been an escort, let alone the

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<sup>1</sup> For the positions of the UK, Australian, New Zealand and Canadian courts, see Susan Corbett, 'Search Engines and the Automated Process: Is a Search Engine Provider "A Publisher" of Defamatory Material?' (2014) 20 New Zealand Business Law Review 200.

<sup>2</sup> Seema Ghatnekar, 'Injury by Algorithm: A Look into Google's Liability for Defamatory Autocompleted Search Suggestions' (2012-13) 33 Loyola of Los Angeles Entertainment Law Review 171,178.

distress of Wulff herself.<sup>3</sup> Although most jurisdictions are reluctant to hold search engines liable for defamation, judges seem to hold different views when it comes to such liability in the case of Autocomplete.<sup>4</sup>

In 2014, for example, the Hong Kong Court of First Instance held that a claimant whose name was often paired with ‘triad member’ in Autocomplete had a good arguable case of defamation to proceed with and dismissed a claim of summary dismissal application made by Google in *Dr Yeung Sau Shing Albert v Google Inc* (hereinafter referred to as *Yeung v Google*).<sup>5</sup> Earlier, in 2013, the Federal Court of Germany held Google to be liable for violating a plaintiff’s personality rights and reputation for associating his name with ‘fraud’ and ‘Scientology’ in an Autocomplete search (this case is hereinafter referred to as *RS v Google*).<sup>6</sup> Are these decisions justified?

Most of us are likely to be hesitant in holding Google liable for defamation based on its search engine results. After all, nearly all of us are indebted to search engines, and our lives would be considerably more difficult without them. Search engines are powerful intermediaries that enable Internet users to identify and locate information from the gigantic volume of data that has flooded cyberspace. The World Wide Web

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<sup>3</sup> Bettina Wulff sued Google for defamation in 2012 for linking her name with ‘escort’ and ‘prostitute’, and the lawsuit was settled in 2012. Der Spiegel, ‘Autocomplete-Funktion: Bettina Wulff und Google einigen sich,’ (Spiegel Online, 16 January 2015) <<http://www.spiegel.de/netzwelt/web/bettina-wulff-und-google-einigen-sich-aussergerichtlich-a-1013217.html>> accessed 16 April 16, 2015.

<sup>4</sup> Google was held liable for defamation for its autocomplete function by the Japanese court and the Italian court. Tim Honyak, ‘Google Loses Autocomplete Defamation Suit in Japan’, (CNET, 16 April 2013) <<http://www.cnet.com/news/google-loses-autocomplete-defamation-suit-in-japan/>> accessed 16 April 2015. For a discussion of similar litigation in France (Cour de cassation – Première chambre civile, Arrêt n° 832 du 12 Juillet 2012 (11-20.358), Italy (Tribunale Ordinario di Milano, March 24, 2011, 10847/2011), Aurelia Tamo and Damian George, ‘Oblivion, Erasure and Forgetting in the Digital Age’ (2014) 5 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 71.

<sup>5</sup> HCA 1383/2012 (5 August 2014).

<sup>6</sup> *RS v Google* is the author’s formulation for easy reference. The official citation of the judgment is BGH, 14.05.2013, VI ZR 269/12. For English version, 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.

is made up of up 60 trillion individual pages,<sup>7</sup> with over three billion Internet users, every one of whom is a potential contributor<sup>8</sup> In the face of such daunting amounts of information, search engines play an indispensable role in identifying the best and most useful information for us. Yet, when search engines not only deliver potentially defamatory search results to us upon request, but actually suggest defamatory ideas to us, a different framework of legal analysis may be called for.

The legal debate over the liability arising from the Autocomplete function captures the empowering and forbidding power of search engines. In examining the legal reasoning behind the Hong Kong case of *Yeung v Google* and German case of *RS v Google*, and comparing the two, this chapter argues that the orthodox approach to fixing responsibility for defamation, based either on the established English common law notion of publisher or innocent disseminator or the existing categories of passive host, conduit and caching in the relevant European Union Directive, is far from adequate to address the challenges brought about by search engines and their Autocomplete function.<sup>9</sup> Whilst orthodox common law is strict in imposing liability in the case of a person's participation in publication, and is fixated on identifying his or her state of knowledge and extent of control in the defamation action, the European Union approach is preoccupied with the over-simplified binary of seeing an intermediary as either an active or passive entity. The legal challenge posed by search engines, however, stems from the fact that they run on artificial intelligence (AI).<sup>10</sup>

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<sup>7</sup> Google, How Search Works <<http://www.google.com/insidesearch/howsearchworks/thestory/>> accessed 16 April 2015.

<sup>8</sup> Internet Usage Statistics, The Internet Big Picture: World Internet Users and 2014 Population Stats, <<http://www.internetworldstats.com/stats.htm>> accessed 16 April 2015.

<sup>9</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178/1, articles 12-15.

<sup>10</sup> Artificial intelligence (AI) refers to the study of the programming and performance of computers used both for problem-solving across a wide range of intellectual, engineering and operational tasks and as a tool in psychology for modelling mental abilities. It is concerned with the building of computer programmes that perform tasks requiring intelligence when done by humans, including game

Autocomplete predictions are automatically generated by an algorithm effectively using more than 200 signals to extrapolate information from the Internet, and then generating likely predictions from each variant of a word.<sup>11</sup> The process takes place automatically, although the design of the algorithm is frequently updated and modified by engineers. In the entire process, Google retains control in generating its search results.<sup>12</sup> The legal issue should be redirected towards examining the possible role played by the algorithm creators in the content or result generated. Thus, this chapter argues that, in its Autocomplete function, Google indeed plays a unique role in contributing to defamatory content. Although the Hong Kong Court has not delivered any definitive answer on the role and liability of Google Inc., in a summary application, the German Court has rightly recognised the novel legal challenge that search engine prediction technology presents and treated search engines as a special intermediary processor. As explained earlier, an Autocomplete suggestion responds to a search query in a unique way with the mere input of each additional stroke and without the user completing his or her query. In this ‘search-in-progress’,<sup>13</sup> Google is neither entirely active nor entirely passive, but rather interactive. Thus, imposing

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playing, automated reasoning, machine learning, natural-language understanding, planning, speech understanding and theorem proving. John Daintith and Edmund Wright, ‘Artificial Intelligence’ in *A Dictionary of Computing* (6 ed. OUP 2008)

< <http://www.oxfordreference.com.eproxy1.lib.hku.hk/view/10.1093/acref/9780199234004.00.0001/acref-9780199234004-e-204?rskey=bN7dW6&result=9>> accessed 11 May 2015.

<sup>11</sup> Magazine Monitor, ‘Who, What, Why: How Does Google’s Autocomplete Censor Predictions?’ (*BBC*, 5 February 2015) < <http://www.bbc.com/news/blogs-magazine-monitor-31131920> > accessed 14 May 2015.

<sup>12</sup> The ways that Google can manipulate search results can be seen in a report by the US Federal Trade Commission investigation. Federal Trade Commission, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (3 January 2013) < <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>> accessed 18 April 2015. For discussion of litigation challenging Google’s practices in the US, Tansy Woan, ‘Searching for an Answer: Can Google Legally Manipulate Search Engine Results?’ (2013) 16 *University of Pennsylvania Journal of Business Law* 294.

<sup>13</sup> Smith argues that a distinction should be drawn between a search-in-progress and a completed search. Google materially contributes in the former but not in the latter. Michael L. Smith, ‘Search Engine Liability for Autocomplete Defamation: Combating the Power of Suggestion,’ *University of Illinois Journal of Law, Technology and Policy* 313, 329 (2013).

liability on Google in a defamation action based on its Autocomplete function is justified in a notice-and-takedown regime when a substantive complaint has been made.

### **Search Engine and Autocomplete as Publisher: *Yeung v Google***

In *Yeung v Google*, the plaintiff sued Google Inc. for providing defamatory predictive suggestions through its search engine's Autocomplete and Related Searches features.<sup>14</sup> Whenever users typed Yeung's name (Albert Yeung Sau Shing) into Google in English or Chinese, Google Autocomplete instantaneously and automatically generated a list of search suggestions in a drop-down menu before they clicked on the search button, some of which linked Yeung to the names of specific triad gangs and serious criminal offences. Likewise, when users typed his name into Google's search box, characters or words related to triad societies were generated as outcome/results under a list of Related Searches.<sup>15</sup> The plaintiff is a well-known businessman in Hong Kong and the founder of a company that engages in various business sectors, including entertainment and films, and manages a number of Hong Kong celebrities. Yeung was understandably upset by the Google search results and suggestions, and accordingly made a defamation claim against Google Inc. and sought an injunction to restrain it from publishing and/or participating in the publication of alleged libellous material.<sup>16</sup> More specifically, he demanded that Google remove or prevent defamatory words from appearing or reappearing in any current or future

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<sup>14</sup> HCA 1383/2012 [5].

<sup>15</sup> *ibid* [4b]. Google Inc. stopped running the Related Searches feature in 2013. Barry Schwartz, 'Google Pulls Related Searches Filter Due To Lack Of Usage' (2013) <<http://searchengineland.com/google-pulls-related-searches-filter-due-to-lack-of-usage-156668>> accessed 8 May 2015.

<sup>16</sup> *ibid* [9].

Google searches.<sup>17</sup> As Google Inc. is a US-based company, the plaintiff had to apply for leave to serve the writ of summons out of jurisdiction in the US.<sup>18</sup> It was therefore necessary for Yeung to demonstrate that he had a good arguable case involving a substantive question of fact or law to be tried on the merits of his claim.<sup>19</sup>

Although Justice Marlene Ng of the Hong Kong High Court delivered only a summary judgment, her reasoning was detailed (filling 100 pages) and centred largely on whether Google Inc. should be considered the publisher of the suggestions or predictions that appear in Autocomplete and Related Searches.<sup>20</sup> The defence counsel's major argument was that Google Inc. is not a publisher, as no human input or operation is required in the search process, but is rather a mere passive medium of communication.<sup>21</sup> However, Justice Ng was not convinced, and subsequently ruled that there was a good arguable case for considering Google Inc. as a publisher.

### Search Engine Liability

In defamation cases under common law, publication takes place when a defendant communicates a defamatory statement to a third party, and liability in defamation arises from participation in the publication of defamatory material.<sup>22</sup> Under this strict publication rule, a person would be held liable for publishing a libel 'if by an act of any description, he could be said to have intentionally assisted in the process of conveying the words bearing the defamatory meaning to a third party,

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<sup>17</sup> *ibid* [6].

<sup>18</sup> Under Order 11 rule1(1)(f) of Rules of High Court, *ibid* [11].

<sup>19</sup> *ibid* [35].

<sup>20</sup> Other issues before the Court included whether there was evidence of publication of the defamatory statement to a genuine third party. Justice Ng concluded that publication to any third party would be established regardless of whether that publication was by the procurement of the plaintiff, *ibid* [20], [41] and [48].

<sup>21</sup> *ibid* [51].

<sup>22</sup> Alastair Mullis and Richard Parkes (ed), *Gatley on Libel and Slander* (12 edn, Sweet & Maxwell Thomson Reuters 2013), para 6.23.

regardless of whether he knew that the article in question contained those words'.<sup>23</sup> *Prima facie*, the author, editor, publisher, printer, distributor or vendor of a newspaper is liable for the material therein.<sup>24</sup>

Having said that, common law allows the defence of innocent dissemination for an individual who is not the first or main publisher of a libellous work but who 'in the ordinary course of business plays a subordinate role in the process of disseminating the impugned article'.<sup>25</sup> Well known examples of those who can make such a defence are the proprietors of libraries (*Vizetelly v Mudie's Select Library Limited*)<sup>26</sup> and newsvendors (*Emmens v Pottle*).<sup>27</sup> To rely on this defence and to be seen as a secondary publisher or innocent disseminator, the defendant must show (1) that he or she was unaware or innocent of any knowledge of the libel contained in the work disseminated by him or her; (2) that there was nothing in the work or the circumstances under which it came to or was disseminated by him or her that should have led him or her to suppose that it contained a libel; and (3) that such want of knowledge was not due to any negligence on his or her part.<sup>28</sup> The onus of proof is on the defendant.<sup>29</sup> In comparison, a primary publisher is one who knows about or can easily acquire knowledge of the content of the article in question and has a realistic ability to control its publication.<sup>30</sup> The Hong Kong Court refers to these two criteria as the 'knowledge criterion' and the 'control criterion'.<sup>31</sup> The former refers to the fact that a publisher must know or be taken to know 'the gist or substantive content of what is being published', although there may be no realisation that the content is

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<sup>23</sup> *Yeung v Google* (n 14) [57], quoting *Oriental Press Group Ltd. v Fevaworks Solutions Ltd.* (hereinafter referred as *Fevaworks*) [2013] HKCFA 47 [19].

<sup>24</sup> *Mullis and Parkes* (n 22).

<sup>25</sup> *Yeung v Google* (n 14) [59].

<sup>26</sup> [1900] 2 QB 170.

<sup>27</sup> (1886) 16 QBD 354.

<sup>28</sup> The ratio was established in the *Vizetelly* judgment, referred to in *Fevaworks* (n 23) [27].

<sup>29</sup> *Fevaworks* (n 23).

<sup>30</sup> *Fevaworks* (n 23) [76].

<sup>31</sup> *ibid.*

actually defamatory in law.<sup>32</sup> The latter points to the publisher's realistic ability and opportunity to prevent and control the publication of defamatory content.<sup>33</sup> The liability of the primary publisher is strict, with no defence available.

Armed with the common law principle of strict publication liability in *Yeung v Google*, Justice Ng concluded that Google Inc. is definitely a publisher. Applying the law to the given facts, it was obvious to Justice Ng that Google Inc. is in the business of disseminating information and had, in this case, participated in the publication and dissemination of the alleged defamatory statement.<sup>34</sup> The company has created and operates automated systems that generate materials in a manner it intends, thereby providing a platform for dissemination, encouragement, facilitation or active participation in publication. If Google Inc. is indeed the publisher of its Autocomplete and Related Searches results, the next legal question is whether the company should be considered the primary or secondary publisher. It is this separate issue that proves precisely the limitation of common law in the face of contemporary technological challenges.

#### 'The' Common Law

What Justice Ng did in the aforementioned case is apply the strict publication rule under an orthodox understanding of common law to an Internet service provider's (ISP) liability. This approach was first propounded in *Oriental Press Group Ltd v Fevaworks Solutions Ltd* (hereinafter referred to as *Fevaworks*) by the Hong Kong Court of Final Appeal.<sup>35</sup> The highest court in Hong Kong ruled that a provider of an online discussion forum is a secondary publisher and must bear legal

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<sup>32</sup> *Yeung v Google* (n 14) [74].

<sup>33</sup> *ibid* [65][76].

<sup>34</sup> *ibid*[103].

<sup>35</sup> *Fevaworks*, (n 23).



liability for defamatory remarks posted by third parties, with its responsibilities being imposed from the outset, but that it does have recourse to the defence of innocent dissemination.<sup>36</sup> The actual effect of the judgment is that online discussion forum providers now have to remove any alleged defamatory remarks within a reasonable timeframe upon receiving notification from the complainant.<sup>37</sup> The judgment has been cited as a faithful application of orthodox common law principles of publication.<sup>38</sup> Yet, it should be noted that Hong Kong's position constitutes a departure from a leading case in the area of search engine and Internet intermediary liability in England.

The English case that is of direct relevance to the present debate is *Metropolitan Schools Ltd v Designtecnica Corp.* (hereinafter referred to as *Metropolitan Schools Ltd*), the judgment on which was delivered by the English High Court in 2009.<sup>39</sup> The claimant, Metropolitan Schools Ltd, was a provider of adult distance learning courses on the development and design of computer games. The first defendant, Designtecnica Corp., hosted web forums that include threads which the claimant said defamed it by accusing it of running a fraudulent practice. Google UK Ltd was another defendant because it published or caused to be published in its search engine a 'snippet' of information linking Metropolitan Schools to the word 'scam'.<sup>40</sup> The claimant demanded removal of the defamatory statements from the web forums and the Google search engine. The fundamental issue before the English High Court was whether Google as a search engine should be held liable for publication under common law.

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<sup>36</sup> *Fevaworks* [2013] HKCFA 47, [12], [103].

<sup>37</sup> I have argued that although the legal outcome of the *Fevaworks* case is justified, the legal reasoning is far from satisfactory. Anne SY Cheung, 'Liability of Internet Host Providers in Defamation Actions: From Gatekeepers to Identifiers' in Andras Koltay (ed), *Media Freedom and Regulation in the New Media World* (Wolters Kluwer Ltd 2014).

<sup>38</sup> Mullis and Parkes (n 22), para 6.29.

<sup>39</sup> [2009] EWHC 1765.

<sup>40</sup> *ibid* [18].

Justice David Eady ruled that Google was not a publisher at all. Instead of asking whether there had been any participation in publication by Google, as generally seen in orthodox common law analysis, Justice Eady considered that the starting point should be examination of the ‘mental element’, that is, the defendant’s degree of awareness or at least assumption of general responsibility.<sup>41</sup> It was clear to him that Google does not have any mental capacity or the required knowledge because there is neither human input nor intervention when a search is performed automatically in accordance with a computer programme.<sup>42</sup> Search results are generated, he said, by web-crawling robots designed by Google, which then report text matches in response to a search term.<sup>43</sup> Furthermore, in the case in question, Google could not have effectively prevented the defamatory snippet from appearing in response to a user’s request.<sup>44</sup>

Justice Eady’s position in *Metropolitan Schools Ltd* was consistent with his earlier ruling in *Bunt v Tilley*<sup>45</sup> in which he did not treat ISPs as publishers of defamatory statements in an online discussion forum. Although one may criticise Justice Eady’s ruling as an unwarranted departure from orthodox common law principles on publication and defamation,<sup>46</sup> his interpretation of common law is a response to the technological reality of the Internet age. In fact, he examined the rationale behind common law precedents, and further developed the law in light of contemporary challenges and the legislative developments in other European countries. First, he referred to *Emmens v Pottle*, a case dating back to 1885 that established the defence

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<sup>41</sup> *ibid* [49].

<sup>42</sup> *ibid* [50].

<sup>43</sup> *ibid* [53].

<sup>44</sup> *ibid* [51].

<sup>45</sup> [2006] EWHC 407.

<sup>46</sup> *Mullis and Parkes* (n 22) para. 6.27.

of innocent dissemination for newsvendors.<sup>47</sup> Justice Eady examined the rationale behind the distinction between a publisher and a disseminator. He then commented that analogies are not always helpful, particularly when the law has to be applied to new and unfamiliar concepts.<sup>48</sup> It was plain to him that, as a search engine is not the author of a defamatory statement, and is thus hardly comparable to a printer or newspaper proprietor, it cannot be considered a primary publisher.<sup>49</sup> Equally, it is not a library. At best, in Justice Eady's view, it can be compared to a compiler of a conventional library catalogue, where conscious effort is involved.<sup>50</sup> However, none of these analogies is entirely suited to the modern search engine. Thus, Justice Eady concluded that a search engine does not fit exactly into the category of disseminator. To a certain extent, it is even more innocent than a disseminator in passing on a defamatory statement. In 2009, there were approximately 39 billion web pages and 1.59 billion Internet users.<sup>51</sup> At the time, Google compiled an index of pages from the web, and its Googlebot's automated and pre-programmed algorithmic search processes then extracted information from that index and found matching webpages to return results that contained or were relevant to the search terms.<sup>52</sup> Justice Eady preferred to characterise a search engine as a 'facilitator' based on its provision of a search service.<sup>53</sup>

Second, Justice Eady perused the positions of various national courts on rulings concerning Google's role in defamation as a search engine under European Union

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<sup>47</sup> (1885) 16 QBD 354, discussed [2009] EWHC 1765 [49], referred to in n 27 earlier.

<sup>48</sup> [2009] EWHC 1765 [52].

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid* [7].

<sup>52</sup> For an understanding of how search engine technology works in Google's PageRank, Autocomplete and search feature, Ghatnekar (n 2).

<sup>53</sup> [2009] EWHC 1765 [51].

Directive 2000/31/EC (better known as the Electronic Commerce [EC] Directive).<sup>54</sup> He found that none of the countries he considered, including France, Spain, the Netherlands, Portugal and Switzerland, have held Google to be liable for defamation as a result of its search engine results,<sup>55</sup> with some (Portugal, Hungary and Romania) ruling that Google is only a 'host'.<sup>56</sup> In the end, Justice Eady fixed no responsibility on Google, and did not consider it to be a publisher either before or after notification of the defamatory statement in question.<sup>57</sup> Google was not held liable for the publication of search results, as there was a lack of knowing involvement in publication and the company had no control over those results. With the benefit of hindsight (which will be explained further in the following section), we now know that the extent of Google's control is much more extensive than Justice Eady envisioned it. If this newfound awareness of the technical ability of the Google search engine had been factored in, different legal reasoning may have been applied and a different legal conclusion reached. At the very least, it is unlikely that Google would have been considered a totally passive medium of communication.

Nevertheless, Justice Eady's practical approach in examining the role of an Internet intermediary and its relation to publication is laudable. His position in considering the state of knowledge of such an intermediary at the forefront of any debate on publication and defamation was endorsed by the Court of Appeal in *Tamiz v Google* in 2012.<sup>58</sup> The English courts need no longer worry about the common law

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<sup>54</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, particularly electronic commerce, in the Internal Market [2000] OJ L178/1(Directive on electronic commerce). The Directive has been transposed into English law by the Electronic Commerce (the EC Directive) Regulations 2002.

<sup>55</sup> [2009] EWHC 1765 [98][106][107][109].

<sup>56</sup> *ibid* [100-104]

<sup>57</sup> *ibid* [123].

<sup>58</sup> [2013] EWCA Civ 68 CA. Google Inc. was sued as an operator of the service of a blogger site in relation of anonymous defamatory comments by others. The Court of Appeal found that Google Inc. had only facilitated the publication of blog posts, which could not be construed as it being a publisher.

conundrum on the vexing issue of publication for an Internet intermediary following England's legislative reform in 2013.<sup>59</sup> Unfortunately, the Hong Kong courts and those of other common law jurisdictions, which have been provided with no legislative guidelines in this respect, continue to grapple with this unresolved legal issue.

Adhering to the orthodox common law view of a strict publication rule, the Hong Kong Court of Final Appeal parted with the English approach in *Fevaworks*. It thus follows that Justice Ng of the Hong Kong High Court was bound in *Yeung v Google* by local precedent. In addition to relying on Hong Kong authority, importantly, Justice Ng also relied on the Australian authority of *Trkulja v Google Inc. (No. 5)* (hereinafter referred to as *Trkulja*),<sup>60</sup> in which Justice David Beach of the Supreme Court of Victoria held that there was sufficient evidence upon which a reasonable jury, if properly directed, could return a verdict for the plaintiff and hold Google to be liable for defamation for its search results under orthodox common law principles. In *Trkulja*, the plaintiff was a music promoter who sued Google Inc. for search engine results that had turned up images and an article concerning his involvement with serious crime in Melbourne and alleging that rivals had hired a hit man to murder him. The jury's verdict was that Google Inc. was a publisher of the defamatory material but was entitled to the defence of innocent dissemination for the period prior to receiving notification from the plaintiff. The company contended that the trial judge had a mistaken view of the law on publication and had wrongly directed the jury.<sup>61</sup>

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Different from Justice Eady, the higher court considered that Google's position would be different once it had received a notice of complaint by the plaintiff, which would render it the publisher.

<sup>59</sup> Section 5 Defamation Act 2013 (UK), see discussion *Mullis and Parkes* (n 22) para. 6.39 and 6.40.

<sup>60</sup> [2012] VSC 533, discussed in *Yeung v Google* (n 14)[97-102].

<sup>61</sup> [2012] VSC 533 [15].

Justice Beach did not accept Google Inc.'s argument, and further declared that *Metropolitan Schools Ltd* and *Tamiz v Google Inc* do not represent the common law in Australia.<sup>62</sup> He ruled that Google Inc. could be held liable as a publisher because it operates an Internet search engine, an automated system, precisely as intended and has the ability to block identified web pages.<sup>63</sup> For this judge, a search engine is like a newsagent or a library, which might not have the specific intention to publish but does have the relevant intention for the purpose of the law of defamation.<sup>64</sup>

Convincing as that reasoning may have been to Justice Ng of the Hong Kong court, she did not have the benefit of the more recent decision in *Bleyer v Google Inc* (hereinafter referred to as *Bleyer*) delivered by the Supreme Court of New South Wales in Australia.<sup>65</sup> In *Bleyer*, the plaintiff sued Google Inc. for its search engine results turning up seven items defamatory of him and delivering them to three people. Google Inc. sought an order to permanently stay or summarily dismiss the proceedings as an abuse of process.<sup>66</sup> In addition to the issue of disproportionality between the cost of bringing an action and the interest at stake, Justice Lucy McCallum had to determine the applicable law on defamation for search engines. After reviewing the English authorities in *Metropolitan Schools Ltd* and *Tamiz v Google*, and the Australian in *Trkulja*, Justice McCallum decided to follow the former and to distinguish the case before her from *Trkulja*.<sup>67</sup> She ruled that there was no human input in the application of Google's search engine apart from the creation of the algorithm, and thus that Google could not be held liable as a publisher for results

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<sup>62</sup> *ibid* [29].

<sup>63</sup> *ibid* [27].

<sup>64</sup> *ibid* [18-19].

<sup>65</sup> [2014] NSWSC 897.

<sup>66</sup> *ibid* [2].

<sup>67</sup> *ibid* [66][72][76].

that appeared prior to notification of a complaint.<sup>68</sup> Like Justice Eady, she relied on the landmark authority of *Emmens v Pottle* (the first challenge to the role of a news vendor in defamation cases) and reiterated that ‘for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process.’<sup>69</sup> Further, she expressed reservations about viewing Google Inc. as playing the role of secondary publisher, facilitating publication in a manner analogous to a distributor.<sup>70</sup> In Justice McCallum’s view, an Internet intermediary does no more than fulfil the role of a passive medium of communication and should not be characterised as a publisher.<sup>71</sup> She distinguished the decision in *Trkulja* from hers in *Bleyer* on the grounds that the former was based on *Urbanchich v Drummoyne Municipal Council*,<sup>72</sup> which concerned the liability of the Urban Transit Authority in failing to remove defamatory posters placed on its bus shelters after receiving notice of the plaintiff’s complaint. As a result, Justice McCallum concluded that it was clear that Google Inc. was not liable as a publisher, and ordered the proceedings to be permanently stayed.<sup>73</sup>

Regardless of whether one agrees with Justice Eady’s or Justice McCallum’s analysis and conclusions, both have applied common sense and fairness to examining the role of an Internet intermediary and its automated search engine system in the context of the debate over publication and defamation. As one critic comments, ‘not every act of dissemination can or should lead to liability for publishing defamatory

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<sup>68</sup> *ibid* [71][78].

<sup>69</sup> *ibid* [67].

<sup>70</sup> *ibid* [78].

<sup>71</sup> *ibid* [68].

<sup>72</sup> Unreported, Supreme Court of New South Wales, 22 December 1988, discussed in *Bleyer*, *ibid* [75].

<sup>73</sup> *Bleyer*, *ibid* [95].

matter'.<sup>74</sup> The fundamental concept of publication in the Internet era must be carefully explored.

#### Autocomplete and Related Searches

Returning to our analysis of *Yeung v Google*, all of the cases discussed thus far concern the liability of a search engine but do not directly address Google's Autocomplete and Related Searches functions. Interestingly, and significantly, when Justice Ng focused on these particular functions, she characterised the question as one of 'whether they [search engines] are an information provider with a neutral tool or whether they act beyond the scope of simply making information publicly available'.<sup>75</sup> In her view, the 'more fundamental question' is: 'as a matter of general tort principle, should or should not a person/entity remain responsible in law for acts done by his/her tool, and what are the limits of such liability (if any)?'<sup>76</sup> The focus in this part of her judgment switches from Google Inc.'s mere participation in publication to its instrumentality in the publication of the suggestions or predictions on its website.

The defence counsel argued that Google Autocomplete should be seen as a neutral tool because Google Inc. has adopted an algorithm that requires no human input, and is thus a mere passive facilitator.<sup>77</sup> He explained that the predictions or suggestions are drawn from the universe of previous users' searches,<sup>78</sup> with Autocomplete turning up the most relevant or most frequently searched results. Google Inc. could not police or manually interfere with the huge volume of webpages

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<sup>74</sup> David Rolph, 'Australia: A Landmark Judgment' (28 August 2014) <<https://infirm.wordpress.com/2014/08/28/australia-a-landmark-judgment-david-rolph/>> accessed 9 May 2015.

<sup>75</sup> *Yeung v Google* (n 14) [115].

<sup>76</sup> *ibid* [120].

<sup>77</sup> *ibid* [111].

<sup>78</sup> *ibid* [113].



it crawls, has no control over the search terms entered by users and is unaware of predictions or search results at the time each search is conducted.<sup>79</sup> In addition, he further argued that the predictions or suggestions generated in the case in question did not reflect the ultimate content of the search results, which might confirm or dispel rumours of the plaintiff's triad connections.<sup>80</sup>

Rather than seeing Google Autocomplete as playing a passive role, however, Justice Ng considered that Google Inc. 'recombines' and 'aggregates' data from web content, 'reconstitutes' aggregations based on what other users have at one time typed and then 'transforms' that data into suggestions and predictions.<sup>81</sup> She cast serious doubt on the claim that Google Autocomplete is a neutral tool, given that its algorithms are 'synthesising and reconstituting input query data by previous users and web content uploaded by internet users before publishing them'. Furthermore, she highlighted a number of Google Inc. practices, such as launching 516 improvements to its searches in a single year, censoring materials, manually editing results to improve the user experience, removing pages from its index for security reasons, interfering with search results for legal reasons (e.g. removing child sexual abuse content or cases of copyright infringement) and deleting spam.<sup>82</sup>

At this juncture, one might have thought that Justice Ng was referring to the extent of control that Google Inc. has and could have exercised in the case in question. However, immediately after outlining this active role of Google Inc., her analysis turned to a discussion of the company's knowledge, the other essential element in the defamation debate concerning whether a defendant is a primary or secondary publisher. In rebutting the defence counsel's argument that, because of automation,

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<sup>79</sup> *ibid* [109],[113].

<sup>80</sup> *ibid* [112].

<sup>81</sup> *ibid* [116].

<sup>82</sup> *ibid* [116][118]

Google Inc. could not be said to be aware of the predictions or search results generated by its own design, Justice Ng reiterated that

under the strict publication rule, the requisite mental element is not knowledge of the defamatory content or any intent to defame, but rather whether the defendant has actively facilitated or intentionally assisted in the process of conveying the material bearing the defamatory meaning to a third party, regardless of whether he knew that the material in question is defamatory.<sup>83</sup>

With the control exercised by Google Inc. obvious, and the required mental element also present, the only logical conclusion in this case was that there was ‘plainly a good arguable case’ against Google Inc. and that Google Inc. was not a mere passive facilitator.<sup>84</sup> Yet, Justice Ng stopped short of pursuing any further analysis of whether the company should be seen as a primary or secondary publisher.

Whilst Justice Ng was perfectly justified in putting the legal discussion on hold, as her task was simply to decide whether a good arguable case could be established, any further analysis of liability for Google Autocomplete results based on whether Google Inc. is a primary or secondary publisher is likely to stretch common law analysis. On the one hand, Autocomplete passes on information, including (or despite the presence of) defamatory statements, exactly as intended by Google Inc.’s computer engineers and algorithm designers. The argument that the company lacks knowing involvement in publication and has no control over the result of searches is no longer persuasive. Arguably, Google Inc. and its Autocomplete function are more like a primary (than secondary) publisher, for which the defence of innocent dissemination is of no avail. However, the legal consequences of such a ruling would

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<sup>83</sup> *ibid* [119].

<sup>84</sup> *ibid* [121].

simply be too drastic, as it would mean that Google Inc. would have to stop offering that function to avoid any further defamation lawsuits.

On the other hand, to hold that Google Inc. is a secondary publisher would mean that the company plays only a subordinate role in disseminating defamatory statements, that it does not know or could not by the exercise of reasonable care be expected to know that publication of given content is likely to be defamatory and that it has no realistic ability of controlling such publication. In *Yeung v Google*, Justice Ng, who identified the requisite state of mind and degree of control that Google Inc. has with regard to Autocomplete, clearly felt some sympathy for the company, hinting that it could invoke the defence of innocent dissemination when the defence counsel raised the potential constitutional challenge to freedom of expression and chilling effect on its exercise.<sup>85</sup> If Google Inc. is an innocent disseminator, then it can be held liable for a defamatory statement only after receiving notice. Reaching such a conclusion certainly absolves Google Inc. of extensive liability as a primary publisher, but it runs contrary to the company's actual involvement in reality. Justice Ng's ruling in this case risks being seen as an outcome-driven legal decision.

In the context of Autocomplete, one has to admit that Google Inc.'s involvement is not extensive enough to render it akin to an author or editor. Yet, it clearly plays a more active role than that of a secondary publisher merely facilitating publication in a manner analogous to a library or post office. Unless the unique role of a search engine and its Autocomplete function is recognised in passing judgment in defamation cases such as this one, orthodox common law legal analysis will remain in limbo in this important area.

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<sup>85</sup> *ibid* [140].

### **Autocomplete as Unique ‘Processor’: *RS v Google***

The German Federal Court, in contrast, has recognised the specific role and contribution of Google Autocomplete in legal infringement, and engaged in a different type of legal analysis in the case of *RS v Google*. The legal dispute involved a businessman suing Google Inc. in Germany for displaying the terms ‘Scientology’ and ‘fraud’ (*Betrug*) in Google’s Autocomplete predictions whenever his (full) name was typed.<sup>86</sup> The plaintiff was the founder and chairman of a stock corporation that sold food supplements and cosmetics on the Internet through a network marketing system. He sought an injunction to prohibit Google from suggesting the combination of such terms, arguing that doing so was an infringement of his personality rights (*Persoenlichkeitsrecht*)<sup>87</sup> and harmed the reputation of his business. A preliminary injunction was initially granted, but Google Inc. refused to issue a final declaration. Whilst the Cologne Higher Regional Court ruled in Google’s favour and held that no conceptual or comprehensible meaning could be attached to the aforesaid Autocomplete suggestions, the German Federal Court of Justice (*Bundesgerichtshof*) ruled otherwise.<sup>88</sup>

The assessment of injunctive relief was examined by the Federal Court under articles 1 and 2 of the German Basic Law (*Grundgesetz*)<sup>89</sup> in conjunction with s. 823(1) and s.1004 of the Civil Code (*Bürgerliches Gesetzbuch*)<sup>90</sup> and article 7(1) of

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<sup>86</sup> BGH, 14.05.2013, VI ZR 269/12. For English version, 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.

<sup>87</sup> Although the English translation of the judgment uses the term ‘rights of privacy’, the German version uses the term *Persoenlichkeitsrecht*, which is closer to ‘personality rights’.

<sup>88</sup> German Federal Court of Justice (n 86) [4].

<sup>89</sup> Bundesministerium der Justiz und für Verbraucherschutz, *Basic Law for the Federal Republic of Germany*, <[http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/)> accessed 10 May 2015.

<sup>90</sup> Bundesministerium der Justiz und für Verbraucherschutz, *German Civil Code*, < 10 May 2015.

Section 823 of the Civil Code states one’s tortious liability in damages. It stipulates that:

(1) A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this.

the German Telemedia Act.<sup>91</sup> It is a five step analysis looking into (1) the infringement of personality right; (2) the causal link between such infringement and the plaintiff's right; (3) the unlawfulness of the infringing act; (4) the extent of Google Inc.'s liability; and (5) the nature of injunctive relief to be granted.

As a first step, the Federal Court had to establish whether there was an infringement of personality rights. Under German Basic Law, article 1(1) protects one's dignity, whilst article 2(1) protects the free development of one's personality. The scope of personality rights is manifold, including protection against untrue assertions and the portrayal of any distorted picture of an individual in public.<sup>92</sup> The plaintiff in *RS v Google* claimed that he had never been involved with Scientology and had never been accused of, or investigated for, any fraudulent activities. Rather than viewing the terms 'Scientology' and 'fraud' as devoid of any meaning, as the Cologne Court had done, the Federal Court considered that connecting the terms with the name of a real person could give rise to a meaningful association and negative connotation.<sup>93</sup> The average reader would be likely to link the plaintiff with the sect and with the morally reprehensible action of taking advantage of another upon seeing the terms in combination.<sup>94</sup> The Federal Court ruled that it would be only natural for Internet users to conclude that there was an objective link between the plaintiff and

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(2) The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault.

Section 1004 of the Civil Code is on a claim for removal and injunction. It stipulates that:

(1) If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.

(2) The claim is excluded if the owner is obliged to tolerate the interference.

<sup>91</sup> BGBI. I, 1870.

<sup>92</sup> Corinna Coors, 'Reputations at Stake: The German Federal Court's Decision Concerning Google's Liability for Autocomplete Suggestions in the International Context' (2013) 5 *Journal of Media Law* 322, 323.

<sup>93</sup> German Federal Court of Justice (n 86) [33].

<sup>94</sup> *ibid* [14].

the derogatory words upon viewing the Autocomplete results.<sup>95</sup> As a result, the Federal Court concluded that the plaintiff's rights of personality has been encroached. In the second step the Federal Court also ruled that Google Inc. was directly responsible for infringing the plaintiff's personality rights.<sup>96</sup> It pointed out that it was Google Inc. that had analysed user behaviour using computer programmes it had developed and it was also Google Inc. that had made the corresponding suggestions to users.<sup>97</sup> Those suggestions were not arbitrary results from an 'ocean of data' (direct quote from the Federal Court judgment).<sup>98</sup> Further, the objectionable terms had been combined by the search engine, not by a third party.<sup>99</sup> The Court pointed out that the search engine had been designed by Google Inc. in a specific manner, namely, in such a way that predictions developed search queries further through a search programme driven by highly complex algorithms. Hence, search queries previously typed could later present Internet users with a combination of the terms most frequently entered in relation to the search terms in question.<sup>100</sup> Besides, the predictive terms had been made available on the Internet by Google Inc., and the Court thus ruled that they originated directly with Google Inc.<sup>101</sup> Since Google Inc. has provided the predictions over the Internet by means of its search engine without involving any third party, the infringement can be directly attributed to Google Inc.. Yet, the Federal Court reminded us that in establishing infringement and causality do not yet permit drawing the conclusion that Google Inc. is liable 'for each and every infringement of rights' of personality through search engine predictions.

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<sup>95</sup> *ibid* [16].

<sup>96</sup> *ibid* [17].

<sup>97</sup> *ibid* [17].

<sup>98</sup> *ibid* [16].

<sup>99</sup> *ibid* [17].

<sup>100</sup> *ibid* [16].

<sup>101</sup> *ibid* [17].

Consequently, the third step of analysis on the unlawfulness of an infringement requires balancing of conflicting rights and interests to be undertaken. Under German law, interference with rights of personality is only unlawful where the interests of the injured party take precedence over the interests of the defendants.<sup>102</sup>

In examining the rights and interests of Google Inc., the Federal Court stated that Google Inc. was a service provider in making its own information available for use, and thus came under the rubric of the Telemedia Act.<sup>103</sup> The Court was also quick to point out that the plaintiff had not sued Google Inc. for being the conduit of or caching or storing third-party information, which, under s. 8-10 of the German Telemedia Act, the defendant would bear limited responsibility for. Instead, the plaintiff sued the company specifically for the search term predictions generated by its Autocomplete function, in other words for the search engine's 'own' content (direct quote from the Court).<sup>104</sup> Thus, Google Inc. could not claim exemption from responsibility for the contents of Autocomplete.

Although the plaintiff's rights to personality has been infringed by Google Inc, a comprehensive balancing of fundamental rights and conflicting interests needs to be undertaken under the framework of the European Court of Human Rights.<sup>105</sup> The court weighed the rights of personality of the plaintiff (arts. (2) and 5(1) of the Constitution) against the defendant's rights of personality, freedom of speech and freedom to do business (arts. 2, 5(1) and 14 of the Constitution). In the Court's opinion, due to the untrue character of the statement in question, the plaintiff's interest clearly prevailed.<sup>106</sup>

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<sup>102</sup> *ibid* [21].

<sup>103</sup> *ibid* [20].

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* [21].

<sup>106</sup> *ibid* [22].

Based on this reasoning, it was ruled that Google had ‘somehow contributed towards’ causing ‘the unlawful impairment in an intentional and adequately causal manner’ and could be held as a co-liable party because it had the legal possibility of preventing the infringing act under s. 1004 of the Civil Code.<sup>107</sup> Whether the defendant could be considered the offender or an accessory in the circumstances was irrelevant, particularly if it had the legal possibility of preventing the act.<sup>108</sup> Liability here is strict in the sense that the defendant need not be aware of the circumstances giving rise to the offence and its unlawful nature, and fault is not required.<sup>109</sup>

More significant to our present analysis is the fourth step of analysis on the extent of Google Inc.’s liability. Despite the fact that the Federal Court has ruled that Google Inc. is a co-liable party in respect of its fault, it also made it clear that Google Inc. is not ‘liable unreservedly.’<sup>110</sup> The Federal Court highlighted the role of a search engine under the Telemedia Act, which bears close resemblance to the aforementioned EC Directive.<sup>111</sup> The EC Directive defines the circumstances in which Internet intermediaries should be held accountable for material that is hosted,<sup>112</sup> cached<sup>113</sup> or carried by them but which they did not create. In effect, it provides a ‘safe haven’ allowing an exemption to ISPs’ liability when they are merely conduits,<sup>114</sup> unless they have actual knowledge of unlawful activity or information,<sup>115</sup>

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<sup>107</sup> *ibid* [24]. German Civil Code (n 90).

<sup>108</sup> German Federal Court of Justice (n 86)[24].

<sup>109</sup> *ibid*.

<sup>110</sup> *ibid* [25].

<sup>111</sup> Article 1 of the Telemedia Act states clearly that the Act is to implement Directive 2000/31/EC. For a general discussion of the Act, Thomas Hoeren, ‘Liability for Online Services in Germany’ (2009) 10 *German Law Journal* 561.

<sup>112</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) [2000] OJ L178/1, art 14.

<sup>113</sup> *ibid* art 13.

<sup>114</sup> *ibid* art 12.

<sup>115</sup> *ibid* art 13.



but have failed to act expeditiously to remove the offending materials.<sup>116</sup> Under the EC Directive framework, there is no general duty on ISPs to monitor information that passes through or is hosted on their system (article 15). The critical issue before the Federal Court in *RS v Google* was how to fit a search engine and its Autocomplete function into the existing framework.

Accordingly, when the Federal Court ruled in favour of the plaintiff, it was considering Google Inc. to be a content provider in offering word combinations, predictions and suggestions through its Autocomplete function. The Court reasoned that Google Inc.'s activities were 'not purely technical, automatic and passive in nature'<sup>117</sup> nor 'confined solely to the making available of information for access by third parties'.<sup>118</sup> If Google Inc. was a content provider, then it would bear the highest standard of responsibility, including a duty to monitor content and remove or disable access to unlawful content (section 7 of the Telemedia Act).<sup>119</sup> Following this reasoning, the only outcome would be that Google Inc. is no longer able to operate its Autocomplete function, as it would be effectively impossible for the company to carefully monitor the 'ocean of data' in cyberspace to prevent any defamatory predictions from appearing.

Once again, one is caught in an odd legal limbo. Google's Autocomplete is not a passive service provider of the search term predictions and combinations that it offers, and yet it is not the original author or source of defamatory material. It would be unfair to an injured party to view Google Inc. as a conduit or mere host of information, and yet it would be equally unfair to Google Inc. to hold it to the highest standard of responsibility as a content provider, which would render it impossible for

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<sup>116</sup> *ibid* art 14.

<sup>117</sup> German Federal Court of Justice (n 86 ) [26].

<sup>118</sup> *ibid*.

<sup>119</sup> Telemedia Act and Hoeren (n 111).

it to offer the Autocomplete function. To resolve this difficult dilemma, the German Federal Court opted for a practical approach. It highlighted the fact that Google Inc. Autocomplete ‘processes’ information in a unique way beyond the existing legal framework of the ‘technical process of operating and giving access to a communication network’<sup>120</sup> and that the company’s interests and rights are protected by articles 2, 5(1) and 14 of the German Basic Law. Under the German Constitution, Google Inc. is also entitled to the right of the free development of its personality, to freedom of speech and to freedom to do business.<sup>121</sup>

Due to the various possibilities for an infringement of the ‘personality right’, the court tried to limit liability to a certain extent and examined as a fifth step as to whether it was possible to prevent and reasonably expectable for the defendant to prevent the realization of the occurrence in question. The court thereby relied on the aspect “whether and to what extent the party sued can be expected to monitor in the relevant circumstance”, i.e. the duty to monitor. Thereby the Court distinguished that the search engine operator is under obligation to monitor prediction in advance for any infractions, but it has to apply a preventive filter for certain areas. Besides, it affirmed a duty to monitor only in case when it becomes aware of the infringement of rights.

Despite the fact that Google had contributed to the infringement of the plaintiff’s personality rights in *RS v Google*, the Federal Court gave weight to the Autocomplete feature being not reprehensible but rather a legitimate business activity.<sup>122</sup> The Court further noted that a search engine does not aim from the outset to infringe any rights to assert untrue allegations against any person.<sup>123</sup> More

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<sup>120</sup> Recital 42 of the EC Directive (n 9).

<sup>121</sup> German Federal Court of Justice (n 86) [22].

<sup>122</sup> *ibid* [22][26].

<sup>123</sup> *ibid*[26]

specifically, the Court took into account that it was only through the additional element of certain third-party behaviour that derogatory combinations of terms could be generated by the system.<sup>124</sup> Nevertheless, it highlighted Google Autocomplete's role as a processor of users' search queries using its own programme to form word combinations<sup>125</sup>: '[O]wing to the processing it conducts, the defendant is responsible for the terms proposed in the form of predictions.'<sup>126</sup> Consequently, the Court concluded that Google Inc. could be held liable only for failing to take sufficient precautions to prevent the predictions generated by its algorithm from infringing the rights of the plaintiff.<sup>127</sup> Given that Google Inc. has the power and control to remove and to interfere with word combinations and predictions, it has the obligation to monitor and prevent such infringements in future after it has received notice from a complainant.<sup>128</sup> In sum, the Court formulated the rule of notice and takedown for a special type of 'processor'. The case itself was sent back to the Cologne Higher Regional Court in order to decide whether the plaintiff is entitled to pecuniary damages.<sup>129</sup>

## Conclusion

In juxtaposing the Hong Kong Court's decision in *Yeung v Google* and the German Federal Court's judgment in *RS v Google*, one realises that the legal challenge posed by Autocomplete lies in its ambivalent nature. Not only does this relatively new algorithm fail to fit with our understanding of what a publisher and

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<sup>124</sup> *ibid.*

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid* [27].

<sup>128</sup> *ibid* [30].

<sup>129</sup> *ibid* [31].

innocent disseminator are under orthodox common law dating back to the 19<sup>th</sup> century, but it also sits uncomfortably with contemporary categories of ISPs, that is, passive host provider, mere conduit or content provider, formulated under the European EC model in the 21<sup>st</sup> century. Whilst the German Court made a bold move in recognising Autocomplete as a unique type of processor and imposing upon it a new set of obligations to monitor, block and prevent predictions with defamatory content upon notice of complaint, the Hong Kong Court is faltering along the path of defamation liability under orthodox common law concepts.

In a related debate on the role and liabilities of a search engine in different contexts (defamation, unfair competition and free speech) in the US, academics have urged us to acknowledge the special functions of a search engine and its various features. For instance, James Grimmelman labels a search engine an ‘advisor’,<sup>130</sup> and Seema Ghatnekar calls Autocomplete a ‘algorithm based re-publisher’.<sup>131</sup> We have all experienced the efficiency of Autocomplete, and in this chapter witnessed how its roles as advisor and re-publisher have been prominently played out in the present legal debate. Google Inc. has indisputably tampered with information transmission in exercising algorithm-based editorial control to actively generate suggestions for users. It has combined not only human input and artificial intelligence, but also the third-party content of search terms from numerous Internet users and its own sophisticated algorithm editing. It certainly has the power to exercise control and curtail results. Perhaps, Autocomplete should be seen as an ‘AI processor’. Whatever it is called, until judges or legislators are willing to acknowledge this new ‘in-between’ creature that can combine the transmission of bits of information with the selection

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<sup>130</sup> James Grimmelman, ‘Speech Engines’ (2014) 98 Minnesota Law Review 868.

<sup>131</sup> Ghatnekar (n 2) 196.

and transformation of content production, there remains a long way to go to reach the ultimate goal and sensible solution of a notice-and-takedown liability regime.