

Article Information

Authors: Tim O'Callaghan, Zoe Underwood

Service: Intellectual Property, Intellectual Property & Technology, Intellectual Property Litigation

Sector: IT & Telecommunications

Voller and Defamatory Facebook Comments: Are businesses liable for third party comments?

If you allow others to post on your social media sites, you are likely to be held responsible if those posts breach the law or other people's rights.

The NSW Supreme Court confirmed this in a recent decision when former youth detainee Dylan Voller from the Northern Territory alleged that he had been defamed by three major Australian news outlets as a consequence of what others posted about him on the Facebook pages of those outlets. This is despite evidence from those news outlets that the removal of unacceptable comments would involve constant vetting of thousands of new comments posted by the public each day, and that only some of this editing work could be automated.

Justice Rothman found in this case that the owner of a public Facebook page is able to assess its original post as one which is likely to give rise to one or more defamatory comments. Whereas, in some circumstances there may be posts that, on initial assessment, would be unlikely to give rise to defamatory comments.

Justice Rothman noted that where a business hosts a public Facebook page, it generally does so to improve its own commercial interests. Noting in particular, that for a media company *"the primary purpose of the operation of the public Facebook page is to optimise readership of the newspaper (whether hardcopy or digital) or broadcast and to optimise advertising revenue. The exchange of ideas on the public Facebook page is a mechanism (or one of the mechanisms) by which that is achieved."*

A business also has some means of assessing when unacceptable posts may be predicted, and has some degree of control over the posts it receives:

"[a] public Facebook page ... allows the publication of the Facebook page and comments by the Administrator, but allows the Administrator to forbid all comments by others. Further, by the use of a list of prohibited words that includes words that would be necessary to render any comment intelligible, such as all pronouns; the definite and indefinite articles; and all conjunctions and prepositions, the Administrator is able to hide all comments, pending the monitoring of such comments."

On that basis, the Court said:

"When a defendant commercially operates an electronic bulletin board and posts material that, more probably than not, will result in defamatory material, the commercial operator is "promoting" defamatory material and ratifying its presence and publication. A defendant cannot escape the likely consequences of its action by turning a blind eye to it. ... [I]t assumes the risks that comments made on that page will render it liable under various laws that may prevent, render unlawful, or render actionable in damages various statements."

The full decision in *Voller v Nationwide News Pty Ltd* [2019] NSWSC 766 ('Voller') can be [found here](#). The decision has been appealed by all three news outlets and is listed for hearing on 17 December 2019.

Note that the decision in *Voller* was a preliminary decision. There has not at this stage been a finding that any of the posts were in fact defamatory, but if they are found to be defamatory, the media company host will be held responsible.

This is not the first time that a business has been considered responsible in these circumstances.

Similar to the decision in *Voller*, in 2018 the District Court of South Australia held in *Johnston v Aldridge* [2018] SADC 68, that a pop up farmers market were liable for defamatory comments about Mr Johnston made on posts to its Facebook page. These Facebook comments were again made by other Facebook users rather than the business itself. Justice Brebner held that Mr Aldridge *"must be taken to have accepted the responsibility to monitor (the comments) and remove those which were inappropriate for suffer the consequences of the inconvenience involved"*.

In 2012, the Advertising Standards Bureau held Carlton United Brewery in breach of the Australian Advertiser Code of Ethics, for content posted on the "VB" Facebook page which was considered obscene, sexist, racist and promoting irresponsible drinking. The Bureau noted that *"social media is an advertising platform that requires monitoring to ensure that offensive material is removed within a reasonable timeframe and that content within a Facebook page should, like all other advertising and marketing communication, be assessed with the Code in mind."*

In 2011, the Federal Court found in *ACCC v Allergy Pathway Pty Ltd (No 2)* [2011] FCA 74 that Allergy Pathway engaged in misleading and deceptive conduct by reason of comments posted by apparent customers on the Allergy Pathway Facebook page, which praised the Allergy Pathways products with statements which were found to be false or misleading.

Following that case, the then ACCC Commissioner, Sarah Court, said in a statement to media: *"A court would have to be satisfied that a big company had somehow become aware and ignored these false testimonials ... If you knew about them and they worked to your advantage and left them there, then I don't think you could say: 'It isn't our fault and therefore it isn't our responsibility'."*

This principle can be equally applied to public social media posts which breach the intellectual property rights of others.

The decision in *Voller* underpins the importance, when businesses host social media sites, that they take a risk management approach to regulating its social media content. To practically manage a public social media page, businesses should consider incorporating the following strategies:

- communicating "house rules" which clearly set out what is and is not acceptable in a post;
- making a preliminary assessment of social media posts to determine whether it is likely to attract controversial responses from third party users;
- for posts that a more likely attract controversy, ensure comment controls are being used to vet comments from third party users before they are made publically available; and

for posts that are less likely to attract controversy, ensure that the post is monitored at least once or twice a day, and ensure unacceptable comments are quickly deleted.

How often does your business monitor the comments it receives on your public social media sites?