

IP & MEDIA NEWS

Newsletter on Recent Developments

December 2022

ONLINE SAFETY BILL

Delayed until this month, according to the BBC,¹ the requirement for major platforms to take down "legal but harmful" –aka "*lawful but awful*" content has now been dropped from the Online Safety Bill (OSB). This was to replace section 127 of the Communications Act on "offensive communications." Our position has always been that the current law is adequate and what is needed is better enforcement.² The DCMS this week explained that several of the amendments that have been publicised will be tabled in the Lords, so they will not be visible on the amendments paper for the Commons debate next week

NEW EU DIGITAL REGULATIONS

This quarter saw the introduction of the Digital Services Act (DSA) and the Digital Markets Act (DMA). The Commission made the proposals in December 2020 and on 25 March 2022 and a political agreement was reached on the Digital Markets Act, and on 23 April 2022 on the Digital Services Act. Together they form a set of new rules that will be applicable across the single market. The DSA and DMA have two main goals: (1) to create a safer digital space in which the fundamental rights of all users of digital services are protected; (2) to establish a level playing field to foster innovation, growth, and competitiveness.

DIGITAL MARKETS ACT (DMA)

The Digital Market Act (DMA) establishes a uniform regulatory regime. It entered into force on 1 November 2022. It constitutes an important development in the regulation of the digital economy by giving the European Commission significantly more powers to control the behaviour of large online platforms and intervene in the functioning of digital markets. The DMA creates a mandatory set of rules for online platforms designated as gatekeepers for one or more core platform services. The rules are intended to stop gatekeepers from imposing unfair terms and conditions on businesses and end users and ensure effective competition. From 2 May 2023, platforms that meet the quantitative thresholds will have two months to notify themselves to the Commission, which then has 45 days in which to adopt a designation. Once designated, gatekeepers have six months to comply with their obligations and report back to the Commission.

¹ <https://www.bbc.com/news/technology-63782082>

² <http://mcevedys.com/wp-content/uploads/2019/05/our-view-re-online-harms-white-paper.pdf>

DIGITAL SERVICES ACT (DSA)

Adopted in October 2022, the DSA is an EU regulation to modernise the E-commerce Directive. Arts 3-5 contain the familiar safe harbours. Search Engines are now expressly included. The prohibition on general monitoring remains in art. 7. Art 8 makes clear that will not be breached by orders related to specific content, reflecting the general state of EU law.³ Such court orders should have: a legal basis, reasons, identify the issuing authority, the relevant URL, provide information on redress mechanisms, state territorial scope, be in an EU language etc. Art. 11 requires that “*Providers of intermediary services which do not have an establishment in the Union but which offer services in the Union shall designate, in writing, a legal or natural person to act as their legal representative in one of the Member States where the provider offers its services.*” That representative must have a mandate to deal with authorities and can be held liable for non-compliance with obligations under the DSA without prejudice to the liability of the Intermediary. Their contact details are to be notified and be publicly available. Such a legal representative does not however amount to establishment in the Union for the service provider. Art 13 imposes Transparency Reporting obligations for intermediaries that are not micro/small enterprises. They must make publicly available annual reports on content moderation including the number of court orders and notices to hosting providers categorised by: illegal content type, trusted flagger notices, actions taken and the number of complaints. Automated means for content moderation must also be reported. Section 2 deals with Hosting and art 14 provides for “*Notice & Mechanisms.*” Providers of hosting must put mechanisms in place to allow others to notify them of the presence of/suspicions of *specific* items considered illegal. Mechanisms shall be easy to access & user friendly and allow submission of e-notices. The hosts must facilitate sufficiently precise and adequate substantial notices with substantial explanations, an exact location ie URL, names and email addresses and good faith statements by notice givers. Notices shall be considered to give rise to actual knowledge for art. 5 in respect of the specific item where it would allow a diligent provider of services to identify the illegality of the relevant activity or information without a detailed legal examination. Art 15 provides for statement of reasons by providers to any affected recipients of services for restrictions imposed. That extends to any restriction in the visibility of content—including removals/disablements/demotions/suspensions and restrictions of service and accounts. The statements shall contain at least: where the decision entails removal, the facts and circumstances relied on for that, the use made of automated means in taking the decision (including as to detection). If there is illegal content, the legal grounds and if just incompatible with T&Cs – then a reference to the term relied on and an explanation of how it was incompatible. Finally, clear and user-friendly information must be provided on redress.

A new special regime for copyright takedowns was already introduced in the Digital Media Services Directive (DMSD), by its new Article 17 which replaced the E-commerce Directive

³ See Case 18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, (art. 15 of the E-commerce Directive does not preclude a host provider from being ordered – by means of an injunction – to seek and identify: (a) all the information identical to the illegal information in that injunction and (b) all equivalent information disseminated by the user that disseminated that illegal information.

intermediary safe harbours for copyright infringement cases for “for-profit” “online content sharing service providers” aka platforms and created direct liability for them in infringement, treating them as making a communication to the public when their users do but offering a new, conditional exemption to liability if they have/have sought authorisation and are a good actor with good record.

We have had the previous E-commerce regime for almost 22 years now and it has served us well, however these developments are timely and apposite.

INTERMEDIARY DEFENCES FOR PLATFORMS

In the YouTube Case, C-682/18, the German Federal Court of Justice, referred six questions to the Court. The ECJ judgment came in June 2021. Here a music producer sought and got Takedown from YouTube of a music video but same content then re-surfaced. The case was about “Stay-down.” The questions in issue were: (1) whether an online video sharing platform, such as YouTube, when its users upload copyright works, *performs an act of communication to the public*; and (2) whether rightsholder can require platforms to make sure copyright-protected material is not re-uploaded and how they need to cooperate with hosting providers. The judgment of the CJEU was on the existing legal framework, not including the new DSMD which had not been adopted when the case was brought. The ECJ said there is no “communication to the public” of the content within the meaning of Art. 3 of Directive 2001/29, *unless the platform operator actively contributes, beyond the mere provision of the platform, to providing the public with access to such illegal content in violation of copyright. Specifically, this is the case if the platform operator has concrete knowledge of an infringement and does not immediately delete the illegally uploaded content or block access to it.* Express notice is sufficient for that knowledge. This is also the case if the platform operator does not take the appropriate technical measures (with due diligence) to combat copyright infringements on that platform in a credible and effective manner, including not providing tools on the platform specifically designed for the unauthorized sharing of such content. However, platform operators can only fulfil their duty in relation to **specific content**, the ECJ emphasized. The fact that Youtube performs automated indexing of content uploaded to that platform and recommends videos according to the user’s profile or preferences, and also enables the sharing of content, is not sufficient for the platform to be deemed to have “concrete” knowledge of unlawful activities, according to the court. The criteria for direct liability is the *interference* to give access. That must be *indispensable* to the sharing (per *Brein* aka the *Pirate Bay* case). Crucially general revenue is not relevant, for liability you need *specific advertisements around that content*. One cannot rely on the *GS media* presumption if a use is profit making. Direct liability is a question for the referring court.

DSMD APPLICATION

As noted above, the Copyright in the Digital Single Market Directive 2019/790 (DSMD) was introduced to update and adapt EU law on copyright– in particular the Copyright Directive 2001/29, to the evolution of digital technologies and address/remedy the ‘Value Gap’, namely the perceived gap between the value that online sharing service providers derive from protected works and subject matter and the revenue they distribute to rightholders. Article 17 of the DSMD requires certain online platforms to obtain authorization from rights holders for users uploads and the only exception is when the platform has “made best efforts to obtain an authorization” and is a good solider and has demonstrated good practice in prevention and removals. This new regime replaced the hosting exemption in the Ecommerce Directive for these platforms. Member states had until 7 June 2021 to transpose it.

Similar issues to those in the *Youtube* case arose in the challenge to the new art 17 of the DSMD in *Republic of Poland v European Parliament and Council of the European Union*, Case C-401/19. The applicant claimed that the Court should: “annul Article 17(4)(b) and Article 17(4)(c), and, in the alternative, annul Article 17 in its entirety. Art. 17 of Directive 2019/790 imposes on online content providers obligations to monitor the content posted by the users to *prevent the uploading of protected works*. Such preventive monitoring will, as a general rule, take the form of filtering that content using software tools. As the court noted, the filtering measures which sharing service providers are required to implement must comply with two cumulative obligations: (a) they must seek to prevent the uploading of content which unlawfully reproduces the works and other protected subject matter identified by rightholders; while (b) not preventing the making available of content which lawfully reproduces that subject matter. They cannot preventively and systematically block content falling within the scope of the exceptions and limitations to copyright. They must take into account ex ante, respect for users’ rights. Two types of content were identified: (1) the clearly unlawful; and (2) that not immediately apparent as being unlawful and which requires a contextual analysis, when such monitoring cannot be required. For the latter type of information, a duly reasoned notification, providing the contextual elements likely to make the unlawfulness apparent, or where such a notification is not sufficient, an injunction order, is necessary to obtain its removal. Reflexively applying the *Glawischmig-Piesczek case*, in accordance with art. 15 of Directive 2000/31, an intermediary provider cannot be required to undertake general filtering of the information it stores in order to seek any infringement, but that provision does not, a priori, prevent that provider from being compelled to block **a specific file** that makes an illicit use of a protected work, previously established by a court. That provision does not, in that context, preclude the provider from being obliged to detect and block not only identical copies of that file, but also other equivalent files, namely those that use the work in question in the same way. The AG found that art. 17 contains sufficient safeguards for freedom of expression and satisfied all of the conditions laid down in art. 52(1) of the EU Charter on Fundamental Rights. The limitation was therefore compatible with the Charter.

The safeguards were carefully examined. The restrictions on fundamental rights had to comply with the three-step test. They had to be provided by law. While *best efforts* in art. 17(4) was not defined, legislation can be sufficiently open to keep abreast of changing circumstances. Where more than one fundamental right in issue, as here, a fair balance must be struck and may be necessary to allow ISPs to select the measures. Art 17(7) protected users' rights and legitimate uses/defences/exemptions so there was a fair balance. As the DSMD reflects EU case law, measures must be strictly targeted to enable protection of © without affecting lawful uses. It was also necessary to protect IP and ensure a well-functioning marketplace for ©. So, a liability mechanism was appropriate and necessary and other measures would not be as effective. As to proportionality for art. 52 of the Charter, it was not disproportionate and to prevent risk from automated filtering, a precise limit was laid down in 17(4) (b & c), by the exclusion of measures that target uploading of lawful content. A system that did not distinguish between lawful and unlawful content could lead to blocking lawful content which would be incompatible with Freedom of Expression and not be a fair balance between the competing rights but art. 17 does distinguish. Any liability of ISPs to remove is subject to precondition of a specific notice as a safeguard. The prohibitions on general monitoring were also protection for users' rights. Some content is only to be avoided by notice and it must be sufficient notice to enable ISPs to satisfy themselves *without detailed legal examination* that the communication of the content is illegal & removal is compatible with fundamental rights. IP rights are not absolute and art. 17(9) has safeguards. Further, art. 17(9) stipulated complaint mechanisms and out of court dispute resolution mechanisms and art.17(10) meant the system had safeguards in the commission/and stakeholder dialogues. Therefore, there were appropriate safeguards for fundamental rights and art. 17 must be transposed. The action brought by the Republic of Poland was dismissed.

TRADE MARKS -EU AND EARLIER RIGHTS

A recent case clarified that evidence of use of an earlier EU Trade Mark (EUTM) in the UK won't assist those seeking to invalidate a later EUTM where the decision on invalidity was taken after Brexit. This confirms the previous case law that required the owner of the earlier right to establish that they could prohibit the use of the later EUTM, not only on its filing date, but also on the date on which the EUIPO makes its decision (in cancellation proceedings or in opposition proceedings). This is in line with the Communication dated September 2020 from the Executive Director of the EUIPO on the impact of Brexit, [here](#). See *Shopify Inc. v EUIPO*, T-222/21. The issue is expected to proceed to the ECJ.

ART. 10 AND PROTECTED SPEECH

In a recent case, the Employment Appeal Tribunal overturned an earlier ruling and established that gender-critical beliefs are protected in the workplace and the courts examined the limits of arts.9 &10 of the ECHR. See *Forstater v Center for Global Development Europe* UKEAT/0105/20/JOJ, 10 June 2022. The case centred on Maya Forstater, a researcher who holds the belief that “biological sex is real, important, immutable and not to be conflated with gender identity”. She believes that statements such as “woman means adult human female” or “trans women are male” are true, neutral facts and are not phrases of bigotry or hostility towards trans people. In 2016, she became a visiting fellow for the Center for Global Development (CGD), a think-tank focused international development. In 2018, the Claimant made a series of tweets on her personal account regarding transgender women, as part of a public discourse on the potential reforms of Gender Recognition Act. This included the Claimant tweeting on 2 September 2018 the following:

“I share the concerns of @fairplaywomen that radically expanding the legal definition of ‘women’ so that it can include both males and females makes it a meaningless concept, and will undermine women’s rights and protection for vulnerable women and girls.” “Some transgender people have cosmetic surgery. But most retain their birth genitals. Everyone’s equality and safety should be protected, but women and girls lose out on privacy, safety and fairness if males are allowed into changing rooms, dormitories, prisons, sports teams.”

Subsequently, her colleagues and staff members at CGD purportedly found her statements on Twitter transphobic, offensive and complained. Later on, when her contract was not renewed by CGD, the Claimant challenged the decision at the Central London Employment Tribunal in which she claimed that she was being discriminated against because of her beliefs. The Employment Tribunal in 2019 found against the Claimant. The Tribunal determined that Claimant’s beliefs were “absolutist” and the “specific belief that the Claimant holds as determined in the reasons, is not a philosophical belief protected by the Equality Act 2010 (EqA 2010).”

The Claimant appealed against the judgment, arguing that the Tribunal did not apply the test set out in *Grainger plc v Nicholson [2010] ICR 360* correctly. The Grainger Criteria sets out the elements that one must satisfy to qualify as a ‘philosophical belief’ under EqA 2010.

- (i) The belief must be genuinely held.
- (ii) It must be a belief and not an opinion or viewpoint based on the present state of information available.
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
- (v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

Mr Justice Choudhury held that the preliminary Tribunal misapplied the test, specifically the fifth element known as *Grainger V*. This element was the only criteria that was in doubt in the preliminary Tribunal causing the judge to state that the Claimant's views were "not worthy of respect in a democratic society". However, Mr Justice Choudhury, on the appeal, held that a philosophical belief would only fail to meet the *Grainger V* condition "if it was the kind of belief the expression of which would be akin to Nazism or totalitarianism and thereby liable to be excluded from the protection of rights under Articles 9 and 10 of the European Convention on Human Rights (ECHR) by virtue of Article 17 thereof." The Tribunal went on to state that s10 of the EqA 2010 must be interpreted alongside Article 9 (the right to freedom of thought, conscience and religion) and Article 10 (the right to freedom of expression) of the ECHR. The judgement held that while the Claimant's beliefs were offensive to some, it did not seek to destroy the rights of trans people.

The Employment Appeal Tribunal overturned the earlier ruling and established that gender-critical beliefs are protected in the workplace under Article 9(1) of the ECHR and s.10, EqA 2010. However, the Tribunal clarified that the (1) judgement did not add to substantively to the transgender debate, (2) persons that hold gender-critical beliefs are still subjected to prohibitions of harassment and discrimination, (3) a trans persons continues to have protections against discrimination and harassment as conferred by the EqA 2010 and finally, (4) employers are still liable to provide a safe environment (free from harassment and discrimination) for trans persons.

DEFAMATION: RILEY V MURRAY [2021]

This case arose out of a series of tweets. Former leader of the Labour Party, Jeremy Corbyn was hit with an egg whilst visiting a mosque on 3 March 2019. On the same day, TV Presenter Rachel Riley re-tweeted a tweet from 10 January 2019 of Guardian journalist, Owen Jones with the words 'Good advice' (later referred to as the Good Advice Tweet or GAT in the judgment) in response to the egg attack. The original tweet by Owen Jones was in respect of another incident where Nick Griffin, the former leader of the British National Party, had an egg thrown at him.



The tweet garnered 1.5 million impressions with many replies including one from Mr Corbyn's Stakeholder Manager, Laura Murray who stated:

“You are publicly encouraging violent attacks against a man who is already a target for death threats. Please think for a second about what a dangerous and unhealthy role you are now choosing to play in public life.”

Later in the evening, Ms Murray sent out another tweet as follows:



This tweet of Ms Murray was not in reply of the GAT as before, nor was the GAT quoted or a screenshot included. The following day, Ms Riley responded to Ms Murray's quote as an “appalling distortion of the truth” and subsequently sued for libel, claiming serious harm to her reputation.

Ruling at first instance

20 December 2020, Mr Justice Nicklin ruled that the Defendant, Ms Murray, failed to satisfy the criteria for the defences to defamation in sections 2 (Truth), 3 (Honest Opinion), and 4 (Responsible Publication) of the Defamation Act of 2013. Nicklin J held that the defence of Truth failed because her tweet was presented as a statement of fact when the Claimant's GAT, at face value, was ambiguous and could be interpreted in many ways and was therefore, not a statement of fact. Nicklin J held that the defendant failed in her defence of Honest Opinion because she did not satisfy section 3 (4)(a) of the Act which required that an honest person could have held the opinion on the basis of any true fact which existed at the time the statement complained of was published. In other words, the defendant's Honest Opinion was not based on true facts due to the ambiguity of the GAT. In relation to Responsible Publication, Nicklin J applied the three-part test from *Economou v de Freitas* [2018] EWCA Civ. 2591. The defendant failed the third stage of the test because she could not establish that her beliefs were reasonable. Nicklin J stated that the defendant's failure to quote or retweet the GAT, removed accuracy and important context from

the tweet which resulted in the misrepresentation by the defendant. Therefore, the defendant could not reasonably believe that providing erroneous information was in the public interest. Mr Justice Nicklin ruled in favour of the Claimant and awarded her damages of £10,000.

The Defendant appealed Nicklin J's rejection of the statutory defences. On 11 August 2022 in the Court of Appeals, Lord Justice Warby gave judgment. The defendant contended that the judge had misinterpreted the law on two grounds. Firstly, the defendant argued that if a section of the audience could have reasonably understood the GAT to contain the meaning stated, then her defence of Truth should stand. The defendant went on to point out, citing *Begg v BBC* [2016], that the Judge himself found that a section of audience could and did reasonably interpret the GAT in the manner as she intended which therefore would mean her defence should have succeeded. Furthermore, the defendant argued that the Judge, on his own findings, stated that "the GAT did *contain* the meaning stated" and thus, made the defendant's Tweet was substantially true. This in turn would allow for the defence of Truth to succeed. Warby LJ. upheld Nicklin J's finding that the "*GAT was ambiguous in the way that he identified and that the Factual Allegation was in substance one of the reasonable meanings of the GAT.*" In relation to whether the ambiguity of the GAT made the defendant's tweet substantially true, Warby LJ agreed with Nicklin J.'s reasoning. *Begg* was not applicable. Here there were various statements and posts whereas the GAT is an express statement. The presentation of the GAT was as a fact without context or a retweet even though it could have been interpreted in many ways.

The defendant challenged Nicklin J's decision on Honest Opinion on the basis that his approach was wrong and he should have not relied on "on the common law to give s 3(4)(a) of the 2013 Act a construction which its words do not bear". Warby LJ. agreed that the if the court's approach was to apply the literal meaning of section 3(4)(a), then the defendant's honest opinion would succeed, even if its basis were false. However, Warby LJ., citing Parkes J. in *Burki*, stated "*that it would involve a "radical" departure from the common law rather than retaining the "broad principles" of the common law, as the Explanatory Notes suggest was the intention*". In other words, the literal approach was not what Parliament had intended and would be a dramatic shift from the long-held common law position. He noted that the literal approach would lead to odd outcomes. Warby LJ found the defence of Honest Opinion failed due to the defendant's choice of wording, in particular in usage of "*by so doing the claimant has shown herself to be a dangerous and stupid person who risked inciting unlawful violence*". This specifically linked the defendant's opinion to the allegation in the tweet. Warby LJ agreed with Nicklin J that "*the Opinion was expressly...premiered on the truth of the Factual Allegation means that it cannot survive the failure of the defendant's case on the issue of Truth.*" This finding means, if the opinion is found to be based on false facts, then the defence of Honest Opinion cannot succeed.

As to Responsible Publication, and its requirement of public interest, Warby LJ noted it would be wrong to take a narrow view and that public interest is a broad concept. He confirmed that the defendant was aware of the multiple meanings of the tweet as she had initially replied to the



claimant before her second tweet. She had also read the many reply reactions to the GAT (on her own account) and had made the decision not to include the original GAT or repost the tweet. Therefore, Warby LJ accepted Nicklin J's assertion that the defendant ought to have known of the ambiguity of the GAT and thus, it was unreasonable of her to believe it was in the interest of the public to frame the GAT as she did. He dismissed the appeal and upheld the original decision.

The case is an important one as it clarifies the parameters and the application of all three of the newly codified defences. The decision on Honest Opinion is particularly useful. While it has always been the case that the opinion had to be based on true or privileged facts, it's rare to see that in issue. It remains a difficult defence. Similarly, it has long been understood that there is no public interest in disinformation, and this is another reminder. Tweeters who are prepared to publish negative statements about others should have a basic grasp of defamation law.

Case notes by B. Haymon