

Defamation and Intermediaries: ISP Defences

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☞ Innocent dissemination; Internet service providers; Knowledge; Libel; Mere conduit; Secondary responsibility

Introduction

This is a short review of the current position on ISP's defences to libel. The E-Commerce Directive 2000/31 is now over 10 years old. Overall, however, there is a surprising paucity of case law, perhaps an indicator of practical success, but some questions have been tentatively answered at least. This is a brief review of the current position.

Three defences

At present, ISPs find it challenging to rely on many primary defences to libel as they may lack the co-operation of the authors, direct knowledge and evidence of the truth or otherwise of the allegations. Further, defences are fact intensive and expensive to prove. This renders the intermediary defences all the more attractive. Three defences are available to internet intermediaries facing claims from third-party defamatory content: the horizontal immunities under the E-Commerce Directive and implementing Regulations, the statutory defence of secondary responsibility and common law innocent dissemination. The different contours of these three defences now have come into focus following a series of recent cases.

The E-Commerce Directive 2000/31¹ and the implementing Regulations, the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013), provide immunities² or limitations of liability in regs 17–19 of the Regulations based on arts 12 and 14 dealing with mere conduits, caches and hosts respectively. These are not

properly exemptions as they protect only from awards of damages and are without prejudice to the potential for injunctive relief.

The defence of secondary responsibility in the Defamation Act 1996 (the Act) at s.1 provides a defence for secondary, but not primary (author, editor or publisher), publishers without knowledge of the defamation who take reasonable care.³

It had been thought that the defence of innocent dissemination was abolished by the Act, but it has now been clarified that the common law defence lives on, if effectively superseded, in *Metropolitan Schools v DesignTechnica*.⁴ At common law, liability in libel was strict and the burden of proof fell squarely on the disseminator to bring himself within the defence, proving he had no actual or constructive knowledge that the publication contained defamatory material.⁵ The common law also recognised a distinction between primary and secondary publishers, and secondary publishers could escape liability by proving lack of knowledge of the defamatory statement subject to taking reasonable care.

Arguably the Directive and then the common law defence are the most attractive as they are the broadest; see further below in relation to the definitions in the Act. There has been no suggestion that in libel, defendants should be forced to rely on the Act or common law instead of the Directive—see *Imran Karim v Newsquest Media Group Ltd*,⁶ cited with approval in *Kaschke v Gray*.⁷ ISPs can defend their user generated content under the Directive with its wider protection.

Conduits and search engines

Although publication is a question of fact in each case, it is now settled that mere conduits, a purely passive role, will not be publishers at common law; that is, their conduct will not suffice for that element of the cause of action for libel—see *Bunt v Tilley*,⁸ knowing involvement in the publication of *the relevant words* is required for liability.⁹ Therefore some element of intention is required for the act of publication, and an ISP which performs a merely passive role in facilitating postings online is analogous to a telephone company and can not be a publisher at common law.¹⁰

¹ [2000] OJ L178/1. These apply to “Information society services”—art.2(a) of the Directive, which refers to art.1(2) of Directive 98/34 as amended by Directive 98/48—as being “any service normally provided for remuneration at a distance by electronic means and at the individual request of a recipient of services”.

² These are not properly exemptions both owing to the potential for injunctive relief and also as often they apply where no liability would otherwise attach under national law in any event.

³ Defamation Act 1996 s.1: “Responsibility for publication. (1) In defamation proceedings a person has a defence if he shows that — (a) he was not the author, editor or publisher of the statement complained of, (b) he took reasonable care in relation to its publication, and (c) he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.”

⁴ *Metropolitan Schools v DesignTechnica* [2009] EWHC 1765 (QB); [2011] 1 W.L.R. 1743 at [70].

⁵ See *Godfrey v Demon* [1999] 4 All E.R. 342 QBD at [26]–[34].

⁶ *Imran Karim v Newsquest Media Group Ltd* [2009] EWHC 3205 (QB) at [15], regarding summary judgment and strike-out applications in relation to a site containing both editorial and user generated content in the form of “have your say” sections at the end of editorial articles. The defendants successfully relied on the Directive in relation to the user content and privilege in relation to the article.

⁷ *Kaschke v Gray* [2010] EWHC 690 (QB); [2011] 1 W.L.R. 452 at [62]–[72].

⁸ *Bunt v Tilley* [2006] EWHC 407 (QB); [2007] 1 W.L.R. 1243 at [23]. Three defendants were ISPs, sued in relation to defamatory postings made in chat rooms, although their only role was to afford a connection to the internet so that they were conduits, not hosts. Nothing that would qualify as proper notice had been given to them. The court considered the unanswered question in *Demon* [1999] 4 All E.R. 342; if an ISP had only played a passive role, would it be liable?

⁹ *Bunt* [2006] EWHC 407 (QB); [2007] 1 W.L.R. 1243 at [23], citing *Emmens v Pottle* (1885) 16 Q.B.D. 354 CA at 357.

¹⁰ *Bunt* [2006] EWHC 407 (QB); [2007] 1 W.L.R. 1243 at [14] and at [37].

In *Bunt*, the court revisited territory unresolved in *Demon*—to be a publisher required some element of intention or knowing involvement in the act or process of publication itself, not just of the particular words. Some degree of awareness or assumption of responsibility was required for publication at law. An ISP which performed a passive role was analogous to a telephone company and could not be a publisher at common law. Such entities did not require even a defence such as the mere conduit or other immunities.

Although different positions have been taken within the EU,¹¹ the English courts treat search engines as conduits rather than hosts as in *Metropolitan Schools v DesignTechnica*.¹² In *Metropolitan*, Google was joined as a defendant owing to its role as an information location/search engine. The court held that Google's wholly automatic functions performed by its algorithm could not render it a publisher on the basis of authorship or acquiescence—echoing *Bunt* (above). As it was not a publisher at common law, Google had no need of any defence.

Owing to the futility of suing search engines, primary publishers find themselves facing additional claims for the republication by the search engines, as in *Budu v BBC*,¹³ where search results yielded three defamatory snippets from the BBC news archives in reverse order. Google was not sued owing to *Metropolitan*, but the BBC was sued for its own and Google's republication and “the tattoo”, the stigma of the search results attached to the claimant's name. The BBC escaped liability but the defence turned on its own particular facts. In theory a case on similar principles may succeed, although not if the original is published aboard in another language and only accessible via a third-party translation service.¹⁴

Google's position in terms of its search functions may be clear, but others who try to similarly characterise themselves must pay careful attention to all aspects of their service. In *Fox v Newzbin*¹⁵ (copyright infringement) Newzbin claimed it was a search engine directed to Usenet rather than the web and was “content agnostic”

and a mere intermediary providing links to sites storing the claimants' films in downloadable form. This was rejected.

The law on conduits is evolving generally and there are few certainties. Notably, while a service provider did not lose the protection of art.12(1) of the Directive even with actual knowledge, this has now gone in infringement cases and may not be a safe proposition for much longer even in defamation. The rule was abrogated in relation to copyright infringement, by art. 8(3) of the Information Society Directive 2001/29/EC and the implementing §97A of the Copyright Designs and Patents Act 1988, which enable an injunction to be granted against a service provider which carries an infringement and has actual knowledge, even if a mere conduit. This was extended to other intellectual property rights, by art. 11 of the Enforcement Directive 2004/48/EC and although the UK did not specifically implement art. 11, the flexibility of §37(1) of the Senior Courts Act 1981 allows for such an injunction. Notice will provide such conduits with actual knowledge. See *Twentieth Century Fox Film Corp v British Telecommunications plc*¹⁶ and *L'Oréal v eBay*.¹⁷

Hosts and defences

The three defences apply different standards of knowledge relevant to hosts. The Act does not protect any secondary publisher who receives a takedown notice as he cannot therefore not satisfy the s.1(1)(c) stipulation that “he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement”. As to the position prior to such a notice, the Act and the common law appear to require knowledge that the defendant is contributing to the publication of a “defamatory statement”. In contrast, the Directive refers to knowledge of “unlawful activity”, prima facie requiring knowledge a statement is a libel—that is, that there is no defence to any defamation. This issue was first raised by the Law Commission, which considered it addressed by the presumption of falsity in libel¹⁸ such that defamatory statements are assumed to be untrue, so that ISPs could just assume defamatory statements were libels. This fails to address defences such as privilege or honest¹⁹ comment

¹¹ Austria and Bulgaria had by legislation extended the mere conduit immunity to search engines while Spain, Portugal, Hungary, Liechtenstein and Romania had applied the hosting immunity—as discussed in *Metropolitan* [2009] EWHC 1765 (QB); [2011] 1 W.L.R. 1743 at [89].

¹² *Metropolitan* [2009] EWHC 1765 (QB); [2007] 1 W.L.R. 1243 at [70]. It was an application to set aside leave to serve Google out of the jurisdiction so the issues included whether there was a good arguable case against Google in light of its defences where search results which included a snippet from the first defendant's website, which snippet included the word “Scam”. Google was not a host as it did not have anything from which to “take down” the offending words. Its wholly automatic algorithm could not render it a publisher at common law. Although it could not take down, Google had taken steps to block identified URLs from being accessed from google.co.uk, but in order to avoid blocking a large amount of inoffensive material, blocks had to be URL specific.

¹³ *Budu v BBC* [2010] EWHC 616 (QB).

¹⁴ As in *Farid El Diwany v Ministry of Justice* [2011] EWHC 2077 (QB), a claim in relation to an article published in 2006 in Norwegian on a provincial Norwegian news website read in imperfect English via Google translate accessed from within the UK jurisdiction. The claimant complained that a search of his name on both google.co.uk and google.com gave the article. Google was not sued. The police officer, who was the subject interviewed in the article, the Ministry responsible for her, and the journalist/author were sued. It was held that republication of the article was unforeseeable.

¹⁵ *Fox v Newzbin* [2010] EWHC 608 (Ch); [2010] E.C.C. 13.

¹⁶ *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch) (28 July 2011), [2011] RPC 28, at [145]–[156].

¹⁷ *L'Oréal v eBay* [2009] EWHC 1094 (Ch), [2009] RPC 21, at [447]–[454].

¹⁸ See Law Commission, “Scoping Paper into Aspects of Defamation Procedure” (May 2002) and the follow-up paper, “Defamation and the Internet” (December 2002), para.2.18.

¹⁹ Formerly “fair comment”, renamed in *British Chiropractic Association v Singh* [2010] EWCA Civ 350, [2011] 1 W.L.R. 133 at [35] and [36]; and *Spiller v Joseph* [2010] UKSC 53, [2011] 1 A.C. 852 at [117].

and the issue was discussed in *Bunt, Kaschke v Gray*²⁰ and *Metropolitan*.²¹ It was settled in two cases concerning takedown notices to Google about alleged defamation on its hosted platform, Blogger.com, namely *Davison v Habeeb*²² and *Tamiz v Google*.²³

In *Davison v Habeeb*,²⁴ Parks QC considered that Blogger.com was like a giant notice board and Google could not be familiar with postings until notified. He rejected the Law Commission's gloss that unlawful meant "prima facie unlawful" and found that while Google had received a takedown notice alleging defamation, where it faced conflicting claims it was in no position to adjudicate it could not know whether there was a defence to defamation or not. Unless it knew there was a libel, it was not on notice of unlawful activity according to the Directive.

This was followed in *Tamiz v Google*²⁵ by Eady J. He noted that none of the cases definitively settled how ISPs fitted with common law principles on publication, but that if Google was not a publisher before notification it was difficult to see how it could become one thereafter given it took a neutral stance despite its technical ability to take down content.²⁶ He found the lack of positive or affirmative steps in continuing to publish relevant and analogous to the passive role of conduits in *Bunt*.

Eady J. departed from the authorities following *Byrne v Deane*²⁷ (a golf club held liable for failing to remove a defamatory notice from its notice board given it was entitled to remove it and its consent was required to post). In *Tamiz*, Eady adopted Google's analogy that it was the owner of a wall which had been graffitied and was not responsible for the graffiti. The owner of the wall can whitewash it each morning, but is he obliged to?²⁸ He answered in the negative. *Godfrey v Demon*²⁹ (Demon

became a publisher from, and was liable from, the date of the takedown notice but was not liable, however, prior to being placed on notice) was distinguished on the ground that it was decided before the Human Rights Act (HRA),³⁰ as the European Human Rights Convention (ECHR) places equal value on the competing rights of reputation and speech in arts 8 and 10 of the Convention.³¹

The appellate court in *Tamiz*³² disagreed with Eady and distinguished Google's passive role as a search engine from its role as a host. The court noted that *after* a takedown notice, Google as a host could be a secondary publisher. As to the s.1 defence, the appellate court in *Tamiz* agreed that Google had acted with reasonable care on receiving the takedown notice but as it had the relevant knowledge once it received the takedown notice it could not claim the defence under the Act.³³ The court applied *Byrne* (above) and preferred Parks QC's notice board analogy to the graffitied wall. All of this was obiter, however, as no sufficiently substantial tort could be made out given the period in issue between the notice and removal.

The decision in the lower court in *Tamiz* stands on the e-commerce defence, where Eady J. found that a bare notification that statements were defamatory would not make it apparent that they were unlawful, where no details of falsity were provided or substantiation of bare assertions, and it had no ability to consider the availability of defences to defamation. Eady J. relied on *L'Oreal v eBay*³⁴ for the finding that art. 14. of the Directive was not to be rendered redundant in every situation where notice or facts reveal an issue, given they may turn out to be unsubstantiated and imprecise. The Advocate General

²⁰ *Kaschke* [2011] 1 W.L.R. 452 at [100]. See also *Davison v Habeeb* [2011] EWHC 3031 (QB); [2012] 3 C.M.L.R. 6 at [64].

²¹ *Metropolitan* [2009] EWHC 1765; [2011] 1 W.L.R. 1743 at [69]. Eady J. noted that it "throws up more problems than it is likely to solve. How could someone hoping to avail himself of the defence know that a defence of justification was bound to fail, save in the simplest of cases? How is he/she to approach the (often controversial and uncertain) question of meaning? How much legal knowledge is to be attributed to him/her in arriving at these conclusions? What of a possible Reynolds defence?"

²² *Davison v Habeeb* [2011] EWHC 3031 (QB); [2012] 3 C.M.L.R. 6.

²³ *Tamiz v Google* [2012] EWHC 449 (QB); [2012] E.M.L.R. 24.

²⁴ *Metropolitan* [2011] EWHC 3031 (QB); [2011] 1 W.L.R. 1743.

²⁵ *Tamiz* [2012] EWHC 449 (QB); [2012] E.M.L.R. 24, an application to set aside permission to serve Google Inc out of the jurisdiction where the claimant had not made any claim for the period prior to his takedown notice. The statements complained of were a report of the claimant's resignation from the Tory party over statements he had made, and online comments from the public. The comments were prima facie highly defamatory and abusive. On receipt of takedown requests Google sought permission to forward the notice to the author of the blog, who then removed all comments.

²⁶ Google's position was that it did not have to investigate truth or local law in case of every complaint.

²⁷ *Byrne v Deane* [1937] 1 K.B. 818 CA, Greene L.J. at 837.

²⁸ *Tamiz* [2012] EWHC 449 (QB); [2012] E.M.L.R. 24 at [38].

²⁹ *Demon* [1999] 4 All E.R. 342. The case concerned a defamatory posting to a "newsgroup" distributed to subscribers, purporting to come from the claimant, distributed and stored on Usenet. The claimant dialled up to his own British-based ISP, Demon Internet, who transmitted the offending material to him. Demon ignored a takedown notice for 10 days, so that its defence under s.1 of the Act was found to be hopeless as Demon had chosen to continue to receive, store and make available and eventually delete the user posts.

³⁰ *Tamiz* [2012] EWHC 449 (QB); [2012] E.M.L.R. 24 at [33].

³¹ *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 A.C. 593; *Attorney-General's Reference No.3 of 1999, Ex p. BBC* [2009] UKHL 34, [2010] 1 A.C. 145; and *Flood v Times Newspapers Ltd* [2010] EWCA Civ 804, [2011] 1 W.L.R. 153 at [20].

³² *Tamiz v Google Inc* [2013] EWCA Civ 68.

³³ However, Google won the day as any liability could only relate to the two-month period and it was improbable that significant numbers of readers had accessed the comments in that time, so the court agreed the "game was not worth the candle" and it would be an abuse of process to maintain it.

³⁴ *L'Oreal v eBay International AG* (C-324/09) [2012] Bus. L.R. 1369 at [120]-[122].

laid the groundwork for this finding in his Opinion that for art. 14, actual knowledge had to be distinguished from mere suspicion or assumption.

*McGrath v Dawkins*³⁵ was a hosting case where the claimant failed to address the merits of any defences and make it apparent that the statements were unlawful under the Directive.³⁶ Neither *Tamiz* nor *Davidson* was cited. However, the finding was consistent with those cases and Amazon was not on notice of libels where its processes were automated, where takedown notices were defective as to the defences³⁷ and otherwise.³⁸ This remains good law following the appeal in *Tamiz*, as the appellate court did not go on to the e-commerce defence.

The Act at s.1(2) restricts the definition of primary publisher to commercial or business publishers,³⁹ so that publishing must be his business (not that he be acting in trade or business generally). The intention of the act was to be technologically neutral by extending the defence to all disseminators other than those who are likely to have knowledge.⁴⁰ In *Metropolitan*, Eady J. found that Google would be a commercial publisher for s.1 when acting as a search engine⁴¹ (but not under the common law, see above). In *Tamiz*, where Google was a host, Blogger.com users issued the material to the public—not Google.⁴² The appellate court upheld this, finding that Google was not a commercial publisher as it did not itself issue material to the public.

Other activity

To date the courts have compartmentalised hosting activities from other activities to give effect to the immunities. Other activity will not therefore necessarily jeopardise them. See *Kaschke* (denying summary judgment), where editorial and user generated content were combined. See also *Mulvaney v Betfair*,⁴³ where the defendant provided a betting exchange website which also contained a chat room hosting user generated content.

See also *Imran Karim v Newsquest Media Group Ltd*⁴⁴ (editorial and user generated content), cited in *Kaschke*. In *McGrath*, Amazon sold books but also hosted reviews.

Following *Kaschke*, if a service consists of the storage of the particular information complained of (that is, the particular post or entry complained of), the service provider is not precluded from invoking the hosting immunity merely because he also provides some other—unprotected—services, provided that the nexus between the activities does not require them to be considered together. There is little or no guidance on the boundaries rendering the nexus too proximate.

Moderating

In *Kaschke* (above), a host and the operator of the site corrected and amended language in user posts, and the court rightly characterised this as the exercise of editorial control.⁴⁵ What saved the defendant in that case was the failure to edit the *particular* post in issue.⁴⁶ The fact that the defendant took posts down of his own volition, scored them and rated them was not the subject of in-depth separate analysis in *Kaschke*; however, this conduct is classic moderating and a form of editorial control.

In *McGrath*, Amazon narrowly escaped liability as a primary publisher as it had a moderation policy of limited pre-publication control by an automatic filter for forbidden words or blacklisted users which if found would escalate the post for manual, human review. None of the postings complained of failed either of these tests, so they were displayed without any human intervention. As Amazon took no steps in relation to the content and no part in any decision to publish, except by way of the automatic process referred to above, it was bound to succeed under the Directive⁴⁷—and the claim against it was struck out. The judge noted that if there had been a manual review (human eyes) the position might have been very different, and noted the notorious “Catch-22”

³⁵ *McGrath v Dawkins* [2012] EWHC 83 (QB), a summary judgment and strike-out application in relation to alleged libels published on Amazon and on the US site of the Richard Dawkins Foundation for Reason and Science operated by the second defendant, a UK company. The first defendant was Professor Richard Dawkins himself, the well-known scientist and scientific atheist.

³⁶ In *McGrath* [2012] EWHC 83 (QB), the first defendant, a well-known scientist, had structured matters so that his UK company had no responsibility for his Foundation’s website which hosted user generated content and was run by a US company, with US servers and a US address for the domain name registration. The UK company had a separate website, which had no user generated content. While the US site had a hyperlink to the UK website, there was no link from the UK site to the US site. This was all arranged to protect the assets of the UK company from liability for defamation. The US company was potentially liable in the UK for its publications which were actually read in the UK, but UK libel judgments are in effect unenforceable against assets in the US by virtue of the SPEECH Act, Public Law 111-223, 124 Stat. 2480, 28 USC 4101. However, by clicking the “home” button on the UK .org site, visitors were taken to the .net site and the user generated content. Mr *McGrath* therefore claimed the English company was also liable for the content on the US site. Despite some authority that a mere hyperlink does not render the operator of the linking website liable for the content of the linked site, the judge thought this point was arguable.

³⁷ *McGrath* [2012] EWHC 83 (QB) at [43] and [48].

³⁸ The precise URLs and words complained of were not identified and some but not all comments objected to, where Amazon could not be expected to identify those that were and were not defamatory, let alone libels.

³⁹ “‘Publisher’ means a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business.”

⁴⁰ See D. Price, K. Duodu and N. Cain, *Defamation, Law, Procedure and Practice*, 4th edn (London: Sweet & Maxwell, 2009), para.15-03.

⁴¹ *Metropolitan* [2011] EWHC 3031 (QB); [2011] 1 W.L.R. 1743 at [80].

⁴² *Tamiz* [2013] EWCA Civ 68 at [42]–[44].

⁴³ *Mulvaney v Betfair* [2009] IEHC 133.

⁴⁴ *Imran Karim v Newsquest Media Group Ltd* [2009] EWHC 3205 (QB).

⁴⁵ *Kaschke* [2011] 1 W.L.R. 452 at [77], and see [88]: “[A]s I have held, the question whether Regulation 19 immunity is potentially available to Mr Hilton falls to be considered by reference not to the website as a whole or the homepage or even the general storage of blog posts on web pages made available on the website. It falls to be considered by reference to the specific blog posted by the first defendant alone.”

⁴⁶ It is submitted that this ad hoc item-by-item approach to editorial control must be wrong. Just as an editor may elect not to edit some items and to edit others, this does not mean that editorial judgment was not exercised in the determination that no changes were required to those items which were not amended.

⁴⁷ *McGrath* [2012] EWHC 83 (QB) at [44]. H.H. Judge Moloney QC noted that determining reasonable care under the Act was fact sensitive and so the attempt to strike out on that basis on an interim application failed.

under which an ISP seeking to attract the statutory defence by taking reasonable care may find that it has instead forfeited it by becoming an editor.⁴⁸

Google and others have been held to act as hosts when providing keyword services—on the basis that the search triggers the hosted ad. See *Google France Sàrl v Louis Vuitton Malletier SA*,⁴⁹ and *L'Oreal v eBay*.⁵⁰ However, in both cases the court stressed that to benefit from the immunity, the host had to be neutral, that is, its role must be merely technical, automatic and passive and without knowledge or control.⁵¹ Assistance in drafting commercial messages or selecting keywords might well step over the line and provide knowledge and so jeopardise the immunity, and it was a question of fact for national courts in each case.⁵²

In *L'Oreal*, the court was also asked what impact on eBay's covered hosting activities, other "unprotected" activities⁵³ had, but merely reiterated that if the ISP takes an active role of such a kind as to give it knowledge of, or control over, those data then the immunity will be lost.⁵⁴ The failure to address the question more directly is notable as the Advocate General⁵⁵ characterised *Google* as having wrongly anchored the immunities to *neutrality*—and disagreed that this was the correct test⁵⁶ and contrary to the Directive's focus on the activity—not the nature of the entity, noting that in practical terms, current business models often spanned a number of the relevant activities in an industry in the process of constant change.⁵⁷

Conclusion

As this article was going to press, the Lords passed the Defamation Bill which will now return to the Commons but not for further amendment. It was not previously clear that the Bill would proceed at all. The Bill leaves our three defences untouched but introduces a new defence for Operators of Websites who can show they were not the poster of the statement complained of,⁵⁸ they complied with procedures (yet to come) on receiving a (complying) notice of complaint, and provided the complainant can identify the poster. The Government's Response to the Joint Committee on the Draft Bill provides some clues as to these future procedures.⁵⁹ Eschewing proposals that had complaints posted alongside the statements and left up until further court order (either takedown or leave up); the regulations will likely require the Operator to liaise between the parties; to forward the complaint to the poster or takedown the statement. If after the facilitated exchange, the matter is unresolved, the Operator must reveal the identity of the poster, who can then be sued for removal (and other remedies). The Operator however will be immune. Also relevant is a provision in the Bill limiting jurisdiction for claims against secondary publishers unless it is impractical to sue the primary publishers. This is a significant win for the besieged gatekeepers, however the devil will be in the detail and we will reserve final judgment until the regulations become legislation.

⁴⁸ *McGrath* [2012] EWHC 83 (QB) at [41].

⁴⁹ See *Google France Sàrl v Louis Vuitton Malletier SA* (C-236/08 to C 238/08) [2011] Bus. L.R. 1. The ECJ determined Google did not by selling keywords use them for trade mark purposes, as it was a referencing service provider allowing its clients to use signs identical/similar to trade marks, without itself using those signs.

⁵⁰ *L'Oreal v eBay* (C-324/09) [2012] Bus. L.R. 1369.

⁵¹ *L'Oreal v eBay* [2012] Bus. L.R. 1369 at [111]–[113].

⁵² *L'Oreal v eBay* [2012] Bus. L.R. 1369 at [118]. The payment and other terms did not create the wrong kind of control, however; see [116].

⁵³ *L'Oreal v eBay* [2012] Bus. L.R. 1369 at [45], question 9(b): "[I]f the use does not consist exclusively of activities falling within the scope of Article 14(1) of [Directive 2000/31], but includes such activities, is the operator of the online marketplace exempted from liability to the extent that the use consists of such activities and if so may damages or other financial remedies be granted in respect of such use to the extent that it is not exempted from liability?"

⁵⁴ *L'Oreal v eBay* [2012] Bus. L.R. 1369 at [112]–[116].

⁵⁵ The case is interesting given its similarity to the US case of *Tiffany (NJ) Inc v 26 eBay, Inc* 576 F. Supp. 2d 463 (S.D.N.Y. 2008), affirmed 600 F. 3d 93 (2d Cir. April 1, 2010).

⁵⁶ In issue was the related contradiction between the ostensible scope of the hosting immunity and the requirements of passivity and neutrality, lack of control in Recital 42 of the Directive. Recital 42, the Advocate General opined, should be read as limited to the "mere conduit" and "caching" immunities in arts 12 and 13 of Directive 2000/31 while Recital 46 applied to hosting. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT> [Accessed April 2, 2013]. See the discussion of the same issues in *Kaschke* [2010] EWHC 690 (QB); [2011] 1 W.L.R. 452 at [44]–[46].

⁵⁷ *L'Oreal v eBay* [2012] Bus. L.R. 1369 at [145]–[151].

⁵⁸ Reminiscent in its approach to the defence for ISPs in the US Communications Decency Act 1996, 47 U.S.C. § 223. Pub. L. No. 104-104 509 § 230 (c) (1), (2) (A) and (d) (3).

⁵⁹ <http://www.parliament.uk/documents/joint-committees/draft%20defamation%20bill/government%20response%20cm%208295.pdf> [Accessed April 24, 2013] at pp. 24–25.