

Your World First



Defamation and Media Conference 27 November 2018

Social media

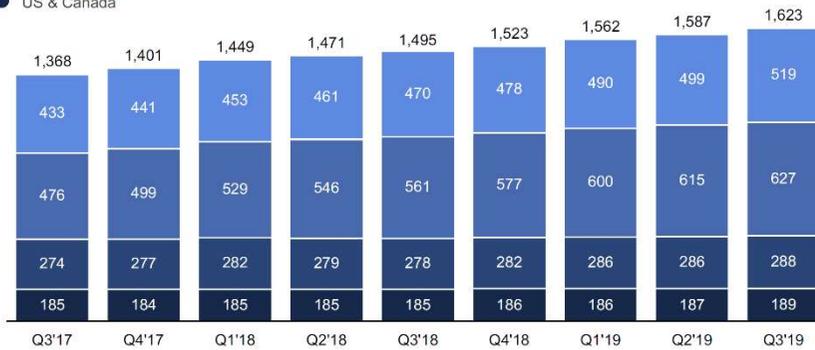


The size of social media

Daily Active Users (DAUs)

In Millions

- Rest of World
- Asia-Pacific
- Europe
- US & Canada



Monthly Active Users (MAUs)

In Millions

- Rest of World
- Asia-Pacific
- Europe
- US & Canada



Revenue

In Millions

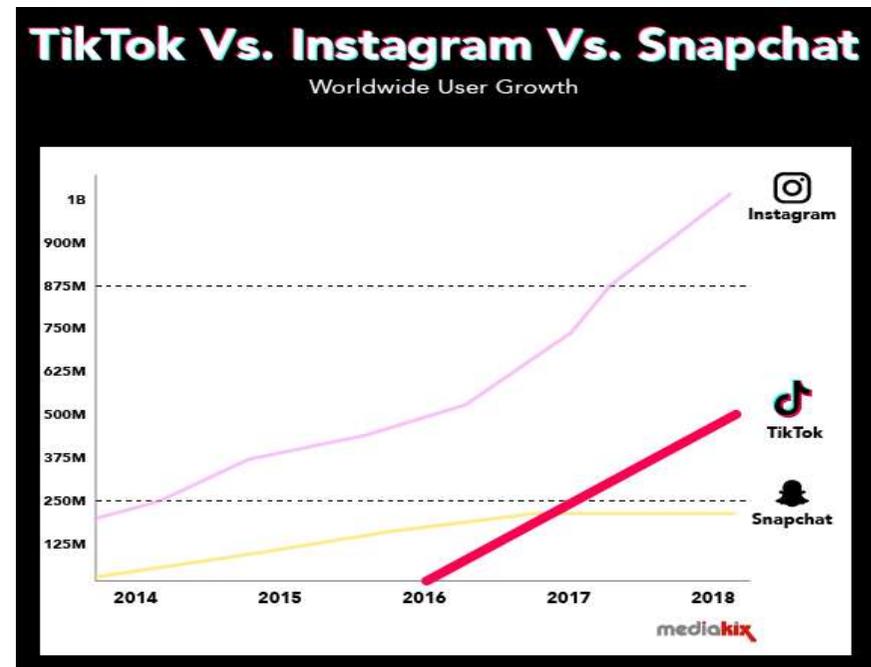
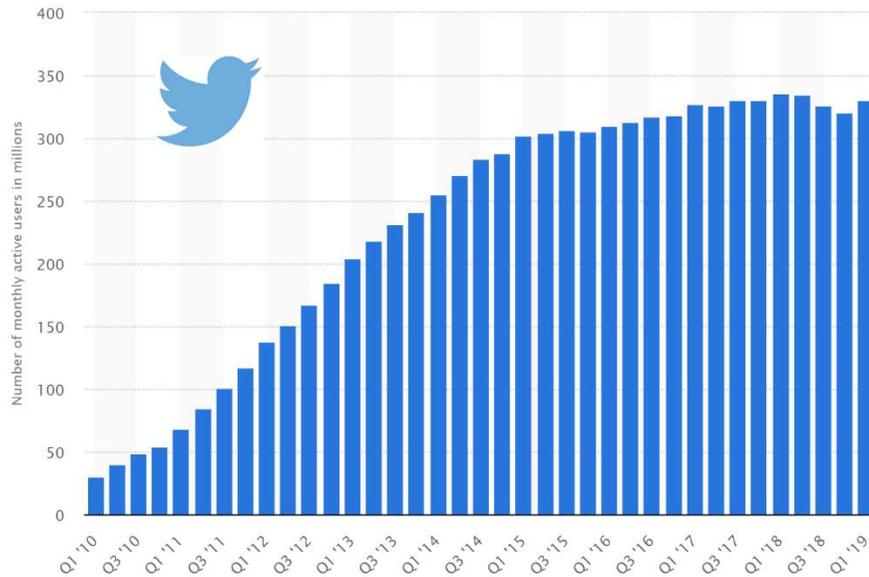
- Payments and Other Fees
- Advertising



- Payments and Other Fees
- Advertising



The size of social media



Actions against the perpetrator

Actions against the perpetrator

- Take down requests
- Causes of action
- Tracking down the perpetrator
- Orders

Causes of action

- Defamation
 - *Stocker v Stocker* [2019] UKSC 17 (3 April 2019)
 - “The fact that this was a Facebook post is critical. The advent of the 21st century has brought with it a new class of reader: the social media user. The judge tasked with deciding how a Facebook post or a tweet on Twitter would be interpreted by a social media user must keep in mind the way in which such postings and tweets are made and read.
 - ... It will be clear from what I have said already that, in my view, Mitting J fell into legal error by relying upon the dictionary definition of the verb “to strangle” ... Readers of Facebook posts do not subject them to close analysis. They do not have someone by their side pointing out the possible meanings that might, theoretically, be given to the post.”
- Privacy
- Data protection
 - *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311
 - GDPR – Recital 18

“This Regulation does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity and thus with no connection to a professional or commercial activity. Personal or household activities could include correspondence and the holding of addresses, or social networking and online activity undertaken within the context of such activities. However, this Regulation applies to controllers or processors which provide the means for processing personal data for such personal or household activities.”
- Harassment

Serious harm

- Section 1 Defamation Act 2013

- *“Serious harm*

- *(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*

- *(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not “serious harm” unless it has caused or is likely to cause the body serious financial loss.”*

- *Monroe v Hopkins* [2017] EWHC 433

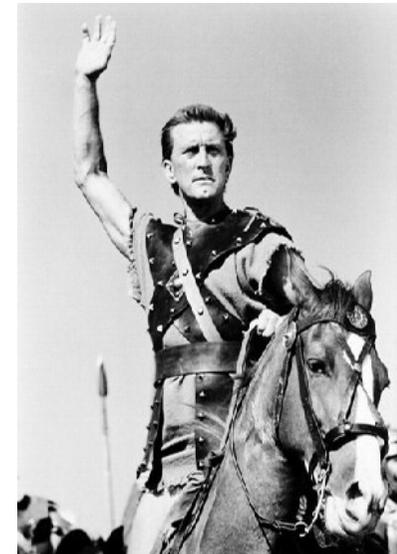
- *Dennis Rice and Byline Media Holdings Limited*

- *Lachaux v Independent Print Ltd & Anor* [2019] UKSC 27

Identifying the perpetrator

- Responsibility for publication – what participation is required for liability to arise?
- Content / technical means to identify those responsible
- The use of disclosure orders in Internet cases
 - *Lockton v Persons Unknown and Google*
 - *AB Bank Ltd v Abu Dhabi Commercial Bank*
- Spartacus orders

- Persons unknown orders in Internet cases



Persons unknown orders and judgments

- Orders and damages can be obtained even if the identity of the guilty party is not known
 - *Brett Wilson LLP v Person(s) Unknown, Responsible for the Operation and Publication of the Website www.solicitorsfromhelluk.com* [2015] EWHC 2628 (QB) (16 September 2015)
 - *Smith v Unknown Defendant, Pseudonym 'Likeicare' & Ors* [2016] EWHC 1775 (QB) (15 July 2016)
 - *Canada Goose UK Retail Ltd & Anor v Persons Unknown & Anor* ([2019] EWHC 2459
- Can be served via an email address or even a social networking site
- Can restrain the guilty party from disseminating information
- May bind any third party with notice

Damages in internet cases

- Internet publication may be seen as less tangible than for example newspapers publication
- But allegations published on the Internet can obtain traction – particularly if supplemented by a forum
- Publication may be small but to key individuals
- Libel
 - *Gentoo & Peter Walls v Baines & Others* - £119,000 (libel and harassment)
 - Factors: seriousness; extent and duration of publication – talk of the town; audience – key associates and stakeholders; actual damage caused – “no smoke without fire”; aggravation
 - *Brett Wilson LLP v Person(s) Unknown* - £10,000
 - *Smith v Unknown Defendant* - £10,000
 - *Monroe v Hopkins* - £24,000
 - *Dennis Rice and Byline Media Holdings Limited* - £2,500

Actions against the platform

Actions against the platform

- Right to be forgotten
- Intermediary liability
- International element

The legal context – intermediary defences

- Section 5 of the Defamation Act 2013
- Section 10 of the Defamation Act 2013
- Section 1 of the Defamation Act 1996
- Regulations 17 to 19 of the Electronic Commerce (EC Directive) Regulations 2002
 - Application to data protection: *CG v Facebook Ireland Ltd & Anor* [2016] NICA 54
- Common law

	Defamation only	Defeated by notice	Substantive law / jurisdiction	Depends on practicality of proceedings	Relate specifically to the Internet
s.1 DA96	Yes	Yes	Yes	No	No
s.5 DA13	Yes	Yes	Yes	Yes	Yes
s.10 DA13	Yes	No	No	Yes	No
Regs	No	Yes	Yes	No	Yes

Defamation Act 2013

5 Operators of websites

(1) This section applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website.

(2) It is a defence for the operator to show that it was not the operator who posted the statement on the website.

(3) The defence is defeated if the claimant shows that—

(a) it was not possible for the claimant to identify the person who posted the statement,

(b) the claimant gave the operator a notice of complaint in relation to the statement, and

(c) the operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

...

10 Action against a person who was not the author, editor etc

(1) A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

Inroads into intermediary defences

- *Eva Glawischnig-Piesczek v Facebook* [2019] EUECJ C-18/18 (03 October 2019)
 - “*identical to the content of information which was previously declared to be unlawful ... irrespective of who requested the storage of that information*”
 - “*the content of which is equivalent to the content of information which was previously declared to be unlawful ... provided that the monitoring of and search for the information concerned by such an injunction are limited to information conveying a message the content of which remains essentially unchanged compared with the content which gave rise to the finding of illegality and containing the elements specified in the injunction, and provided that the differences in the wording of that equivalent content, compared with the wording characterising the information which was previously declared to be illegal, are not such as to require the host provider to carry out an independent assessment of that content*”

- *Voller v Nationwide News & Ors* [2019] NSWSC 766
 - Hosting comments on Facebook => primary publisher

International element

- Service out
 - *Google Inc v Vidal-Hall & Ors* [2015] EWCA Civ 311
 - CPR PD 6B 3.1 (21)

- Governing law
 - *Google Spain* (C-131/12)
 - *Weltimmo* (C-230/14)
 - *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v Wirtschaftsakademie Schleswig-Holstein GmbH* (C-210/16)

- Territorial scope
 - *Google v CNIL* (C-507/17)
 - *Swami Ramdev v Facebook* (CS(OS)27/2019)

The regulatory position

- Social media currently unregulated
- Online harms White Paper
 - Harms: child sexual exploitation / terrorist content / online disinformation / anonymous abuse
 - Private / public communications
 - International enforcement
 - Civil liability
 - Country of origin principle
- General Election 2019
 - Conservative - *“We will legislate to make the UK the safest place in the world to be online – protecting children from online abuse and harms, protecting the most vulnerable from accessing harmful content, and ensuring there is no safe space for terrorists to hide online – but at the same time defending freedom of expression and in particular recognising and defending the invaluable role of a free press.”*
 - Labour – *“We will enforce a legal duty of care to protect our children online, impose fines on companies that fail on online abuse and empower the public with a Charter of Digital Rights.”*