

Third Party Hosts and Persons Unknown



WHITE PAPER DEFAMATION & PRIVACY CONFERENCE

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*How do you compel **third-party hosts** to take down websites that contain defamatory content and pursue claims against **persons unknown** who operate online?*

THE PROBLEM

Total sham. Avoid like the plague.

Jeremy Wonderwall



Better off trying to do it yourself. Run a mile.

Samira Supernova



“Nigel” from customer service made me want to cry

JP Mateta KC



- Anonymous reviews on a website like Trustpilot
- Suspicious, no record of relevant services being provided
- Bad for business

THIRD PARTY HOSTS

- ‘3rd Party Host’ – generally understood to be a provider of server space, infrastructure or other hosting-related service, whether to businesses or individuals
- Much of the web’s content is hosted this way – i.e. by an entity other than the originator of the content itself (hence ‘3rd party’)
- Types of host:
 - **Cloud infrastructure** providers, eg Amazon Web Services
 - **Domain service** and hosting providers, eg GoDaddy, DreamHost
 - Pure internet-based **communications providers**, such as WhatsApp, Signal?
 - Google’s ***blogger*** and similar platforms
 - **Websites** with user generated material/comments. Eg Trust Pilot, Tripadvisor, news websites, Facebook etc.

CONTENT REMOVAL

Terms of service

- Fake reviews, or content that is misleading, offensive or violates any law, infringes on the rights of others are not allowed under **Trustpilot's** Terms of Use and Guidelines.
- Meta operates a real name policy for **Facebook** and other services: “You must provide for your account the same name that you use in everyday life” and “only create one account”.
- **Meta** has “content that’s not allowed” and “content that requires additional information or context”. “Content that’s not allowed” includes “allegations of ... dishonesty, basic criminality” (albeit in tier 2).

... but how to ‘compel’?

THE APPROACH TO TPH LIABILITY

- At **common law** anyone who facilitates publication is legally responsible and a potential defendant – certainly includes TPHs, though as secondary publishers they may only become liable on notice
- A TPH without notice may also try to take advantage of **s.1, 1996 Act**
- By **s.10, 2013 Act** the court has jurisdiction for defamation claims only insofar as the defendant is an author, editor or publisher, where a publisher is a commercial publisher whose business is issuing material to the public
- In ***Tamiz v Google*** [2013] EWCA Civ 68; [2013] 1 WLR 2151, the Court of Appeal held that Google Inc was not a publisher in the context of it hosting its blogger platform, because it did not ‘issue’ material to the public, but instead provided access to a system by means of which statements were transmitted (*Tamiz*, §39).
- See also:
 - ***Delfi v Estonia*** (Application no. 645569/09) EHRR; [2015] EMLR 26
 - Electronic Commerce (EC Directive) Regulations 2002/2013 and case law
 - Section 230, US Communications Decency Act of 1934: immunity for online computer services with respect to third-party content

DEFAMATION ACT 2013, SECTION 5

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.
- (4) For the purposes of subsection (3)(a), it is possible for a claimant to “identify” a person only if the claimant has sufficient information to bring proceedings against the person.

THE NPO HURDLES

- (1) A wrong must have been (arguably) carried out by an ultimate wrongdoer
- (2) There must be the need for an order to enable action to be brought against the ultimate wrongdoer
- (3) The respondent must be:
 - (a) mixed up in so as to have facilitated the wrongdoing;
and
 - (b) (likely) able to provide the information necessary to enable the ultimate wrongdoer to be pursued

Finally, and in any event: the court's discretion



ANONYMITY AND ARTICLE 10

- Art. 10 protects anonymous speech
- Anonymity can hide harmful acts
- But can also be a force for good, particularly where speech is political: “Anonymity is a shield form the tyranny of the majority.” (Justice Stevens in *McIntyre v Ohio Elections Commission* (1995) 514 US 334)
- See *The Secret Barrister* – “The modern equivalent of the anonymous pamphleteers of 200 years ago.” (Nicklin J in *Davidoff* at [30])
- If anonymity is being used to avoid recrimination/retribution/punishment (eg a whistleblower) an NPO unmasking the target will likely interfere with his Art. 10 rights, so the *Re S* balancing exercise must be undertaken (Davidoff at [32])
- In such a case, “*an applicant ... must demonstrate more than simply an arguable case that s/he has been the subject of a civil wrong. S/he must show that they have a claim that has sufficient weight or substance to outweigh the countervailing rights of the target.*” (Davidoff at [33])

MIXED UP?

- More than a mere ‘witness’, ‘spectator’, ‘bystander’ or ‘onlooker’
- ‘Facilitation’ (as opposed to full participation) is sufficient
- Providing an email address in order to access the service and post the defamatory comment is not sufficient

“Indeed, facilitation is what usually satisfies this element for Norwich Pharmacal orders against operators of websites on which material has been posted by (anonymous) third parties. In such cases, the websites have (at least) facilitated the publication that is the arguable wrong.”

(Davidoff at [20])

WAKE ME UP...

THE *VIAGOGO* PRINCIPLES

- (1) The jurisdiction exists to allow a prospective claimant to obtain information in order to seek redress for an arguable wrong: para 14.
- (2) The court should exercise flexibility and discretion when considering whether the remedy should be granted: para 15.
- (3) It is not a pre-requisite that the applicant intends to bring legal proceedings in respect of the arguable wrong; any form of redress (for example disciplinary action or the dismissal of an employee) will suffice to ground an application for the order: para 15.
- (4) An order for disclosure will be made only if it is a “necessary and proportionate response in all the circumstances”. But the test of necessity does not require the remedy to be one of last resort: para 16.
- (5) The essential purpose of the remedy is to do justice. This involves the exercise of discretion by a careful and fair weighing of all relevant factors: para 17

... LIKE A YO-YO **THE VIAGOGO FACTORS**

- (1) What is the strength of the possible cause of action?
- (2) A strong public interest in allowing an applicant to vindicate his legal rights.
- (3) Will granting the application deter similar wrongdoing in the future?
- (4) Could the information be obtained from another source?
- (5) Did/should the respondent know he was facilitating arguable wrongdoing?
- (6) Might the order reveal the names of innocent persons and if so will they be harmed?
- (7) The degree of any confidentiality of the information sought.
- (8) The Art. 8 rights of the target.
- (9) The data protection rights of the target.
- (10) The confidentiality of journalistic sources (s.10, CCA 1981 and Art. 10).

POSSIBLE ALTERNATIVES TO AN NPO

CPR 31.17

- Orders for disclosure against a person not a party
- Documents must be likely to support the case of the applicant or adversely affect the case of another party
- Disclosure must be necessary to fairly dispose of the claim or to save costs

28 USC §1782

- Discovery for use in foreign proceedings
- Respondent must be in (or resident in) US
- Can be for 'reasonably contemplated' foreign proceedings
- Applicant must be 'an interested person' (includes the foreign court)
- Broad residual discretion

PERSONS UNKNOWN

Supreme Court

- ***Wolverhampton City Council v London Gypsies & Travellers*** [2023] UKSC 47; [2024] AC 983

Other cases

- ***Chirkunov v Persons Unknown*** [2024] EWHC 3177 (KB) (Nicklin J)
(data protection; website publication)
- ***University College Union v Persons Unknown*** [2025] EWHC 192 (KB) (Sheldon J)
(breach of confidence; ransomware)
- ***HCRG Care Limited v Persons Unknown*** [2025] EWHC 794 (KB) (Susie Allegre, DHJ)
(breach of confidence; ransomware)

WOLVERHAMPTON CITY COUNCIL

- Power to grant interim and final injunctions is governed by equitable principles. Equity:
 - (i) Seeks to provide an effective remedy where other remedies available under the law are inadequate
 - (ii) Looks to substance over form
 - (iii) Takes a flexible approach to the formulation of a remedy
 - (iv) When fashioning a remedy to suit new circumstances is not constrained by any limiting principle other than justice and convenience
- Deals with procedural safeguards in newcomer injunctions

CHIRKUNOV

- Explores the procedural limits of Persons Unknown proceedings in particular relating to:
 - Defining 'Persons Unknown'
 - Remedies
 - Service
 - Jurisdiction

- Claimants need to work hard to gather as much information as possible before going against Persons Unknown
 - Definitions need to be tight
 - Remedies claimed must be achievable and of substantive value considering the context: **What is the point of the proposed proceedings?** [96]

TAKEAWAYS

- Start with NPO
- Evidence must be clear, cogent and meet merits hurdle
- If necessary, move to a Persons Unknown armed with NPO information
- Frame applications with care and precision

