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Defamation, Privacy, Data: Shaping New Law into solution-focused answers for clients

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What are the critical success factors for compelling third party hosts to take down websites that breach privacy/ copyright or contain defamatory content, and pursue claims against persons unknown?

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The importance of the internet for freedom of expression

- *Freedom of expression includes the freedom to hold opinions as well as receive and impart information and ideas (Axel Springer AG v Germany (2012) 55 EHRR 6)*

- *Freedom of expression also applies to expressions that offend, shock and disturb (eg Stoll v Switzerland [2008] 47 EHRR 49; Steel and Morris v UK [2005] 41 EHRR 22)*

- As a result of its accessibility and its capacity to store huge amounts of information, the Internet plays an important role in enhancing access to news and facilitating dissemination of information (*Delfi AS v Estonia* (2016) 62 EHRR 6 [133])

The importance of the internet for freedom of expression

- The Internet offers an unprecedented platform for spreading user-generated content and it is an important vehicle for citizen journalism (*Delfi* [110])

> '*...political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism. From that perspective, the Court accepts that YouTube is a unique platform on account of its characteristics, its accessibility and above all its potential impact, and that no alternatives were available to the applicants.*' *Cengiz v Turkey* [52]

> "*essential tools for participation in activities and discussions concerning political issues and issues of general interest*." *Cengiz v Turkey* (ECtHR, 12 December 2015) [49]

Reducing freedom of expression

"Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online" (Delfi [110])

While the internet provides a useful platform for obtaining information, presenting and commenting on opinions, hate speech, abuse and insults on the Internet can also silence people who have been or are afraid of becoming targets.

Value of anonymous speech

"It is unsurprising that the most robust protection of anonymous speech is to be found in US law. In McIntyre v Ohio Elections Commission (1995) 514 US 334, a case on a statute prohibiting anonymous political literature, it was famously said by Justice Stevens that: 'Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honourable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.'"

(per Lord Neuberger, cited by Nicklin J in *Davidoff v Google LLC [2024]* 4 WLR 6)

Initial stages

- Notice and take down request to the site admin
- Delisting requests to Google, domain registrars (ICANN, Nominet etc)
- Identify cause(s) of action (defamation, MOPI, breach of confidence, data protection and/or copyright)
  - Note: in *Soriano v Forensic News LLC & Ors* [2021] EWCA Civ 1952 it was held *arguable* that a data protection claim could be brought against a defendant based outside England and Wales principally because the maintenance of a website which solicited subscribers in the UK and EU and monitored C's behaviour arguably met the tests in art.3 GDPR.
- Collect the evidence

Liability of third party hosts: defences

- Reg 19 of the Electronic Commerce (EC Directive) Regulations 2002
- Section 1 of the Defamation Act 1996
- Section 5 of the Defamation Act 2013
- Section 10 of the Defamation Act 2013

- *What are the boundary conditions set by the ECtHR on internet intermediary liability?*

What will the third party host argue?

1. Jurisdiction/service out (Gateway/Merits/Forum tests)
2. D did not (and does not) have **actual knowledge of unlawful activity or information** and **was not (and is not) aware of facts or circumstances from which it could have been apparent** to D that the activity or information was unlawful, for the purposes of **Regulation 19** ("**Hosting**") **of the Electronic Commerce (EC Directive) Regulations 2002 ("the UK e-Commerce Regulations");**
3. (in defamation cases) the Court does not have jurisdiction to hear and determine the action as C has not established that it is not reasonably practicable for an action to be brought against the "author", "editor" or "publisher" (as defined) for the purposes of **section 10 of the Defamation Act 2013**;
4. (in defamation cases against "operators of websites") it did not post the statement on the website for the purposes of **s5 of the Defamation Act 2013** and C has not established that it is not possible to identify the person who posted the statement or malice;
5. (in defamation cases) that D was not the publisher of the website/blog/content complained of or if it was a secondary publisher, it has a defence under **s1 of the Defamation Act 1996**.

Regulation 19 (“Hosting”)

“Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where— (a) the service provider— (i) **does not have actual knowledge of unlawful activity or information** and, where a claim for damages is made, is **not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful**; or (ii) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information …”

Reg 19 'Hosting' defence: two key tests

1. "Storage"

- "Where an information society service is provided which consists of the **storage** of information provided by a recipient of the service, the service provider (if he otherwise would) shall not be liable for damages or for any other pecuniary remedy ... as a result of that storage where—"

- Is the service "**storage**"?

2. Knowledge of "unlawful activity or information"

"1(a) the service provider— (i) does not have **actual knowledge of unlawful activity or information** and, where a claim for damages is made, is **not aware of facts or circumstances from which it would have been apparent** to the service provider **that the activity or information was unlawful"**

- Does the service provider have **actual knowledge of unlawful activity or information** or **facts or circumstances from which it would have been apparent**?

Reg 19: Knowledge of unlawful information

- The central question, therefore, is whether the service provider had actual knowledge of **unlawful activity or information**, and **was not aware of facts or circumstances from which it would have been apparent** to it that the activity or information was unlawful?

"(22) In determining whether a service provider has actual knowledge for the purposes of … regulation 19(a)(i), a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, among other things, shall have regard to –

(a) **whether a service provider has received a notice through a means of contact made available** in accordance with regulation 6(1)(c), and

(b) the extent to which any notice includes – (i) the **full name and address** of the sender of the notice; (ii) details of the **location of the information** in question; and (iii) details of the **unlawful nature of the activity or information** in question." (Regulation 22 of the 2002 Regulations)

Reg 19: Knowledge of unlawful information

- in order to be able to characterise information as 'unlawful', a person **'would need to know something of the strength or weakness of available defences**' : *Bunt v Tilley* [2007] 1 WLR 1243 [72]; *Kaschke v Gray* [2011] 1 WLR 452 [100]
- the question is whether the service provider was: "**actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality**" : *L'Oreal v eBay* [2011] ECR I-6011; *Montres Breguet ('Swatch') v Samsung* [2023] EWCA Civ 1478 (trademark cases)
- the illegality of the activity or information must be "**specifically established or readily identifiable**": (*Peterson v Google LLC* (copyright case) [2021] Bus LR 1196 at [113], [118] (cited by CA in '*Swatch*').

Reg 19: Knowledge of unlawful information

Not straight-forward in the defamation context:

"[*Blogger.com] was faced with conflicting claims from the claimant and the [author/blog host] between which it was in no position to adjudicate. That is of course not to say that a different conclusion could not be reached on different facts, such as where (to adapt the words of the ECJ) a complaint was sufficiently precise and well substantiated, and where there was no attempt by the author of the defamatory material to defend what had been written*" *Davison v Habeeb* [2011] EWHC 3031 [68]

Guidance on the ‘Notice and Take Down’ letter

- **identify information and cause of action precisely**
  - for defamation/MOPI/confidence/DP – requirements set out in CPR PD 53B
  - (in defamation cases) need to show case of serious harm has real prospect of success

“*The impact of Lachaux is that such reputational harm must be proved … Drawing inferences is not a process of optimistic guesswork; it is a process whereby the court concludes that the evidence adduced enables a further inference of fact to be drawn*.” *Amersi v Leslie* [2023] EWHC 1368 (KB) at [157]–[159]

Guidance on the ‘Notice and Take Down’ letter

- w/p to the fact that D bears the burden of proof and falsity is presumed, **substantiate the absence of any defence** (particularly not honest opinion, no QP, no public interest/reasonable belief (s4) - and not true)

- consequences for C – attempts to go after authors/editors – why the problem of anonymity and no remedy is not theoretical, but real

- NOTE: No defence to claim for an injunction but does not give C a special right (*Bunt v Tilley*)

Guidance on the notice and take down request

- ***Means of contact*:** Intermediaries must provide a "*speedy, direct and accessible*" notice and take down service but there is no requirement to give notice through the online notification procedure. (*CG v Facebook Ireland* at [58]; *J20 v Facebook Ireland* at [71]).

- ***Location:*** *Provide URLS of all posts complained of*

	Date	Author	Text	IP info

Reg 19: Stage 1 - “Storage”

*“the concept of “storage” has been interpreted in Google France and L’Oréal v eBay, which both form part of retained law, in a relatively restrictive manner, as being limited to conduct of a “**technical, automatic and passive**” nature, rather than an **active** role that would give the relevant person “**knowledge of, or control over**” the data. This approach reflects the wording of the recitals, in particular recital (42)” Swatch v Samsung per Falk J [216]*

“It is worth noting that the reference to knowledge and control here is separate from the knowledge-related condition in [Reg 19(1)(a)]” [216]

Recitals to e-Commerce Directive

"(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a **mere technical, automatic and passive nature**, which implies that the information society service provider has neither **knowledge of nor control** over the information which is transmitted or stored. …"

Reg 19: “Storage” - Guidance from *Swatch -v- Samsung*

Why was Samsung’s conduct not “***technical, automatic and passive***”?

- Samsung actively encouraged of the creation of watch face apps by third party developers;
- it materially assisted app developers with the creation of the apps;
- the apps were designed exclusively for Samsung smartwatches;
- it promoted the fact its watches had interchangeable faces;
- it had a clear commercial interest in the watch face apps given they were being applied to Samsung watches;
- it operated a “notice and take down” process, whereby Samsung will investigate and, if appropriate, remove the app from the store; and
- it reviewed the content and functionality of the apps before listing them on the app store.

Falk J and Court of Appeal agreed that Samsung’s conduct **was “*not passive*” with no knowledge or control**.

Reg 19: “Storage” - Guidance from *Swatch –v- Samsung*

“Samsung’s second argument is that it should not be penalised for undertaking content review in order to try to prevent illegality. On the contrary, [Samsung argued] it is in the interests of rights holders and in the public interest that it should undertake content review.

This is a familiar conundrum with the exemptions in the e-Commerce Directive. … As the law stands in this country, the answer to the conundrum is that an intermediary service provider is not obliged to undertake content review.... Many providers wish to undertake content review for their own commercial reasons, however. If they do so, they have to accept the risk that they may not be able to rely upon [Regulation 19]” per Arnold LJ in *Swatch v Samsung*

Reg 19: "Storage" and *Byrne -v- Deane ratification*

Nicklin J in *Monir v Wood* [2018] EWHC 3525:

"The principle from ***Byrne v Deane*** [1937] 1 KB 818 can be stated, shortly, as follows: **where a third party publishes material via a medium over which the defendant has control, the defendant can become liable for the publication if, in all the circumstances, it can be inferred that the defendant, from his failure to remove the defamatory material, acquiesced in or authorised the continued publication**.

Once liability is established under the *Byrne -v- Deane* principle based on actual authorisation of publication, the defendant cannot avail himself of any type of innocent dissemination defence. From the point of authorisation, he has become a primary publisher (cf. *Davison v Habeeb* [47]).

The fundamental distinction between primary and secondary liability is **knowledge** that the publication contains some defamatory matter and the ability to **control** its publication or continued publication."

Reg 19: "Storage" and *Byrne -v- Deane* ratification

"To my mind, there is no better summary of the common law than the following paragraphs from the decision of the Court of Final Appeal of the Hong Kong Special Administrative Region in ***Oriental Press Group Ltd -v- Fevaworks Solutions Ltd.***

I prefer the terms "primary" and "secondary" because, in the context of ***Byrne -v- Deane*** liability, it avoids the potential confusion that the relevant publisher is not the "first" publisher, yet his **liability (by authorisation) is primary**. The same would apply to those who consciously choose to republish the publication of another. Chronologically, they are not the "first" publishers, but their liability is also **primary**.

Tamiz v Google **is an example of <u>primary liability</u> on the basis of the *Byrne -v- Deane* concept of authorisation: the defendant having knowledge of the defamatory publication, after being given notice, and the ability to control its continued publication [34]"** per Nicklin J in *Monir v Wood* [174]-[181]

Reg 19: “Storage” and *Byrne -v- Deane* ratification

“It seems to me that the real question, at the heart of this case, is what knowledge of the publication is sufficient to sustain liability on the ***Byrne -v- Deane*** basis?

In my judgment, the starting point is a passage in the judgment of Greene LJ in ***Byrne -v- Deane*** (at 838): “The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?”

In ***Bunt -v- Tilley*** [23], Eady J held that there must be “knowing involvement in the process of publication of the relevant words”. per Nicklin J in *Monir v Wood* [174]-[181]

Reg 19: “Storage” and *Byrne -v- Deane* ratification

“The closer the connection of the defendant with the means of publication and the easier it is for him to identify and remove the defamatory publication complained about, the easier it will be to draw the inference of authorisation from the refusal/failure to prevent its continued publication. Ultimately, it is not possible to draw bright lines around the level of knowledge that is required. The fundamental question to be answered is **whether, on the particular facts, the defendant’s knowledge of the defamatory publication is sufficient to draw the inference that he has authorised and should be liable for its continued publication**” per Nicklin J in *Monir v Wood* [174]-[181]

Reg 19: “Storage” and *Byrne -v- Deane* ratification

- Eady J in *Tamiz v Google*:

“The fact that an entity in Google Inc’s position may have been notified of a complaint does not immediately convert its status or role into that of a [primary] publisher. It is not easy to see that its role…. ***should be automatically expanded thereafter into that of a person who authorises or acquiesces in publication***. It claims to remain as neutral in that process after notification as it was before. It takes no position on the appropriateness of publication one way or the other. It may be true that it has the technical capability of taking down (or, in a real sense, censoring) communications which have been launched by bloggers or commentators on its platform.” Tamiz v Google per Eady J

- Court of Appeal in *Tamiz v Google* :

“In relation to the position after notification of the complaint… I take a different view to Eady J. I am led to do so primarily by the decision in Byrne v Deane. …The provision of a platform for the blogs is equivalent to the **provision of a noticeboard**; and Google Inc goes further than this by **providing tools to help a blogger design the layout** of his part of the notice board and by **providing a service that enables a blogger to display ads**.. Most importantly, it makes the [analogous gigantic] notice board available to bloggers **on terms of its own choice** and it can **readily remove** or block access. Those features bring the case in my view within the scope of the reasoning in *Byrne v Deane*” *Tamiz v Google* [2013] 1 WLR 2151 per Richards LJ

S1 DA 1996 and *Byrne -v- Deane* ratification

" There is occasionally confusion in the authorities in distinguishing clearly between (1) those who are not publishers at all under common law (e.g. ISPs that take an entirely passive role as conduit for a publication and who have no need of any form of innocent dissemination defence; and (2) primary and secondary publishers, in respect of which only secondary publishers could avail themselves of any sort of innocent dissemination defence.

Once liability is established under the ***Byrne -v- Deane*** principle based on actual authorisation of publication, the defendant cannot avail himself of any type of innocent dissemination defence. From the point of authorisation, he has become a **primary publisher**". per Nicklin J in *Monir v Wood* [174]-[181]

s 5 DA 2013: Not possible to identify the author

(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.

(11) The defence under this section is defeated if the claimant shows that the operator of the website has acted with malice in relation to the posting of the statement concerned.

s10 DA 2013:

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.

(2) In this section “author”, “editor” and “publisher” have the same meaning as in section 1 of the Defamation Act 1996.

ss 5 & 10 DA 2013: Not possible to identify the author

- s5 available to anyone who publishes a website
- If author refuses to remove, Norwich Pharmacal application (unless compelling argument that judgment unenforceable or author insolvent)

What are the critical success factors in persuading the third party host to act?

- Precisely identify the claim (incl req'ments in regs under s5 DA 2013)
- 3P host is on notice and is a "primary publisher" by dint of the *Byrne v Dean* principle
    - Explain why control and knowledge criterion are met.

- Reg 19 defence does not apply on the grounds that (i) the service is not "storage"; and in any event (ii) D has "actual knowledge of unlawful info/activity or is aware of facts and circumstances that make it apparent"
    - Service is not "*passive*" but "*active*" e.g.
        - advertised and encouraged authors to build websites
        - assisted authors with creation of websites
        - listed/indexed websites

What are the critical success factors in persuading the third party host to act?

- promoted websites
- commercial interests
- ability to remove content
- reviewed the content and functionality of the website?
- *Any other factors that make the platform analogous to the Samsung app store*

- s1 DA 1996 (s10 DA 2013) is not a defence as the host is a primary publisher/on notice by dint of *Byrne v Deane*

- Not possible to sue author

From *Delfi* to *Sanchez:* a whistle-stop tour

- ***Delfi v Estonia*:**
  - ECtHR (GC) found that the imposition of liability of the Estonian news portal for offensive anonymous comments posted by its readers below an online news article justified and proportionate.

- ***MTE and Index.hu Zrt v Hungary:***
  - ECHR applied five relevant criteria for assessment of proportionality of an interference in situations of platform liability not involving hate speech.
  - liability would have a negative impact on the commenting environment online. The difference between this case and *Delfi* was that the messages were not clearly hate speech.
- ***Sanchez v France***
  - GC held that the conviction of a politician for failing to promptly delete unlawful comments by third parties from his FB wall did not breach A10.

Finding your person unknown

- Norwich Pharmacal Order compelling person who facilitated or became mixed up, innocently or otherwise, in wrongdoing to provide identity of wrongdoer: important guidance in *Davidoff v Google*
- Evidence should be provided to establish that the underlying claim has a real prospect of success. (In a defamation case serious harm and reference need to be expressly addressed)
- Strict analysis of “facilitation” precondition: why it is said that the host “facilitated” the wrong
- Need to explain why the order is “necessary” and give F&F disclosure
- Discretionary remedy: merits will be assessed

Norwich Pharmacal: a roadmap

"the defendant, in its provision of a Gmail account, has played no role; it has neither engaged in nor facilitated the alleged wrongdoing; nor has it furthered the posting of the Review. ... Once the Trustpilot account has been registered, the defendant is, for all practical purposes, not involved in (and is powerless to control) what is posted using it. At the stage when each Review was posted, the defendant was and is a mere witness to the anterior event of initial registration" *Davidoff* [107]

Claims against persons unknown

- Category 2 comprises individuals or entities who are identifiable, but whose names are not known. Persons in this group can properly be sued as "persons unknown", provided only that it is possible to bring the proceedings effectively to their attention eg by one of the methods of alternative service" *Cameron v Liverpool Victoria Insurance Co Ltd* [2019] 1 WLR 1471 SC
- **Descriptor:** It is necessary for the unknown persons to be identified by description, in such a way as to identify with certainty those who are included within it and those who are not e.g.

  "*Persons Unknown responsible for the operation and publication of the website [.com]*".

  "*Person(s) Unknown responsible for obtaining data from the Applicant's IT systems on or about [ ] 2024 and/or who has disclosed or is intending or threatening to disclose the information thereby obtained*"

Claims against persons unknown

- **Service by alt method** under CPR 6.15 eg email/social media/browser (need evidence that C has taken all practicable steps, by service as directed, to notify the Defendant(s) of its application, that they have not responded to it, and that the most likely reason they have not responded is that they have no intention of identifying themselves as the perpetrators)
- **Dealt with on the papers**: *Clarkson Plc v Person(s) Unknown* [2018] EWHC 417 [7] (Warby J: reality is more accessible if case is dealt with on the papers); *Armstrong Watson LLP v Persons Unknown* [2023] EWHC 1761
- **Remedies**: final mandatory and prohibitory injunctions, damages

Legislative developments

Australia: Model Defamation Amendment (Digital Intermediaries Provisions 2023 (July 2024)

- Caching/conduit services exempt
- Search engines exempt save for sponsored search results
- All other digital intermediaries - s31A Defence ('reasonable access prevention steps' within 7 days)