



**QUEEN'S
UNIVERSITY
BELFAST**

DAITHÍ MAC SÍTHIGH

INTERNET INTERMEDIARIES:

FROM DEFAMATION

TO DIRECTIVE

TO DATA PROTECTION

INFORMATION LAW AND POLICY CENTRE

5 OCTOBER 2017

INTERMEDIARIES THEN AND NOW

For more than two decades internet platforms have largely been treated as intermediaries. They have been seen as more like telecom companies, which may transmit criminal material for which they are not liable, than media firms, which can be prosecuted or sued for what they publish
(*Economist* 10 August 2017)

1997
FIRST CASES ON DA
1996 / (US) CDA

ECD
Period of calm?



2007
REVIEW OF ECD
LIABILITY
PROVISIONS



Clarification
Fragmentation

2017
ILLEGAL CONTENT
VIDEO SHARING
TERRORISM
ABUSE
DATA PROTECTION
CONTEMPT
...

SO WHAT DO WE DO
NOW?

1997-2007

THE FIRST WAVE OF NEW SHIELDS / DEFENCES

- Defamation Act 1996

- s 1 'AEP' reasonable care defence

- *Godfrey v Demon Internet* [2001] QB 201 (though, events in 1997, decision in 1999)

US

- 1996 - Communications Decency Act

- 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider' (47 USC 230(c))

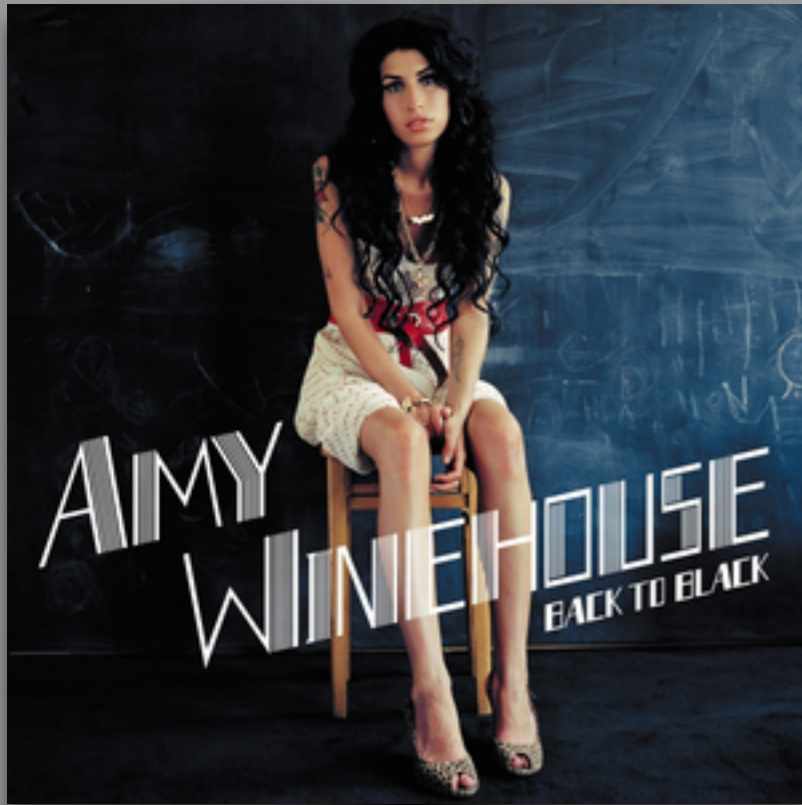
- 1998 - Digital Millennium Copyright Act

- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, **IF THE SERVICE PROVIDER...** (and the rest is history)



1997-2007

E-COMMERCE DIRECTIVE



- E-Commerce Directive 2000 (transposed in UK 2002)
 - Mere conduits (art 12), cache (13), hosts (14)
- 2007 commissioned review of liability provisions
 - The manner in which courts and legal practitioners interpret the [ECD] in the EU's various national jurisdictions reveals a complex tapestry of implementation. This often reflects the distinct values found in each of the respective legal regimes. Moreover, changes in the social evaluation of the Internet (good or evil? enhancing communication or crimes and copyright infringements?), new techniques, and business models seem to have influenced legal practice and court decisions.
- AVMSD 2007 (extension to certain on-demand services, but much less impact on intermediaries than anticipated)

2007-2017

CLARIFICATION OR FRAGMENTATION?

- And in the years that followed:
 - *Google France* and *L'Oreal* CJEU decisions on automatic nature
 - 'Injunction' cases: *SABAM* to *Telekabel Wien* to *McFadden*
 - Commission statement - COM(2011) 942
 - Four uncertainties (definitions, conditions, N&TD, monitoring)
 - Need for 'horizontal initiative'; 'clean and open' consultation
- 'Fragmentation' (my argument in *JIPLP* 2013 - defamation and copyright moving in opposite directions)

2017

A COMPLEX TALE

- EU1: Revisiting the E-Commerce Directive
- EU2: Revision of the AVMS Directive
- Digital Economy Act 2017
- Abuse and harassment
- Extremist and terrorist material
- Data protection
- Contempt of court
- And back to defamation



2017

THE EU AND THE DIGITAL SINGLE MARKET

- May 2016 Communication on online platforms (COM(2016) 288, p 8)
 - the Commission will maintain a balanced and predictable liability regime for online platforms. This is crucial for the further development of the digital economy in the EU and for unlocking investments in platform ecosystems. At the same time, a number of specific issues relating to illegal and harmful content and activities online have been identified that need to be addressed to render this approach sustainable.
- May 2017 mid-term review of the DSM (COM(2017) 228, p 9):
 - ensure better coordination of platform dialogues within the Digital Single Market focusing on the mechanisms and technical solutions for removal of illegal content, with a view to enhancing their effectiveness in full respect of fundamental rights. Where applicable, the aim should be to underpin these mechanisms with guidance on coherent procedural aspects such as the notification and removal of illegal content while ensuring transparency and the necessary checks and balances to protect fundamental rights, avoiding over-removal of legal content. The Commission will also provide guidance on liability rules and support to platforms on voluntary measures taken by platforms when they work proactively to remove illegal content, acting in good faith.
- Reform of copyright law (Commission proposal - COM(2016) 593 (recital 38 vs article 13))

2017

THE EU AND THE DIGITAL SINGLE MARKET

- September 2017 Communication - 'Tackling Illegal Content Online' COM(2017) 555
 - 'A more aligned approach [to removing illegal content] would make the fight against illegal content more effective' and 'reduce the cost of compliance'
 - How does this interact with Art 14 ECD?
 - 'assess whether additional measures are needed ... including possible legislative measures to complement the existing regulatory framework' (by May 2018)

2017

AVMS AND VIDEO SHARING PLATFORMS (COMMISSION PROPOSED ART 28A/28B)

- 'video-sharing platform service': a TFEU service made available by ECN, with a principal purpose (or that of a dissociable section) of 'providing programmes and user-generated videos to the general public, in order to inform, entertain or educate' consisting 'of the storage of a large amount of programmes or user-generated videos, for which the video-sharing platform provider does not have editorial responsibility', where the organisation of that content is 'determined by the provider of the service including by automatic means or algorithms, in particular by hosting, displaying, tagging and sequencing;
- Obligations: 'protect minors from content which may impair their physical, mental or moral development' and 'protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin'
- 'Practical and proportionate' measures which can include T&C, user report/flag/rate (and feedback), age verification and parental controls (for first category only), media literacy
- UK line - opposing new text, but "being pragmatic and assessing if the proposals would cause excessive burdens, as many of the requirements are already captured in the terms and conditions of existing social media platforms."

2017

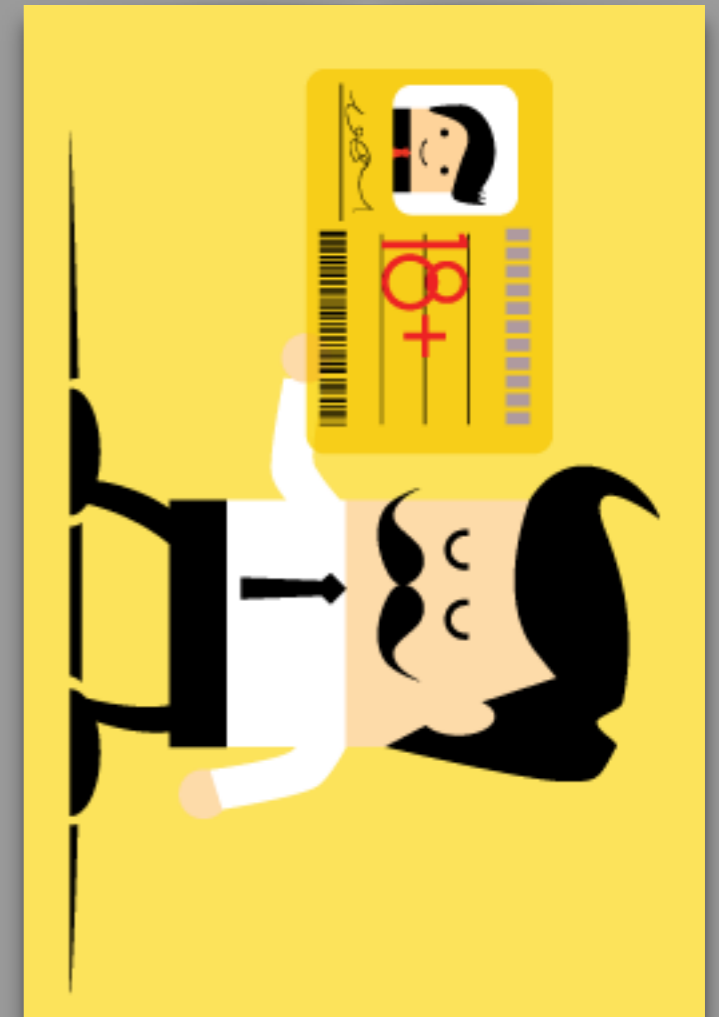
THE AVMS REFORM IN THE LEGISLATIVE PROCESS

- Council: majority supports, but would add 'provocation to commit a terrorist offence' clause (cf art 5 Dir 2017/541), delete reference to 'large amount', and give greater scope to states to go further
- Parliament: draft resolution (after initial consideration in committees) that would rule out 'any ex-ante control measures or upload-filtering of content'

2017

DIGITAL ECONOMY ACT 2017

- The ratchet
 - AVMSD 2007 on on-demand (which the UK opposed)
 - 2010ff ATVOD broad interpretation of might seriously impair (for mandatory access control), and inclusion of 'material' in assessment
 - 2014 secondary legislation to ensure ability for complete ban on some content, and to use the MSI standard for other
 - 2017: covering wider range of material ('pornographic' including sex-18, 'material' inc video, still, and sound), though does not cover UK ODPS - obligations stronger than for (e.g.) copyright
- 'Age verification regulator' with powers over (a) content providers, (b) payment-services providers (notice), (c) ancillary service providers e.g. advertisers (notice), (d) Internet service providers (blocking)



2017

ABUSE AND HARASSMENT

Police chief challenges social media firms to tackle online abuse

Andy Trotter says sites such as Twitter and Facebook must take responsibility for issue that could cause police 'great difficulty'

- European Commission code of conduct on countering illegal hate speech online, 2016:
 - “this work must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously reviewed by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate time-frame. To be considered valid in this respect, a notification should not be insufficiently precise or inadequately substantiated”
- HoC Home Affairs select committee (*Hate crime: abuse, hate and extremism online*, HC 69, 2016-17, para 36):
 - “The major social media companies are big enough, rich enough and clever enough to sort this problem out—as they have proved they can do in relation to advertising or copyright. It is shameful that they have failed to use the same ingenuity to protect public safety and abide by the law as they have to protect their own income.

2017

TERRORISM DIRECTIVE 2017/541

- Art 21: (1) Member States shall take the necessary measures to ensure the prompt removal of online content constituting a public provocation to commit a terrorist offence, as referred to in Article 5, that is hosted in their territory. They shall also endeavour to obtain the removal of such content hosted outside their territory; (2) Member States may, when removal of [such content] at its source is not feasible, take measures to block access to such content towards the internet users within their territory.
- Safeguards?
 - Art 21(3): “Measures of removal and blocking must be set following transparent procedures and provide adequate safeguards, in particular to ensure that those measures are limited to what is necessary and proportionate and that users are informed of the reason for those measures. Safeguards relating to removal or blocking shall also include the possibility of judicial redress.”
 - Recital 40 “Nothing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, falls outside the scope of this Directive and, in particular, of the definition of public provocation to commit terrorist offences.”

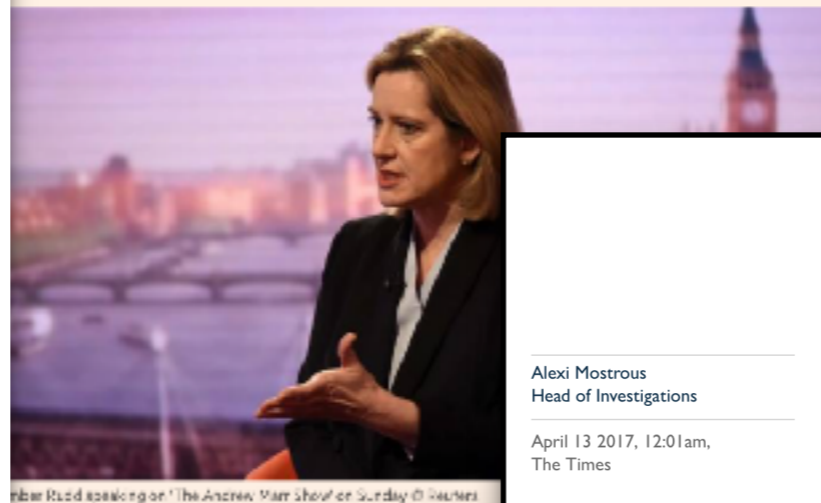
2017

FURTHER EXHORTATIONS

- Expectation that industry will 'develop new technology and tools to improve the automatic detection and removal of content that incites to terrorist acts' with complementary legislative measures 'if necessary' (Council of the EU, June 2017)
- 'Now I address [the internet companies] directly. I call on you with urgency, to bring forward technology solutions to rid your platforms of this vile terrorist material that plays such a key role in radicalisation. Act now. Honour your moral obligations.' (Amber Rudd, Conservative party conference, October 2017)

I READ THE NEWS TODAY, OH BOY

The Guardian view on Google: overweening power Editorial



TIMES INVESTIGATION

Facebook's darkest secret: a platform for paedophiles

Alexi Mostrous
Head of Investigations

April 13 2017, 12:01 am,
The Times

Facebook is an admired social network for many of its users, but there are pages that host disturbing and potentially illegal content that most people would find alarming

2017

DATA PROTECTION

- The understanding of DP law as the missing remedy
 - *Google Spain* and the GDPR
 - DP Bill: commitment on wipe-slate provision
- The interaction between the ECD and DPD (and now GDPR)
 - Incomplete exclusion (see Erdos 2017 on legislative history)
 - Occasional mentions in cases e.g. *CG v Facebook* (NI CoA)
 - GDPR: This Regulation shall be without prejudice to the application of Directive 2000/31/EC, in particular of the liability rules of intermediary service providers in Articles 12 to 15 of that Directive

2017

BLAME CANADA

- *Google v Equustek Solutions* 2017 SCC 34
 - (Industrial) IP interlocutory case but based on general power of courts to issue injunctions
 - Google as 'the determinative player in allowing the harm to occur' ([53])
 - Initial Google approach (URLs not domain; .ca only)
 - Worldwide injunction (invitation to reapply to court if compliance would be illegal elsewhere)

2017

CONTEMPT OF COURT

- Law Commission (E&W) review
 - Should there be a new power to order the temporary removal of material first published before proceedings became active?
- NZ Law Commission report 2017, including draft statute
 - “A new statutory provision should authorise a court to make an order that an online content host take down or disable public access to” specific information covered by other proposals (previous convictions and suppression orders)
 - Proposed new offence re ‘untrue allegations or accusations that pose a real risk of undermining public confidence in the judiciary and the courts’

2017

...AND DEFAMATION (AGAIN)

- Defamation Act 2013, s 5 (and s 10, s 13) and its Regulations
 - Andrew Scott - 'unwholesome layer cake' of defences
- Scottish Law Commission 2017 draft bill, clause 3 (based on ch 7 of 2016 consultation paper)
 - Except as may be provided for under section 4, a right to bring defamation proceedings in respect of a statement does not accrue against a person unless the person is— (a) the author, editor or publisher of the statement, or (b) both—(i) an employee or agent of such a person, and (ii) responsible for the statement's content or the decision to publish it

CONCLUSION

(1) TAKING STOCK

- 'In the last 20 years, media litigation has become much more diverse in its nature, and a great deal more complex. This has mainly, though not entirely, resulted from legislation' (Warby J, speech to Media Law Resource Center, London, 26 September 2017)
- Barlow 1996: 'I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear...Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are all based on matter, and there is no matter here.'
- European Commission 2017: 'The open digital spaces [online platforms] provide must not become breeding grounds for ... spaces that escape the rule of law'
- Economist 2017: 'Internet firms face a global techlash'

CONCLUSION

(2) TAKING ACTION

- A review that:
 - is UK-wide (see Scottish LC defamation project)
 - takes a horizontal approach (multiple causes of action)
 - addresses questions of power (cf Lynskey 2017, HoL EU Internal Market Sub-Ctee 2016)
 - considers liability, duties, and knock-on effects together
 - responds to Brexit
- Who should do this?



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