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The fragmentation of intermediary liability in the UK

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I. INTRODUCTION¹

The liability of Internet intermediaries has been a key question in information technology law for nearly two decades.² There is a well-understood difference in how this issue is treated in US and European Union law.³ Federal law in the US distinguishes between liability for intellectual property infringements on one hand and a range of other civil actions on the other. This is because section 230 Communications Decency Act (1996) provides a general exclusion from liability, i.e. that intermediaries are not to be treated as a ‘publisher or speaker’ in respect of information provided by others. Taking a different approach, section 512 Digital Millennium Copyright Act (1998) establishes, in respect of some intermediaries, a conditional scheme (including what is often termed ‘notice and takedown’ or NTD) in the field of copyright. This scheme increases the legal risk to the intermediary, requiring as it does specific procedures to be put in place and actions taken.⁴ The result is that, in practice, US intermediaries must pay more attention to allegations of copyright infringement than to allegations of defamation.

The argument advanced in this article is that, despite the existence of different cross-cutting provisions on liability in the Electronic Commerce Directive [‘ECD’],⁵ a similar type of hierarchy of harm is emerging in the United Kingdom, albeit in a less

¹ Thanks to Dr. Emily Laidlaw (University of East Anglia) for reviewing a draft of this article, and to co-presenters and audience members at the 5RB Conference (London, September 2012) and LLT 7th Annual Media Law Conference (London, March 2012), where earlier versions of this paper were presented.

² See generally the thorough consideration of the question in L Edwards, ‘The fall and rise of intermediary liability online’ in L Edwards & C Waelde (eds), *Law and the Internet* (3rd edn, 2009). The focus of this article is on the recently-emerged tensions in UK law, and will not attempt to reassess the earlier debate on the adoption of the 1996, 1998 and 2000 provisions.

³ C Marsden, ‘Internet service providers: content liability, control, and neutrality’ in I Walden (ed), *Telecommunications Law & Regulation* (4th edn, 2012) 703-711.

⁴ Discussed in J Urban & L Quilter, ‘Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act’ (2006) 4 *Santa Clara Computer and High Technology Law Journal* 621

⁵ Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178.

clear fashion than is the case in the United States. This phenomenon will be explained by reference to defamation, privacy, and copyright. It will also be shown how the interaction between domestic and EU law and between statute and common laws affect the position of intermediaries, again indicating a difference with the simpler US approach. The intention is not to make a normative claim about intermediary liability, but to present a critical perspective on how different liability regimes have come into being.

A distinction will be made between four types of intermediary, based on the lines drawn in the ECD (all of which are ‘information society service providers’ (ISSPs) as defined in and in relation to the ECD – although not every ISSP is necessarily an intermediary). The law as it stands has different expectations of these categories, and they carry out different technical functions too. Political statements regarding ‘ISPs’ without further distinction often serve to confuse rather than illustrate; the problem also affects the interpretation of prior decisions.

The first type is a mere conduit, i.e. one which provides access to the Internet (often what is meant in business by the term ISPs), such as Virgin Media or TalkTalk. The second is a cache, i.e. temporary storage (which will not be considered in any detail here as few if any novel or distinctive issues are raised). Third is the class of ‘hosts’, such as YouTube or Twitter. Finally, there is the category of search engines, which – in so far as implemented in the UK – is not covered by the immunity provisions of the ECD. (In some member states, search engines are so protected).

The position of conduits, hosts and search engines will now be considered, followed by a concluding section which summarises the position of each in respect of the three areas of law within the scope of this article.

II. CONDUITS

A. Overview

The main provision for mere conduits is Article 12 ECD, which offers generous immunity from liability; defamation cases (e.g. *Bunt v Tilley*⁶) demonstrate this practice, and there has been little discussion of recasting or amending the provision.

However, article 12 does not tell the full story. Article 12(3) does not appear to rule out injunctions (i.e. without liability) against mere conduits, subject to the ‘no duty to monitor’ requirement of article 15 ECD. Article 15 itself is unclear.⁷ *Norwich Pharmacal* orders (also without any suggestion of liability, indeed quite the opposite) are also available against mere conduits. Finally, it has not been a barrier to the new (EU) provision (first proposed as mandatory, but now an option for member states)⁸ for blocking images of child sexual abuse.⁹

Furthermore, the picture is even more complex in the case of copyright, for three reasons:

- (i) s 97A Copyright, Designs & Patents Act [‘CDPA’], transposing Directive 2001/29,¹⁰ can and has been used for ‘blocking’ of specified websites;
- (ii) s 17 Digital Economy Act [‘DEA’] provided for a new type of blocking injunction, although its future is uncertain; and
- (iii) the DEA also established a ‘graduated response’ system, not based on liability but demonstrating a different Parliamentary approach to mere conduits.

B. Section 97A

The effect of s 97A CDPA is demonstrated in the trio of ‘Newzbin’ cases. In *20th Century Fox v Newzbin*¹¹ copyright infringement was established (authorisation, communication to the public, common design for copying) and an injunction granted

⁶ [2006] EWHC 407 (QB).

⁷ European Commission, ‘Online services, including e-commerce, in the Single Market’ SEC(2011) 1641, 47. Some of the gaps have been filled in by the CJEU in cases where the additional provisions of the Information Society Directive or IP Rights Enforcement Directive are engaged: Case C-70/10 *Scarlet Extended v SABAM*, Case C-324/09 *L’Oreal v eBay*.

⁸ Marsden (n 3) 728.

⁹ Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography [2011] OJ L335, art 25.

¹⁰ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167.

¹¹ [2010] EWHC 608 (Ch).

against the Newzbin website (an index of binary files available via Usenet), albeit in narrow terms. Subsequently, Newzbin was closed - but an offshore Newzbin2 was launched shortly afterwards. *20th Century Fox v BT (no 1)*¹² therefore saw an injunction granted against BT to block access to Newzbin2 using the ‘Cleanfeed’ system it already uses (long predating EU interest) to block access to material on the Internet Watch Foundation’s list (images of child sexual abuse).¹³ It was confirmed that neither Article 12 nor 15 ECD were a barrier to the injunction sought. Finally in *20th Century Fox v BT (no 2)*¹⁴ the form of the injunction is set out, along with an interesting debate on costs and on the differences between s 97A and Norwich Pharmacal orders. Further (unreported, unopposed) injunctions were issued against other ISPs.¹⁵

A slightly different approach is that in *Dramatico v BSKyB & ors*¹⁶ where the case begins as one between the record companies and the ‘top six’ ISPs¹⁷ (who were unrepresented). The website being considered, The Pirate Bay, was not the subject of UK proceedings at any point. Subsequently, a second judgment (in respect of five of the six; BT separately) dealt with the granting of an injunction under s 97A.¹⁸ It was noted that a two-stage approach should not be assumed to be required. The present position must surely be one where section 97A orders are a feature of the obligations of mere conduits in the UK. Indeed, in 2013, a single case (*EMI & ors v BSKyB & ors*)¹⁹ demonstrates that the ‘formula’ is now clear. This is a case by a group of labels, in respect of three different sites, against all of the top six, with both the determination of infringement and the granting of the order dealt with in the decision.

C. Blocking injunctions under the DEA

¹² [2011] EWHC 1981 (Ch).

¹³ On Cleanfeed and the IWF, see TJ McIntyre, ‘Child Abuse Images and Cleanfeeds: Assessing Internet Blocking Systems’ in I Brown (ed), *Research Handbook on Governance of the Internet* (Edward Elgar, 2013) 277, 282-3; E Laidlaw, ‘The Responsibilities of Free Speech Regulators: An Analysis of the Internet Watch Foundation’ (2012) 20 *International Journal of Law and Information Technology* 312, 316-317; 319-320; Marsden (n 3) 727.

¹⁴ [2011] EWHC 2714 (Ch).

¹⁵ D Worth, ‘Motion Picture Association asks Virgin and TalkTalk to block Newzbin 2’ (*V3*, 9 November 2011) <http://www.v3.co.uk/v3-uk/news/2123843/virgin-talktalk-hit-newzbin-blocking-request-mpa>.

¹⁶ [2012] EWHC 268 (Ch).

¹⁷ BT, Virgin, Sky, TalkTalk, Everything Everywhere (i.e. Orange & T-Mobile), o2.

¹⁸ [2012] EWHC 1152 (Ch).

¹⁹ [2013] EWHC 379 (Ch).

A further power for a ‘blocking injunction in respect of a location on the internet’ is provided for in s 17 DEA, although this power would only be available if further secondary legislation were adopted. This is **not** based on actual knowledge but does apply to the same category of entities (‘service providers’) as defined in s 97A CDPA. It came to be in the final version of the Act after the withdrawal of a more extensive power to grant blocking injunctions. The explanation was that it would form a part of the strategy to tackle copyright infringement, by addressing Web-based infringement as opposed to the peer-to-peer form of infringement, which would be tackled through the graduated response system (discussed below). Although the DEA was the subject of judicial review,²⁰ the criticism of s 17 was not addressed, on the grounds that no secondary legislation had yet been adopted!²¹

Ofcom reported on s 17 DEA in 2011,²² expressing various doubts on the efficacy of the section as a response to copyright infringement. In policy terms, this raises some questions about the s 97A CDPA route too, although the success of cases under this section has somewhat lessened the demand for implementation of s 17. The Government noted it would not introduce secondary legislation in 2011²³ and in June 2012 announced that it would propose the repeal of s 17 DEA.²⁴ However, the attempt by Parliament to add more duties (in respect of copyright alone) demonstrates the temptation of regulatory co-opting of mere conduits.

D. Graduated response

While not an issue of liability or takedown *per se*, the rollout of the scheme of the Digital Economy Act for dealing with online copyright infringement is significant, because it changes the perceived position of the ISP as a neutral conduit, and may lead to better record-keeping and related activities. It also calls into question the definition of a conduit; see for example the debate during the DEA’s passage on the

²⁰ *R (BT) v Secretary of State for Business, Innovation & Skills* [2011] EWHC 1021 (Admin).

²¹ *Ibid* [94].

²² Ofcom, “‘Site blocking’ to reduce online copyright infringement: a review of section 17 & 18 of the Digital Economy Act’ (27 May 2010) <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>.

²³ Intellectual Property Office, ‘Sweeping intellectual property reforms to boost growth and add billions to the UK economy’ (press release, 3 August 2011) <http://www.ipo.gov.uk/about/press/press-release/press-release-2011/press-release-20110803.htm>.

²⁴ Department for Culture, Media & Sport, ‘Measures to tackle Internet piracy moved forward today’ (press release, 26 June 2012) <https://www.gov.uk/government/news/next-steps-to-tackle-internet-piracy>.

definition of a service provider as applied to providers of wifi hotspots such as libraries and cafes.²⁵

One must also note the relevance of the existing Cleanfeed system (designed for a different purpose) in persuading the High Court to make the order it did regarding Newzbin2; will the existence of the scheme required by the DEA make other orders more technically feasible and so more likely to be granted?

The system proposed as of a draft code of June 2012²⁶ is for rightsholders to notify ISPs of infringement by one of its users, for the ISP to identify the user and warn them, and for the ISP to notify rightsholders of the (anonymous) details of repeat infringers. This would only apply to the ‘top six’ ISPs. The system would facilitate the initiation of legal action by a rightsholder, presumably commencing with a Norwich Pharmacal order). In the DEA, infringement is not further defined. From the supporting documents and technical reports, it is clear that the focus is on peer-to-peer services. In such a case, all downloaders are essentially also uploaders; the latter is easier to detect and indeed to define as infringement. Subsequently, if activated (no earlier than a year after the initial code comes into force), a further provision will require ISPs to take action against customers who are repeat infringers, through what are termed ‘technical measures’ (e.g. slowing down of connection speed).

E. Conclusion

All of these obligations are presented in a careful way so as to avoid suggesting that the high mark of immunity under article 12 ECD has not been compromised. However, a political reading of the developments demonstrates that the position of the intermediary is more complex than a mere reading of the law on liability. Copyright has been prioritised through the approval of measures that take advantage of the technological functions and information resources of the intermediary. The UK legislature was even prepared – again only for copyright – to go beyond EU law in the

²⁵ HL Deb 2 December 2009, vol 715, col 786 (Lord Clement-Jones); HL Deb 12 January 2010, vol 716, col 446 (Lord Young). See also D Mac Sithigh, ‘Law in the last mile: sharing Internet access through wi-fi’ (2009) 6 SCRIPTed 355 <http://www.law.ed.ac.uk/ahrc/script-ed/vol6-2/macsthigh.pdf>, 366-8.

²⁶ Ofcom, ‘New measures to protect online copyright and inform consumers’ (press release, 26 June 2012) <http://media.ofcom.org.uk/2012/06/26/new-measures-to-protect-online-copyright-and-inform-consumers/>; Ofcom, ‘Online Infringement of Copyright and the Digital Economy Act 2010 - Notice of Ofcom’s proposal to make by order a code for regulating the initial obligations’ (26 June 2012) <http://stakeholders.ofcom.org.uk/consultations/infringement-notice/>.

adoption of section 17 DEA.²⁷ While a single one of these points might be explained in other ways, assembling them demonstrates that the general approach to intermediary liability is considered appropriate in the case of some legal wrongs, but insufficient in the case of others. In that context, it is not surprising to see arguments emerging that the effect of section 97A CDPA could be extended to other fields, not through the section itself (which is clearly limited to copyright) but through developing a common law version thereof, within the scope of section 37 Senior Courts Act 1981 (power of High Court to grant injunctions where just and convenient to do so).²⁸

The backdrop to all of these developments is the ongoing considerations of injunctions and the ECD by the Court of Justice, although so far, the English courts have not gone much further than noting the jurisprudence. The cases do express important principles on proportionality and on problems with requirements to filter.²⁹ The test for granting a *Norwich Pharmacal* order has itself been clarified³⁰ and further developed (with specific reference to copyright and ISPs) in *Golden Eye v Telefonica*.³¹ Such detailed consideration is long overdue, given (i) the existence of data protection legislation and the treatment of such by the Court of Justice in similar cases,³² (ii) the evolution of data retention provisions (for access by public authorities),³³ including how they interact with other data questions,³⁴ and (iii) the recognition of computer history as an aspect of privacy in the European Court of Human Rights,³⁵ alongside the pending fundamental rights scrutiny of data retention in the Court of Justice.³⁶

²⁷ Described by Bainbridge as ‘jump(ing) the gun’, i.e. not waiting for EU harmonisation in this area: D Bainbridge, *Intellectual property* (9th ed, 2012) 199.

²⁸ G Busuttill, ‘The Internet and injunctions’ (conference paper, 5RB Annual Conference, 27 September 2012) 6 (copy on file with author). See also *L’Oreal v eBay* [2009] EWHC 1094 (Ch) [447-454].

²⁹ *Scarlet* (n 7). See discussion in E Bonadio & M Santo, ‘ISPs cannot be ordered to adopt general and preventive filtering systems’ (2012) 7 *JIPLP* 234.

³⁰ *RFU v Viagogo* [2011] EWCA Civ 1585.

³¹ [2012] EWHC 723 (Ch).

³² e.g. Case C-275/06 *Promusicae* [2008] ECR I-271.

³³ Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJ L105.

³⁴ Case C-461/10 *Bonnier Audio*.

³⁵ *Copland v UK* (2007) 45 EHRR 37 [41]

³⁶ Case C-293/12 *DRI v Ireland*.

All of this activity reveals something important about the purposes of regulating online activity in accordance with law (which could prompt a long discussion on lobbying, influence and legislative priorities, and strategic litigation), and demonstrates to critics of the current approach to liability how claims for reform can be articulated in respect of other wrongs. The next section will establish how liability itself can be seen, through a close reading, to be a site of debate regarding the harm caused by different types of online behaviour, in the case of hosts.

III. HOSTS

A. A notice-based approach

The ECD establishes in article 14 a scheme informally known as ‘notice and takedown’ or ‘notice and action’. Despite the similar name, it is far less detailed than the Digital Millennium Copyright Act (DMCA) ‘notice and takedown’ system for copyright in the US. For example, the ECD test for immunity (that a host is safe unless it has ‘actual knowledge of illegal activity or information’ or is ‘aware of facts or circumstances from which the illegal activity or information is apparent’) and requirement for immunity (obligation to ‘act expeditiously to remove or to disable access to the information’) does not govern the form or validity of notice. UK law adds a little more detail, directing courts to have regard to factors like the inclusion of name and address and details of the unlawful nature of the information or activity in a notice;³⁷ there is also a potentially significant change of wording in transposition, from ‘is apparent’ to ‘would have been apparent’.³⁸

The European Commission completed in 2012 a review of the ECD. It suggested that, regarding articles 12-15, there were four types of uncertainty: definitions, conditions (e.g. actual knowledge), notice and takedown, and obligations to monitor. It did not come down in favour of amending the provisions, but did announce what it calls a ‘horizontal initiative’.³⁹ The purpose of this initiative is to address the different approaches to notice and takedown across the EU, and, being horizontal, it is about a general principle that would apply across causes of action and types of services. It

³⁷ Electronic Commerce (EC Directive) Regulations 2002, SI 2002/2013, reg 22.

³⁸ M Collins, *The law of defamation and the Internet* (3rd edn, 2010) [16.68]

³⁹ European Commission, ‘A coherent framework for building trust in the Digital Single Market for e-commerce and online services’ COM(2011) 942, 14.

also hints at needing more detail by way of the adequacy of a notice and also quicker action. Consideration of a subsequent questionnaire issued by the Commission⁴⁰ supports this observation, with questions including whether hosts should have a notification procedure (question 10), options for the format of notices (question 12) and whether the requirement to act ‘expeditiously’ could be replaced by a specified time period (question 19).

A further theme is whether a single approach to notice and takedown is the best one. The UK already goes beyond the ECD in setting out the details of how notice and takedown works in the special case of sections 3-4 Terrorism Act 2006, and the Commission reports a wide range of other practices across the EU.⁴¹ In the case of defamation, there are similar (although not identical) provisions for a defence of innocent dissemination under the Defamation Act 1996.⁴²

There is however a fundamental difficulty with a notice-based approach to intermediary liability which continues to provoke debate.⁴³ This is the inescapable bias in favour of action on the part of the host, which is explained here in the style of Pascal’s Wager (on the logic of belief in God). Table 1 compares the positions of four parties, in a situation where an allegation that content is unlawful is sent by a complainant) to a host in respect of content uploaded by an author; the fourth party is a reader of the website, or the public.⁴⁴ Table 1 compares the outcomes for lawful and unlawful content for the two options open to the host, ‘leaving up’ the content and ‘taking it down’.

⁴⁰ European Commission, ‘A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries’ (4 June 2012) http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet_en.htm.

⁴¹ SEC(2011) 1641 (n 7) part 3.4.

⁴² This article does not attempt to deal with the 1996 Act. In general, the ECD is comparable or offers slightly stronger protection to intermediaries: Collins (n 38) [16.47].

⁴³ J Rowbottom, ‘To rant, vent and converse: protecting low-level digital speech’ (2012) 71 CLJ 355, 380-1.

⁴⁴ This is a necessary addition; “the law’s shield for service providers becomes, paradoxically, a sword against the public, which depends upon these providers as platforms for speech” W Seltzer, ‘Free speech unmoored in copyright’s safe harbour: effects of the DMCA on the First Amendment’ (2010) 24 Harvard Journal of Law & Technology 171, 175.

	Unlawful	Lawful
Leave Up	<ul style="list-style-type: none"> • Harm to complainant (reputation), with remedy available (action against host and possibly against author) • Minor (deserved) harm to author (host's inaction increases risk of action against) • Harm to host (liability) • Neutral to reader 	<ul style="list-style-type: none"> • Neutral to complainant • Neutral to author • Minor harm to host (opportunity cost of defending) • Benefit to reader (access to legal content)
Take Down	<ul style="list-style-type: none"> • Benefit to complainant • Neutral to author • Neutral to host (immunity) • Neutral to reader 	<ul style="list-style-type: none"> • Neutral to complainant, or (undeserved) minor benefit from suppression of critical speech despite legality) • Harm to author (suppression of legal speech, probably with no remedy against complainant or host) • Neutral or minor harm to host (possible dispute with author, but terms and conditions likely to prevent legal action, so limited to possible loss of business) • Harm to reader (denied access to legal content)

Table 1: options available to a host on receipt of notice

As the host is the party being asked to take action, we focus first on its choice, and then assess the consequences for other parties. It can so be seen that the ‘leave up’ option means that the outcome for the host will be either harm or minor harm, while the ‘take down’ option delivers the option of no harm or ‘no to minor’ harm. As such, without further information, the host should choose ‘take down’. However, where the content is legal, there is a marked difference between the ‘leave up’ (no harm to complainant or author and benefit to reader) and ‘take down’ (no harm to complainant, harm to author and reader) approaches, meaning that the optimal approach for the host is suboptimal for both the author and reader. Assuming that leaving up legal

content affecting a complainant is not (legally) harmful, the complainant's position is not affected by the choice of path unless the content is unlawful. Therefore, the system produces the result that the host's action will benefit or not affect the complainant, but harm or not affect the author or reader. The interests of the complainant are therefore favoured. Furthermore, adjusting the standard for what is 'unlawful' – as discussed below – will be a significant step. This is because it increases the class of situations where lawful content is taken down.

With this problem in mind, we can turn to three ways in which the balance may be shifted, all relating to defamation law.

B. The definition of notice

Recent cases in the High Court have added further complication to the understanding of article 14 ECD: *Tamiz v Google*⁴⁵ and *Davison v Habeeb*.⁴⁶ These develop in more detail a point made by the Court of Justice regarding notice.⁴⁷ In both cases, Google (which runs the Blogger service at issue) advanced an argument that it did not have sufficient notice for the article 14 obligation to take down to kick in. It is made clear in *Tamiz* that a complaint about content is not notice, with it being suggested that there needs to be enough evidence of unlawfulness before takedown becomes necessary. The distinction drawn by learned authors⁴⁸ between 'unlawful' and 'prime facie unlawful' is considered, with the former being favoured in *Tamiz*.⁴⁹ (This debate has been observed in other member states too. For example, Austrian decisions adopt a standard that unlawfulness must be obvious to a non-lawyer without further investigation, meaning that certain areas e.g. trademark are unlikely to be so because of the need for further research).⁵⁰

Sadly, the Court of Appeal did not deal with article 14 at all in its hearing of *Tamiz*,⁵¹ as it has already resolved the matter before it through the treatment of the claim as

⁴⁵ [2012] EWHC 449 (QB) [*Tamiz (HC)*].

⁴⁶ [2011] EWHC 3031 (QB).

⁴⁷ *L'Oreal* (n 7) [122]: 'notifications of allegedly illegal activities or information may turn out to be insufficiently precise or inadequately substantiated'.

⁴⁸ Compare P Milmo & W Rogers (eds), *Gatley on Libel & Slander* (11th edn 2008) [6.31] and Collins (n 38) [16.75].

⁴⁹ *Tamiz (HC)* (n 45) [57].

⁵⁰ SEC(2011) 1641 (n 7), p 34.

⁵¹ *Tamiz v Google* [2013] EWCA Civ 68 [*Tamiz (CA)*] [52].

Jameel abuse.⁵² It is therefore difficult to offer a definitive interpretation of article 14 at this point in time, making the Commission's horizontal initiative particularly important.

The exploration of article 14 in the context of privacy is also eagerly awaited. It has been argued that there is a need to development the common law or introduce a statutory provision to do for privacy what s 1 Defamation Act 1996 does for defamation,⁵³ but this may not be necessary, if it is true that the ECD (which would apply to an action for breach of privacy) is broader than the 1996 Act in each case.⁵⁴

C. A condition precedent? Publication and defamation law

There is a further point of doubt under English law on defamation liability itself (which could have made the notice question and indeed the ECD irrelevant). This is whether the host is a publisher, at common law. In *Tamiz* at first instance, Eady J says no (comparing Blogger, provocatively, with the owner of a wall on which graffiti has been daubed); in *Davison*, there is a long discussion of the status of Blogger – compared with giant noticeboards, conduits, search engines – and it is concluded that there is an arguable case that Google is a publisher. The decision at first instance in *Tamiz*, on the contrary, is that liability (as a publisher) is not present whether there is notice or not. The conflict (on comparable facts, regarding the same host) between the two decisions was thus the backdrop to the Court of Appeal's consideration of the appeal in *Tamiz*. At this Court, the matter was be fully argued by counsel; both *Tamiz* and *Davison* were cases involving self-represented litigants. The court admitted the possibility of post-notice hosted material being considered as published by the host,⁵⁵ pulling back from Eady J's 'graffiti' argument. However, it did rule out liability in the situation before the host is notified, both in respect of primary and secondary publication.⁵⁶

Surprisingly, this finding has been greeted by outrage by advocates of free expression – despite the situation that the finding at first instance was a departure from the

⁵² Ibid [49-50].

⁵³ M Warby, N Moreham & I Christie (eds), *Tugendhat: the law of privacy and the media* (2nd edn 2011) [8.97].

⁵⁴ Collins (n 38) [16.47].

⁵⁵ *Tamiz (CA)* (n 51) [34].

⁵⁶ Ibid [25-26]

generally assumed position,⁵⁷ that it was already at odds with that of *Davison* from a court of the same level, that the finding in *Tamiz* was not based on clear precedent from a higher court, and that the defences (particularly article 14 ECD) have not been affected. So the argument that the finding ‘reads like a threat to the concept of “mere conduit”, the concept enshrined in the European Union e-Commerce Directive establishing that ISPs cannot be held responsible for content on third party blogs, Facebook updates, tweets etc’⁵⁸ is not consistent with the actual state of affairs; hosts are and have never been not mere conduits, and the issue of liability remains governed by the ECD without change. It is perfectly fair for the system of liability to be criticised from a free expression point of view (indeed, that is part of the interpretation of table 1, above) but much less fair to suggest that the Court of Appeal undermined a clear and established principle.

D. Reform of the law of defamation

The lengthy debate leading up to the Defamation Act 2013 has seen a proliferation of proposed notice schemes. Lord Lester’s original Bill proposed a new defence for ‘facilitators’, while the Joint Committee on the Draft Defamation Bill proposed a distinction between authored and anonymous speech (where a statement with an identified author would stay online with complaint appended while a takedown order was sought, but works of unidentified authorship would need to be taken down on receipt of complaint, with a ‘leave-up’ order available). This was the subject of much debate at its hearings and the Government has responded that it believes this scheme to be unworkable for various reasons.

Section 5 of the 2013 Act⁵⁹ contains a new defence for the ‘operator of a website’ which does make whether the author is identifiable (by a claimant) relevant. The defence is framed in language closer to section 230 Communications Decency Act

⁵⁷ See for example P Lambert, ‘Google and Online Liability’ (2012) 23(5) *Computers & Law* 11 (‘This goes further than even a service provider could have hoped’); R Griffiths, ‘New immunity for websites which host defamatory user generated content’ (2012) 23 *Ent LR* 145, 146 (‘marks a sea change in the law applicable to websites which host defamatory user generated content’).

⁵⁸ P Reidy, ‘London court ruling could have grave consequences for free speech online’ (*Index on Censorship blog*, 15 February 2012) <http://blog.indexoncensorship.org/2013/02/15/london-court-ruling-could-have-grave-consequences-for-free-speech-online/>.

⁵⁹ During consideration in the House of Lords, referred to as clause 7: HL Bill 84 2012-13, 7 February 2013, <http://www.publications.parliament.uk/pa/bills/lbill/2012-2013/0084/2013084.pdf>.

than English law has ever been: ‘it is a defence for the operator to show that it was not the operator who posted the statement on the website’.

However, s 5(3) plots a middle way between blanket immunity and the approach of the ECD, through enabling the defence to be defeated if the author is unidentifiable, a notice of complaint was given to the operator, and there was a failure to respond in accordance with regulations. As such, the (future) regulations need to be considered. . The regulations will include key factors such as time limits, and disclosure of contact details, although the legislation does give a little more detail on what a ‘notice of complaint’ should contain. The main thrust of the new approach, and what sets it apart from the existing defences, is that the operator would (for identifiable authors) be protected against liability through passing on notices, *without* a requirement to take material down if the operator and author comply with certain requirements.

Draft regulations have been circulated by the Ministry of Justice to selected parties, although they have become publicly available through unofficial republication on the Internet.⁶⁰ If the author is already identifiable, no further steps would be needed. If the author is not initially identifiable, the complainant would issue a notice to the operator, who would transmit it to the author; if the author provided contact information, the information could ‘stay up’ without risk to the host. The regulations would add further points to the information required in the notice, a 3-day period for the operator to pass the notice to the author followed by a 7-day period for a response, and other points of detail. However, the Act does not constrain the regulations in a particularly serious way, so other schemes (more or less onerous in terms of the obligations on the operator and/or author) could be adopted without amending the primary legislation; the regulations do, however, require parliamentary assent. The Government also noted the possibility of requiring that details be passed the other way, i.e. giving the complainant information about the user.⁶¹ This latter aspect is indeed considered in the draft regulations, although it appears to be permitted rather than required by the

⁶⁰ ‘Defamation Bill: MoJ Informal Consultation on Regulations under Clause 5’ (*Inform Blog*, 4 January 2013) <http://inform.wordpress.com/2013/01/04/defamation-bill-moj-informal-consultation-on-regulations-under-clause-5/>

⁶¹ *Ibid* [85].

proposed legislation. After a late amendment, though, malice on the part of the website operator now defeats the defence.⁶²

The Act resembles (but is less favourable towards the service provider than) the simple ‘notice and notice’ system used for copyright in Canada,⁶³ where there is a requirement on a host to pass on the notice to the user, with no liability or requirement for further action. (Surprisingly, the pre-Bill paper from the Government⁶⁴ did not take the opportunity to discuss this precedent). The Act requires table 1 to be revisited, as set out below.

⁶² Defamation Act 2013, s 5(11).

⁶³ A voluntary system since 2000, and a statutory one since 2012. See P Chwelos, ‘Internet service providers report, prepared for Industry Canada’ (20 January 2006) [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapi/ISP%20Report%202006-01-20.pdf/\\$file/ISP%20Report%202006-01-20.pdf](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapi/ISP%20Report%202006-01-20.pdf/$file/ISP%20Report%202006-01-20.pdf); Copyright Modernization Act (SC 2012, c. 20), adding new § 41.25 to the Copyright Act, RSC c. C-42.

⁶⁴, Ministry of Justice, *Government response to the report of the Joint Committee on the Draft Defamation Bill* (Cm 8295, 2012) [85-88].

	Unlawful	Lawful
Leave Up (with ID)	<ul style="list-style-type: none"> • <i>Harm to complainant (reputation), with remedy available (action against author only)</i> • <i>Deserved harm to author (easier for complainant to pursue)</i> • <i>Neutral to host (immunity)</i> • Neutral to reader 	<ul style="list-style-type: none"> • Neutral to complainant • <i>Minor harm to author (opportunity cost of defending)</i> • <i>Neutral to host</i> • Benefit to reader (access to legal content)
Take down (no ID)	<p>[As table 1, above]</p> <ul style="list-style-type: none"> • Benefit to complainant • Neutral to author • Neutral to host (immunity) • Neutral to reader 	<p>[As table 1, above]</p> <ul style="list-style-type: none"> • Neutral to complainant, or (undeserved) minor benefit from suppression of critical speech despite legality) • Harm to author (suppression of legal speech, probably with no remedy against complainant or host) • Neutral or minor harm to host (possible dispute with author, but terms and conditions likely to prevent legal action, so limited to possible loss of business) • Harm to reader (denied access to legal content)

Table 2: options available to a host under Defamation Act 2013

If the content is unlawful and identified, the outcome is the removal of the complainant’s remedy against the host, and shifts from minor harm to harm for the author (legal action by the complainant becomes easier) and from harm to neutral for the host. If the content is lawful and identified, the host’s minor harm is replaced by a neutral outcome, but the author experiences minor harm through being forced to defend. If the content is unidentified, the analysis is unchanged. The host is the major ‘winner’ if the content is identified (although there is some shift of labour towards the author and also a limited remedy for the complainant), so it now has an incentive to choose the ‘leave up’ option. This is very close to the situation in the US for

defamation (but not copyright) under the Communications Decency Act. On the contrary, if the author is unidentified, the host continues to have the incentive to choose ‘take down’. The harms of this option, discussed in connection with table 1, are thus reduced if the content is identified. It can therefore be said that the UK is considering the radical approach of the CDA, but only for defamation and for identifiable authors.

Importantly, a debate has continued (recalling the issue disputed in *Tamiz*, discussed above) on whether a notice would have to show that material is unlawful or merely defamatory. As there, this is a question on whether it is sufficient for the complainant to show that the words are defamatory, or if they must show that relevant defences (e.g. fair comment, qualified privilege) are not applicable. The ‘defamatory’ approach is what appears in s 5(6)(b) of the 2013 Act, but was criticised by the Joint Committee on Human Rights.⁶⁵ This is at least a better situation than what has prevailed in the application of the ECD, in that the courts will be given a single, clear test. However, if the end result is the ‘defamatory’ test, the intention of the Act may not be matched in practice in respect of unidentified lawful (but defamatory) speech, for the reasons set out in table 2, above.

E. Defamation as a special case

Much of the material discussed in this section relates specifically to defamation. The first issue, regarding notice, is an interpretation of the ECD, but because of the discussion of the relevance of defences, some work would be necessary if it were desired that the same end (i.e. shifting the burden towards the person making the allegation and sending the notice) be achieved for all areas of liability. More problematic, in terms of an horizontal approach, are the remaining issues. The concept of publication is specific to the law of defamation (and perhaps privacy), and the common law on this point is self-contained. Indeed, as discussed below in the context of search engines, copyright law encompasses other, different concepts such as making available and authorization. Finally, the development of entirely novel notice and takedown schemes, including the placing of substantial weight on whether an

⁶⁵ Joint Committee on Human Rights, *Legislative scrutiny: Defamation Bill* (2012-13, HL 80, HC 810) [36-40].

author is identifiable is taking place within a defamation statute which could not, without further parliamentary intervention, affect liability in other areas.

The result of the three developments would therefore be likely to create a system for defamation that is favourable to the interests of the host (and, as set out in table 2, the reader), while preserving a system for other areas of liability which is much more favourable towards complainants. Considering Howarth's discussion of libel reform, where he notes that the consequences of change is to shift risk towards the victims of content (i.e. away from publishers) and increase the expectations placed upon judges,⁶⁶ it is difficult to conclude that due consideration has been given to this matter, or to explain why harm to reputation is so much less serious than harm to intellectual property rightsholders.

Furthermore, the host will also need to be aware of matters outside of liability. We have already noted the *SABAM* decision in the context of article 12 ECD. However, in the case of hosts, there is a further, more relevant decision to consider: *SABAM v Netlog*, where non-liability requirements on hosts were considered by the Court of Justice.⁶⁷ Although both cases had a similar interpretation of the relevant Directives, and use similar language, the second decision does serve to remind us that while section 97A CDPA cases in England to date have involved conduits, the section (and the underlying Information Society Directive) is applicable in the case of all service providers.⁶⁸ An entity need not be a conduit or indeed any kind of intermediary (for the purposes of articles 12-15 ECD) to be a service provider. As such, while the exact treatment of such an application against a social networking or video sharing site (or indeed a search engine, as noted below) awaits elaboration, this copyright-specific remedy only strengthens the conclusion that hosts are in very different positions when it comes to defamation and copyright.

IV. SEARCH ENGINES

⁶⁶ D Howarth, 'Libel: Its Purpose and Reform' (2011) 74 MLR 845, 876-7.

⁶⁷ Case C-360/10 *Netlog*.

⁶⁸ Section 97A(3) CDPA, referring to Electronic Commerce (EC Directive) Regulations 2002, regulation 2, which in turn uses the language of Directive 2000/31/EC, which itself adopts the definition in the technical standards directives, 98/34/EC and 98/48/EC; 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'.

Member states were not required to apply the ECD to search engines. The divergent treatment of search engines was an issue in the Commission's review of it.⁶⁹ As the UK has not done so, the argument here has turned on the common-law publication question. In *Metropolitan Schools v Designtecnica*,⁷⁰ Google (as a search engine) was held not to be a publisher. In the highest level treatment of the matter to date, the Supreme Court of Canada found that in general, a hyperlink without more does not constitute publication for the purposes of defamation law.⁷¹ Taking the two points together, and considering the matter from the point of view of the search engine operator, the common law is serving it well. However, this is not necessarily the case in all common law jurisdictions; there is a suggestion (not developed because the court reached its decision for other reasons) of some doubt regarding *Metropolitan* in a New Zealand decision of 2012,⁷² and both criticism of the finding and rejection of the relevance in an Australian case (at the Victoria Supreme Court) of the same year.⁷³

Yet turning once more to copyright law, there has been a shift in favour of liability for linking (predominantly as an infringement of the 'making available' right). Compare the conviction of Vickerman⁷⁴ for fraud offences in respect of a 'links' website and the extradition proceedings in respect of O'Dwyer⁷⁵ with the earlier dismissal of charges in *Rock & Overton*.⁷⁶ The question of linking as communication to the public is before the Court of Justice in the pending case of *Svensson*.⁷⁷

These developments could be confined to copyright law, given that they turn on the interpretation of copyright statutes on copyright concepts. Taken in conjunction with the recommendation of the parliamentary committee on privacy and injunctions for

⁶⁹ SEC(2011) 1641 (n 7) 27.

⁷⁰ [2009] EWHC 1765 (QB).

⁷¹ *Crookes v Newton* 2011 SCC 47.

⁷² *A v Google NZ* [2012] NZHC 2352 [74]. This case is mentioned by the Court of Appeal in *Tamiz* in the context of applying *Byrne v Deane*: [32].

⁷³ *Trkulja v Google (No 5)* [2012] VSC 533 [27] (criticism of *Metropolitan*), [29] (not the common law of Australia).

⁷⁴ Newcastle Crown Court, 14 August 2012:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/anton-vickerman-sentencing-remarks-14082012.pdf>

⁷⁵ Westminster Magistrates' Court, 13 January 2012:

<http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/us-v-odwyer-ruling.pdf>

⁷⁶ Gloucester Crown Court, 6 February 2010:

http://www.obs.coe.int/oea_publ/legal/reginavsrockoverton.pdf

⁷⁷ Case C-466/12 *Svensson*.

new (statutory?) obligations on search engines to block unlawful material,⁷⁸ however, the shifts in liability may be a basis for renewed pressure from those favouring the interests of claimants to **regulate** search engine liability rather than **exclude** it in its entirety. Although the approach under defamation law has been criticised as favouring speech over reputation and taking a blanket approach to a complex problem,⁷⁹ this is demonstrably consistent with the debate regarding hosts, in that the impact of defamation law on online expression is being steadily minimised.

There are at least five questions to consider regarding the future regulation of search engines, as set out in Table 3.

(a) Has the reconsideration of the ‘common law publisher’ question *Tamiz* at both stages, or the reception of it outside of England, undermined the basis of *Metropolitan*? The extension of *Metropolitan* to a context where a statutory defence already existed has clearly provoked criticism of the common law approach.

(b) If new statutory provisions for privacy are introduced, will that create pressure – particularly in the context of the ‘right to be forgotten’ debate⁸⁰ – for extending to defamation complainants the same opportunities as available for those in privacy claims? Here, the relevance of a data protection approach should be noted, particularly given the argument that a search engine is a data processor.⁸¹

(c) If obligations on search engines become more onerous, will providers lobby the European Union more energetically so as to be included within Articles 12-15 of a revised ECD? At this point in time it seems unusual that European harmonisation is necessary in respect of caches but not search engines.

(d) Can section 97A CDPA and/or section 17 DEA be used against search engines, given that a search engine is still an ISSP, albeit not within the immunity schemes?⁸²

⁷⁸ Joint Committee on Privacy and Injunctions, *Privacy and injunctions* (2010-12, HL 273, HC 1443) [110-115].

⁷⁹ G Chan, ‘Defamation via hyperlinks: more than meets the eye’ (2012) 128 LQR 346, 348.

⁸⁰ See for example European Commission, ‘Proposal for a regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data’ COM(2012) 11, art 7; pending Case C-131/12 *Google Spain*; P Bernal, ‘A Right to Delete?’ (2011) 2(2) European Journal of Law & Technology <http://ejlt.org/article/view/75/144>.

⁸¹ Article 29 Working Party, Opinion 1/2008 on data protection issues related to search engines http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf 24.

⁸² Discussed above (n 68).

There is no obvious textual reason why not, but again, the actual use of these powers would affect the tolerance of search engine providers of the current lacuna regarding liability.

(e) Does Article 10 ECHR restrict blocking, filtering or takedown requirements? The indications from international human rights bodies are that restrictions on Internet access are suspect,⁸³ and the Court of Justice (and legislative debate within the European Union) notes the importance of freedom of expression and of access to information. The Electronic Commerce Directive itself recognises the problem.⁸⁴ There is also a long (underdeveloped) tradition of considering the regulation of technology as a relevant factor on the part of the European Court of Human Rights.⁸⁵ Most recently, it has found a violation of article 10 in the case of a court order blocking users from accessing material hosted by a hosting service (Google Sites) because of illegal content on one site hosted there.⁸⁶

V. CONCLUSION

It is now possible to compare the position of the intermediary across the areas of law and types of intermediary, as follows.

	Defamation	Privacy	Copyright
Mere Conduit	Article 12 ECD, no liability	Article 12 ECD, no liability	Article 12 ECD, but also section 97A CDPA and graduated response
Host	Article 14 ECD, interpreted by <i>Tamiz</i> , alongside s 1 Defamation Act 1996	Assumed similar to defamation, except for s 1 Defamation Act 1996 and s 5	Article 14 ECD (alone), and presumed section 97A CDPA [Low Hurdle NTD]

⁸³ A/HRC/17/27, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (16 May 2011) http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

⁸⁴ ECD, recital 46: 'the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level'.

⁸⁵ See for example *Mustafa v Sweden* (2008) 52 EHRR 803; regarding the right of a tenant to install a satellite dish to receive foreign programmes: article 10 applies to State actions which '(prevent) a person from receiving transmissions from telecommunications satellites' [32].

⁸⁶ *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012).

	and common law publication, and s 5 Defamation Act 2013 [Moderate to High Hurdle Notice and Takedown (NTD)]. ‘High’ hurdle means it is difficult for a claimant to overcome the host’s defence.	Defamation Act 2013 [Moderate Hurdle NTD]	
Search Engine	Common law publication, no liability (<i>Metropolitan</i>).	Unclear (but note parliamentary committee recommendation and data protection issues)	Unclear (but with increasing attention to the consequences of linking)

Table 3. Summary of differing obligations of intermediaries

Intermediaries are thus already being asked to do more in the case of copyright as compared with defamation, and the current position is one pointing towards further divergence, with caselaw and proposed legislation reducing the obligations of intermediaries regarding defamation, but their obligations regarding copyright becoming more onerous, even in the case of mere conduits. The position of privacy is close to that of defamation but with some ‘missing pieces’, alongside proposals to take a different approach being considered. But is this, as it should be, the result of due consideration of the relative merits of intellectual property, reputation and privacy rights, each set against the threat to freedom of expression posed by poorly calibrated notice and takedown schemes? Or, as it seems, a series of piecemeal changes which produce a system that overprotects some interests and underprotects others? The next steps in the review of the ECD do present an opportunity to ‘fix’ some of the problems, but restraint on the part of national lawmakers in applying ‘quick fixes’ is also necessary. The inconclusive outcome of the *Tamiz* appeal surely heightens the clamour for a more considered, coherent take on intermediary liability to be at the heart of the next legislative response.