



**Hogan
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Liability regulation of online platforms in the UK

A White Paper

April 2018

This preparation of this paper has been funded by Google

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1. Executive Summary

Online platforms are good for the UK

The UK's diverse ecology of online platforms is a key growth engine for the UK economy and society. It enables knowledge discovery, sales, social and economic interaction and the sharing and distribution of content.

The liability regime established by the EU e-Commerce Directive has enabled almost all platforms to incorporate material generated, or provided, by users be those individuals or businesses. From product reviews to political opinions; recipe ideas to musical compositions; cuddly cats to charity appeals, this is a sharing of ideas, creativity, experiences and insight which is absent from other forms of communication and which enriches society, public discourse and the UK's economy.

This legal regime delivers immense tangible benefits for the UK. By enabling users to share content quickly and easily, platforms are breaking down social and economic barriers. They are providing a voice to ethnic communities underrepresented in the traditional media. They are helping new groups to become e-commerce entrepreneurs. They are creating channels for British talent and businesses of all sizes to reach international markets.



Content on platforms is already regulated

Critics who argue for new regulation imply that platforms represent an unregulated "wild west". In fact, there is extensive regulation of online content and, in practice, that regulation is being enforced. The current regime balances the primary responsibility of the creator of content to ensure that it is lawful with the responsibility of a platform operator to remove content when it becomes aware it is unlawful.

Additional platform responsibilities would force them to be censors of social discourse

Any change to platform responsibilities would have a significant impact on the services available in the UK. Imposing on platforms a liability for illegal content would, in practice, require most operators to distinguish, before members of the public are permitted to publish, between acceptable content and that which is potentially illegal content. This would turn technology businesses into "arbiters of truth" over sensitive issues such as defamation, political opinions, free speech etc. in relation not to their own content but that which millions of members of the public wish to share. Alternatively, an operator could choose not to intervene prior to publication but to accept the financial risk of claims arising from any content uploaded by a user which turns out to be unlawful.

In practice if additional responsibilities for user content were placed on platform operators, the operators would inevitably look to manage those risks. Whilst the details would no doubt vary, it would almost inevitably make sharing or accessing content more difficult and/or more expensive for platform users, as well as potentially putting platform operators in the role of "censoring" content.

In such a fast changing market, it is not possible only to regulate "big players"?

A distinct feature of the development of platforms has been the pace of growth and change both of the platforms themselves and the way they are used. This makes it both extremely difficult and undesirable to identify clear subdivisions in the platform market with sufficient clarity to be useful for legal or regulatory purposes. Taking just the simplest characteristic of size, Snapchat's UK users doubled in a single year (2016) whilst the users of MySpace halved in a similar period (2010) demonstrating not only the futility of attempting to determine different approaches according to scale but also the fact that any attempt to do so would almost inevitably introduce artificial barriers within the market entrenching the position of the biggest current players at the expense of potential competition.

This means that additional burdens – restrictions on making content available and costs and complexity of sharing or accessing content – would fall on all platform operators and users. If Facebook needs new procedures, so will a hyperlocal community platform; if a global consumer brand selling products through Amazon Marketplace faces additional checks and costs, so will a UK SME seeking export markets; and if content uploading becomes less user friendly for an organised political group expressing views bordering on hate crime it will also be more difficult for the individual proponent of peace and love.

New regulation would disproportionately impact smaller players, damaging diversity

The impact of these burdens would not, however, be equal. Whilst a global consumer brand or organised political group will be equipped to bear those burdens, the same is unlikely to be true of the hyperlocal platform, SME or an independent app developer. Indeed it is SMEs who most directly benefit from the ability which platforms provide to access large markets rapidly and substantially by-passing the time, cost and effort which is required for an entirely self-generated and maintained online presence.

As a result, increasing the regulatory burden on platform operators would disproportionately harm the diversity which the current model promotes, reduce competition in the market and make it harder for new UK and local platforms to start and scale.

A heavy-handed approach would risk undermining the benefits of platforms to the UK

In short, such a change would substantially reduce the benefits online platforms currently deliver to UK consumers, society and economy.



2. Platforms and the role of user provided content

2.1 Diversity of Online Platforms

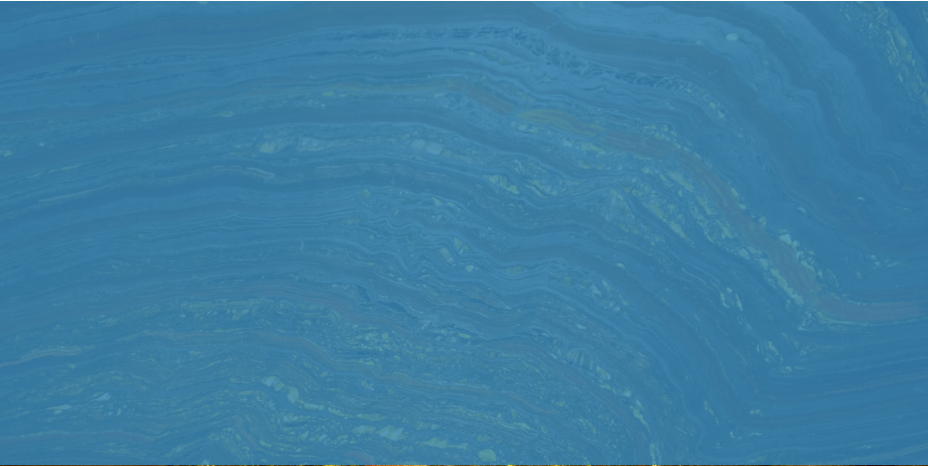
There is no generally accepted definition of an "online platform".

For the purposes of analysing liability regulation of platforms, the characteristic of a "platform" which sets it apart from other forms of online presence is the facilitation of the provision and access to products, information, entertainment, opinions, sales, advertising or other content or services from a variety of sources. Within this broad umbrella, platform models diverge widely according to several characteristics which include:

- the nature of the content, services or products involved: from financial products to football boots; from historical research to pictures of cats;
- the scale of the content, services or products involved: from a feature film to an individual emoji;
- the consumer facing business model: subscription (e.g. Financial Times), transactional (e.g. Now TV), advertiser funded (e.g. ITV Hub), charitable (e.g. justgiving.com); or hybrid models where subscriptions can remove advertisements and unlock additional content (e.g. theguardian.com);
- the extent to which contributions are controlled: from highly contractualised provision of long form TV services to spontaneous provision of personal product reviews on websites such as johnlewis.com or powered by providers such as trustpilot.com;
- the business model applicable to content contribution: paid, revenue share/pass through or gratuitous;
- whether content is originated only by the platform provider (e.g. BBC iPlayer), by others (e.g. Live Leak) or both (e.g. YouTube).

Whilst social networks and search engines are high profile examples of platforms whose predominant use is the sharing and accessing information from a range of sources¹ many other digital outlets now incorporate content or products provided by platform users rather than platform providers.

This user provided content can range from the short user reviews present on many retail sites² or comment and debate across the media³, to crowdfunding sites where anyone can upload a video about their charitable run⁴. This led the House of Lords Select Committee to conclude in 2016 that "...there is hardly an area of economic and, arguably, social interaction these days that is left untouched by platforms in some way."⁵



2.2 The current liability regime and relevant categories of content

This paper analyses the role played by the regime of protection granted to "information society services" under the Electronic Commerce (EC Directive) Regulations 2002 which implement the Articles 12–15 of EU Directive 2000/31/EC. As described below, that regime applies to content which appears on platforms, but with respect to which the platform operator performs only certain technical functions⁶ (i.e. services whose primary function is hosting content contributed by others)

In this paper we therefore categorise content (note this can include products and services) as either:

- **"Platform Managed Content"**: that which is actively selected or managed by the platform operator such that it does not benefit from the liability exemption under the current liability regime.

This typically consists of information or analysis (such as news, public service information or academic research); services provided wholly online (such as online banking applications or the ability to stream music, films etc.), the ability to purchase goods or services

which are provided offline (such as shopping for delivery to home), and information or marketing materials for other goods or services (such as product specifications or instruction manuals).

- **"User Provided Content"**: that made available on a platform by users and with respect to which the platform operator performs limited functions such that it falls within the exemptions under the current liability regime.

User Provided Content can include similar types of content to those which are platform managed (for example, recipes shared in a cookery community, user generated video clips or information on products available in an online "marketplace"). However, it typically extends well beyond this to include expressions of personal views and opinions (such as reviews of products or services, social media updates or contributions to debates on subjects like politics, sport or music).

It is not uncommon for platforms to include both Platform Managed and User Provided content. However, this paper is primarily focused on the contribution of User Provided Content and the potential impact on that contribution of the current liability regime.

3. Platforms are a UK success story valued by users and businesses

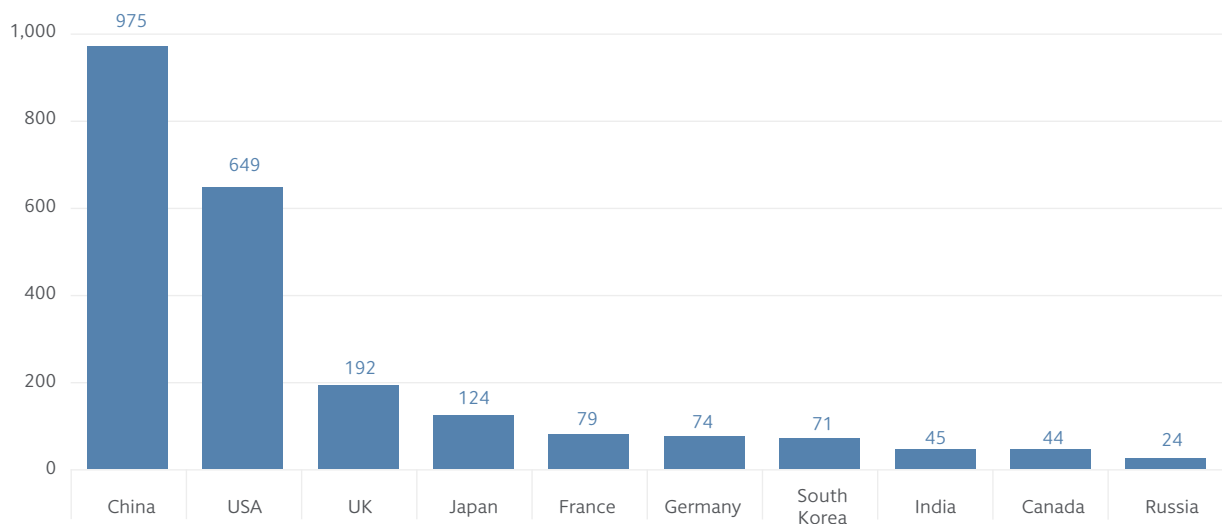
3.1 The UK's e-commerce success is at the heart of its digital economy

The UK's digital economy is a recognised leader and contributes nearly £100 bn to the UK economy each year⁷. A key component of that success is the UK's e-commerce sector, which is one of the top 3 globally.

Platforms are a key contributor to the e-commerce sector as well as providing a wide range of other benefits from enabling charity fundraising⁸, connecting local sports teams⁹, sharing family history data¹⁰ or enabling neighbours to share items¹¹.

With 90% of UK households having internet access¹², consumers increasingly use online platforms motivated for their convenience, choice, transparency, monetary benefits and relationships¹³. As a result, platforms are central to consumers' lives – 77% of adults buy goods or services online; 66% use social media for networking purposes¹⁴. Platforms are valued by advertisers who use their advanced targeting tools and vast audiences – online advertising spend in 2016 was more than £10.3 bn.

Countries with largest B2C e-commerce markets in 2016 (\$bn)



(Source: Statista)



3.2 Online platforms are part of the UK's e-commerce success story

Platforms now play a key role in the UK's society and economy.

The vibrancy of online platforms in the UK is striking: home grown success stories like Just Eat alongside global players like Amazon; distinctively British social networks like KILTR alongside Facebook; HomeSwapper alongside Airbnb; Wakelet alongside YouTube; LiveLeak alongside Vimeo; goarshare alongside Lyft; The Lincolnite alongside The Guardian; UKSocial alongside Match.com, Wiki Camps UK alongside Wikipedia; The Dots alongside LinkedIn.

This has resulted in the creation of new networks of social and economic connectivity which in turn attracts greater investment from incumbents and encourages new entrants and entrepreneurial activity¹⁵. It is also a direct driver of exports with 60% of SMEs selling on Amazon marketplace now selling abroad¹⁶.

In short, e-commerce is the clearest cut success story of the UK's digital economy. Leveraging the UK's leadership in e-commerce can, and should, be an important contributor to the UK's wider digital strategy, creating a "halo effect" by benefitting the wider digital economy. By the same token, anything which puts the UK's e-commerce sector at a relative disadvantage has the potential to have a disproportionately damaging impact on the UK's wider digital economy.

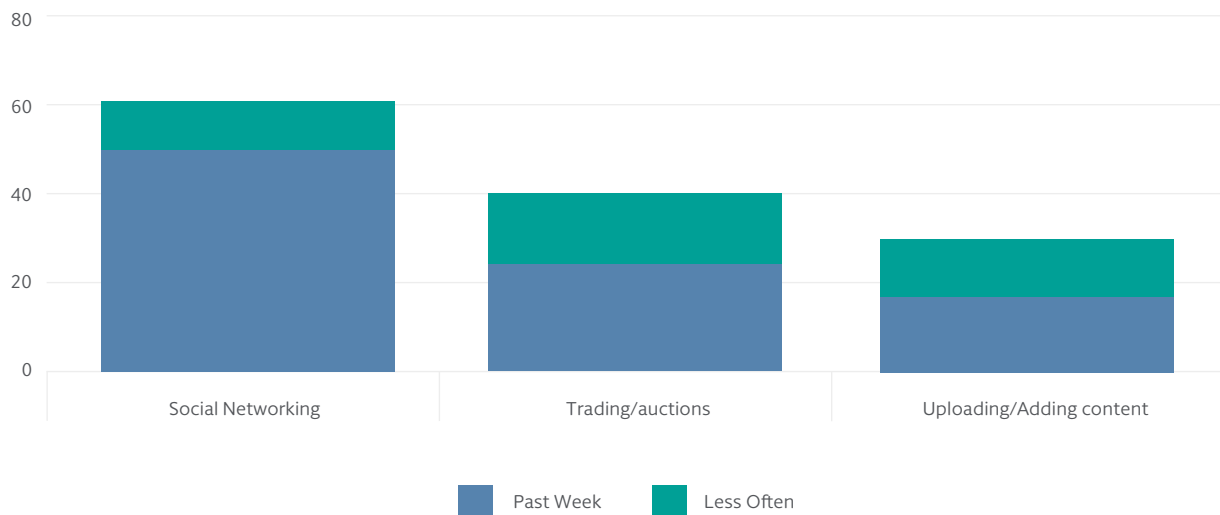
3.3 User Provided Content has become a significant activity in itself

User Provided Content, and its use and presentation, takes many forms: from online sales by business users of platforms to travel updates provided by individual passengers. This makes it impossible to measure precisely the overall volume or impact of that content.

It is clear however that activities involving User Provided Content now form a significant part of the internet economy and one which is distinctly different from traditional media with a much more direct ("disintermediated") connection between creators and their audience. Ofcom figures suggest that between a quarter and half of the UK adult population regularly engage in three activities in which User Provided Content clearly has a predominant role: social media, trading (e.g. eBay) and active content uploading¹⁷.

The development of online content creation as a significant economic and cultural activity has reinforced the strength of the UK's creative industries. The UK is the third largest exporter of cultural goods and services in the world¹⁸ and open platforms are helping to create a new talent pipeline – both in front of and behind the camera. An entirely new breed of content creators, vloggers, 'how to' experts, musicians, influencers and the like are using platforms to build their profiles and fan bases. On YouTube alone, over 190 UK YouTube channels have surpassed 1m subscribers¹⁹. This process can form the jumping off point for award winning projects – Asim Chaudhry's BAFTA Award winning comedy series "People Just Do Nothing" ran on YouTube for two years before its BBC commission. This content is a big export potential for the creative industries as 78% of all YouTube views on videos uploaded by a UK-based creator are viewed outside of the UK.

Selected internet activities, % of those with internet access



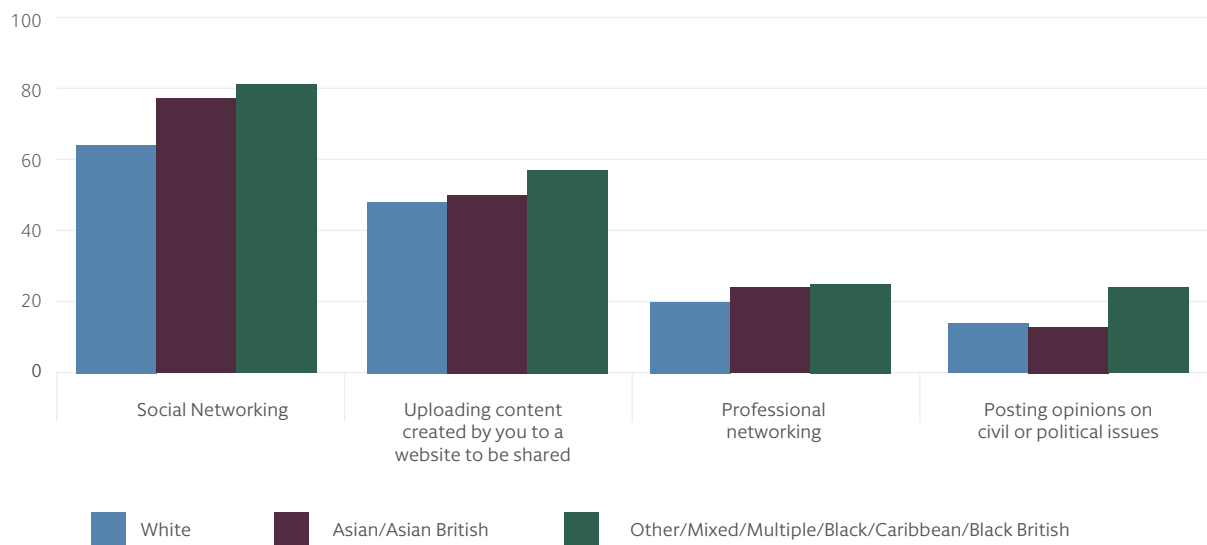
(Source: Ofcom Communications Market report 2017)

3.4 Platforms which facilitate User Provided Content are a source of diversity

Platforms facilitate the creation and sharing of a much wider and more diverse range of content than would otherwise be generally available. They also provide opportunities for a wider and more diverse cross section of the population to contribute and share content.

Research by Ofcom²⁰ and the Office for National Statistics indicates that, whilst there are variations in content activity across various social groups, minority ethnic and disability groups are significant contributors of content via platforms. This is in marked contrast to traditional media where surveys suggest that, as with many other aspects of society, such groups are traditionally underrepresented.

Selected internet activities, % by Ethnic Group 2017



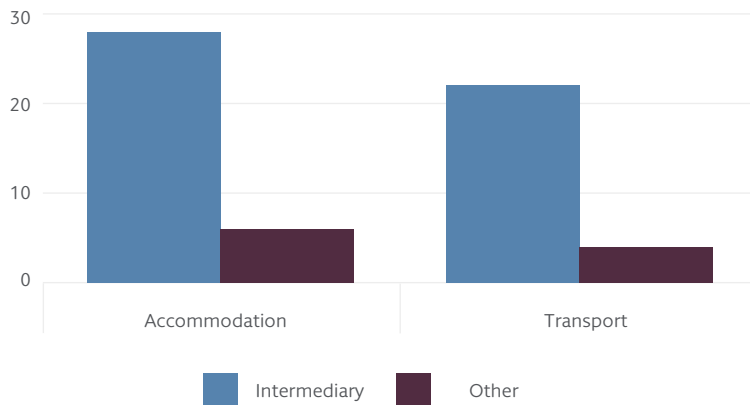
(Source: Office for National Statistics, August 2017)

3.5 Platforms which facilitate User Provided Content are driving innovation

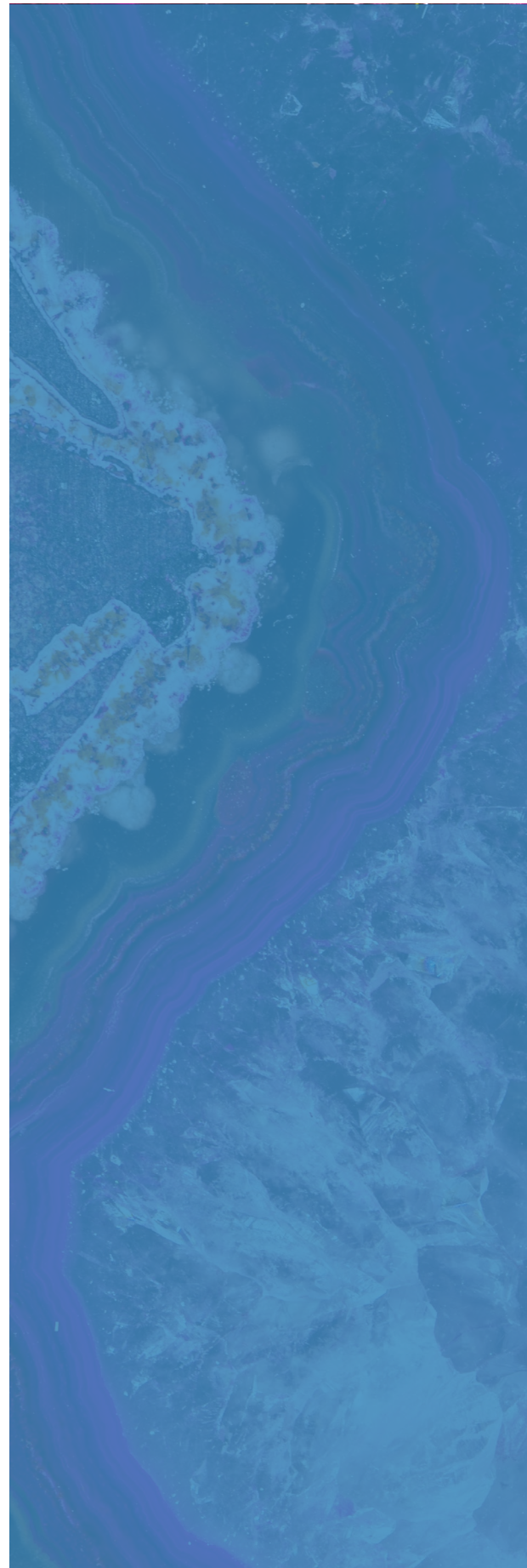
A significant category of User Provided Content is information about products and services made available to be bought and sold between platform users. Online marketplaces have been established for some years and now represent significant features of the UK economy. For example, eBay launched in the UK in 1999 and now reports UK revenues of £1bn annually.

More recently the growth of focused intermediary companies has seen the expansion of the marketplace model (which inherently involves the exchange of User Provided Content) into services. Initial statistical assessments of these activities suggest that engagement has grown rapidly attracting a significant proportion of the UK population.

Selected internet activities, % by Ethnic Group 2017



(Source: Office for National Statistics, August 2017)
 Note: Intermediary services includes AirBnB; Lifeshare
 Other includes Facebook; Twitter



3.6 User provided content is a significant driver of the value of online platforms

Whilst it is relatively straightforward to track the direct impact of User Provided Content in relation to activities such as social networking and online marketplaces, it is important not to overlook their value for a wider range of e-commerce and content based platforms, including those where sales and/or other content/products which are directly provided by the platform operator represent the predominant source of revenue.

In some cases, for example Amazon, whilst platform operator sales predominate there is a significant marketplace element, involving the provision of content by users. And even where the sales via an e-commerce service are entirely by the operator of that service, product reviews and other User Provided Content are frequently key to the overall value which the service delivers to users – making it a de facto platform. Research suggests that around two-thirds of shoppers consult online reviews before buying online²¹ and that those reviews are generally regarded as a trusted source of consumer information.

There is little doubt that creating barriers to user participation even on this category of platforms would significantly reduce both their utility to consumers and their economic success.

4. The current liability regime creates a balance of interests

The current liability regime creates a balance between the interests and responsibilities of users, content providers and platform operators to support transparent, responsible and informed sharing of User Provided Content.

It does this by ensuring that those who produce content or make products or services available are clearly responsible for them and that platform operators, who are under a responsibility to act and remove content when they receive notifications that content is illegal, provide an orderly environment for sharing of content and the tools and operational arrangements which ensure that content which is illegal or otherwise violates the platform's policies is removed.

As a result, consumers of content benefit from a clear allocation of responsibility and transparency of information and contract terms.

The principal mechanisms employed by the Regulations are:

- users benefit from mandatory information about the online platform and the way in which contracts are concluded using that platform. They also benefit from requirements as to the form of commercial communication delivered using the platform and obligations of the service provider relating to the processing of orders placed with the online platform;
- platform operators are responsible for providing mandatory information but benefit from broad exemptions from liability for material published on, transmitted through, or stored on, the platform if the platform operator:
 - does not initiate transmission of, or modify, the content, or determines the identity of the recipients of the information or when it would be sent;
 - only processes the content by way of automatic, intermediate, temporary storage, where that is for the sole purpose of making more efficient onward transmission of the information to other recipients of the service on their request;
 - does not have actual knowledge of any unlawful element of the content;
 - content providers remain responsible for the content they provide and cannot seek to "hide behind" the platform through whom they provide that content.

That said, the e-Commerce Directive does specify that in order to retain their liability exemption, hosting providers should act expeditiously to remove or to disable access to content when they receive actual knowledge of illegal activity or information. As a result these providers have developed notice and action systems that allow users to easily inform them of infringing content.

Even more, based on these foundations, commercial and reputational factors as well as broader principles of corporate responsibility²² provide incentives to platform operators to put in place measures to manage the potential for illegal or socially offensive content to appear on their platforms. The practical result has been that, armed with clarity as to the legal regime, platform operators operate a range of technological and other steps (for example the application of "hashing" technologies to identify and deal with child sexual abuse imagery, or content management systems which allow rights holders to manage how their content is used) which address issues of unacceptable content both individually and in cooperation with organisations such as the Internet Watch Foundation.



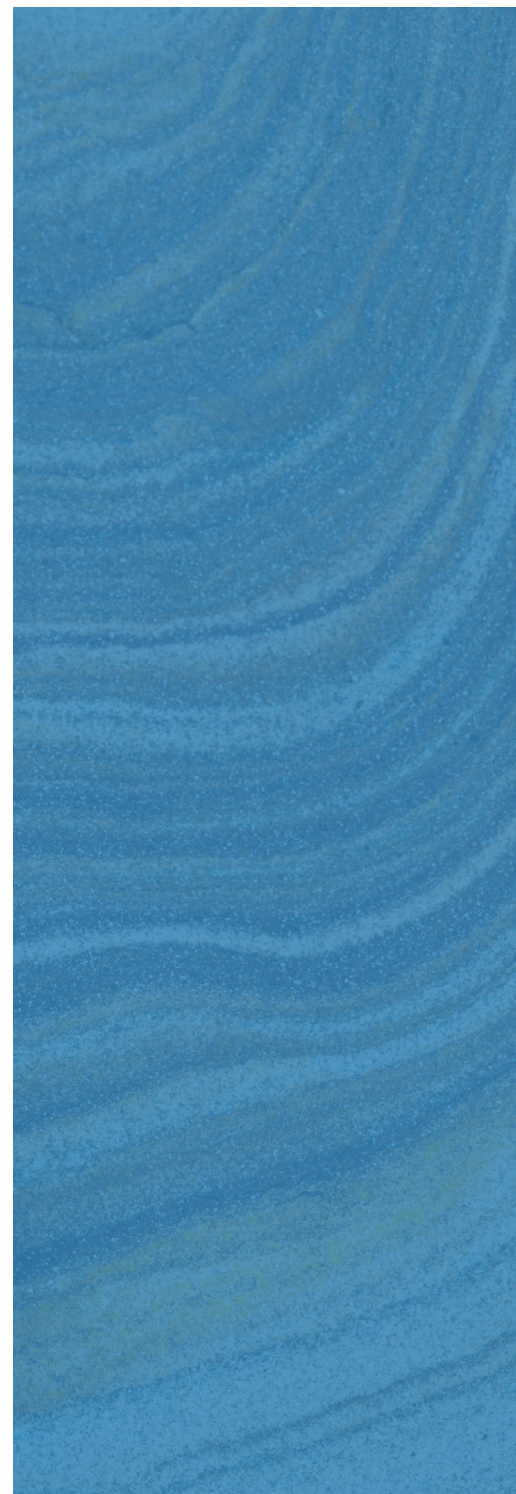
5. Extensive regulation already applies to online platform activities

5.1 Online activity is not exempt from regulation

It is important not to lose sight of the fact that the content on online platforms is far from unregulated. Indeed, much of regulation is equivalent to that which applies offline with some additional protections applicable specifically to the online context.

Regulation is generally calibrated to specific content (or content related to specific activities). For example, specific regulation applies to content related to financial or medical services and this will apply where that content is accessible through an online platform. However, there are also broadly applicable rules including:

- the responsibility of anyone offering products or services for supply to consumers to ensure descriptions are accurate (according to the Companies Act)²³ and information relating to the product or service is not false or misleading,²⁴ to comply with overarching obligations of transparency and to treat consumers fairly (Consumer Rights Act)²⁵. Additional requirements apply online²⁶ to ensure that consumers know who they are transacting with and have a record of the terms on which the transaction took place.
- online advertising is subject to the same rules as other forms of advertising: to protect consumers from unfair or aggressive practices, to ensure that all advertising is true, accurate and legal as well as ensuring that they do not mislead by exaggeration or omission²⁷. As with other advertising, these rules primarily apply to the advertiser.
- content is subject to the same rules regarding threatening, abusive, insulting, obscene or offensive material or material intended to stir up religious, racial or sexual orientation hatred²⁸ as apply in print media or society generally. Whilst there is no single piece of legislation that covers hate speech²⁹, there are a range of criminal sanctions. In addition, platforms are subject to a range of other regulatory regimes across a wide range of areas such as privacy, data protection and cyber security.



5.2 There is active enforcement of current regulation against activities online

Relevant UK regulators are actively engaged in enforcing regulation with respect to activities undertaken online in respect of compliance with consumer protection regulations, advertising rules and other legislation. Active regulatory engagement with platforms includes:

- the Competition and Markets Authority ("CMA") regularly investigates compliance with consumer protection laws, recent examples of which include online dating, hotel booking and car rental comparison platforms³⁰, and the 2016/17 review of cloud storage providers' compliance with consumer law. Finding improvements could be made, the CMA secured commitments from Amazon, Apple, Microsoft and Google amongst others to make changes to their contract terms;
- the CMA also announced in November 2017 that it would take enforcement action against secondary ticketing websites breaching consumer protection law³¹, in particular specific provisions of the Consumer Rights Act 2015³²;
- the Advertising Standards Authority ("ASA") has also made a series of decisions regarding content on social media platforms³³.

The ASA will generally seek an amendment or withdrawal by an advertiser of an advertisement that it has found to have breached the BCAP Code (which covers VOD advertising online) or the CAP Code (which covers other online advertising). The ASA has the power to refer an advertiser to Ofcom or Trading Standards for further action, but in practice this is rarely necessary as the self-regulatory system operates successfully³⁴;

- the Crown Prosecution Service actively pursues online hate crimes in this category with over fifteen thousand prosecutions in 2015/16 and announced its reinforced willingness to pursue online hate crime in August 2017³⁵;
- we also see a number of effective, voluntary self-regulatory initiatives involving online providers. The IPO oversees a search engine code of practice dedicated to the removal of links to infringing content from search results.³⁶

6. The current liability regime delivers greater benefits than any alternative

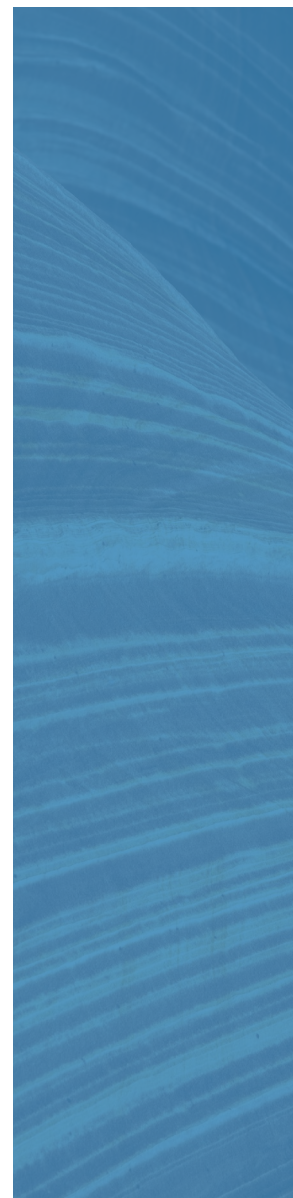
6.1 The current regime has clear benefits

Under the current regime there is a balance of obligations. Responsibility for User Provided Content rests with the user who provides that content. Platform operators are fully responsible for Platform Provided Content – and they are also called upon to respond expeditiously to notifications of illegal content that may be provided by their users.

This model ensures that the business or individual (whether platform operator or user) who originates content has clear responsibility for it, while providing mechanisms to adequately limit the availability of certain types of content online. Online content is regulated – for the most part to a similar (or, in some cases such as the 2013 Consumer Contracts Regulations referred to above, higher) standard than the equivalent content used offline. Enforcement authorities are actively holding those responsible to account in accordance with those standards.

The regime also enables platforms to facilitate the widest sharing of content and ideas without extensive compliance or clearance procedures acting as a bottleneck

By contrast, whilst a range of changes could potentially be made³⁷, the overall effect (and purpose) would inevitably be to transfer increased legal risk and responsibility for User Provided Content to the operator of the platform. This would effectively revert the UK to a position similar to the pre-2002 position, exemplified by the Laurence Godfrey case – widely criticised at the time³⁸ as exposing internet service providers to uncertainty and unacceptable risk and risking conflict with the Human Rights Act.



6.2 Platform operators would manage any increased risk imposed on them

Faced with any transfer of risk as a result of a change to the regime, platform operators would, properly, look to control their exposure to that risk.

Changes to the regime would potentially impose direct legal requirements to put in place active filtering or monitoring of content before it is uploaded, impose content standards which indirectly require such filtering or monitoring, or shift the regulatory balance in such a way as to render unviable the current preponderance of platform access made available to users free of charge unless such prior filtering or monitoring is in operation.

Any of these changes would impose significant additional risk and/or cost on platform operators. Smaller, specialist, regional or hyperlocal platforms (which still can reach millions of users) would inevitably be disproportionately impacted by additional burdens which would act as a disincentive on start-ups and innovation and potentially force many smaller operators to discontinue or significantly restrict their activities so harming the UK's platform and e-commerce ecology.

Platforms which continued to operate would be likely to respond to change by one or more of the following:

- *Private enterprise acting as censors:* undertaking detailed monitoring of all User Provided Content before it is made available on the platform and excluding any content which could give rise to risk – in an effort to screen out specific "objectionable" content. In effect, the platform becomes a "policeman" of User Provided Content. A proposal along these lines would drag platform operators into the role of making judgements as to what should, and should not, be an acceptable social norm – something which is the proper function of the courts and public authorities not of commercial operators. As such, it would be likely to reignite the concerns raised by civil liberties groups expressed about the potential for the proposed filtering requirements of the Copyright Directive to threaten freedom of expression³⁹. The additional costs involved could also be significant and, particularly if the UK is out of line with broader international norms, would be likely to act as a significant disincentive on start-ups and growing platforms establishing UK operations;
- *Barriers to use:* imposing additional or more onerous contractual terms on users (for example, extensive indemnities) who wish to contribute content – in an effort to pass the risk of subsequent regulatory or legal actions arising with respect to particular content on to the user who contributes that content. Given the nature of laws protecting consumers against onerous clauses, there is considerable potential for this to significantly complicate consumers' access to the benefits of using platforms;
- *Cost burden on users:* charging all users to place content on the platform – in an effort to pass some or all legal and regulatory costs associated with content on to users as a whole (including the costs of enhanced monitoring); increased cost can also manifest in slower upload and processing times which directly affect sellers and content creators;
- *Reducing user access:* excluding all User Provided Content from their sites – to eliminate any risk associated with such content.

6.3 Changes would inhibit the exchange of content and so damage the sector

It is presumed that any policy decision which was taken to impose greater responsibility on platforms for User Provided Content would be made with the intent of incentivising platform operators to take steps which would reduce the amount of "inappropriate" User Provided Content (i.e. that which breaches criminal or regulatory requirements or which infringes a third party's civil law rights) which could be accessed via platforms.

The steps referred to in Section 6.2 of this paper would be the mechanisms open to platform operators to respond to any change in the regulatory balance. Any of these steps, whether taken individually or together, would have the effect of significantly increasing the costs, complexity or time involved for users to contribute or access User Provided Content and so is likely to materially reduce the contribution of that content. This could be by:

- directly reducing the means by which users can share the content;
- making it more difficult for them to do so (meaning that many simply stop doing so); or
- skewing contribution towards those individuals or businesses that are relatively well resourced.

As noted above, platforms, online marketplaces and User Provided Content create significant value and diversity for consumers, artists, content creators and business and help drive the wider digital economy.

In 2015 more than half of all SMEs were already selling through online marketplaces⁴⁰ and currently 89% of Notonthehighstreet.com's online sellers are women, compared to 21% of small business owners nationwide⁴¹. Platforms like social media companies or even maps allow business owners to have an online presence and find new customers without even investing in a web page or bespoke payment processes, inviting new players on the e-commerce market and allowing them to grow. Inhibiting the contribution of User Provided Content could therefore inhibit this section of the population from contributing to the hugely successful UK economy.

This, in turn, suggests that materially inhibiting the contribution of that content would be likely to be significantly damaging for UK consumers and businesses and the wider UK economy.

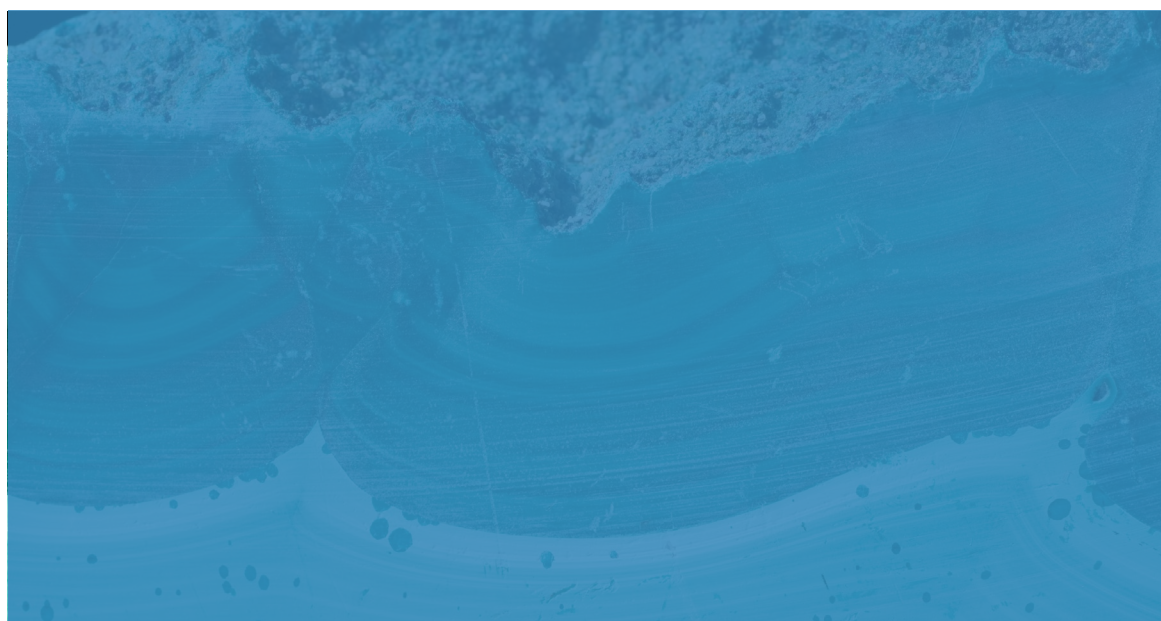
6.4 UK only changes would risk being of limited effect and potentially harmful to UK competitiveness

The UK has established itself as a leader in European e-commerce and a major European hub for the technology industry in the context of a regulatory and business environment in which the technology and business models deployed are common across Europe.

If the UK's liability regime diverges materially from that applicable in the EU:

- a need to build a separate operating model specifically for the UK (which, relative to the EU, US and Chinese markets is relatively small) is likely to weaken incentives to invest in the UK. It may also mean that EU based platforms seek to block UK users in order to avoid any liability so cutting off UK residents' (consumers and businesses) access to the benefits that platforms offer;
- even if UK versions of platforms do not carry "undesirable" User Provided Content, if that content is carried on other international platforms (particularly those based in nearby jurisdictions), it is unlikely that the UK will be "hermetically sealed" against that content. Indeed there is a risk that in this scenario, UK users will increasingly try access "offshore" platforms which are just a click away as an alternative to the UK versions, so undermining both the UK industry and the credibility of the UK regulatory regime.

In short, a decision to diverge fundamentally from the EU regime would jeopardise UK success in a sector which has been built on the UK's role as a European hub and would close-off the UK's ability to build a thriving forward-looking partnership with the EU in this key area of the digital economy and to use that as a platform to develop wider international trading opportunities in the sector.



6.5 Users could become less responsible in providing or accessing content

As described in Section 5 of this paper, platform users currently already ultimately have liability under both the civil and criminal law for content which they contribute to platforms. Changes to platform operators' responsibilities would be unlikely to materially increase the legal responsibilities of users for their content. As a result, there is little to suggest that a change of this type would result in contributing users acting more responsibly when producing or providing content.

There is indeed a risk that, if users perceive platform operators as being subject to greater legal responsibility for User Provided Content, contributing users might even become less responsible in contributing or accessing content. Contributing users may perceive that, rather than pursuing the contributing user, any complainant would choose to pursue a platform operator (whom might be perceived as having "deep pockets").

It is even possible that contributing users would effectively abdicate their own responsibility for ensuring the legality of content in anticipation that the platform operator would police content for them.

6.6 Users could become less engaged

One of the strengths of platforms is the diversity, and often spontaneity, of content contributed to them. Platform operators faced with taking increased responsibility for very significant volumes of real time content would almost inevitably take a cautious perspective in many cases where judgement is required. This would, in turn, give many platforms a "sanitized" feel.

There is a real risk that users might also be less engaged in and by that content if they perceive content as having been "sanitized" by the platform operator.

6.7 Smaller and new platforms would be disproportionately impacted

Whilst changes to the regime would have an adverse impact on all online platforms, including those which are large and well-established, the larger players will be relatively more well-equipped to manage that impact than smaller players and new entrants for a number of reasons:

- large, well-established, platforms will have the financial resources to withstand additional claims and liabilities than smaller platforms and new-entrants;
- large, well-established, platforms will find it easier to devote management and legal resources to put in place new contractual and other procedures to manage risks than smaller platforms and new-entrants;
- large, well-established, platforms will be better placed to develop technological solutions which can help to manage content such as artificial intelligence screening than smaller platforms and new-entrants.

As a result a shift in the balance to place more risk and responsibility on platform operators would also be likely to discriminate disproportionately against smaller players and new entrants and so to have an adverse impact on diversity and competition in the platform market.

7. Conclusion

The current regime of internet intermediary regulation is clear and simple. It ensures that those who publish material take responsibility for it whilst also fixing platforms with a clear responsibility to act if they become aware of unacceptable material.

At a stroke, that regime created clarity which swept away previous confusion over roles and responsibilities and created the conditions in which the vibrant digital world we see today has been able to thrive.

Much has changed since 2002 and there is a case to look at again at whether improvements can be made to the current regime. However, it is easy today to focus on high-profile incidents where things do go wrong and to lose sight of the immense benefits society has gleaned from the open sharing of ideas, information and opinions which platforms have enabled over the past 15 years.

Sweeping fundamental changes to install platforms as pre-publication censors would inevitably suffocate much of that vibrant digital world. It is, therefore, critical that any proposals for reform are carefully assessed and consulted upon and are surgically targeted with the aim of strengthening the partnership between the law, the public and the platforms in rooting out unacceptable content.



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