User Generated Content – Risks, Prevention and Protection for Service Providers in the UK: Part 1

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1. What are User Generated Content websites?

From small beginnings User Generated Content ("UGC") websites have risen massively in popularity in the past few years to become a huge phenomenon on the internet. Indeed, OFCOM research has indicated that 38% of online users participate in such social networking, media and blogging sites, which include YouTube, MySpace and FaceBook. UGC websites are a fruitful commercial enterprise for internet and website service providers. The UGC, typically users' videos, posts, discussions, ratings, blogs and photos, is created by that website's users or third party content which is posted by that user. According to CNN, YouTube users view 100 million clips and upload 65,000 new videos every day.

2. What are the Risks of UGC for Internet and Website Service Providers?

The fact that the above websites have become household names is testament to their popularity, but is also telling of the breadth of exposure that they may face in a legal context as regards liability for uploaded UGC. At present, the following areas pose the most significant legal risks to internet service providers ("service providers"): **ownership of the content; copyright infringement; defamation; hatred; data protection and infringement of privacy;** and **the impact of the Digital Economy Act 2010**.

3. Ownership of the content

UGC poses an obvious question as to ownership of the materials that are being uploaded by individual users. Historically, UK website providers have taken a broad brush approach in resolving this question, by having a blanket provision in the site's T&Cs to the effect that the ownership in any uploaded content vests in the service provider itself, and not in its individual users.

However the issues with this approach are twofold:

First, doubt has arisen as to how effective such T&Cs would be, were they to be put to the test in court. Users are often deemed to submit to the T&Cs of the website merely through use of the site without being prompted to actively read and accept the T&Cs (by ticking a box or clicking on an "I agree" button, for example) before uploading their content. Moreover, the T&Cs often place relatively onerous content ownership clauses upon the user. Most users will remain unaware that the title in the materials they upload has passed to the service provider and the possible legal consequences therein. If a consumer user is oblivious to an assignment clause buried in T&Cs there is a significant chance that the assignment is ineffective.

Secondly, if ownership does vest successfully in the service provider, they open themselves up to claims by third parties regarding content which may be of an undesirable, illegal, offensive or inappropriate nature.

Risk Prevention:

- Prominently display the website's T&Cs at the point at which the user proposes to upload and submit the content;
- Obtain an express assignment of the rights in the content by way of an obvious active acceptance such as an "I accept" button or tick box below the relevant T&Cs (ideally in a way that forces a user to scroll all the way down the screen before accepting);
- Ensure the T&Cs are simple and explicit and make the following clear to the user:

- the user is prohibited from posting illegal, offensive and inappropriate content;
- the service provider reserves the right to remove illegal, offensive and inappropriate content at its discretion and without notice; and
- the service provider disclaims liability for illegal, inappropriate or offensive content.

4. Copyright infringement

Users often upload content onto a website which they themselves, do not own. Copyright will almost always subsist in that content and by facilitating the publication of the material on the website the service provider increases the risk of claims of copyright infringement. These can include a claim for an interim injunction to suspend the site, an order to remove the contentious content immediately and damages.

Defence:

Ideally service providers should enact pro-active risk prevention procedures (if they have capacity) combined with a reactive approach relying on defending potential claims. If a service provider enacts an appropriate procedure it should benefit from the "hosting" defence in a copyright claim.

Under the UK's Electronic Commerce (EC Directive) Regulations 2002, acting as a "mere host" will be a successful defence where the service provider is merely providing a content hosting forum and can prove that:

(a) it did not have actual knowledge of the content or the infringement; or
(b) where the service provider was made aware of the infringing content, it acted expeditiously to remove access to that content; and
(c) the end-user was not acting under the authority or control of the service provider.

YouTube recently successfully defended claims both in the US (by Viacom) and Europe (by the Spanish copyright owner Telecinco) for mass copyright infringement and this may be of some comfort to service providers who have effective "take-down policies" in place. In both cases, the Court held that YouTube were operating an effective take-down policy, and given the scale of uploads they could not have had actual knowledge of the particular infringing material. These cases highlight the fact that "general knowledge" of copyright infringement, an apparent inevitability on websites as large as YouTube, is not sufficient to lead to a finding of infringement.

Risk Prevention:

- Ensure there are clear warning policies issued to users prior to uploading content which warn them of the legal risks of copyright infringement;
- Restrict users to streaming-only options rather than allowing third party downloads;
- Implement software that compares and alerts the service provider of conflicts with known copyright material, for example the Copyright Verification tool on YouTube;
- Operate an effective notice and take-down policy in the event that rights holders complain of an infringement. Examples include Google's infringement notification procedure and eBay's Vero programme; and
- Where practical, and especially where there is actual knowledge of copyright infringement, seek the appropriate rights clearance by way of a licence or assignment of rights from the true copyright holder.

5. Defamation

An actionable defamation is a statement that is published to a third party, which discredits a living entity or individual, or which tends to lower them in the opinion of right-thinking members of society; or exposes them to public ridicule or contempt; or causes them to be shunned or avoided. The defendant has to prove the truth of the statement. Libel is committed when defamatory matter is published in a "permanent" form or in a form that is deemed to be permanent. A recent example of this is Juliet Farrall v Rick Kordowski [2010] EWHC 2436 (QB) in which the owner of the "Solicitors from Hell" website, a consumer site that claims to "name and shame" underperforming lawyers, was successfully served with an interim injunction and sued for libel, by a lawyer who was criticised on the site by two users. Liability rests with the "publisher" of a defamatory statement and with internet posts the "publisher" is the service provider. Clearly therefore, there is a foreseeable risk of liability where service providers offer user-rating and reviewing functions, for example on restaurant and bar review websites which allow users to post their potentially damaging thoughts and criticisms of an individual or business.

Defence:

To establish a defence of "Innocent dissemination" under the Defamation Act 1996 a service provider will need to show that:

(a) it is not the author, editor or publisher of the statement;
(b) it took reasonable care in relation to its publication; and
(c) it did not know, and had no reason to believe, that what it did caused or contributed to the publication of a defamatory statement.

The defence of "hosting" as discussed in section 4 above may also be available to the service provider.

Should the above statutory defences fail, a service provider may be able to rely on the substantive common law defences to potentially defamatory statements as follows:

(a) that the statement was a clear expression of opinion and not fact;
(b) that the statement was made in good faith with a reasonable belief that it was true;
(c) that the statement was a fair comment on a matter of public interest; or
(d) that the claimant consented to the dissemination of the statement.

However, these are likely to be defences of last resort, since providing evidence to prove them will be difficult where it is the user, and not the service provider, who was the original author.

The specific problems for service providers as regards defamatory statements in UGC are twofold:

(a) Ordinarily, a defamatory statement is only actionable for 1 year from the date of "publication". A comment in a newspaper therefore would only be actionable for 1 year from the date it goes to press. However, as regards defamatory statements on the internet, there is a risk of "continuous publication" of the statement, since every time a viewer downloads the material, it is deemed to be "published" (and therefore actionable) again.
(b) There is some debate as to how best service providers may approach monitoring their website content. The options are either to take preventative action by closely monitoring uploaded UGC and issue take-down notices if it does appear (which is time-consuming and costly); or a take a reactive approach, by not monitoring the site content, but immediately acting on complaints by way of a take down strategy. Although there has not been a clear decision about what is expected of service providers, the latter option has been the preferred course of action, given the impracticality of the former for large service providers such as YouTube, Facebook and Yell.com. Either way it is clear that inaction once a complaint has been lodged is not an option as Godfrey v Demon Internet Service[1] demonstrated that the courts will rule against service providers who refuse to take action to remove defamatory posts by users having received a take-down request by the individual who is defamed.

Risk Prevention:

- Avoid editing or modifying the content of any defamatory statement or content, as by doing so a service provider may become liable as an "editor", an "author" and / or a "publisher" under the Defamation Act 1996;
- Actively dissuade users from making defamatory comments by issuing a warning and / or an Acceptable Use policy; and
- Always respond in a timely manner to complaints and implement an effective take-down policy.

If you require further information on anything covered in this bulletin please contact **Anthony Misquitta** or your usual contact at the firm on 020 3375 7000.

This publication is a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

1 [2001] QB 201