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On the Record Webinar Series: Content & Safety Litigation

Claire Temple – Partner

Bryony Hurst – Partner



Agenda

1. Online Content Legal Landscape
2. The impact of the DSA
3. The impact of the OSA
4. Looking to the future

The background features a dark blue gradient with numerous thin, curved lines of light in shades of blue, purple, and red. These lines appear to be light trails or data paths, creating a sense of motion and digital connectivity. Small, glowing particles are scattered throughout the scene, particularly concentrated in the lower right area where the light trails are more prominent.

Online Content Legal Landscape



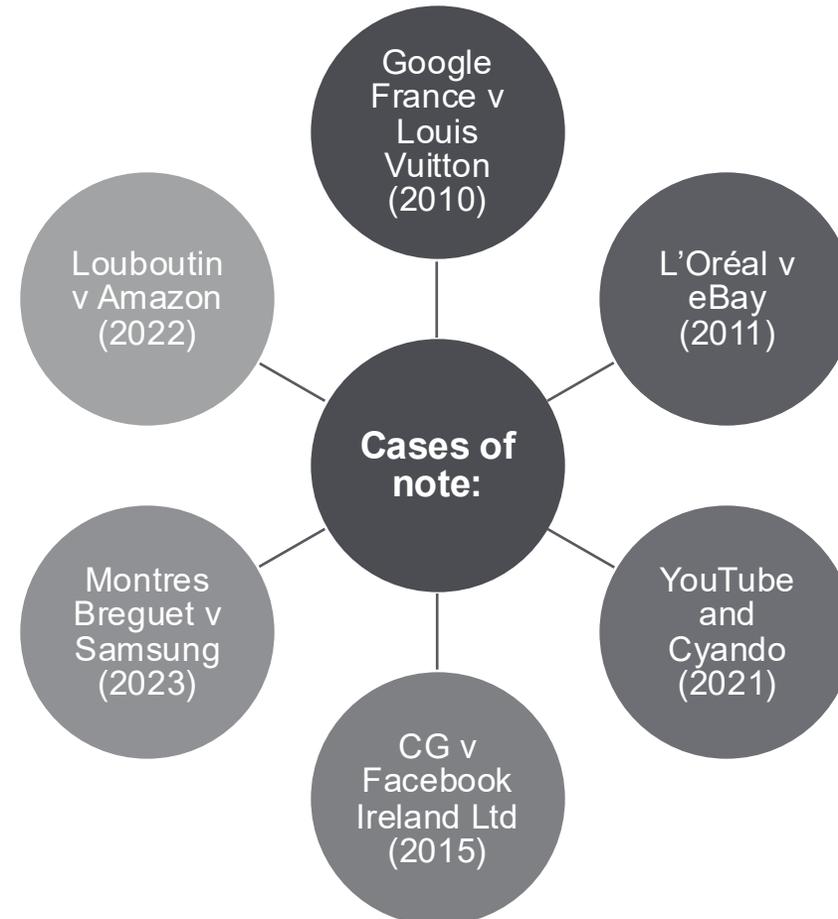
Illegal content categories

- Copyright
- Trademark
- Defamation
- Privacy
- Data protection
- Hate Speech & terrorism content
- CSAM & revenge porn
- Illegal products (e.g. unsafe / non-compliant / prohibited / age-restricted / counterfeiting)
- Illegal services (e.g. unlicensed gambling services / unregulated financial services / unlicensed taxi services / illegal drug services)

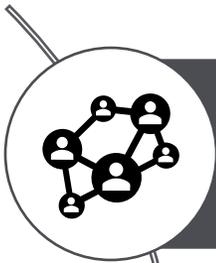
E-Commerce Directive/E-Commerce Regulations

EU law dating back to 2000

- Intermediary defences: Articles 12-14 ECD/Regs 17-19 ECR
- Prohibition vs general monitoring obligation: Art 15 ECD (never transposed into ECR)
- Including hosting defence: Art 14 ECD, Reg 19 ECR



e-Commerce Regime: Hosting Defence



What is a hosting service? – Passive/neutral role:

- Online storage and distribution
- Networking & collaborative production
- Selection and referencing



Defence against what?

- Criminal liability
- Civil liability regarding claims for damages (not injunctions)



How does a service take advantage of the defence?

- No actual knowledge (for criminal liability defence)
- No actual or constructive knowledge (for civil liability)
- If has knowledge, acts expeditiously to remove content

e-Commerce Regime: Key Issues



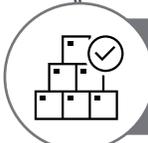
When does a service stop being passive?

- Technical, automatic, no control over info



What amounts to actual knowledge?

- Sufficiently precise and adequately substantiated
- Apparent/manifest



What amounts to constructive knowledge?

- Aware of facts or circumstances on basis of which diligent operator should have realised content was unlawful



What is the meaning of expeditious?

- Context-dependent



Proactive monitoring

- Art 15 ECD – but specific monitoring obligations are ok
- Risk of losing hosting defence



EU Digital Services Act

- EU law came into force November 2022 (in phases)
- Focus in on safety and transparency for users of online services
- Content moderation obligations feature heavily
- Essentially restates the intermediary defences from the ECD regime – but with a few important qualifications



UK Online Safety Act

- UK law came into force October 2023
- Staged implementation, regulator plays central role in designing detailed obligations
- Key obligations include systems to identify and remove criminally illegal content, and easy to use notice and takedown processes
- Focusses on systems and processes, not individual content disputes
- But potential to undermine liability position in respect of individual content

Other laws of relevance

Copyright:	Data Protection:	General Product Safety Regulation:
<ul style="list-style-type: none">• Important qualification to hosting defence• Online content-sharing service providers can be primarily liable for copyright-infringing user content• Unless obtain authorisation, or make best efforts to filter infringing content out, or take down expeditiously	<ul style="list-style-type: none">• Data controller and content host are in principle different concepts• Obligations to erase data can be used in takedown requests• Lack of clarity as to interaction between GDPR and ECD regimes	<ul style="list-style-type: none">• New specific role of "online marketplace"• Cross referencing certain obligations in DSA, particularly around Notice and Action (takedown requests) pro

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Impact of the Digital Services Act



Impact of DSA

Content Moderation

- Obligations to tackle content which is:
 - illegal (criminal or civil) under national law
 - breaches ToS
 - harmful content (VLOPs/VLOSEs only)
- Obligations to:
 - detect and identify; and
 - to take measures to reduce:
 - access/availability; or
 - users' ability to provide the content
- Article 7 = “good Samaritan” provision



Impact of DSA

Complaints-handling

- Article 16 (1) & (2): put in place easy to use notice and action mechanisms – to ensure sufficiently precise and adequately substantiated
- Article 16(5): inform sender of takedown notice of outcome of decision and to provide information about redress
- Article 17 (1)-(3): inform affected users of reasons why content is taken down/restricted, or why user account suspended/blocked
- Article 20 (1)-(4): provide internal complaints-handling procedure, for a period of 6 months from notification of outcome of decision
- Article 20(5): provide further SOR to complainant and to notify of out of court resolution option



Impact of DSA

Content disputes

- Article 21: introduction of out-of court settlement bodies, certified by Digital Services Coordinator
- Independent bodies, non-binding decisions
- 6 have been certified so far
- Appeals Centre Europe (Ireland):
 - Determines disputes concerning YouTube, Facebook and TikTok
 - 1500 disputes received in first 5 months
 - Most disputes received from Italy, France and Germany
 - Concern nudity, bullying, harassment and restricted goods and services



Impact of DSA

Monetary claims

- Article 54 – recipients of a service can seek compensation for harm caused by breach of a DSA provision
- In context of failure to comply with content moderation provisions, material loss only?
- User class action risk - re. Collective Redress Directive

Impact of the Online Safety Act

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Impact of OSA

Content Moderation

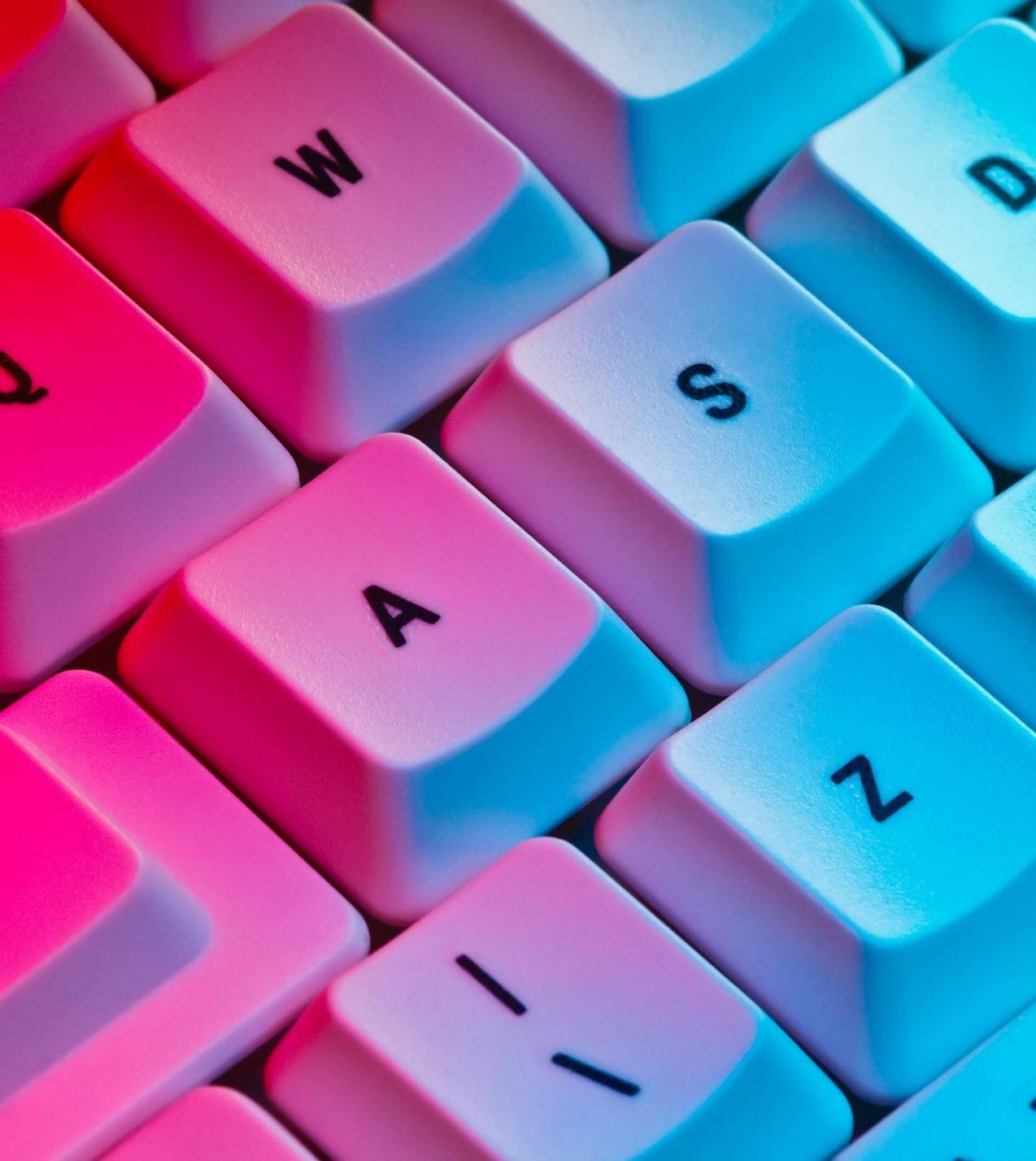
- Obligation to tackle content which is:
 - Criminally illegal (not civilly)
 - Harmful to children
- Obligation to implement systems and processes to:
 - Prevent users encountering illegal content and minimise its presence on the service
 - Protect children from harmful content
- Does not address liability for individual pieces of content:
 - In theory does not affect ECR regime
 - No “good Samaritan” provision (unlike DSA)
- Illegal Harms Code of Practice specifically recommends automated and human content moderation, with performance targets



Impact of OSA

Content reporting

- Section 20: allow users or affected persons to easily report illegal content or content harmful to children
- Section 72(5)(a): allow users to easily report
 - content that breaches ToS; or
 - Users who should be suspended/banned
- Section 72(4): duty specific to Category 1 services, to provide enough information in ToS about how content will be treated and why to enable users to understand whether and what action will be taken



Impact of OSA

Complaints-handling

- Section 21: provide a complaints procedure that handles different kinds of complaint - and spell out how handled in ToS
- Covers complaints about illegal content and content harmful to children, about its removal, about account suspension/termination, or about failure to comply with an OSA duty
- Section 72(6): operate complaints procedure in respect of content which breaches ToS
- And/or – section 72 (1) – breach of contract claim



Impact of OSA

Content disputes

- User/users who alleges harm from non-removal of illegal/harmful content could try:
 - Breach of contract
 - Consumer Protection
 - Negligence
 - Product liability
- Class action risk?
- ECR interplay?
 - Systems to detect/identify criminally illegal content en masse
 - Could this be used to argue knowledge/awareness of content not removed?
 - What about civilly illegal content?

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Looking to the future



Looking to the future

- Reduction in content litigation?
 - Mandatory complaints handling process
 - EU out of court dispute bodies
 - Increased transparency
- But.....
 - EU right to damages
 - Class action risk
 - Increased protection of fundamental rights
 - Greater enforcement
- Intermediary defences survive in EU:
 - X v Russmedia Digital SRL – pending CJEU case re liability of online marketplaces for user content
- But clarity required in the UK

Questions?



Claire Temple
ctemple@cooley.com



Bryony Hurst
bhurst@cooley.com

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