

2015 - House of Lords Enquiry into Online Platforms

Jisc evidence to [House of Lords enquiry into online platforms](#) ^[1]

Jisc is the UK's expert body for digital technology and digital resources in higher education, further education and research. Since its foundation in the early 1990s, Jisc has played a pivotal role in the adoption of information technology by UK universities and colleges, supporting them to improve learning, teaching, the student experience and institutional efficiency, as well as enabling more powerful research. Jisc operates the Janet computer network: connecting universities, colleges and research organisations to each other and to the global Internet. Most of those organisations rely on services that could be considered online platforms for their research, teaching, community engagement and business support activities; many also operate their own hosting platforms to facilitate debate and the development of new ideas.

We are concerned that the current EU notice and takedown regime allows such uses to be suppressed by alleging to the platform operator that a law has been breached. EU law discourages platform operators from investigating such allegations, or even seeking the view of those whose actions are complained of, before removing whatever material is the subject of the complaint. During the passage of the UK *Defamation Act 2013* we worked with the Ministry of Justice and the Universities and Colleges Information Systems Association (UCISA) to develop legal provisions that allowed contested allegations to be assessed by a court, rather than the platform operator. We hope that the current EU consultation will allow similar provisions to be added to EU law, extending users' protections beyond just allegations of defamation in the UK.

Jisc considers that online platforms play a vital role in enabling individuals, businesses and society to exploit the opportunities provided by the global Internet. One of the key benefits of the Internet is what has been described as "permissionless innovation" – that any individual or business can test their ideas against a global audience without first obtaining permission from those who operate national and global communications media. Platforms facilitate this by removing the need for innovators to first possess the technical skills or equipment needed to host an internet service or discussion.

Under Article 14 of the EU *E-commerce Directive* (2000/31/EC), organisations that provide hosting services for third parties are protected from legal liability for the actions of those parties until they "have actual knowledge of illegal activity or information" or are "aware of facts or circumstances from which the illegal activity or information is apparent". However it is not clear from statute or case law what "facts or circumstances" may be sufficient to trigger liability. Since most hosting organisations operate on a commercial basis, it is common for them to adopt a precautionary approach and eliminate any liability risk by removing material or activity as soon as it is the subject of a complaint, without investigating the validity of the claim or consulting the person whose activity was its subject. This regime –known as "notice

and takedown" – allows even lawful activities to be removed from the Internet. When applied to commercial platforms, the one-sided incentive can prevent innovation and the societal benefits that might have arisen from it; when applied to universities and colleges it also creates a direct conflict with their legal duty (and societal role) to promote free speech.

Section 5 of the UK's *Defamation Act 2013* introduced another option for platform operators by providing a short extension to the liability shield while they contact the subject of the activity complained of. If the complaint is contested, the complainant can seek a decision from a court on whether material should be removed; the platform can only acquire liability if it does not act as the court determines. Although this process involves some additional cost for the platform operator, it allows those who wish (or have a legal duty) to promote free speech or support innovation to do so without risking unknown liability for the actions of third parties. Having a court rule on questions of fact or legal interpretation is much more likely to result in a correct implementation of public policy than forcing the decision onto a hosting provider who may have neither the information nor expertise needed to reach an accurate conclusion.

However this protection at present only covers complaints of defamation under UK law. Those who wish to suppress lawful criticism or competition can instead allege a breach in another area of law, or under a different jurisdiction, thus recreating a liability risk that platform operators may simply choose to avoid. We therefore encourage the UK Government to seek a similar provision in general EU law, to the benefit of individuals, businesses and governments that rely on platforms to develop the digital society.

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Links

[1] <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-internal-market-subcommittee/news-parliament-2015/online-platforms-inquiry-launch/>