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Question B: Response from the Competition Law Association (UK)

What responsibility or obligations should online platforms have when it comes to eliminating infringements by their users, especially in the areas of IP and unfair competition?

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# Historical perspective

The UK’s status as a former EU member state leaves it in a position where its regulatory structures maintain some aspects of EU regulation, but only until the point of departure from the EU. Thus, while the position of UK definitions of service providers and intermediary liability was coherent when compared to the EU as of 2016, the changes wrought by the Digital Single Market Directive and the Digital Services Act have no impact in the UK, creating divergence between the regimes. Subsequent regulatory regimes introduced by the UK, particularly in relation to online harms, have widened the gap between jurisdictions.

Definitions of online service providers vary according to the regime in which they are grounded but the most relevant for intellectual property purposes remains the European definition. This definition of **information society services** is “as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.”[[2]](#footnote-2) It is used for the liability shield implemented by the Electronic Commerce (EC Directive) Regulations 2002, which covers all types of content, and is the same definition as in Art 3(i) DSA, and thus consistent with EU jurisprudence. A further relevant definition is **service provider**, which is “any person providing an information society service”.

There are several other regimes which regulate platform accountability, using different definitions of platforms and service providers. Kretschmer et al, in 2021, performed an analysis of eight government-backed reports published in an eighteen-month period from 2018 to 2020, exploring the emergence of platforms as a distinct regulatory field. They identified eight subject-areas of law (data protection and privacy, competition, education, media and broadcasting, consumer protection, tax law and financial regulation, intellectual property law, security law) which were subject to regulatory oversight by nine named bodies in the reports (Advertising Standards Authority (ASA), British Board of Film Classification (BBFC), Competition and Market Authority (CMA), Ofcom, Information Commissioner’s Office (ICO), Intellectual Property Office (IPO), Centre for Data Ethics and Innovation (CDEI)[[3]](#footnote-3), Internet Watch Foundation (IWF), Counter-Terrorism Internet Referral Unit (CTIRU)). They argued that the regulatory response in the UK has been developed on an issue-attention basis and outlined the development of the capacity of two existing regulatory bodies – Ofcom, for online harms, and the Competition and Markets Authority for competition. But the extent of platform regulation is much broader than these two authorities, and its piecemeal approach leaves lacunae in this emerging field. Importantly, while there are regulations around intellectual property infringement, the IPO is **not a regulator**, meaning IPR infringements do not have the same monitoring obligations as other types of online content, and the IPO lacks investigatory and enforcement powers. Rather, its staff are concerned primarily with the registration and administration of intellectual property rights.[[4]](#footnote-4)

The Online Safety Act, which regulates duties around access to harmful and illegal content, and additional duties for under-18s uses two definitions: a **user-to-user service** is defined as an internet service by means of which content that is generated directly on the service by a user of the service, or uploaded to or shared on the service by a user of the service, may be encountered by another user, or other users, of the service.[[5]](#footnote-5) A **search service** is defined as an internet service that is, or includes, a search engine[[6]](#footnote-6) The Online Safety Act regime, which is backed by Ofcom, creates duties to assess the risk of harm arising from illegal content or illegal activity on platforms, and take proportionate steps to manage and mitigate those risks. Service providers of U2U platforms must take proactive steps to minimise the risks of users encountering content that amounts to one of the offences designated as **priority illegal content**.[[7]](#footnote-7) There are also duties relating to relevant non-priority offences, but the definition of this specifically excludes offences relating to the infringement of intellectual property rights.

Digital Markets are regulated by the Digital Markets, Competition and Consumers Act 2024, which is overseen by the Digital Markets Unit of the Competition and Markets Authority (CMA). The DMCCA regime came into force in January 2025 and relies on the definition of an undertaking having **Strategic Market Status (SMS).** An undertaking has SMS in respect of digital activity in the UK if it is linked to the United Kingdom,[[8]](#footnote-8) and if it has (a) substantial and entrenched market power and (b)a position of strategic significance.[[9]](#footnote-9) Designation of an undertaking as having SMS requires the CMA to have carried out an SMS investigation, which is detailed in the Act. Since the coming into force of the Act in January 2025, the CMA has launched three investigations into potential SMSs, with statutory decision deadlines of October 2025 for all three.[[10]](#footnote-10)

Questions of platform liability under the eCommerce Directive have been subject to clarification from the CJEU in *Filmspeler* ([C-527/15](https://curia.europa.eu/juris/document/document.jsf?text=&docid=190142&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=17224773)) and *The Pirate Bay* ([C-610/15](https://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=17224866)), which concern primary liability for sites which play an essential role in making infringing content available online. In *Peterson* and *Elsevier* (joined cases [C-682/18 and C-683/18](https://curia.europa.eu/juris/document/document.jsf;jsessionid=9B3224352717FA0786575F6F3628A10B?text=&docid=243241&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3889635)) the CJEU clarified that platforms will be held primarily liable only where they act in **full knowledge** of the illegal nature of the specific piece of content. General knowledge that infringing content is uploaded to the platform is not enough to trigger liability. Monetising, indexing, ranking or categorising such content is also not enough to amount to full knowledge of its infringing nature. Platforms can also rely on the liability shield contained in Article 14 eCommerce Directive until such full knowledge is obtained. Thus, if a platform acts expeditiously to remove or disable access to the infringing content, it will retain its immunity from suit. This decision is particularly relevant for the UK, as it remains applicable, whereas those regimes subject to the DSM Directive have moved to a new regime under Article 17 DSM for most (but not all) online platforms. There are separate, but related, questions around platform accountability for AI-generated material, particularly where the AI engine is owned or operated by the platform itself (e.g. Google’s Gemini search summary or Meta’s AI assistant) which require detailed analysis that this report does not dive into. Suffice it to say that this will soon be a live question in multiple jurisdictions for multiple types of infringement – including defamation, IP infringement, data protection, etc.[[11]](#footnote-11) There are also further questions yet to be answered about the nature of web-crawling for training Large Language Models (LLMs) and whether website operators can opt-out of this in a way which is machine-readable.[[12]](#footnote-12)

# Legal Basis for Liability and Responsibility

Primary infringement of intellectual property rights in the UK is a strict liability tort. Thus, provided the conditions for dropping a liability shield are fulfilled (i.e. actual or constructive knowledge), there is no requirement of intention to infringe on the part of the platform. The definition of relevant services is very wide, as discussed above, and can be conceptualised to include inter alia, search services, internet service providers (ISPs), social media sites, online marketplaces, and even small businesses, discussion sites, or websites generally. For the most part, platforms are not liable for the unfair competition (e.g. passing off) or intellectual property infringement (e.g. copyright or trade mark infringement) of the users of the service, thanks to the liability shield of the eCommerce Directive. There is also no general obligation for an ISS to monitor their service for infringing acts – they are liable only upon notification of the infringing content, or where they have done something to make the infringement their own.

## Criminal Liability

While several criminal offences cover various types of intellectual property infringement, they have a high threshold for liability, generally requiring at least knowledge, if not intention to infringe, in contrast to the strict liability of tortious infringement. Criminal offences are prosecuted by the State and have a higher burden of proof – beyond reasonable doubt – than civil actions, which are decided on the balance of probabilities. As such, platforms and/or intermediaries are unlikely to be charged with, or found guilty of, criminal infringement unless they are actively involved in the infringement, rather than acting as an intermediary or host.[[13]](#footnote-13)

## Civil Liability

### Trade Marks

UK Trade Mark law is set out in the Trade Marks Act 1994 (as amended), which implements the Trade Marks Directive (2015/2436) and Trade Mark Regulation (Recast) (Regulation (EU) 2017/1001 of the European Parliament and of the Council). While any online service could conceivably infringe a trade mark, the primary issues have arisen with regard to search services and online marketplaces.

#### Search Engines

The latest authorities on using trade mark terms for online advertising (i.e. AdWords) are Court of Appeal in *Interflora Inc v Marks and Spencer plc* (2014) EWCA Civ 1403 and Victoria Plum. *Interflora*, which was an appeal following a decision after the case was remitted by the CJEU in *Interflora* (Case [C-323/09](https://curia.europa.eu/juris/liste.jsf?num=C-323/09)) clarified that AdWords are only an infringement of trade marks if they are likely to have an effect on function of the registered mark. The Court of Appeal did not rule on whether a failure to negative match (i.e. for M&S to request that Google not serve their ad where ‘interflora’ was entered as a search term) would amount to a negative effect on the function of the Interflora mark. Although the case was remitted to the High Court for retrial on that specific issue, the parties settled. The second AdWords case is *Victoria Plum(b) v Victorian Plumbing* [2016] EWHC 2911, which confirmed that the appropriate test for AdWords infringement is that from the *Google France* judgment (Case C-236/08), which states, at [84]:

The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

#### Online Marketplaces

The authority for liability of online marketplaces remains in L’Oréal v eBay ([C‑324/09](https://curia.europa.eu/juris/document/document.jsf?docid=107261&doclang=EN)), which concerned use of a trade mark by a third party user of an online marketplace. eBay sought to rely on the liability shield of the eCommerce Directive for both the sale on its marketplace, and its use of L’Oréal AdWords. The CJEU stated, at [97]:

the proprietor of a trade mark is entitled to prevent an online marketplace operator from advertising – on the basis of a keyword which is identical to his trade mark and which has been selected in an internet referencing service by that operator – goods bearing that trade mark which are offered for sale on the marketplace, where that advertising does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods concerned originate from the proprietor of the trade mark or from an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.

The judgment further went on to discuss the circumstances in which an online marketplace may not rely on the liability shield of the eCommerce Directive [123-124]:

Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.

Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.

The final question of the referral to the CJEU concerned the nature and extent of injunctions available against the operator of the online marketplace. Article 11 of Directive 2004/48 allows for two distinct types of injunction – the first against the primary infringers, aimed at preventing continuing infringement, and the second against online intermediaries. This second type of injunction cannot be a general monitoring obligation [139], nor can it be a general prohibition of the sale of goods bearing a particular trade mark from the marketplace concerned [140], but can take other forms, such as requiring the suspension of the account which has been infringing the impugned mark or identifying the customer-seller to the rightsholder [141-143]. In any case, the injunction “must be effective, proportionate, dissuasive and must not create barriers to legitimate trade.” [144]

### Copyright

UK copyright law is primarily found in the Copyright Designs and Patents Act (CDPA) 1988, which outlines protection for a closed list of categories of works set out in s 1(1) of the Act, comprising original literary, dramatic, musical and artistic works, sound recordings, films, broadcasts and the typographical arrangement of published works. The *Infopaq (*Case[C5/08](https://curia.europa.eu/juris/liste.jsf?num=c-5/08)) standard of the ‘author’s own intellectual creation’ has tacitly expanded this list,[[14]](#footnote-14) although there is not yet a test case confirming this position.

Primary infringement, in the form of copying, is a necessary element of online communication. All forms of UGC, indexing, hosting and providing online services will likely result in some unauthorised reproduction of material protected by copyright, on a scale which it is not feasible for an ISS to detect or prevent. An ISS is generally not held liable for infringement, provided it falls within the eCommerce Directive’s liability shields. Circumstances in which ISSs can be held liable, and in which they can be forced to act, relate to where they make the infringement their own (authorising infringement) or where they have actual knowledge of infringement. The extent of reproduction which is required in order to be held liable is very small – excerpts from news articles as short as 11 words in length were the subject of *NLA v Meltwater*[[15]](#footnote-15) in the Court of Appeal which considered this in detail.

#### Authorising Infringement

A second form of primary infringement found in the CDPA is that of authorising another to do any of the acts restricted by copyright, also found in s 16(2) CDPA. Operating websites and online services which facilitate the illegitimate streaming and/or downloading of materials protected by copyright could amount to authorisation of that infringement.

The question of authorisation was tackled before the widespread advent of internet access in *CBS Songs v Amstrad Consumer Electronics,[[16]](#footnote-16)* which considered whether sale of a dual tape deck (which would facilitate reproduction of tapes and records) amounted to authorising infringement. The House of Lords construed ‘authorising’ in a very narrow sense – where technology can be used for legitimate purposes, the seller will only authorise infringement where he does something which would ‘sanction, approve or countenance’ the use of the technology to infringe the copyright. This is a narrower interpretation than that of the Australian court a few years earlier, which found authorisation by virtue of a lack of sufficient deterrent to copy.[[17]](#footnote-17)

This judgment translates well to online intermediaries also – in *Twentieth Century Film Corporation v Newzbin[[18]](#footnote-18)* the High Court found that the high degree of indexing, verification and description which the site engaged in amounted to sanctioning, approving and countenancing the infringement, and found the site liable for authorising copyright infringement.

### Passing Off

Passing off is the main form of protection against unfair competition in the UK. It offers protection for market position and recognition, which can include the ‘get-up’ of a product. It is effectively an unregistered rights protection.[[19]](#footnote-19) Claiming passing off, which is a common law tort, requires the claimant to prove commercial goodwill, misrepresentation, and damage. Thus, the claimant must have a protectable interest in some aspect of their goods or services, such as trade dress, brand name, etc, there must be a misrepresentation such that a reasonable consumer would be confused as to the commercial origin of the goods or service or there is an aspect of unfair free-riding on the brand identity of the claimant, and the claimant must have suffered damage as a result of this. It is, in the author’s view, unlikely that an intermediary would be primarily liable for passing off, much like with trade marks above, but it is possible that questions of AdWords could give rise to liability. This question is not yet settled, but the likelihood of a successful claim is low.

### Breach of Confidence

Confidential information is protected in the UK by the common law tort of breach of confidence. A successful claim requires that the information concerned had the necessary quality of confidence, was imparted in circumstances imposing an obligation of confidence, and that the disclosure of the information would [or has already] cause damage to the claimant’s interests. *Sir Elton John v Countess Joulebine[[20]](#footnote-20)* is an example of a case where a website operator was held liable for breach of confidence. Although the information (confidential legal advice) was initially posted on the website without the knowledge of the operator, upon gaining knowledge they increased the prominence of the information by posting a link to it from the site home page. When informed it was confidential, the website operator removed the posting. Liability was not immediate upon uploading of the material to the website, but from the point at which she ought to have known it was confidential. Given the context of confidential legal advice, this was deemed to be the point at which the operator was made aware of its presence on the site.

### Joint Tortfeasorship

All the above civil liability regimes are tortious, and thus open to the possibility of finding multiple parties liable for the tort. Joint tortfeasorship requires more than just accessory liability, facilitating, or knowingly assisting the tortious action. The tortfeasors must, rather, have acted in pursuance of a common design to have procured the infringement, whether by their own act or inducement, incitement or persuasion.[[21]](#footnote-21) This has been discussed in several of the cases mentioned above. The English High Court considered it in *L’Oréal v eBay* but rejected claims of joint tortfeasorship. In *Newzbin*, however, they found that the website operator had acted in pursuance of a common design and found joint tortfeasorship. This is a high threshold to clear, and thus joint tortfeasorship is likely only to be an issue in exceptional circumstances.

There is no monitoring obligation in the UK. Per Article 15(1) of the eCommerce Directive, such obligation could not be imposed. As stated in *Peterson* and *Elsevier,* own-initiative (Good Samaritan) investigations will only result in liability if there is actual knowledge of infringement and there is no expeditious action to remove or disable access to the infringing content. There are general monitoring obligations under the Online Safety Act 2023, but as discussed above, these specifically exclude IP infringements.

## Algorithmic Content Monitoring

There are no rules in the UK regarding how far and how platforms need to refrain from algorithmic content monitoring or other measures influencing user experience for intellectual property infringement or unfair competition. Providers of U2U and search services are required, from July 2025, to 1) Ensure content recommender systems are designed and operated so that content indicated potentially to be PPC is excluded from the recommender feeds of children, 2) Ensure content recommender systems are designed and operated so that content indicated potentially to be PC or NDC is excluded or given a low degree of prominence in the recommender feeds of children and 3) Enable children to give negative feedback on content that is recommended to them which is taken into account in how content is recommended to them.[[22]](#footnote-22) The OSA also mandates, from March 2025, illegal content risk assessments, which can include, but does not mandate, assessment of algorithms and recommender systems for providers of U2U and search services.[[23]](#footnote-23)

## Liability Shields and Content Types

Liability shields are generally the same for all types of illegal content, as they all stem from the eCommerce Directive Articles 12-14. The Regulations implementing the Directive did not have prospective effect, meaning that new types of content restrictions required an implementation of a liability shield as part of the enacting legislation. This was frequently neglected, and thus shields were implemented post-enactment by secondary legislation under the European Communities Act 1972. The same provisions are no longer available to government post-Brexit, meaning that liability shields need to be specifically included in primary legislation, and if they are omitted, further primary legislation would be required. Graham Smith argues that there is still a potential direct effect mechanism for liability shields but, as held by the CJEU in *Papasavvas*[[24]](#footnote-24), this is a vertical, and not a horizontal, direct effect.[[25]](#footnote-25)

# Mechanisms in cases of infringement

There are no designated mechanisms mandated for platforms to facilitate reporting of content that may be violating IP rights. While there is a requirement that platforms must act ‘expeditiously to remove or disable access’ to infringing content upon notification of infringement, there is no requirement for a designated contact point, form, or other mechanism to submit said notification. The US DMCA process provides a structured notice requirement with a list of the details required, so in practice, it is likely that many UK takedown notices follow a DMCA structure. The requirements for a DMCA takedown notice are as follows:

a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

1. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
2. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
3. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
4. Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
5. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
6. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.[[26]](#footnote-26)

The eCommerce takedown requirement is non-prescriptive, meaning that a claimant could conceivably send a valid takedown notice without fulfilling all of the requirements of the DMA takedown, but it is simultaneously difficult for users to access, as there is little by way of guidance for what to include in the notice, and unlike the DMCA, there is no requirement for service providers to nominate a designated agent.

Where a platform fails to act expeditiously to remove or disable access to infringing content upon gaining ‘actual knowledge’ of the infringement, their liability shield will cease to operate, opening them to liability as primary infringers of copyright. However, this is only a precursory step, as the rightsholder must then engage in a process of issuing suit for IPR infringement. This requires engagement with formal legal processes and, providing all formalities have been correctly engaged in, the rightsholder then must show that the platform has actual knowledge, as well as the general requirements of an infringement suit, showing the existence and validity of a protected right, which is validly registered if appropriate, and that the content on the platform is infringing that right. Although technically available to rightsholders, the scale and rapidity of content sharing online makes this an onerous task to engage in for each individual IP infringement. There are also questions of class action suits, which were considered in *Lloyd v Google LLC,[[27]](#footnote-27)* but, as with all issues which exist primarily online, jurisdiction and choice of court is a thorny question to which there is no single correct answer. Beyond general civil liability, however, there is also a provision to seek from the court an injunction against an Internet Service Provider (ISP) where that ISP has “actual knowledge of another person using their service to infringe copyright”.[[28]](#footnote-28) The first injunction of this type was granted in 2011,[[29]](#footnote-29) and it served as a model for a similar injunction for trade mark infringement some years later.[[30]](#footnote-30) Generally, the costs of implementing the injunctions are borne by the ISPs, while the costs of applying for the injunction are borne by the rightsholder.[[31]](#footnote-31)

Trusted flaggers are not enshrined in UK law with respect to intellectual property infringement. The closest comparator is the trusted flagger programmes which exist between helplines and online service providers.[[32]](#footnote-32)

Notice and action procedures are the only remedy for requesting removal of content absent a court order. While interim injunctions are available for various forms of intellectual property infringement, the standard for interim injunctions is high (per *American Cyanamid v Ethicon* [1975] AC 396) and will require the complainant to lodge a cross-undertaking in damages with the court in order to pay costs if the interim injunction is found to have been wrongly granted. Final injunctions and/or delivery up and destruction are only available at the conclusion of a successful infringement case. While many intermediaries will comply with a takedown notice, in order to avoid the potential of liability arising, if they do not comply the rightsholder’s only remaining option is to issue suit in infringement.

Given that decisions of whether to remove content are made by platform operators or the court, the mechanisms for appeal against removal of content will lie either within the platform operator’s terms of service, or with leave to appeal through the courts.

# Fundamental Rights

In determining whether or not to grant an interim injunction, the court will have reference to fundamental rights as part of the general consideration of the balance of convenience. The public interest is one such consideration. In *Roussel-Uclaf v G.D. Searle* [1977] FSR 125, interim relief was refused on the basis that granting it would prevent a new life-saving drug from reaching the market. In *Cream Holdings Ltd v Banerjee* [2004] UKHL 44 an injunction preventing a ‘whistleblower’ was lifted, even though disclosing the wrongdoing of their former employer involved breach of the employee’s duty of confidentiality. Both of these judgments emphasise that an interim injunction is an equitable relief, which sits within the purview of the court and will only be granted where there is a real likelihood of success at trial, and if it is, in all the circumstances, equitable.

There are specific exceptions to copyright protection for, inter alia, news reporting, parody and pastiche, laid out in the CDPA. Thus, pure freedom of expression arguments are rare in the context of copyright litigation. However, there have been some instances.

In *Lion Laboratories v Evans[[33]](#footnote-33)* the publication of an internal memo which disclosed faults in breathalysers was opposed on the basis of breach of confidence and breach of copyright. An injunction granted at first instance failed to consider the public interest arguments which, when taken into account reversed the decision to injunct publication and permitted the publication. This was because of the strong public interest in circulating the information, sufficient to outweigh the claimant’s strong interest in keeping their internal documents confidential.

Similar considerations were raised in *Ashdown v Telegraph[[34]](#footnote-34)* concerning the publication of verbatim extracts from a minute of a meeting which contradicted statements from Downing Street. The Claimant sued in breach of confidence and breach of copyright. The Daily Telegraph argued fair dealing and public interest defences. While their defence did not succeed, the Court did acknowledge that Article 10 ECHR might, in appropriate circumstances, oblige the court to consider a public interest defence beyond the current statutory defences.

To the best of the author’s knowledge, the only case brought before the ECtHR against the United Kingdom on the basis of article 6 ECHR is *Lenzing AG v United Kingdom.[[35]](#footnote-35)* This queried the lack of a judicial review of the decision of the EPO, arguing that it was a violation of Article 6. The Court dismissed the claim as inadmissible on the grounds of equivalent protection provided by the EPC as regards the ECHR, and emphasising the fact that in availing of the EPO registration scheme rather than applying separately in each EPO jurisdiction, applicants implicitly accept the limitation on access to courts as a trade-off for convenience. This position is echoed in other Strasbourg jurisprudence (of which there are more than seventy cases on right to a fair trial in intellectual property law).

In *Samherji Hf v Oddur Fridriksson,[[36]](#footnote-36)* the defendant, an Icelandic protest artist, argued that his right as an artist to freedom of expression under Article 10 of the ECHR as incorporated into the laws of the UK by the HRA outweighed the intellectual property rights of the claimant, and thus justified his registering a domain name Samherji.co.uk, using the claimant’s brand name and logo, and circulating a false press release which brought attention to the Fishrot scandal by impersonation and misinformation. The Claimant sued in passing off, copyright infringement and malicious falsehood. Master Teverson gave summary judgment dismissing Fridriksson’s defences, outlining that they had no real prospect of succeeding at trial.

More generally, public interest considerations are taken into account in patent infringement cases and are visible in the decisions of both rightsholders and the court in whether or not to grant/seek an injunction prohibiting further manufacture (effectively forcing a licensing agreement on the rightsholder). In *Evalve v Edwards Lifesciences,[[37]](#footnote-37)* Birss J considered the public interest in the context of patent infringement and delivered a nuanced exploration of the importance of getting the balance right between encouraging innovation and protecting the public interest, taking into account the lifespan of return on investment can be many years. He also identified a number of statutory areas where the public interest plays a role, including *inter alia* non-patentable subject material, clinical trials, statutory compulsory licensing and crown use. In drawing the balance between competing interests in patent infringement which is in the public interest, Birss J laid out a list of seven general principles which can guide future decisions on these issues at 73:

1. A general injunction to restrain future infringements is the normal remedy for the patentee.
2. The burden is on the defendant to give reasons why such an injunction should not be granted.
3. All the circumstances should be considered. The public interest, such as the impact on third parties, is a relevant consideration. This applies under domestic law (Coventry v Lawrence) and under Art 3 of the Enforcement Directive.
4. In a proper case the public interest may justify refusal of or carve out from injunction, and an award of damages in lieu. Smallness of the damages in lieu is not determinative. Even if the damages were a large sum of money and/or one which was difficult to calculate, it might still be in the public interest to refuse an injunction or carve scope out of it.
5. The starting point of any consideration of the public interest in relation to a remedy after a patent trial is that the patent system as a whole is already crisscrossed with provisions which strike balances between different public interests.
6. The availability of an exclusionary injunction is an important manifestation of the monopolistic nature of a patent right. While monopolies in general are against the public interest, once a patent has been found valid and infringed, the patent monopoly is something which it is in the public interest to protect by an injunction in order to further the purposes of the system as a whole, such as to promote investment in innovation.
7. Therefore when, as here, various public interests are engaged and pull in different directions, one should have in mind that the legislator is better equipped than the courts to examine these issues and draw the appropriate broad balance. The jurisdiction to refuse or qualify a patent injunction on public interest grounds is not there to redraw the broad balance of public interests set by Parliament in the patent system. The power should be used sparingly and in limited circumstances

While these principles are valuable in determining the public interest considerations to be taken into account, they give little guidance as to what direction the courts may take in issuing injunctions for IPR or competition infringements, particularly when the question of liability is not against the infringer themselves, but the platform as a facilitator of that infringement.

# Reflection

While the United Kingdom has developed a variety of sophisticated and detailed regulatory regimes for platforms and intermediaries, it has done so in a disjointed and piecemeal way which has resulted in a variety of regulatory bodies having distinct and disconnected responsibilities. There is a lack of oversight or enforcement of intellectual property infringements, monitoring, regulatory regimes or appetite for change. By not implementing the DSM Directive, the UK has fallen behind its closest neighbours and the divergence between regulatory regimes is widening. Furthermore, there are multiple further questions to be raised around platform liability for outputs of generative AIs, the resolution (or lack thereof) of which is likely to further diverge from the EU approach.

It seems likely that, given increasing regulatory responsibilities on platforms generally, there will be an eventual move towards greater monitoring and filtering obligations on platforms. However, there is not currently any appetite for updating the liability shields on which ISSs can rely. Given the example of the DSM as a direct comparator, implementing similar legislation should, in theory, be relatively simple, and would give the UK the opportunity to avoid difficulties which have become apparent in the first four years of operation of the DSM regime. However, general Brexit sentiment may make it more difficult to import what is essentially a legislative oversight that the State has been actively avoiding for almost a decade now.

There is a distinct risk that overzealous filtering and automated content moderation will result in the strangling of legitimate content and infringement of the freedom of expression of users of online platforms. However, given the lack of duties to moderate, the question of over-moderation remains within the purview of private actors and thus is likely to be resolved only after the imposition of a general duty to filter or control content.

1. This report builds on the LIDC Congress 2011 question, and the author is very grateful to Christopher Strothers for his excellent response, which provided a framework on which to base this 2025 report. The 2011 report is available at <https://www.competitionlawassociation.org.uk/docs/12-04-2011_lidc_finalreport_cstothers.pdf>, accessed 27 June 2025. I am also extremely grateful to Nicolas Gibson and Stephen Dnes, for their valuable support and assistance in drafting the report. Finally, I am very grateful to the members of the UK Competition Law Association for their feedback at our workshop in May 2025, which provided valuable development for my thinking and writing. [↑](#footnote-ref-1)
2. Article 2(a) eCommerce Directive, citing Art 1(2) Directive 98/34/EC as amended by Directive 98/48/EC. [↑](#footnote-ref-2)
3. The CDEI’s independent advisory board was disbanded in 2023, and the unit was renamed the Responsible Technology Adoption Unit (RTA) in February 2024. In January 2025, its remit was subsumed into the Department for Science, Innovation and Technology and Government Digital Service. Its regulatory or watchdog functions appear to have been forgotten. [↑](#footnote-ref-3)
4. The IPO is, at time of writing, an executive agency of the Department of Science, Innovation and Technology, but has been shuffled between remits extensively in recent memory. In 2021, when the report discussed here was published, the IPO was an executive agency of the Department for Business, Energy & Industrial Strategy (BEIS). Prior to that, it was under the auspices of the Department of Trade and Industry, the Department of Business, Innovation and Skills, and has been the responsibility of at least seven ministers or parliamentary undersecretaries since 2022. [↑](#footnote-ref-4)
5. Online Safety Act 2023 s 3(1). [↑](#footnote-ref-5)
6. Online Safety Act 2023 s 3(4). [↑](#footnote-ref-6)
7. Broadly, Ofcom groups these offences into the following groups: terrorism; harassment, stalking, threats and abuse offences; coercive and controlling behaviour; hate offences; intimate image abuse; extreme pornography; child sexual exploitation and abuse; sexual exploitation of adults; unlawful immigration; human trafficking; fraud and financial offences; proceeds of crime; assisting or encouraging suicide; drugs and psychoactive substances; weapons offences; foreign interference; and animal welfare. [↑](#footnote-ref-7)
8. Digital Markets, Competition and Consumers Act 2024 s 2(1)(a) [↑](#footnote-ref-8)
9. Digital Markets, Competition and Consumers Act 2024, s 2(2). [↑](#footnote-ref-9)
10. The first was into Google’s Search and Search Advertising Activity. The second and third, which were launched concurrently, are into Apple and Google as mobile service providers. [↑](#footnote-ref-10)
11. Cáit Caden, ‘Defamation Lawyer Says Tech Companies Should Be on the Hook for AI “Disinformation”’ (*Irish Examiner*, 16 May 2023) <https://www.irishexaminer.com/business/companies/arid-41140729.html> accessed 27 June 2025; ‘Gerry Adams’s Lawyer to Pursue Chatbots for Libel’ <https://www.telegraph.co.uk/business/2025/06/08/gerry-adamss-lawyer-to-pursue-chatbots-for-libel/> accessed 27 June 2025; ‘ChatGPT Falsely Told Man He Killed His Children’ (*BBC News*, 20 March 2025) <https://www.bbc.com/news/articles/c0kgydkr516o> accessed 27 June 2025. [↑](#footnote-ref-11)
12. Much like the robots.txt file, which tells crawlers not to access a website, or the noindex command, which tells Google not to index a website and thus display it in search results. See <https://developers.google.com/search/docs/crawling-indexing/robots/intro> accessed 27 June 2025. [↑](#footnote-ref-12)
13. This question is dealt with in the 2011 LIDC National Report, by Christopher Struthers. [↑](#footnote-ref-13)
14. *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch), per Arnold J at [27] [↑](#footnote-ref-14)
15. Newspaper Licensing Agency v Meltwater [2011] EWCA Civ 890 [↑](#footnote-ref-15)
16. [1988] AC 1013. [↑](#footnote-ref-16)
17. University of New South Wales v. Moorhouse and Angus & Robertson (Publishers) Pty Ltd (1975) 6 ALR 193. High Court of Australia; McTiernan A-C.J, Gibbs and Jacobs JJ. [↑](#footnote-ref-17)
18. [2010] EWHC 608 (Ch). [↑](#footnote-ref-18)
19. The seminal passing off case, which outlines the requirements, is *Reckitt and Colman Products Ltd v Borden Inc & Ors* [1990] UKHL 12 This case allowed protection for the distinctive lemon-shaped bottle in which Jif lemon juice was marketed, affording it protection as a unique form of trade dress, and preventing a competitor from unfairly capitalising on their market position by utilising a confusingly similar lemon-shaped bottle. [↑](#footnote-ref-19)
20. [2001] MCLR 91. [↑](#footnote-ref-20)
21. *CBS* (n 10). [↑](#footnote-ref-21)
22. <https://www.ofcom.org.uk/siteassets/resources/documents/consultations/category-1-10-weeks/statement-protecting-children-from-harms-online/main-document/volume-4-what-should-services-do-to-mitigate-the-risks-of-online-harms-to-children.pdf?v=395793> Recommendations PCU E1-3. [↑](#footnote-ref-22)
23. See Ofcom’s quick guidance on illegal content risk assessments: <https://www.ofcom.org.uk/online-safety/illegal-and-harmful-content/quick-guide-to-online-safety-risk-assessments> [↑](#footnote-ref-23)
24. [*Papasavvas*](http://curia.europa.eu/juris/document/document.jsf;jsessionid=907F7B8CF9E42CB6452BBA93E712814F?text=&docid=157524&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=61350) (C-291/13). [↑](#footnote-ref-24)
25. <https://www.cyberleagle.com/2021/02/corrosion-proofing-uks-intermediary.html> [↑](#footnote-ref-25)
26. Digital Millennium Copyright Act 17 U.S. Code § 512 (c) (3) [United States]. [↑](#footnote-ref-26)
27. [2021] UKSC 50 [↑](#footnote-ref-27)
28. s 97A Copyright Designs and Patents Act 1988. [↑](#footnote-ref-28)
29. *Twentieth Century Fox Film Corp. v. British Telecommunications PLC (Newzbin2)* [2011] EWHC 1981 (Ch). [↑](#footnote-ref-29)
30. *Cartier International and Others vs BSkyB and others* [2016] EWCA Civ 658 [↑](#footnote-ref-30)
31. See eg *Twentieth Century Fox Film Corp v British Telecommunications plc* [2011] EWHC 1981 (Ch), [2012] Bus LR 1471; *Twentieth Century Fox Film Corp v British Telecommunications plc (No 2)* [2011] EWHC 2714 (Ch), [2012] Bus LR 1525; *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch), [2012] 3 CMLR 14; Dramatico Entertainment Ltd v British Sky Broadcasting Ltd (No 2) [2012] EWHC 1152 (Ch), [2012] 3 CMLR 15; see *contra Cartier International and Others v BSkyB and others* – in this case, the ISPs sought to challenge the injunction at great costs, and putting those costs on the rightholder would have been unduly burdensome. [↑](#footnote-ref-31)
32. Such as the Revenge Porn Helpline and online service providers. There is guidance and best practice available on the gov.uk website here: <https://www.gov.uk/government/publications/trusted-flagger-programmes> [↑](#footnote-ref-32)
33. [1985] QB 526 [↑](#footnote-ref-33)
34. [2001] EWCA Civ 1142 [↑](#footnote-ref-34)
35. (dec.), no. 38817/97) 9 September 1998. [↑](#footnote-ref-35)
36. [2024] EWHC 2892 (Ch) [↑](#footnote-ref-36)
37. [2020] EWHC 513 (Pat) [↑](#footnote-ref-37)