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Social Media Content and Accessibility Notes

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THE STICKY AREA OF SOCIAL MEDIA AND ACCESSIBILITY

Why do Sitemorse offer an unstructured support contract? BECAUSE WE NEVER KNOW WHAT WE'RE GOING TO BE ASKED NEXT.

One of our clients has asked us the question: **Am I liable for the accessibility of my Social Media content?**

In a world where not just technology but the law is ever dynamic, it's important to be able to move with it. We all know that criminal law applies to online activity the same way it applies to offline activity. This dynamism is the beauty of the British Legal System as many of these laws were passed before the digital age.

When you're a Sitemorse client, you get an equally dynamic service: where else do you know, when you ask a question, it goes straight to the top? To the working team with a combined expertise covering a menagerie of subjects. This allows us to align equally dynamically with regards to the law and to our corresponding software development.

Today's extremely pertinent topic is the murky area of Social Media accessibility and the corresponding liability. Now, this is a commentary, and should in no way be regarded as legal advice.

A complex and largely unlegislated area, the idea of social media content accessibility and the corresponding burden of responsibility kicks up numerous connotations which need to be considered separately and then together:

1) What is a Social Media Platform?

Being an “interactive web-based application”, social media platforms are user-generated content such as text posts or comments, digital photos or videos, and data generated through all online interactions. In other words, a place where you put your content.

As social media is now recognised as an acceptable medium through which to communicate and do business, many businesses and companies are using it not only in their everyday advertising, but to communicate to their customers, clients or followers. However, thanks to this ever increasing and accepted medium, a whole can of worms has been opened. This brings us on to:

2) Where does the burden of responsibility lie for the content?

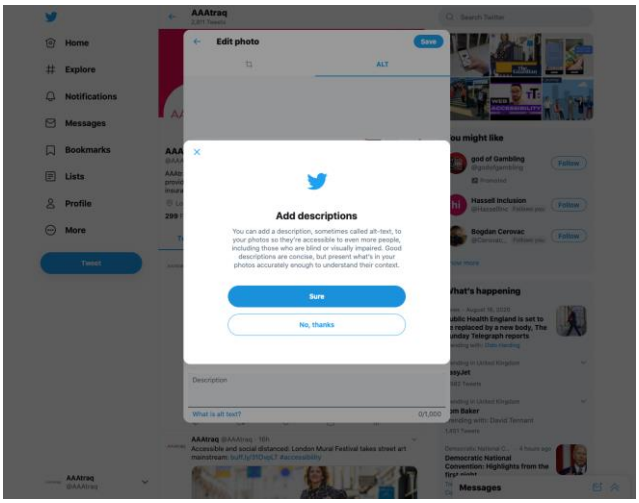
Who is responsible for the content on social media? Is it the press? Could you say that it is a press platform? Are the individual social media companies (or practically Facebook collectively since they own WhatsApp and Instagram, too) responsible for the content? But then you get into the realms of censorship and freedom of speech.

There is still very little case law in this area, and not to forget we are talking about accessibility, not freedom of speech in terms of internet trolling, or conspiracy theories and the like. Even they can fail to pass accessibility tests. We are talking about the actual content.

In a way, it could be argued that through the following statements, Facebook and Twitter ASSUME responsibility by issuing statements against it:

Facebook has a set of "community standards" wherein it reserves the right to "take down content that might be objectionable, illegal or otherwise problematic." Therefore could we factor accessibility or the lack thereof into "otherwise problematic"?

Twitter give similar guidelines, but pass the buck by saying the platform is "at your own risk. We do not endorse, support, represent or guarantee the completeness, truthfulness, accuracy or reliability of any content or communications posted via the services or endorse any opinions expressed via the services." So we're just the platform, right? What you put on it isn't our problem? However, they go on to help as much as possible. Please see below:



Maybe not, thanks to the fact that they have actively taken down some of American President Trump's recent tweets ergo does that mean that social media sites are taking a step towards accepting more responsibility for the content their platforms host? However, the counter-claim would be this: if Twitter et al have the power to take down tweets of anyone let alone the President of the USA, would we be handing over universal power to the likes of Zuckerberg and his mates to effectively rule the content of the world?
This brings us onto the pertinent question:

3) Who is liable for prosecution?

As previously expressed, there is a serious lack of caselaw in this area. Traditionally, media law and publicity law (see Defamation Act 2013) would dictate liability for compliance and responsibility for the content they disseminate. Added to this a matter of jurisdiction (more on this below).

In the case of Eva Glawischnig-Piesczek v Facebook Ireland Limited, a Facebook user posted a comment which the Austrian court found to be "harmful, insulting and defamatory" towards Glawischnig-Piesczek – any FB user could access the post. She asked FB to take it down and FB didn't comply. She then obtained an order through the Austrian courts prohibiting FB from publishing and/or disseminating the harmful content and/or equivalent content. The Austrian Supreme Court then issued a preliminary ruling request based on the E-Commerce Directive to the Court of Justice of the European Union. Importantly the E-Commerce Directive holds that "a hosting platform should not be liable for user-generated content, provided that it has no knowledge of any illegality and acts expeditiously upon obtaining such knowledge" (Article 14(1)). This is followed by "however, national courts cannot subject hosting platforms to a general monitoring obligation or impose a general obligation to seek facts or circumstances indicating illegal activity." (Article 15(1)).

Then the CJEU went on to consider "identical content" where it required social media platforms to continue to remove identical information no matter who uploads it. "Equivalent content" was then considered, and where the message is "essentially unchanged" or "worded slightly differently" it must still be removed not least to prevent the victim from bringing multiple actions. However the E-Commerce Directive strives to strike a balance between the rights of potential victims, and the social media platforms who should be "shielded from any general monitoring obligations." The CJEU clarifies that the differences in a piece of information should not be such that it requires "an independent assessment" of the content by the hosting platform therefore enabling "host providers to identify and remove equivalent content using automated search tools and technologies alone."

In terms of territory, the CJEU ruled that injunctions requiring host providers to remove identical or equivalent content can have a worldwide effect, provided that any applicable international rules are also observed by national courts. However, this has kicked up issues around freedom of expression and "equivalent content." And the technology? Well, there has been deep criticism of the court's reliance on "automated tools" and it is "seen as presuming a level of technological sophistication and a degree of specificity that simply do not, and likely will never, exist." Critics say that the human assessment is necessary to interpret any conveyed message.

Could one therefore argue, that should a host have employed an automated testing system, say for accessibility, then they protect their liability? What if it was insurance-backed?

Based on this, the UK's Department for Digital, Culture, Media and Sport had this to say: "Britain is leading the world in developing a comprehensive regulatory regime to keep people safe online, protect children and other vulnerable users and ensure there are no safe spaces for terrorists online." Whilst all well and good, and presumably accessibility comes under "other vulnerable users", we aren't very much further forward.

Crucially, FB adds, "this ruling goes much further. It undermines the long-standing principle that one country does not have the right to impose its laws on speech on another country. It also opens the door to obligations being imposed on internet companies to proactively monitor content and then interpret if it is 'equivalent' to content that has been found to be illegal."

Even if one could extend this to accessibility, does it even apply now we're not in Europe anymore? Sadly, yes. According to the Information Commissioner's Office "the General Data Protection Regulation will be absorbed into UK law at the point of exit, so there will be no substantive change to the rules that most organisations need to follow."

However, it is still unclear: is this the online platforms or anyone with a website? If the latter is true, then there is going to be a much greater burden on companies to police their content and act expeditiously when questionable content is brought to their attention.

Jurisdiction and the burden of responsibility

All this is well and good, but it still doesn't answer our question: where does the burden of responsibility lie in terms of content in your company's social media posts? Seemingly leaning towards the social media platforms themselves, but potentially the companies. Is it the company's responsibility to manage the content on their social media? What happens when Joe Bloggs uploads a commentary? Do you have the right, as the company, to ask him to take it down if it's not accessible? Or do you have to go through the social media host? And if so, who's responsibility is it or does it become? However, the social media host choses to put themselves in that position, ergo one could argue that that is basically its sole purpose, therefore it must bear the burden of responsibility or duty of care to its audience.

Let's look at the following scenario: a company uploads content to their social media. The company is registered in the UK. The content is delivered from India. It is then seen by a consumer living in Virginia, USA. Now, according to the CJEU decision, and if we apply the same rules as an "illegal" post, the action is worldwide, but in practice, we have to combine UK law, Indian law, USA law – is it federal or state (Federal plus any state laws…). Yikes. Is it a case of who gets there first? Is it possible to even have a "Worldwide Law" in terms of online accessibility? Can one merge all these potentially contravening legal systems?

Where do we go from here?

There have been calls for the e-Commerce Directive to be replaced, however. The government has released a White Paper on social media regulation. In this, it proposes that the duty of care only applies to companies who "provide services or use functionality on their websites which facilitate the sharing of user-generated content or user interactions, for example through comments, forums or video-sharing."

The point is, there is no overall regulator, Lorna Woods (Professor of Internet Law at the University of Essex) and William Perrin (Trustee of Carnegie UK Trust) have proposed a regulatory regime, centred on a new statutory duty of care, to reduce online harm:

"Social media service providers should each be seen as responsible for a public space they have created, much as property owners or operators are in the physical world. Everything that happens on a social media service is a result of corporate decisions: about the terms of service, the software deployed and the resources put into enforcing the terms of service.

In the physical world, Parliament has long imposed statutory duties of care upon property owners or occupiers in respect of people using their places, as well as on employers in respect of their employees. Variants of duties of care also exist in other sectors where harm can occur to users or the public. A statutory duty of care is simple, broadly based and largely future-proof. For instance, the duties of care in the 1974 Health and Safety at Work Act still work well today, enforced and with their application kept up to date by a competent regulator.

A statutory duty of care focuses on the objective – harm reduction – and leaves the detail of the means to those best placed to come up with solutions in context: the companies who are subject to the duty of care. A statutory duty of care returns the cost of harms to those responsible for them, an application of the micro-economically efficient 'polluter pays' principle…"

They suggest a list of rules by which companies must abide. However, the freedom of speech issue rears its head again, as critics claim this will be snuffed out. However, this is still in its developmental stage. The next steps? Well, an interesting point is made in terms of potential enforcement powers of a regulator, which sees it equally as essential that company executives take online safety seriously and senior management liability is being considered. In the absence of any clear directive on the matter from anyway so far, the best practice seems to be to continually assess your online content, whether its on your social media or your website, for accessibility. Remaining dynamic in the face of the world's most dynamic industry is probably a good idea.

Document History

Amendment history

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18/08/2020	0.02	Added screenshots
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Distribution list

Name	Organisation/role	Relevant sections

Related documentation

Reference No	Title	Author	Version and date
	Defamation Act 2013	UK Gov	2013
	E-Commerce Directive 2000	CJEU	2000
	Social media regulation BRIEFING PAPER Number 8743, 26 February 2020		26/02/2020