



Response: Consultation on CPS interim guidelines on prosecuting cases involving communications sent via social media

About ISPA

1. **The Internet Services Providers' Association (ISPA) is the trade association for companies** involved in the provision of Internet Services in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.
2. ISPA membership includes small, medium and large Internet service providers (ISPs), cable companies, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. Furthermore, ISPA is also a founding member of EuroISPA.

General remarks

3. We welcome the interim guidelines on prosecuting cases involving communications sent via social media. The publication of the guidelines comes at a time where there have been frequent calls for the passing of new laws to address the issue of offensive online communications and where online intermediaries (e.g. social media platforms or hosting providers) have increasingly come under pressure to take action against postings which could be considered offensive by some members of the public.
4. ISPA has consistently argued that online intermediaries should not be required to act as a proxy for the courts in enforcing the law online. If notified by a competent authority, responsible providers of social media platforms and hosting providers will take the appropriate action to deal with illegal online content. However, they can merely assess content against their terms and conditions and cannot apply the letter of the law, i.e. they are not qualified to perform the role of a legal authority and, as a matter of principle, should not be asked to perform the role of judge and jury for online publications.
5. We further maintain that the law equally applies online and offline and that new specific offences for online activities should only be created if there is clear evidence that already established offences and laws are insufficiently effective. We therefore welcome guidance for the prosecutors on how and when to prosecute, so that existing laws can be appropriately tested and a body of case law established to guide future prosecutions, especially in relation to borderline cases where the current draft guidelines do not yet provide the same degree of clarity.
6. In this context, the statement made by Keir Starmer on 15 November 2012 is particularly relevant:

“There is no doubt that the message posted by Mr Thomas was offensive and would be regarded as such by reasonable members of society. But the question for the CPS is not whether it was offensive, but whether it was so grossly offensive that criminal charges should be brought.”

The distinction is an important one and not easily made. Context and circumstances are highly relevant and as the European Court of Human Rights observed in the case of Handyside v UK (1976), the right to freedom of expression includes the right to say things or express opinions "...that offend, shock or disturb the state or any sector of the population."(own emphasis)

7. We welcome that the guidelines seem to accept that online intermediaries are ill-placed to apply to letter of the law and instead provide clarity to prosecutors on how to deal with a very complex area of the law. We further welcome that the guidelines aim to clarify the existing law to ensure that it is properly and fairly applied to online communications instead of trying to apply an easy fix by passing a new law. However, there are some areas in the interim guidelines where we would welcome some further clarification. We set out these areas of concern in response to the consultation questions below.

Response to the consultation questions

1. Do you agree with the approach set out in paragraph 12 above to initially assessing offences which may have been committed using social media?

We agree with the approach set out in paragraph 12 and particularly welcome the recognition in **paragraph 29 that "there is the potential for a chilling effect on free speech and prosecutors should exercise considerable caution before bringing charges under section 1 of the Malicious Communications Act 1988 and section 127 of the Communications Act 2003."**

2. Do you agree with the threshold as explained above, in bringing a prosecution under section 127 of the Communications Act 2003 or section 1 of the Malicious Communications Act 1988?

8. Yes, however, we would like to point out that **even though "[b]anter, jokes and offensive comments are commonplace" in social media dialogue, this should not imply that these types of conversation are per definition less valuable than offline communications.** Context is indeed important – some online communications can be regarded as no more than casual conversation intended for the ears of few but other online communications should be regarded as important contributions to (political or other) debates in an open and diverse society.

3. Do you agree with the public interest factors set out in paragraph 39

9. Yes, we agree with the public interest factors set out in paragraph 39. The public interest test accepts that online communications are an important part of an open and diverse society even though the expressed views are not necessarily shared by all members of that society. It further accepts that some online communications are not necessarily intended for a mass audience and that users can take action if they realise that their comments may be regarded as illegal or have reached an unintended audience.

10. The public interest test also recognises that intermediaries can take action against a communication in question. However, under the e-Commerce Directive, information society

service providers are under no obligation to monitor their networks. Moreover, unless a competent authority notifies them of illegal content being hosted on their networks, intermediaries can only make a judgement on the basis of their terms and conditions, i.e. they cannot apply the law and, unlike as prosecutors, cannot take into account all the relevant tests and defences.

11. Under the suggested public interest test, the actions of an intermediary could become material to a decision about whether or not to prosecute. However, the guidelines should not create an expectation that intermediaries will take down (rather than leave up) content in response to every report (by a member of the public) and that this will be done quickly. We believe that the public interest test should merely asks prosecutors to take into account how long the content has been online and available to the public, rather than pass judgment on whether the intermediary has acted reasonably in response to a report. We would welcome a confirmation that this is indeed the intended aim of the guidelines.

4. Are there any other public interest factors that you think should also be included?

12. No.

5. Do you have any further comments on the interim policy on prosecuting cases involving social media?

13. Apart from our **earlier comments under “General remarks”** we have no additional comments.