

IPSO consultation on jurisdiction and global digital publishers

IPSO Digital Review

July 2017

Background

1. IPSO launched a Digital Review on 18th July 2016 in response to concerns about our jurisdiction over online content.
2. Digital publishing is transforming the way in which these publications produce and present content. Increasingly, news providers are seeking to attract a global readership. This means that some providers traditionally seen as UK newspapers and magazines have begun to develop international business models and are producing content from all over the world for a global audience.
3. IPSO regulates all editorial content published on electronic services operated by our members. Membership of IPSO is voluntary, and open to newspapers, magazines and electronic services which are published, or target an audience, in the UK.
4. All digital content published online, unless specifically blocked from appearing in certain geographical areas, is viewable – and therefore ‘published’ – across the world. As ‘UK’ titles become more global in nature, our jurisdiction has come to include published material with little relevance to the UK or impact on its citizens or residents. Our jurisdiction now overlaps with the legal and regulatory regimes of other countries, to which the content is also subject.
5. IPSO has received submissions that this has already become problematic for some publishers, and could deter unregulated publishers from joining IPSO in the future. The Digital Review was therefore launched to investigate ways in which IPSO might better define its jurisdiction over online content. In so doing we have sought to propose a definition which would enable IPSO to be an effective regulator for relevant consumers and protect individuals whilst providing an intuitive and workable solution for publishers.
6. The terms of reference for the Digital Review are to:
 - Consider how best to define the content, published online by a global publisher, that should fall under IPSO’s remit;
 - Consult with global digital publishers on a proposed definition;
 - Examine the experience of overseas press regulators as well as regulators in other areas of communication, such as broadcast or video on demand; and
 - Seek advice on how a revised definition would best be implemented.

The Initial Consultation

7. When the digital review was launched, IPSO held a public consultation.¹ We received nine responses to the invitation to make submissions. The consultees can be broadly grouped as follows:
 - IPSO Regulated Publishers (2)
 - Non-regulated Publishers (2)

¹ <https://www.ipso.co.uk/news-press-releases/press-releases/ipso-announces-review-of-the-way-its-regulations-should-apply-to-global-digital-publishers/>

- Regulators (2)
 - Academics (3)
8. We also discussed the Review with the main press regulators in English speaking jurisdictions. These discussions informed our approach but did not constitute formal submissions in respect of the consultation.
 9. Further discussions followed from the initial consultation in order to develop the responses into more detailed proposals. As part of this process IPSO conducted a survey of complaints; assessing how each proposal might affect our remit in relation to our complaints handling service.
 10. Research was also conducted into comparable jurisdictional tests. These are briefly described below.

The UK Courts

11. In defamation cases the Court will generally accept jurisdiction where publication has occurred in the UK and the claimant is a UK citizen, or has a substantial reputation in the UK. A statement is 'published' at the place where it is read, heard or seen, not where the material was first placed on the internet.
12. The Court may decline jurisdiction if it is not the appropriate forum to hear a case. The Court bases this determination on the extent of the claimant's reputation in the UK and the extent to which the defamatory material was read by a UK readership.
13. For privacy claims made against non-EU entities the Court will determine jurisdiction by considering whether the damage was sustained in the UK, or caused by an act undertaken in the UK. There can also be a determination as to whether England and Wales is the most appropriate place to bring the claim, comparing the cost and convenience of bringing a claim in Scotland or Northern Ireland where a remedy would be available in these jurisdictions. Where the entity is located in the EU, the general rule is that the case must be pursued in the country where they are based. However, jurisdiction may also be accepted in the country where the harmful act occurred.

OFCOM and On Demand Services

14. OFCOM regulates On Demand Services provided by companies based in the UK (where the head office has a registered UK address) if editorial responsibility for the content is also taken in the UK. Service providers are under a duty to notify OFCOM if they provide services that fall within this remit.
15. Editorial responsibility is deemed to lie with the person exercising general control over the selection of programmes and the organisation of the content. OFCOM will look at contractual arrangements and job descriptions in determining who has editorial responsibility. The degree of publication or the extent of UK 'viewership' is not a consideration in this regard.

Advertising Standards Agency and Online Content

16. The ASA regulates advertisements appearing on websites with a .co.uk URL or those with a registered UK address. The place of origin, target audience or 'readership' composition are not relevant factors.
17. The ASA can refer complaints to equivalent regulators in European jurisdictions. It can also take certain action regarding complaints that would not fall under its jurisdiction if there is no equivalent body to which a referral can be made. The scope of the ASA's jurisdiction online has developed based upon the principle of proportionality, taking into account the online space members of the public would reasonably expect the ASA to regulate.

BBFC and Online Content

18. The BBFC has delegated jurisdiction to age rate any film shown in a UK cinema. There is no set rule which gives the BBFC jurisdiction over online content, however a large number of content providers have entered into a voluntary agreement with the BBFC, preferring self-regulation to potential state control.

Developing a Proposal

19. Having conducted the initial consultation and assessed comparable jurisdictional tests, IPSO set up a working group as a sub-committee of our Board of Directors. The working group considered the following approaches as the possible basis for a new jurisdictional test:

Appropriateness

20. This test would be similar to that of the UK Courts in defamation cases. IPSO would determine whether it was an appropriate forum for the complaint, looking at the content of the material complained about, the extent of publication within the UK and the location/nationality of the complainant. This could prevent forum shopping by complainants in circumstances where they should reasonably be expected to complain via a more appropriate system, whether regulatory or legal, in another country.
21. However it would not create a clear distinction between IPSO regulated content and other material and could only be applied post publication. This could undermine the certainty with which journalists could understand whether or not IPSO regulation applied.

Editorial Responsibility

22. This test would be similar to the way OFCOM regulates Video On-Demand Services. It would limit IPSO's remit to content for which editorial control was taken in the UK. This would mean that UK-based editors would always apply the UK Editors' Code of Practice. This would give a degree of certainty to those producing material under UK editorial structures.

23. However, without appropriate safeguards, this test would remove material from IPSO's jurisdiction - even though it was published in the UK and was about a UK citizen or had a particular relevance to the UK – if it were edited abroad. In this regard the content of the material in question may be a more relevant factor in a person's decision to make a complaint to IPSO than the location in which it was regulated. The concept of a 'UK editorial structure' might also prove to be artificial and may not reflect the in the way in which content is actually produced.

Location of the News Event

24. This test would limit IPSO's remit to content reporting on events that occurred within the UK. This would allow readers and journalists to assess whether or not IPSO regulation applied from the content of the material published. In so doing it would identify the scope of IPSO regulation in a way that could be replicated in other countries to avoid unnecessary overlap of regulatory regimes.

25. However, this test would remove regulatory protection for UK citizens while they are abroad, ignoring the fact that stories occurring outside the UK may nonetheless have a specific impact on UK individuals. The test would also undermine IPSO's ability to uphold standards of UK journalism. Journalists based in the UK would have to switch between producing IPSO-regulated content and non-regulated material. This inconsistent approach could, overtime, affect journalists' understanding and application of the Editors' Code of Practice.

26. Furthermore, the application of the test might not always be clear, as events can occur over large geographical areas, rather than specific locations, and articles might relate to a particular topic rather than a specific event.

The Proposal

27. IPSO considered which of the above approaches should form the basis of a more detailed test. IPSO considered that the location of the news event was more readily understandable to members of the public and more workable for journalists.

28. The following proposal was developed in order to address concerns regarding the test's impact on UK citizens abroad, IPSO's remit over stories of genuine relevance to the UK and the consistency with which UK journalism can be regulated:

“IPSO’s jurisdiction regarding material published by a global digital publisher* is limited to content covering events in the UK, save where the content can be viewed in the UK and:

1. The content covers events outside the UK and:
 - a. Principally concerns a UK national or resident who is directly and personally affected by the alleged breach of the Code; or
 - b. In respect of the accuracy of the content, where the coverage concerns UK nationals, residents or institutions.

Or

2. The content is based on material published in a UK print edition of a title within the global digital publisher’s group.

*Global Digital Publisher – an electronic service which employs journalists and operates newsrooms both inside and outside the UK, which operates distinct editorial and compliance structures to deal with jurisdictions outside the UK.”

29. This proposal adds four amendments to the primary consideration (the location of the news event) and seeks to define a global digital publisher. The purpose of each is explained below:

Content that can be viewed in the UK

30. Websites can prevent material from being accessed by people from certain locations. This process is known as geo-blocking. A publisher may therefore choose not to publish certain material in the UK or other jurisdictions.

31. The amendment takes into account this process, and places material that is purposefully not published in the UK outside of IPSO’s remit. A global digital publisher could therefore decide not to publish material in the UK which might breach UK editorial standards whilst still publishing their content globally in jurisdictions where the material is unlikely to breach relevant publishing rules.

Principally concerns a UK national or resident who is directly and personally affected by the alleged breach of the Code.

32. Where the content relates to an event outside the UK, the above amendment acts to protect UK nationals and residents. For example, photographs taken of a UK national whilst abroad could fall within IPSO’s remit to be assessed under the Editors’ Code of Practice. The extent to which the UK national or resident features in, or is significant to, the story will be relevant factors in IPSO’s determination regarding jurisdiction.

33. This is a focused exception to the general rule. It provides specific protection to UK nationals and residents affected by a report. It does not mean that all material featuring a UK national or resident abroad will automatically fall under IPSO’s jurisdiction. Complaints alleging breaches of the Code that do not relate to or impact upon the national or resident in question are likely to fall outside IPSO’s remit.

In respect of the accuracy of the content, where the coverage concerns UK nationals, residents or institutions.

34. This amendment means that accuracy complaints can be dealt with by IPSO in relation to material published by a global digital publisher which reports on foreign events and relates to UK citizens, residents or institutions. It will not be necessary to show that the individual or institution is directly and personally affected by the inaccuracy in order to bring such a complaint. This reflects the current position in IPSO's Regulations which allow us to take accuracy complaints from third parties. IPSO takes into account the position of the party most closely involved when deciding whether or not to deal with such complaints. The same would apply to a determination made in respect of our jurisdiction over content published by a global digital publisher.

35. The amendment also allows IPSO to regulate material relating to UK institutions. This may, for example, include articles about political negotiations - such as trade talks, UN activity or Brexit negotiations - which do not make reference to a specific UK individual. This allows IPSO to retain jurisdiction over 'foreign' stories which nonetheless have a specific relevance to the UK.

The content is based on material published in a UK print edition of a title within the global digital publisher's group.

36. All editorial content published by IPSO-regulated print titles falls under IPSO's remit. When this material is published online on the print title's website, IPSO regulation still applies. The amendment above makes sure that this rule also applies to global digital publishers. Where content is produced by an IPSO regulated print title, that content will remain within IPSO's jurisdiction when published within the same publishing group online, regardless of the website's status as a global digital publisher.

37. This will allow IPSO to require remedial action online where global digital publishers carry content from a print title within their publishing group, even in cases where the presentation of the material has been amended for the online version.

Global digital publisher

38. The definition seeks to distinguish between websites which are online versions of print titles and websites which are publications in their own right, running distinct business structures designed to produce content for a global audience.

Submissions

IPSO invites comments on the proposal above and would like to receive submissions on the following questions in particular:

- 1. Does the test provide an appropriate basis for effective regulation of content published by global digital publishers in the UK?**
 - *Does the proposal sufficiently protect UK individuals?*
 - *Does the proposal provide an adequate solution to the difficulties some publishers appear to be having regarding an overlap of regulatory jurisdictions?*

- *Does the proposal as a whole reflect the differences between ‘UK’ and ‘global digital’ publishers and the manner in which they can be effectively regulated?*
- 2. Is the proposal workable for publishers and understandable for members of the public?**
 - *Does the primary test (the location of the news event) provide a clear and understandable basis upon which journalists and members of the public can assess whether the Editors’ Code of Practice applies?*
 - *Do the amendments to the primary test render it confusing or unworkable?*
 - 3. Do the amendments achieve the stated aims set out in paragraphs 27-35?**
 - *If not, how should the wording be changed to achieve those results?*
 - *Should other exceptions to the primary test apply? If so, what content or complaints should fall within IPSO’s remit?*
 - 4. Is the proposed definition of a global digital publisher appropriate?**
 - *Does the definition adequately distinguish between print edition websites and unique online publications to which the proposals should apply?*

Please email your response to digitalreview@ipso.co.uk by Monday 2 October 2017.

We propose to publish the responses we receive.

If you have any questions about the consultation you may also email us at digitalreview@ipso.co.uk.