



# The law and social media: striking a balance between freedom of expression and responsible usage.

GRÁINNE O'NEILL LEGAL ESSAY COMPETITION

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## Introduction

In this essay, I will outline how social media has, and is, being treated in the courts and the related Irish laws and discuss the proposed *Online Safety and Media Regulation Bill 2022*<sup>1</sup>. I will talk about the relevance of this new bill and what it sets out to achieve. I will also look at other Irish regulation which governs social media content. Finally, I will propose some other solutions to the issues caused by increasing use of social media.

With over 79% of the Irish population being reported<sup>2</sup> as using social media and with the internet being available to 91% of the population, the *Online Safety and Media Regulation Bill 2022*<sup>1</sup> is being strongly debated by politicians, lawyers, industry, media and the general public. Up to now, social media content was largely unregulated, an almost free-for-all. The key question: Given the existing legal framework, is there a need for this new bill and does it have the potential to impact on the fundamental right to freedom of expression?

## Development

There are limited examples of social media cases in Irish law, but the results of these cases could suggest that courts are treating social media in a similar way to print media. For example, in the case of *Crofton vs Gilsean* [2016]<sup>3</sup>, Mr. Gilsean was accused of making defamatory comments against Mr. Crofton on Facebook. With the claim being one of defamation, Judge John O'Hagan awarded Crofton the maximum allowable damages of €75,000 in compensation which should "*teach people posting messages on the social media site to be very careful*". Posting anonymously does not protect someone from a defamation claim, as social media providers can be compelled to reveal the identity under a Norwich Pharmacal order. This Facebook case shows that social media can have the same legal risks as print and digital media.

Another example of an Irish social media case is that of *McKeogh vs John Doe 1* (Username Daithii4U) and others [2012] IEHC 95<sup>4</sup>. Student Eoin McKeogh was wrongly branded as a thief on YouTube, Google, Facebook and many other social media platforms. A video clip went viral on many social media sites. McKeogh took a defamation case to the High Court against the John Doe, as well as two others and the social media companies YouTube, Facebook Google, Yahoo and Crowd Gather Inc. McKeogh sought an injunction to remove all the defamatory content that was posted online, as well as Norwich Pharmacal orders to compel the companies to reveal the identities of those who had defamed him. Following these orders, the Court was told that 95% of the defamatory material had been removed. The Irish High Court found in favor of Mr. McKeogh and stated in relation to the defamatory comments: "*As seems to happen with apparent impunity these days on social media sites, they said whatever thing first came into their vacant, idle and meddlesome head*".

The *Prohibition of Incitement to Hatred Act 1989*<sup>5</sup> sets out the law on hate speech under which it is an offence to communicate threatening, abusive or insulting material that is intended, or likely to, "stir up" hatred against a group of people because of their

race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation<sup>6</sup>. The current law on hate speech is likely to change in early 2023. New laws have been published and will be debated in the Oireachtas soon (*The Incitement to Violence or Hatred and Hate Offences Bill*<sup>7</sup>). Under this law, social media companies are required to take down any content containing hate speech and could be liable for content appearing on their platforms.

The *Harassment, Harmful Communications and Related Offences Act 2020*<sup>8</sup> came into law on 10 February 2021. Known as ‘Coco’s Law’, this act prohibits non-consensual sharing of intimate images. In terms of cyberbullying, this law also provides strong measures against harassment. To date, the DPP has directed one case in the area of recording, distribution or publication of intimate images without consent and a further three prosecutions were directed in respect of threatening or grossly offensive communication<sup>9</sup>.

The government has decided to introduce the *Online Safety and Media Regulation Bill 2022*<sup>1</sup>. The Bill is designed to regulate online services and reduce the availability of harmful online content to protect people using social media. It provides for the establishment of a New Media Commission, in place of the Broadcasting Authority of Ireland (BAI) and will become the new body for the regulation of all media. The commission will create new Online Safety Codes which will be binding on social media companies and is designed to help reduce the amount of harmful content seen online. Only mainstream media companies will fall under these codes as it is nearly impossible to regulate all social media service providers. The Bill identifies 40 offence specific categories which will come within scope. Significant sanctions can be imposed but these will require court approval.

There is no doubt that social media has the potential for both good and harm but in my opinion and that of other groups, the Bill, in its current format, represents a backward step to the fundamental rights of the individual to freedom of speech, as outlined in article 13 of the constitution.

People may have very different opinions on what they believe harmful content is. Some would say that this new bill has the potential to impact on the freedom of expression. What is said may make other people feel uncomfortable but that is not illegal – it may be a difference in beliefs or opinion.

The new bill provides for an individual complaint mechanism to deal with people’s issues with social media; individual complaints would be difficult if not impossible to manage as there is the potential for a huge number of complaints. How will the new commission decide whose side to take and how can the courts judge who is right or wrong?

Another question is how should private messages between people using social media be treated, given the individual’s right to privacy. In order to make a complaint, a person would have to disclose private messages between two parties to the Media Commission which is a breach of privacy laws.

In my opinion the new Bill could be subjective, complicated, expensive and time consuming. It could be a breach of the constitution and the European Convention on Human Rights.

## Conclusion

Although there are limited social media case law examples the courts have shown the ability to manage defamation in social media cases the same way as print media. There are three cases under investigation relating to Coco's Law and it will be interesting to see the outcome. The new Hate Speech legislation has yet to be enacted but this another Bill that will have an impact on social media content. Together the Hate Speech, Defamation and harassment laws will govern the usage of social media by individuals. I do not believe that this new Online Safety Bill is required until the impact of all three of these bills are seen.

Social media companies are often over-using the defense of '*innocent publication*' set out in section 27 of S.I. 68 2003<sup>10</sup>, suggesting that they are not liable for damages where they have no knowledge of the unlawful activity but, as everyone knows, ignorance is not a defense in law and many of these platforms moderate content. There is also the use of reporting of content by individual social media users, which must be acted upon by the companies.

Although this bill will help to regulate people's social media content, there is always the option for individuals to self-regulate their social media, people have the option to block or report harmful content or messages. If social media is becoming too much for a person, they always have the option to simply disconnect from social media entirely. So, we must ask ourselves: do we really need another set of laws to cover this when we could put more pressure on social media companies to moderate further?

## Reflection

I thoroughly enjoyed writing this essay. It was interesting to see how few cases relating to social media there are in Ireland. At first, I was put off by the title of the essay but, the more I researched, the more interested and motivated I became to complete it. As a result of this work, I am now considering a career in law. This essay has made me think about the dangers and benefits of social media and how challenging it is to regulate it. Whenever society takes a significant step forward, society's rules must adapt and catch up to make sure the advancement doesn't impact the fundamental rights of its people.

## References

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