

## The U.K. Online Harms White Paper and the Internet's Cable-ized Future

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The U.K. has embraced Internet censorship before, such as its (temporarily stalled<sup>1</sup>) plan to require an Internet driver's license to view online pornography.<sup>2</sup> In April 2019, the U.K. released a white paper about Online Harms (the "White Paper").<sup>3</sup> The White Paper proposes to take Internet censorship to a new height, essentially unmatched by any other Western democracy. It's a sign of how comprehensive censorship has moved beyond repressive regimes to become trendy even in leading republican democracies.

To redress a wide range of anti-social online activity, the White Paper seeks to tightly circumscribe user-generated content—so tightly that only a small number Internet giants will be able to profitably publish user-generated content. Other Internet publishers will be pushed towards licensing professional content and cover those costs by charging subscriber fees to consumers. Thus, the White Paper will produce a reconfigured Internet 3.0 that will resemble the cable TV industry, not the current Internet we know and love.

This essay addresses three main points. It first deconstructs the some of the "facts" the White Paper uses to justify its censorious ideas. Then it highlights some of the proposals' worst policy aspects. The essay concludes by explaining how the White Paper will reshape the Internet and kill off most user-generated content.

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<sup>1</sup> See Palko Karasz, *U.K. Age Checks for Online Porn Sites Are Delayed*, N.Y. TIMES, June 20, 2019, <https://www.nytimes.com/2019/06/20/world/europe/uk-porn-age-check.html>.

<sup>2</sup> UK Public General Acts, Digital Economy Act 2017, part 3, <http://www.legislation.gov.uk/ukpga/2017/30/part/3/enacted>.

<sup>3</sup> Online Harms White Paper, A Report to Parliament by the Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for the Home Department, Apr. 2019, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/793360/Online\\_Harms\\_White\\_Paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf).

### **I. The White Paper’s Supporting Evidence Highlights the Internet’s Benefits, Not Its Ills**

The White Paper occasionally acknowledges the Internet’s benefits. For example, it says “seven in ten parents think screen time is essential for their children’s learning development” and the “internet opens up new opportunities for learning, performance, creativity and expression.” These are powerful benefits that should not be casually disregarded.

Unfortunately, the White Paper quickly blows past the few positive words it has about the Internet. Principally, the White Paper’s drafters treat the Internet as a threat to society—as serious as health and financial threats that require heavy government intervention to protect consumers. Moreover, the White Paper expresses hostility towards technology generally, including seemingly irrelevant swipes at offline technologies, such as TV screens, and technologies likely outside the paper’s regulatory scope, like private email.

As we often see with arguments in favor of regulating technology, the White Paper skews its supporting facts to highlight its perceived problems, even when that requires intellectual corner-cutting. I’ll highlight one set of skewed examples from Ofcom’s survey about potential online harms,<sup>4</sup> which the White Paper repeatedly cites in support of its policy proposals.

For example, the survey claimed that 79% of 12-15 year olds reported having a “potentially harmful online experience” in the past 12 months.<sup>5</sup> That sounds troubling...except that “[t]hese things were not necessarily classified by respondents as harmful...”<sup>6</sup> Instead, the survey authors added this normative conclusion to the data. In fact, the about 75% of the kids who experienced “offensive language” said they *were not concerned about it*.<sup>7</sup>

Nevertheless, the survey still listed “swear words/offensive language” as their #1 “potentially harmful online experience,” with 39% of kids reported

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<sup>4</sup> *Internet Users’ Concerns About and Experience of Potential Online Harms*, Ofcom & ICO, May 2019, <https://ico.org.uk/media/about-the-ico/documents/2615000/online-harms-chart-pack.pdf> (the “Jigsaw Survey”). I have enmity towards any research company that supports government propaganda like this.

<sup>5</sup> *Id.* The claim is repeated throughout the report; it’s first asserted at slide 7.

<sup>6</sup> *Id.* slide 34.

<sup>7</sup> *Id.* slide 49 (9% said they experienced offensive language and were concerned; 30% said they had experienced offensive language and weren’t concerned). Including the children who claimed they had not experienced offensive language, over 80% of the children total said they were not concerned about offensive language.

experiencing “swear words/offensive language” online.<sup>8</sup> This number seems dubiously low—by about 61 percentage points.

More importantly, the proper baseline for comparison is the number of kids who experienced “swear words/offensive language” offline. I assume 100% did. This makes it disingenuous to characterize “swear words/offensive language” as a “potentially harmful *online* experience,” especially if the percentage of children experiencing it offline is higher than online (in which case more coarse discussions are taking place offline than on).<sup>9</sup>

The survey also shows how much people love the Internet. One slide says “despite the concerns raised, the majority agree that the benefits of going online outweigh the risks;”<sup>10</sup> another says six out of ten 12-15 year olds “agree that the internet makes children’s lives better.”<sup>11</sup>

These pro-Internet findings helpfully contextualize the survey results. The White Paper mines the survey for the scariest bits; yet it ignores the findings that support a counter-narrative. Thus, the White Paper seeks to advance an outcome—the destruction of the modern Internet—using a survey that strongly indicated that constituents would oppose that outcome.

## II. The White Paper’s Worst Policy Details

The White Paper offers several policy “innovations” that are each individually terrible. Combined together, they create an unsalvageable policy disaster. I’ll highlight four major conceptual problems with the White Paper.

### 1) *Duty of Care to Keep Users Safe.*

In the U.S., the courts have roundly rejected plaintiffs’ efforts to impose “duty of care” obligations on Internet services, largely due to Section 230.<sup>12</sup> In 2019

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<sup>8</sup> *Id.* slide 37.

<sup>9</sup> The White Paper occasionally (if unenthusiastically) acknowledges that humanity is awful offline too, and in a couple of places it tries to isolate how much harm is uniquely caused online vs. the baseline set of harms.

<sup>10</sup> *Id.* slide 72.

<sup>11</sup> *Id.* slide 73.

<sup>12</sup> A key case on this topic is *Doe v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (“claims that a website facilitates illegal conduct through its posting rules necessarily treat the website as a publisher or speaker of content provided by third parties and, thus, are precluded by section

alone, cases seeking to impose “duty of care”-style obligations on online intermediaries have been rejected by the D.C. Circuit,<sup>13</sup> the Second Circuit,<sup>14</sup> and the Wisconsin Supreme Court.<sup>15</sup>

The White Paper strikes a different path. Extending its analogy to the health and financial industries, it would impose a duty of care on online services “to take reasonable steps to keep their users safe and tackle illegal and harmful activity on their services.”

This duty of care approach lays a foundation for unlimited liability. Each time a harmful incident takes place online, the burden effectively shifts to the Internet service to demonstrate how they took reasonable steps to avoid the incident.

#### 2) *Setting a Floor for the Duty of Care.*

To avoid that unmanageable legal risk, the White Paper proposes that a government regulator would set minimum standards which, if complied with, would satisfy the duty of care. Internet services would have the freedom to deviate from the minimum standards, but at the peril of proving that their deviations nevertheless complied with the general duty of care. Few online services would take the risk of deviating—at least, not without express approval from the regulator—so the government-set minimum standards would become the de facto standards across the industry.

It’s theoretically possible the government-set standards could simultaneously accommodate both Internet giants and small hobbyists. More likely, the Internet industry will need more than one standard to cover the vast range of Internet activities. Most likely of all, the government-set minimum standards would optimize for regulating the behavior of a few Internet giants (i.e., every regulator wants to “fix” Facebook) and thereby set standards that few other services could afford to meet.

The White Paper briefly acknowledges that the government regulator would need to be sensitive to the anti-competitive/anti-innovation effects of its minimum standards, but what incentive does the regulator have to do this? It’s hard to *prove* ex ante that regulation will destroy innovation; that effect usually becomes clear

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230(c)(1)”). See generally Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TULANE J. TECH. & IP 1 (2017).

<sup>13</sup> *Marshall’s Locksmith Service Inc. v. Google LLC*, 925 F.3d 1263 (D.C. Cir. 2019).

<sup>14</sup> *Herrick v. Grindr LLC*, 765 Fed. Appx. 586 (2d Cir. 2019).

<sup>15</sup> *Daniel v. Armslist, LLC*, 386 Wis.2d 449 (2019).

only ex post, when the damage is already done. Furthermore, a regulator charged with keeping online activities “safe” will necessarily prioritize safety over innovation. Thus, the government-set minimum standards to satisfy the duty of care inevitably will be set in a way that stifles innovation and hard-wires a uniform set of practices for the Internet industry.

### 3) *Creating a Censorship Board.*

The White Paper does not identify the regulator charged with setting the minimum standards to satisfy the duty of care. Whatever regulatory body undertakes this work will necessarily engage in pervasive censorship. Setting a duty of care requires the regulator to dictate what third-party content Internet services can and cannot publish. The White Paper seemingly aspires to frame Internet safety as a goal that can be achieved without content censorship, but in practice, the regulator of Internet safety will function as a government-operated censorship board.

Censorship boards are common in repressive countries (e.g., Russia’s Roskomnadzor),<sup>16</sup> but until recently, most democracies try to avoid blatant censorship. Between the White Paper’s proposal and Sen. Hawley’s proposal to turn the FTC into a censorship board,<sup>17</sup> formalized Internet censorship is now apparently mainstream discussion fodder—even in leading Western democracies.

One twist: the White Paper proposes to fund the censorship board by taxing the regulated Internet companies. If Internet safety is such a crucial social value, it should be funded with general taxpayer funds—but that’s clearly too politically unpalatable. In contrast, no one will lament dunning Google and Facebook for more cash. However, this financing plan will create substantial and inevitable opportunities for regulatory capture and rent-seeking, because the censorship board will have repeat interactions with the regulated entities who are paying its bills. You can see how well that works with services like the USPTO, which routinely sides with the “customers” who pay its bills—patent owners<sup>18</sup>—over the public it is actually supposed to serve.

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<sup>16</sup> Also known as “The Federal Service for Supervision of Communications, Information Technology and Mass Media.” See <https://eng.rkn.gov.ru/>.

<sup>17</sup> Ending Support for Internet Censorship Act (S. 1914). See Eric Goldman, *Comments on Sen. Hawley’s “[Ending] Support for Internet Censorship Act,”* TECH. & MKTG. L. BLOG, July 10, 2019, <https://blog.ericgoldman.org/archives/2019/07/comments-on-sen-hawleys-ending-support-for-internet-censorship-act.htm>.

<sup>18</sup> E.g., Clarisa Long, *The PTO and the Market for Influence in Patent Law*, 157 U. PENN. L. REV. 1965, 1985 (2009); Brian Kahin, *The Expansion of the Patent System: Politics and Political*

Note further that if Google and Facebook have outsized influence with the censorship board, then they will be happy to coordinate with the censorship board to establish minimum duty of care standards that hinder their competition. We're already seeing Facebook routinely embrace censorship regulations globally<sup>19</sup>—coopting government into expensive legal standards that only companies like Facebook can afford. Rather than fight this unhealthy dynamic, the White Paper will amplify it.

#### 4) *Regulation of Lawful Harmful Content.*

The White Paper aspires to regulate legal but harmful content:

3.5 The regulatory approach will impose more specific and stringent requirements for those harms which are clearly illegal, than for those harms which may be legal but harmful, depending on the context.

The Internet services' duty of care would require them to moderate—that is, suppress—lawful content. The drafters obfuscate this crucial point in several ways: (1) suggesting that the duty of care will be less for lawful than unlawful content, (2) by repeatedly highlighting the many ways that legal content causes harm, and (3) by lumping harmful content and unlawful content together in its discussion.

To highlight the latter point, consider the table below, where each column mixes illegal content with legal content.<sup>20</sup> For example, in the right column, excessive screen time is completely legal; in the middle column, many types of “intimidation” are completely legal (even if it is likely anti-social behavior); in the left column, some types of harassment are illegal and others are not. This commingling of illegal and legal content helps the White Paper broaden its scope

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*Economy*, FIRST MONDAY (2001), <https://uncommonculture.org/ojs/index.php/fm/article/view/828/737>; Josh Landau, *USPTO Strategic Plan Focuses on Patent Owners, Ignores Public*, PATENT PROGRESS, Aug. 29, 2018, <https://www.patentprogress.org/2018/08/29/uspto-strategic-plan-focuses-on-patent-owners-ignores-public/>.

<sup>19</sup> E.g., Mark Zuckerberg, *The Internet Needs New Rules. Let's Start in These Four Areas*, WASH. POST, Mar. 30, 2019, [https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f\\_story.html](https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html); Sheryl Sandberg, Facebook Post of Feb. 26, 2018, <https://www.facebook.com/sheryl/posts/10159945887600177?pnref=story> (advocating in favor of FOSTA).

<sup>20</sup> Also, the “clear” vs. “unclear” taxonomy does not work. As just one easy example, what's considered a “hate crime” is ambiguous in the U.K. (and everywhere else).

while making it harder to identify the situations where it is talking about regulating legal content.

**Table 1: Online harms in scope**

Harms with a clear definition	Harms with a less clear definition	Underage exposure to legal content
<ul style="list-style-type: none"> <li>• Child sexual exploitation and abuse.</li> <li>• Terrorist content and activity.</li> <li>• Organised immigration crime.</li> <li>• Modern slavery.</li> <li>• Extreme pornography.</li> <li>• Revenge pornography.</li> <li>• Harassment and cyberstalking.</li> <li>• Hate crime.</li> <li>• Encouraging or assisting suicide.</li> <li>• Incitement of violence.</li> <li>• Sale of illegal goods/ services, such as drugs and weapons (on the open internet).</li> <li>• Content illegally uploaded from prisons.</li> <li>• Sexting of indecent images by under 18s (creating, possessing, copying or distributing indecent or sexual images of children and young people under the age of 18).</li> </ul>	<ul style="list-style-type: none"> <li>• Cyberbullying and trolling.</li> <li>• Extremist content and activity.</li> <li>• Coercive behaviour.</li> <li>• Intimidation.</li> <li>• Disinformation.</li> <li>• Violent content.</li> <li>• Advocacy of self-harm.</li> <li>• Promotion of Female Genital Mutilation (FGM).</li> </ul>	<ul style="list-style-type: none"> <li>• Children accessing pornography.</li> <li>• Children accessing inappropriate material (including under 13s using social media and under 18s using dating apps; excessive screen time).</li> </ul>

This exposes a fundamental conundrum in the White Paper: why is the U.K. government proposing to obligate Internet services to police legal content, rather than making such content illegal? This is a direct and broad form of censorship; not the more typical “collateral” censorship<sup>21</sup> when publishers prophylactically overblock borderline lawful content to ensure that no unlawful content slips through. Clearly, there’s no longer any concern about blatant censorship even in liberal Western democracies.

<sup>21</sup> E.g., Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293 (2013); Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2296 (1999).

### III. The Internet's Cable-ized Future

In the mid-1990s, it was widely assumed that the Internet would look like the cable industry, where a relatively small number of large-ish online cablecasters would publish professional content to paid subscribers. Indeed, the leading commercial online services of the era—including AOL, CompuServe and Prodigy and smaller competitors like GENie,<sup>22</sup> Delphi,<sup>23</sup> and eWorld<sup>24</sup>—deployed cable-style business models.<sup>25</sup> Users paid monthly fees to access walled gardens of content, and the online services shared some of the subscription fees with third-party professional content providers.

Miraculously, the Internet industry evolved into something very different than the cable industry. Aided by late 1990s-era laws like 47 U.S.C. §230 and 17 U.S.C. §512, online services fostered the massive growth of amateur-created content—content that turned out to be exceptionally valuable to society. The move from cable-style professional content to (typically uncompensated) amateur content defined the “Web 2.0” phenomenon. Today, virtually all of the most popular Internet services heavily or exclusively publish uncompensated amateur content.

We're nearing the end of Web 2.0. Regulators across the globe are cracking down on user-generated content, creating a nearly impenetrable phalanx of regulation that will make user-generated content virtually unpublishable. As just one recent example, the E.U. Copyright Directive's Article 17<sup>26</sup> will require online services to deploy upload filters on user-generated content. These mandatory filters will suppress lots of legitimate user-generated content; and any filtering mistakes will create potentially business-ending liability. Furthermore, the costs of

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<sup>22</sup> Steven J. Vaughn-Nichols, *Before the Web: Online Services of Yesteryear*, ZDnet, Dec. 4, 2015, <https://www.zdnet.com/article/before-the-web-online-services/>.

<sup>23</sup> Arlyn Tobias Gajilan, *They Coulda Been Contenders: Once Upon a Time, Delphi Was Fighting It Out with AOL. Then Along Came Rupert.*, FORTUNE, Nov. 1, 1999, [https://money.cnn.com/magazines/fsb/fsb\\_archive/1999/11/01/270056/index.htm](https://money.cnn.com/magazines/fsb/fsb_archive/1999/11/01/270056/index.htm).

<sup>24</sup> Benj Edwards, *Remembering eWorld, Apple's Forgotten Online Service*, MACWORLD, June 9, 2014, <https://www.macworld.com/article/2202091/remembering-eworld-apples-forgotten-online-service.html>.

<sup>25</sup> E.g., Vaughn-Nichols, *supra* note 23. Even the small but highly influential online community The Well had this business model. Katie Hafner, *The Epic Saga of The Well*, WIRED, May 1, 1997, <https://www.wired.com/1997/05/ff-well/>.

<sup>26</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.130.01.0092.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.130.01.0092.01.ENG). This provision gained notoriety as “Article 13” until a last-minute renumbering of the Directive's provisions.



deploying upload filters will drive many small online services out of the market altogether.

Collectively, these dynamics will drive many online services to simply give up on user-generated content altogether. Instead, the services will prefer to license professionally generated content as a way of reducing their risks of infringement.<sup>27</sup> Of course, professional content producers will want to be paid for licensing their content. This pushes the Internet industry closer to the 1990s-style cablecasting industry structure, where a relatively small number of larger online services can afford upload filters or license fees, and everyone else exits the industry.

The UK Online Harms White Paper accelerates the Internet's cable-ization. The costs required to satisfy the duty of care will produce the same effects as the Article 17 upload filters. Internet giants like Google and Facebook will absorb the costs of regulation; other services will publish only professional content to avoid those regulatory costs; and other services will exit the industry. The White Paper's proposals will function like a "neutron bomb" of Internet regulation. It would leave the Internet's "infrastructure" nominally intact, but it would depopulate the Internet of most of its content, leaving a dystopian Internet wasteland in its wake.

The White Paper's drafters might prefer a cable-ized Internet. Undoubtedly it will be "safer"...but at what cost? I also would like a "safer" Internet, but I prefer even more a well-functioning and robust Internet that enables human self-expression. Prioritizing safety over the Internet's fundamental interactivity brought to mind the old idiom, popularized by Justice Frankfurter, about overreaching regulations that "burn the house to roast the pig."<sup>28</sup>

## Conclusion

I hope that the White Paper's vision of the Internet ultimately gets rejected. However, even if that happens, the cumulative crush of Internet regulatory burdens—still being manufactured daily—almost certainly ensures the Internet's inevitable cable-ization. It's only a question of how long.

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<sup>27</sup> Professional content licensors might also be willing to provide financial assurances in the case of unexpected infringement claims, such as indemnities to the licensee or insurance coverage.

<sup>28</sup> *Butler v. Michigan*, 352 U.S. 380 (1957).