EPC European Publishers Council

CONTRIBUTION FROM THE EUROPEAN PUBLISHERS COUNCIL TO THE REVIEW OF THE E-COMMERCE DIRECTIVE

5th November 2010

The European Publishers Council (EPC) brings together Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the EU. A list of our members is attached at Annex 1.

1.0 Background Picture

As stakeholders during the original negotiation of the eCommerce Directive, the European Publishers Council welcomes the opportunity to contribute to this review. The wide range of new original journalistic content, TV programmes and services available online since the enactment of the eCommerce Directive demonstrates the many efforts made by the media to offer the widest choice of creative content to citizens throughout the EU.

Yet the challenge for media online today is that, in spite of the popularity of their content online and on mobile devices, heavy investment and innovation, they are finding it extremely difficult to recoup their investments. There are several reasons for this which we submit by way of background to our comments on the functioning of the directive itself:

EPC
Chairman > Francisco Pinto Balsemão
mgil@impresa.pt
Executive Director > Angela C. Mills Wade
angela.mills@wade.uk.net

EPC > 26 Avenue Livingstone, Bte 3, B-1000 Brussels Tel: +32 (0)2 231 12 99 Fax: +32 (0)2 230 76 58

- **The evolution of the advertising market**. The shift of advertising expenditure online has accelerated a trend towards direct response-type advertising and away from display advertising. Advertisers have been drawn to pay-per-click and similar models, while the mode of use of the Internet compared with offline media means that search advertising in particular has gained a dominant share of total online advertising revenue, and is still growing faster than other forms, leaving little available for supporting content generation
- **User behaviour** also affects the degree to which advertising value returns to content providers; though display ads on publishers' sites may affect subsequent online or offline purchasing and often prompts a search, the action of clicking usually takes place elsewhere and so the value does not go to the publisher. The general environment of the Internet has also tended to lead to a lower propensity to pay for content online than offline. Online users are also spending much more time on social networking sites, and advertisers are showing signs of following them there
- **Unlicensed use of content**: recent studies have confirmed the very widespread use of newspaper content by other web sites which have not licensed its use and therefore are not contributing to the costs of its creation. Nevertheless, the majority of such sites are themselves deriving revenue from selling advertising alongside the content.
- **The lack of a level playing field with online aggregators including search engines:** Traditional publishers bear the high and labour-intensive costs of creating original content, but they also bear the costs of compliance with copyright and other legal requirements, including data privacy, general laws on advertising, defamation and obscenity laws. Intermediaries which are re-using our content outsource these costs, either to the originating publisher or to users. Nevertheless publishers and other content producers compete with ISPs for the same European audience and advertising income.

- The **massive shifts in the advertising market** are a major challenge to publishers. This is driven by the capabilities of the networked economy and the efficiencies that delivers to advertisers; publishers know they have to adapt, as indeed they are doing. Having said that, it is important to ensure that no single company, especially one which is free of many of the constraints which hamper European players, does not become so dominant that it makes the rules to suit itself. Companies which wield great power in the online environment should be open and transparent in their dealings both with consumers and with businesses that have to use them to reach their own customers. Yet there is often no transparency as

to how the revenues received by the publisher actually relate to the activity on the sites which are placed within the deal.

- **Unfair competition from publicly funded broadcasters online:** PSB activities on the internet create unfair competition with publishers online, and for private broadcasters' video-on-demand services. PSB "publishing" activities online are not analogous to their pioneering role in conventional broadcasting. Unlike the early days of traditional broadcasting, rooted in spectrum scarcity, there is no justification for state-subsidised semi-monopolies to create duplication and distortion online.

2.0 Overview of the Directive's impact on the market for eCommerce

2.1 When the European Commission first embarked on establishing a legal framework for the provision of electronic commerce services in 1999 the internet was a mere hint of what we take for granted today. Just at the moment that the eCommerce market was taking off, the Directive provided an essential legal framework for businesses and consumers alike; it brought some order to this brave new world to facilitate market growth, with the confidence of legal certainty. A core tenet of this approach was free circulation based on mutual recognition by Member States of services emanating from another member state which comply with the rules of that country of origin. This approach has been positive and remains crucial to the free flow of information within the Internal Market - a prerequisite to the freedom of expression.

2.2 In the intervening period the continuous technology revolution has expanded dramatically the market for access to websites as well as many mobile devices for media, music, video, travel, shopping, banking, etc. – often supported by advertising, to millions of consumers throughout the European Union. While we saw opportunities burgeoning for the creation, publication and wide distribution of all manner of goods and services, the Directive recognised that the controllers of the technology were taking on a new role, acting as intermediaries between, in the case of the media, our content and our readers.

2.3 Producing high-quality content is labour-intensive and expensive; delivering it across many channels and devices which change rapidly, often driven by forces outside the control of media companies, requires investment,

innovation, and constant attention to matching skills and technologies with what readers and viewers want. See next section on Challenges to the Online Market for Content.

2.4 The web is a very different place today from when the Directive was implemented yet the Directive remains as valid today as it did at the outset. Nevertheless we have witnessed some perverse outcomes which cannot have been foreseen at the time. In particular, when considering the original purpose of Articles 12-15 it is important to remember that immunity from damages does not equate to exemption from all responsibility. Both the E-Commerce and Copyright Directives contain provisions which allow member states to introduce legal rules to require ISPs to play a 'middleman' role in dealing with illegal content.

2.5 Intermediaries were granted limited liability for hosting and caching material on the basis that such businesses could not thrive without exemption from damages or else suffer catastrophic losses through court actions over copyright and defamation. Furthermore, consensus was reached that the providers would not be gaining any additional economic benefit from such activities.

2.6 On the contrary experiences shows that particularly when it comes to copyright, it would seem that such businesses have indeed thrived (some of them via small and incremental IP infringements of 3rd party content) with no evidence that legal risks or uncertainties have inhibited their growth or competitiveness. Some ISPs have deliberately exploited the fact that the exemptions in current legislation do not require any qualifying standards of corporate governance and have chosen to operate a policy of poor identification of users and slow response to rights-holders complaints.

2.7 Furthermore, the "safe harbour" provisions have led to a rise of online business models where the advertising income is based on the third party content contributed by the users, i.e. private persons. We do not believe this outcome was foreseen by the Directive or that it should prevail.

2.8 Telecommunication operators are not the only enterprises that have exercised commercial advantage from the exemptions from liability under the eCommerce Directive. Also search engines and other content aggregators have operated as ISPs and outsourced to the end-users of their services – including the publishers - the content related liability (e.g. obligation to make sure that there is copyright to communicate the work to public). At the same time their services benefit commercially from content produced by the third parties (e.g. publisher's content).

2.9 Section 4 of the Directive and provisions on the liability of the intermediary service providers are difficult to interpret in practice. Provisions, such as Article 14, do not make a clear difference between a pure provision of internet services and a content service where the ISP as a matter of fact benefits commercially from the third party content. The lack of clarity works in favour of ISPs and aggregators.

2.10 Interpretation of the term "actual knowledge" seems to vary on case by case basis, from the Member State to Member State. In many user-generated -content based business models it seems to be clear that the content is not user-created but user-distributed third party content.

2.11 We would wish also to point to a further perverse outcome arising from Data Protection legislation where it interacts with notice and take down practice; where the mantel of privacy is facilitating piracy. The Telefonica[1] judgement from the ECJ said we must balance the provisions in Community law that protected intellectual property rights (IPRs) with those that protected personal privacy. So introducing legal measures that could, in carefully prescribed circumstances, force the disclosure of user information is not precluded. Of course, privacy concerns must be recognised, but in the same way that privacy concerns are recognised in other aspects of private life which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.

2.12 The eCommerce and Copyright Directives allow the Courts to compel ISPs to terminate or prevent infringement or to require them to provide information to competent public authorities of alleged illegal activities by their customers "with whom they have storage arrangements." We therefore simply need clarification to make it explicit and unambiguous that names, IP addresses etc are kept private unless and until the access providers' subscribers break the law. This needs to be complemented by appropriate enforcement of access providers' terms and conditions. Otherwise the law is being flouted in a way which precludes key players in the content chain from accepting and taking a measured but **active** role in dealing with the threats posed by online piracy.

2.13 There is no doubt that the legal framework is in place for ISPs and other service providers to require them to play a role in dealing with removal of illegal content including copyright infringements. The quid pro quo for immunity on the part of service providers needs to be a recognition that as a

[1] Case C-275/06 : Productores de Música de España (Promusicae) v. Telefónica de España SAU

beneficiary, directly or indirectly through advertising or traffic revenues, a balanced but collaborative role is necessary.

2.14 We suggest that the Commission should consider that, as a general rule, any exemptions should be subject to certain qualifying criteria. For example, if an ISP is to be protected by law from the actions of its users, should it not at the very least be able to identify who such users are so that they can be pursued? Similarly, if an aggregator is protected by law from the possibility that some of the 3rd-party content they carry might give rise to civil or criminal sanctions, should they not have had the authority of the content owner to aggregate the content in the first place?

3.0 Contribution to some of the specific questions from the questionnaire

3.1 The Internal Market Approach

3.1.1 We fully support the objectives and scope of the legislation and in particular the application of internal market principles to e-commerce. Such a regulatory basis is essential to enable European businesses and consumers to continue to benefit from goods and services provided through electronic commerce.

3.1.2 **Mutual recognition** by Member States of services emanating from another member state which comply with the rules of that country of origin facilitates the free circulation of legally-compliant services throughout the Internal Market. This is crucial to the free flow of information within the Internal Market and a prerequisite to the freedom of expression.

3.1.3 The directive does nonetheless contain certain **derogations from internal market principles**. In the case of **private international law** the effect is that member states are free to apply their own doctrines when it comes to conflict of law resolution. Since the Directive's implementation, the EU has harmonised rules for dealing with conflicts arising from cross border activity via the Regulations of Brussels I and II and Rome I and II. Therefore in a fully functioning internal market these exemptions should be reviewed and eventually removed.

3.2 Liability of intermediaries

3.2.1 With regard to this section of the Directive, our concern as publishers and producers of a wide range of multi-media content, has been, and will continue to be, to ensure that service providers carrying/distributing (but not producing) content are required to take reasonable steps to ensure that their services are not abused by their customers for illegal purposes, for example by hosting and facilitating the dissemination of harmful, defamatory or copyright infringing material. **See Overview in Section 2 above.**

3.2.2 In the information society, there is increasing confusion between the role of conduits, distributors, and content providers which has produced perverse outcomes from those originally intended by the legislation. We are concerned that established rules on liability should be maintained in the digital environment, and that partners in the information chain should each remember their proper part in ensuring that the law is enforced. **See Overview in section 2 above**.

3.2.3 We would oppose any attempt to extend the exemptions from liability provided for under any of Articles 12 to 14 to new user groups as this would erode the 'permissions-based' approach on which copyright is built. There is a damaging practice amongst certain sectors of the user community which seeks to reverse the 'norm' under the international copyright treaties under which the acts covered by copyright cannot be done without the permission of copyright owners.

3.2.4 Given the widespread disregard of copyright on the Internet, often with the tacit or explicit encouragement of commercial providers of information society services, the EPC believes that there is a significant risk if further exemptions from liability are introduced for use of copyright works or other intellectual property.

3.3 No obligation to monitor

3.3.1 In the light of experience since the implementation of the Directive this area deserves analysis along with the liability provisions (and impact of data protection legislation too – see below) as to its effect on all parties in the distribution chain. On the one hand we continue to support the principle that service providers should not take unilateral monitoring action e.g. towards potentially 'harmful and illegal' materials; on the other hand we are **concerned that this provision has led some to uncooperative behaviour in helping *prevent* law infringements, such as breach of copyright, when put on notice**.

3.3.2 Article 15.2 says that: "*Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."*

3.3.3 There needs to be fuller recognition of the responsibility of all parties in the chain, ideally through agreements reached by collaboration and negotiation between all stakeholders, underpinned, as necessary, with legal sanctions. This is what the legal framework provides for. Recourse to the Courts is costly and unnecessary for the most **part if collaboration works**.

3.3.4 The eCommerce Directive already gives the possibility for remedies against illegal content. For example, Article 12.3 on mere conduit/access providers says "*This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement."*. The requirements to act to remove illegal content are further elaborated under articles 13 (caching) and 14 (hosting). Caching occurs whether you are a mere conduit access provider or a host service provider. In this way, the obligations under articles 13.1 (e) and 13.2 apply to both access AND service providers as follows: *(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. 2. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement."*

3.3.5 Although article 15 of the eCommerce Directive says that there is "no general obligation to monitor" – which the EPC fully supported at the time of the Directive's negotiation so that intermediaries had no right to interfere with our editorial or advertising content unless or until they were put on notice of an illegality by us, it does go onto say at 15.2 that: "*Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their*

request, information enabling the identification of recipients of their service with whom they have storage agreements."

3.3.6 **But access and service providers are failing in their duties to uphold these laws.** Often when put on notice they fail to act promptly, or at all – usually by hiding behind data protection laws as an excuse for not taking down copyright infringing material.

3.3.7 Regarding the question of monitoring and filtering we wish to ensure that ISPs respect the digital watermarking and digital fingerprinting that is attached to content by rightsholders as a way of identifying unauthorised uses.

3.3.8 If such filtering systems can show that "mere conduits" are regularly carrying illegal content and that checking filtering systems can help identify the illegal use they should cooperate with content owners. Filtering technologies can be implemented by an ISP within the existing framework of European law and would not cause an ISP to lose the protection of the Article 12 e-Commerce "mere conduit" safe harbour.

3.4 Regulation of Advertising in the Online World

3.4.1 With regard to the content of advertising, the EU's extensive body of law in addition to the eCommerce Directive (Unfair Commercial Practices, Audiovisual Media Services Directive, Tobacco, Pharmaceuticals, etc.) applies online as well as in traditional media. However we note that the opportunity provided for by the eCommerce Directive for advertising by the professions has not been taken up which is disappointing and would ask the Commission to investigate.

Yet pressure from consumer, health, environmental and social lobbies continues to call for yet further regulation and restriction of advertising in certain categories, or to seek to impose mandatory information within the commercial communications themselves.

Advertising is not labelling and should not be regulated as such; to do so would bring no obvious benefits to consumers but would carry massive disadvantage to media advertising. The imposition through legislation of standardised information tools, symbols and required wording makes the advertising less attractive and eventually obsolete. The role of advertising is to promote the various brands and key features of a product or service since there is a high level of competition among the manufacturers – particularly in mature markets such as cars, in the nature and quality of products and

services they provide. Advertising's role is not to inform the consumer in any great detail, which is better left to brochures, company websites and showrooms when consumers have more time and attention to detail.

A free and independent press is the natural ally of the European Commission as we provide a forum for analysis and debate that is necessary for any sustainable change of mind and behaviour of citizens in Europe whether in the field of health, the environment or social attitudes.

We suggest that self-regulation is a far more proportionate way to tackle advertising in the online environment.

3.4.2 With regard to the self-regulation of the content of advertising delivered online the industry has ensured widespread consumer protection and redress. The media and advertising industry associations together with the network of national, independent advertising self-regulatory organisations agreed and implemented an EU-wide best practice standard for extending codes and complaints handling to digital marketing communications
Download the Digital Marketing Communications Best Practice here [Pdf, 1157Kb]

3.4.3 With regard to the techniques of advertising deployed online to deliver consumers relevant, interest-based advertising (including Online Behavioural Advertising) the media and advertising industry associations together with the network of national, independent advertising self-regulatory organisations are developing a comprehensive framework of self-regulation to deliver consumer control. This is in line with the public policy objectives of aspects of the ePrivacy directive, in particular with regard to the use of cookies for advertising purposes. Further information will be provided to the Commission once finalised.

4.0 Conclusions

- ✓ In order for our sector to be able to innovate and prosper in the future, regulators need to **look more deeply into the changes and challenges facing the various content and service providers in the eCommerce market**.
- ✓ We invite the regulators to think flexibly and **work with us** to find practical ways of growing the European market online.
- ✓ We see **no need for a revision of the Directive itself** as the legal basis is sound.
- ✓ However we do favour an **analysis of some of the perverse outcomes** arising **from lack of compliance and enforcement** in certain areas.

- ✓ Because of the complexity of the online market a wide range **of issues and laws would need to be taken into consideration in parallel** in terms of both market developments as well as combined regulatory impact of several Directives.
- ✓ **This process of analysis and evaluation could usefully be followed by interpretative guidance to the Member States in several areas to ensure compliance with the core elements of the directive, open and fair competition between the various players, taking into account the massive changes since the original directive**.

European Publishers Council
November 2010

Annex 1 – List of EPC Members

Annex 1

MEMBERS OF THE EUROPEAN PUBLISHERS COUNCIL

Chairman:

Mr Francisco Pinto Balsemão, Chairman and CEO, Impresa, Portugal

Members

Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK
Dr Carlo de Benedetti, Chairman, Gruppo Editoriale L'Espresso, Italy
Mr Carl-Johan Bonnier, Chairman, The Bonnier Group, Sweden
Mr Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria
Ms Rebekah Brooks, Chief Executive Officer, News International Ltd, UK
Mr Bernd Buchholz, Chief Executive, Gruner + Jahr, Germany
Dr Hubert Burda, Chairman and CEO, Burda Media, Germany
Mr Juan Luis Cebrian, CEO, Groupo Prisa, Spain
Dr Mathias Döpfner, Chief Executive, Axel Springer AG, Germany
Mr Erik Engstrom, Chief Executive, Reed Elsevier,
Ms Rona Fairhead, Chief Executive, Financial Times Group, UK
Mr Tom Glocer, Chief Executive, Thomson Reuters
Dr Stefan von Holtzbrinck, President and Chairman of the Executive Board, Verlagsgruppe Georg von Holtzbrinck GmbH, Germany
Mr Steffen Kragh, President and CEO, The Egmont Group, Denmark
Mr Murdoch MacLennan, Chief Executive, Telegraph Media Group Ltd, UK
Mr Andrew Miller, Chief Executive, Guardian Media Group, UK
Mr James Murdoch, Chairman and CEO, News Corporation, Europe and Asia
Mr Piotr Niemczycki CEO, Agora, Poland
Sir Anthony O'Reilly, President Emeritus, Independent News & Media PLC, Ireland
Mr Antonello Perricone, CEO, RCS Media Group SpA Italy
Mr. Stavros Psycharis, President, Lambrakis Press Group, Greece
Mr Didier Quillot, Chairman and CEO, Lagardère Active, France
Mr Michael Ringier, President, Ringier, Switzerland
The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK
Mr Rolv Erik Ryssdal, CEO, Schibsted, Norway
Mr Hannu Syrjanen, CEO, Sanoma Corporation, Finland
Mr Christian Van Thillo, Chief Executive, De Persgroep, Belgium
Mr. Jose Manuel Vargas, CEO, Vocento, Spain

Executive Director: Angela Mills Wade
Press Relations: Heidi Lambert Communications