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Council

**Contribution from the European Publishers Council
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**To the public consultation on procedures for notifying and acting
on illegal content hosted by online intermediaries**

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The European Publishers Council is a high level group of Chairmen and CEOs of leading European media corporations actively involved in multimedia markets spanning newspaper, magazine, book, journal, internet and online database publishers, and radio and TV broadcasting. One of our primary goals is to encourage good law-making for the media industry. A list of our members is attached.

Introduction

- The EPC welcomes the opportunity to comment on the consultation. EPC participated in the consultation conducted in 2010 on the e-Commerce directive, addressing extensively the benefits and impact it has had on the media industry. Our response can be found [here](#).
- The consultation on action and notice mainly deals with the difficulties linked to the implementation of article 14 of the Directive dealing with the limitation of liability for service providers under certain conditions. As one of the stakeholders taking part in the original negotiations of the e-Commerce Directive, it can be useful to recall that the limited liability for intermediaries when hosting and caching material was granted on the basis that such businesses could not thrive without the exemption from damages or else suffer catastrophic losses through court actions over actions

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concerning *inter alia*

copyright and defamation. Consensus was reached that the providers would not be gaining any additional economic benefit from such activities.

- Today however, it can be seen that when it comes to copyright, such businesses have indeed thrived with no evidence that legal risks or uncertainties have inhibited their growth or competitiveness. Some ISPs appear to have exploited the fact that the exemptions in the 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.
- After a number of court decisions dealing with the issue of liability in this area, the time has now come to deal urgently with the question of what kind of internet Europe and the world want. Responsibility and high corporate standards should be guiding elements to create trust in the internet. The EPC would support an initiative from the Commission establishing clear and harmonised rules to ensure that service hosting providers deal efficiently with illegal content.
- Meanwhile the content value chain needs to work towards technical solutions to accompany this process. The EPC is engaged in the Linked Content Coalition¹ in finding innovative and practical solutions to communicate and read rights expressions for digital content thus benefitting authors, creators, publishers, broadcasters and other content providers/producers, hosting services and consumers alike. A powerful rights information infrastructure fit for complex digital markets will create trust and efficiency in not only accessing content but also in understanding **who owns the rights** (e.g. publishers, broadcasters and other right owners) and who is the author/ creator. This deliverables from this project can help intermediaries to act swiftly in identify illegal content rather than shielding behind provisions in an E-Commerce Directive that is now over 10 years old.
- EPC and its members are in particular concerned by the impact of illegal content available on the Internet that relates to infringement of copyright and related rights, defamation, privacy infringements, but not limited to these three categories.
- A completed standard Questionnaire is enclosed together with our written comments which follow.

Individual members of the EPC may respond individually or through their respective trade associations.

¹ www.linkedcontentcoalition.org



1. Notice & action procedures in Europe - article 14 of the e-commerce directive

Questionnaire introduction: *“In 2010 the Commission consulted the public on the future of e-commerce and the implementation of the E-Commerce Directive. The public consultation included questions on the liability exemptions for online intermediaries, the interpretation of Article 14 of the E-Commerce Directive and notice-and-action procedures. These responses have been reflected in a staff working paper accompanying the E-Commerce Communications. Many of these responses indicated that there are difficulties with the interpretation of Article 14 of the E-Commerce Directive. Article 14 defines hosting as “an information society service (..) that consists of the storage of information provided by a recipient of the service “. It provides that a provider shall not be liable for hosted illegal content on condition that:*

*“a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information” .*

The Commission would now like to have an updated vision of stakeholders regarding notice-and-action procedures”.

- 1.1. Publishers and media companies have robust processes in place to protect their content from infringement by bloggers, publishers and broadcasters who seek to reuse this without permission. The processes are resource-intensive and in many companies in house monitoring and legal teams work in shifts 7 days a week to identify infringing content and ensure its removal. Although content is taken down after intensive efforts by right holders the delay in doing so limits the extent to which removal is actually effective and it is very difficult to take action against the hosts and/or infringers who chose not to cooperate.
- 1.2. The provisions in article 14 do not make a clear difference between a pure provision of internet services and a content service where the ISP benefits from the third party content. This supposed lack of clarity can be exploited by ISPs and aggregators who chose not to act expeditiously. The wording in article 14 related to “actual knowledge” and “awareness” varies between Member States and is interpreted on a case by case basis. Additionally the terms “hosting” and “expeditiously” are claimed by some to be unclear.
- 1.3 Regarding the scope of what hosting covers, EPC considers that that e-commerce platforms, video sharing sites and social networks are covered by this



definition. Equally cyberlockers, being file hosting services allowing 3rd party file sharing, should also be considered hosting. Blogs and dictionaries can also contain illegal content and defamatory material, and upon notice any such content should be removed. All cloud based services which provide similar services to all of the above should naturally be covered. Search engines pose a conundrum because some are no longer simply providing a search facility. Many are acting as content aggregators and providing eCommerce platforms and content-sharing sites. In our opinion, the natural search element should not be considered hosting whereas distinct and often separately branded parts of a search engine's business should be. Finally, it is crucially important in our view to establish that the privileges of limitations of liability can no longer be enjoyed without commitment to unambiguous obligations in terms of duties to act expeditiously to remove illegal content. By extending the scope of hosting to include new players it would be unacceptable if they only took advantage of limitations of liability yet did not play their part to build trust in the internet and behave according to ethical standards of good corporate behaviour.

2. Notifying illegal content to hosting service providers

Questionnaire introduction: *"The E-commerce Directive does not use the terms "notifying" or "notice". The CJEU has clarified that one possible way to become aware of illegal content is that a hosting service provider is "notified" of such content. However the CJEU has held that a notice cannot automatically lead to awareness of illegal content. If the notice is "insufficiently precise or inadequately substantiated" the notice does not make the hosting service provider aware of illegal content. EC law does not contain rules on the availability and accessibility of means to notify as referred to above. Some notice providers, however have complained that mechanisms for notifying illegal content are not always in place or not always easy to use or to find".*

2.1. Notifying illegal content should be easy and swift to allow speedy removal or disabling of the infringing content. A common framework is a necessary step toward this objective and should be one of the main objectives of further action from the European Commission. The L'Oréal-eBay case highlights precisely the necessity for a clear framework, stating that "insufficiently precise or inadequately substantiated" does not necessarily make the hosting service aware of illegal content.

2.2. The reality is that finding pages/tools allowing notification of illegal content is not always easy. Some sites may provide an easy access; other sites may have the procedure "hidden" behind headlines which are not self-explanatory. Certain



conditions may be attached to the actual notification of the illegal content: for example on You Tube, the notifying party will need to open up a You Tube account and send the declaration from this account.

- 2.3. Such conditions seem overly complicated and it should be possible to send a notice from any email address, or by a letter, a fax or delivery.

To impose one specific way of notifying illegal content (i.e. email only) could discourage the notification of illegal content. Also if the notice provider does not receive a receipt, it is impossible to know if the notice has arrived.

- 2.4. Information on where to send a notice with a choice of methods of communication should be clearly displayed. A receipt should always be provided. A letter may contain the same information as a web form, and should therefore not be discriminated against as a means of notifying illegal content. The service provider take notifications in all forms into account and ensure that it is given the right person/department in charge of handling the notice.

- 2.5. The online questionnaire outlines a number of conditions to be included in a notice: the contact details of the sender; the identification of the alleged illegal content, detailed description of the nature of the content; evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act. While most of these conditions seem reasonable to include in a notice the condition referring to *“evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was not contacted first but did not act”* could lead to long periods of inaction during which the illegal content would still be publicly available. It is also unclear what type of evidence should be included; this could lead to a situation where the hosting service provided would refer back to the content provider and result in a lengthy process. It should be easy for the notice provider to act. In many cases the hosting service may be easier to contact, as in general the contact information is known.

- 2.6. Regarding whether there should be rules to avoid unjustified notices, the notice provider should indicate their full contact details so that the content provider or the hosting service can make contact in case of doubt or if they consider that the notice has no grounds. Regarding additional rules to avoid unjustified or abusive notices, this may differ regarding the type of content concerned. For example additional rules would not necessarily pose a problem in IPR infringement from a



publishers/broadcasters point of view, but in the area of defamation and privacy, additional rules on abusive notices could be misused as a tool to take down information that may be true and/or well founded and thus have an impact on press freedom and societal values such as democracy.

3. Action against illegal content by hosting service providers

Questionnaire introduction: *“Hosting service providers across Europe, react differently when they receive notice about content. For instance, some ensure a quick feedback to notice providers by sending a confirmation of receipt when they receive a notice and informing the notice provider when the requested action has been taken. Others do not. Similarly, some online intermediaries consult the provider of alleged illegal content whenever they receive a notice and offer the content providers the opportunity to give their views on the allegation of illegality concerning the content (the so called “counter-notice”). Other providers do not consult the content provider”.*

- 3.1. To have an efficient notice and action procedure, and more importantly to create overall trust in the internet, rules should be put into place to ensure that the hosting service provider provides feedback to notice providers about the status of their notice; for example the sending of a confirmation receipt should be a first action to take, followed by information on whether any action has been taken or will be in future, and according to what timescale. If such basic steps are not required, trust in the internet will fail and will most likely have a negative impact on the hosting service provider itself in terms of reputation and business partnerships.
- 3.2. We support content being removed wherever possible, as well as access being disabled immediately. Upon receipt of a notice, hosting service providers should disable access swiftly to the content until it is clear whether or not the content is illegal. If the content is illegal it should be permanently taken down within strict time limits.
- 3.3. Procedures should be established to deal with situations when the same item of illegal content is hosted by several providers, or by social networks and/or blogs hosted by service providers. All parties should consider their responsibility to act, depending on the nature of the situation, the seriousness of the illegal content, and the action or lack of action taken by the host in sole position to remove the illegal content. In cases of lack of action from the hosting service provider that has the technical capacity to act, shutting down the whole site may sometimes be the most appropriate course of action.



- 3.4. Question 19: Regarding the obligation put on the hosting service provider to act “expeditiously” if the provider is exempted from liability, is raising questions on what “expeditiously” means. The definition is clear enough even though hosting services choose to ignore its meaning. Also the impact may vary according to the type of content. For some content, a couple of hours of delay may cause considerable damage and impact. In cases where criminal investigations are on-going, an answer for IPR infringements could be to disable access immediately upon notice until it has been decided if the content should be taken down permanently, depending on whether the content is illegal or not. Again here special consideration would need to be given to the nature of content (i.e. the example above regarding defamation and privacy in relation to press freedom).
- 3.5. The consultation document refers to the fact that hosting service providers sometimes take down legal content and the ECJ, and civil rights organisations hold that this can block freedom of expression. The Commission would like to find out how unjustified action against legal content can be best addressed. The most appropriate way to address this issue would seem to be to require detailed notices and consulting the content provider before any permanent taking down of the content is action done, meanwhile access to the content could be disabled. Easy and accessible appeal procedures should be available.
- 3.6. This issue raises the more general question about responsibility on the internet, notably how new market players, such as hosting service providers whose business is underpinned by the flow of content it provides access to, deal with these new issues. Publishers and media companies are operating according to ethics, standards and existing laws regarding the content they are making available, whether this is online or offline. This is professionally produced content by journalists, editors, freelancers, photographers, authors and creators. There are assessments going on 24/7 to decide whether a piece of content is legal, if it could be considered an invasion of privacy, defamatory, and if authorisation has been received from the author before publication. They constantly operate under rules which are part of the values of a democratic society namely to promote access to professional information, trusted content and ensure press freedom, all cornerstones of our society. Lawmakers need to consider that the main issue of concern today is about non-professional content providers, and aggregators who become content providers, where the professional standards and laws do not seem to apply. Nor do they contribute to the production and investment in professional content despite the fact that they are fiercely competing with publishers and media



companies for advertising revenues and audience, as well as befitting from our media content to boost their audience and revenues. If a high quality internet respecting fundamental rights is the aim for Europe and the world, rules need to apply to new market players and new professions to uphold standards and integrity. Liability and responsibility regimes should be adapted to fit the evolution of the internet as an integral part of the society and its values.

- 3.7. EPC encourages proactive measures from a hosting service provider and believes such rules should automatically be part of the overall way hosting service providers' businesses operate.

4. The Role of the EU in notice and action procedures

Consultation introduction: *"The E-commerce directive encourages voluntary agreements on rapid and reliable procedures for removing and disabling access to illegal content. It also obliges the Commission to analyse the need for proposals concerning notice and take down procedures"*

- 4.1. The Commission asks two key questions 1) whether the EU should play a role in contributing to the functioning of notice and action procedures and if so in which way, outlining a number of options such as encouraging self-regulation, providing nonbinding guidelines, providing some binding minimum rules, or binding detailed rules, or a combination of these options, 2) and whether if different categories of illegal content require different policy approaches as regards notice and action procedures.
- 4.2. The EPC firmly believes that the Commission needs to play a role in this area with different approaches for different categories, sensitive to both commercial damage and freedom of expression. We support illegal content being removed wherever possible, as well as access being disabled immediately. The time has come to take stock of how article 14 actually functions and today sufficient evidence is available witnessing the difficulties in the interpretation of the provision as the internet has become a major channel of making all types of illegal content available. For example Interpol has today an entire team dedicated exclusively to monitoring child pornography and child trafficking; the growing number of infringement cases all around Europe in the field of copyright are only examples of how the situation has amplified over the last years. Also the business of hosting service providers has



grown into a powerful economic sector whose customers expect access to the content that flows on its service.

EPC would favour a voluntary approach such as non-binding guidelines to address the issues above related to article 14. However should such an approach fail, other courses of action need to be considered.

European Publishers Council
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