

Mr Ron Walcott
Europe and International Business Relations
Department of Trade and Industry
Bay 202
151 Buckingham Palace Road
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22 September 2005

Dear Sir,

Re: DTI Consultation Electronic Commerce Directive: the Liability of Hyperlinkers, Location Tool Services and Content Aggregators

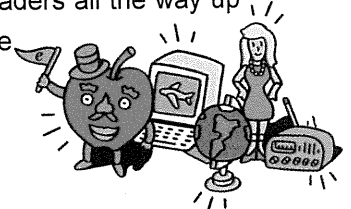
eBay is pleased to respond to the DTI's consultation regarding the liability of hyperlinkers, location tool services and content aggregators.

www.ebay.co.uk is an online marketplace which allows registered users to offer, sell and buy many types of goods in a variety of price formats such as fixed price and auction-style.

eBay.co.uk was launched in the UK in October 1999 and is now the UK's largest online marketplace. The site has more than 10 million registered users and according to Nielsen/NetRatings in July 2005, eBay.co.uk's reach was 43% (where reach is defined as the percentage of all active internet users within that month visiting eBay.co.uk). In 2004, the gross merchandise volume (the value of all successfully closed listings on eBay.co.uk) reached a record \$3.7 billion and in Q2 2005, revenue from eBay.co.uk was over \$100m.

The eBay group of companies operate 33 websites around the world including the UK and the USA. In total these websites have over 157 million registered users. At any one time there are over 55 million items listed for sale on these websites globally, comprising anything from cars to paperclips. Over 3 million of these are listed by UK registrants on the UK website. Each day globally approximately 5 million new items are listed for sale.

eBay is a key enabler and driver of UK e-commerce, it provides a means for thousands of UK small businesses to get online and trade within the UK and globally. In doing so, it creates an instant trading environment for these businesses and creates a significant number of jobs and opportunities. The eBay users range from private individuals, through sole traders all the way up to some of the largest companies in the world, such as IBM, HP and Vodafone.



The eBay marketplace companies are not: (i) retailers; (ii) involved in the actual transaction between buyers and sellers, (iii) in control of the quality, safety or legality of the items advertised, (iv) in control of the truth or accuracy of the listings or the ability of sellers to sell items or the ability of buyers to buy items, (v) at any time in possession of the goods listed; or (vi) able to inspect the goods listed.

With over 50 million items for sale on eBay group websites globally at any one time and with over 5 million new items listed for sale every day, it is not possible for eBay to monitor and check every item on our site either because of the volume or the expertise required for each and every item. In fact, under the E-commerce Regulations 2002, companies like eBay who are "information society service providers" do not have any obligation to monitor their site for illegal content.

eBay supports extension: eBay encourages the DTI to recommend that there is an extension of the current protection given to online intermediaries to cover any liability they may have in relation to hyperlinking, location tool services and content aggregators.

Prospective not retrospective: eBay hopes, in conjunction with a recommendation for new legislation, that the DTI will recommend that this new legislation (and the previous Regulations) is made prospective, rather than retrospective.

We note the statement on page 9 that the E-commerce (EC Directive) Regulations 2002 do not have a "prospective effect". We understand from ISPA (the Internet Service Providers' Association) that the DTI have given an assurance that they are currently seeking to amend the existing E-commerce Regulations 2002, so that they are granted prospective effect. If the legislation is not prospective, eBay and other intermediaries are forced to read every subsequent new proposed statute to determine whether the statute may need separate inclusion within the hosting and other defences. This imposes a high-burden on eBay and other intermediaries and also increases Parliamentary time without justification. Examples of laws which needed to explicitly incorporate the E-commerce Regulations include: The Tobacco Advertising and Promotion Act 2002, the Sexual Offences Act 2003, together with the many pieces of legislation that were amended by the Copyright and Related Rights Regulations 2003,

This issue is particularly acute for eBay when one considers that on any one day eBay.co.uk currently hosts information and links provided by third parties in relation to over three million items for sale. Some of these items for sale are regulated by specific statutes. New legislation brought onto the statute book could affect eBay's legal position even though an aim of the E-commerce Directive was to ensure that intermediaries like eBay were not liable for illegal material, until they were on notice.

Link notices at deepest level: The DTI is encouraged to recommend that any notice and takedown policy in relation to links must ensure that these notices are as specific as is technologically possible.

eBay benefits from third party websites who advertise the eBay site to their customers. Often these third parties will provide a link to a search results page of a particular item or category of item. Other times these third parties will link to the eBay homepage (at, say, eBay.co.uk).

In the event that eBay unwittingly hosts information provided to it by an eBay seller about an illegal item, eBay is not liable under the E-Commerce Regulations unless and until it is provided with notice of that unlawful information. In such a situation, eBay is concerned that companies and individuals may instead of serving notice on eBay, serve those third parties who advertise the eBay site with a notice that links to eBay.co.uk must be removed. The DTI is therefore encouraged to recommend that any notice and takedown policy in relation to links must ensure that these notices are as specific as is technologically possible. If, as is the situation with eBay, items can be identified specifically (by reference to their individual listing number), only specific links to those items should be able to be used to support a notice and takedown request.

Counternotice: eBay recommends that any notice and takedown protocol for links should include a statement of truth and counternotice.

We consider ourselves an industry leader in developing policies and procedures for protecting intellectual property on online trading sites. In 1997, eBay established the first formal programme for working with rights owners to facilitate the removal of infringing listings.

eBay was also one of the first companies to adopt a form enabling rights owners to report suspected infringement and post that form on its web site. That programme, called the Verified Rights Owner (VeRO) Programme, now counts among its members over 13,000 companies and individuals representing every imaginable type of intellectual property – from major software companies to video game developers to music artists to luxury good and clothes manufacturers.

eBay is fundamentally committed to protecting the intellectual property rights of third parties, and to providing its users with a safe and enjoyable place to trade. We believe that the presence of listings offering infringing or unlawful items on our site is bad for our users and bad for eBay. As an intellectual property owner ourselves, we also understand that piracy and counterfeiting on the internet is a growing problem, and we want to do our part to help address what we see as a mutual concern. We also follow similar notice and takedown principles for other unlawful content such as user's listings which offer illegal items for sale.

Two key features of our programme are that rights owners must stand firmly behind any notices they serve; they must be accurate so far as they are aware. Second, the person whose item is being challenged by the rights owner has an opportunity to counter the rights owners' notice.

Currently, eBay operates an informal counter-notice procedure because as a part of an online marketplace business, we believe our users should be able to appeal if they believe their listing should not have been taken down.

eBay would propose that a counter-notice procedure is formalised in an extension to the E-Commerce Regulations. This procedure should include provisions equivalent to the counter-notice procedure such as that contained in the U.S. Digital Millennium Copyright Act of 1998. We feel that it is important that (a) users have a right to complain or appeal if they believe that their listing or content has been incorrectly taken down and (b) online intermediaries such as eBay can operate such a programme with certainty as to its risk..

eBay would also encourage the DTI to introduce a similar scheme in relation to any notice and takedown procedure for links: it ensures that spurious notices are not sent to intermediaries and will ensure that those who complain of particular links will be less tempted to "overreach" as the owner of the linked site will have an opportunity to respond to the allegations.

Finally, eBay is greatly encouraged that the DTI is seeking for the UK to be at the forefront of e-commerce not only in the EU but also in the world; providing clarity over the (lack of) liability of those who link to websites will add to the confidence of those who seek to invest and utilise e-commerce in the UK.

If you have any further questions in relation to this submission, please do not hesitate to contact me.



Yours sincerely

Robert Miller

Senior Director of Legal and Public Affairs - eBay (UK) Ltd