



RESPONSE OF THE MOTION PICTURE ASSOCIATION to DTI Consultation Document on the Electronic Commerce Directive: the Liability of Hyperlinkers, Location Tool Services and Content Aggregators

The Motion Picture Association (MPA) is a trade association that represents seven major international producers and distributors of films, home entertainment products and television programmes¹. We welcome this opportunity to comment on the DTI consultation document on possible exemptions from liability for hyperlinkers, location tool service providers and content aggregators.

The issues raised by the consultation are of acute concern to our member companies, who have been developing a wide range of on-line services and are licensing their works to a broad array of media platforms. However, both online and analogue forms of distribution must at present compete with the massive problem of illegal copies of copyright-protected works circulating on the Internet. As demonstrated by recent research², these infringements inflict substantial damage on national audio-visual industries. Further, they are an obstacle to investment in online services. On the other hand, the success of search engine services, such as Google, and content aggregators, such as Yahoo, suggests that no grounds exist for further horizontal exemptions.

It has to be recognised that the Electronic Commerce Directive has failed to create a safe environment for legitimate online business, while creating incentives against cooperation between content producers and Internet service providers. We would emphasise that technological developments and the awareness on the part of Internet pirates of legal developments mean that the terms "hyperlink" and "search engine" no longer have a clear meaning. The term "content aggregator", on the other hand, is and has always been a vague one, overlapping to some extent with "hyperlink" and "search engine". No adequate definition of any of these terms is offered in the consultation document, though such definition would be an unavoidable pre-condition to the drafting of any statutory text. It may be necessary, in the words of Article 21 of the Directive, to consider "the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technological developments". In particular, the threshold conditions of eligibility included in the Digital Millennium Copyright

¹ The MPA's members comprise: Buena Vista International, Inc., Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Releasing International Corporation, Twentieth Century Fox International Corporation, Universal International Films, Inc., Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

² See, e.g., Henning, "An Empirical Study of the Effects of Peer-to-Peer Filesharing on the Film Industry", Bauhaus-University of Weimar (August 2004).

Act (such as a policy for termination of repeat infringers) may be necessary to create a better balance between ISP and right holder interests.

The MPA considers that it is premature to consider any extension of the current exceptions from liability until stable cooperation has been established between ISPs and right holders in the prevention of mass piracy. The focus should be on encouraging efficient action by ISPs to terminate infringements notified to them by right holders and on facilitating the sharing of information to permit infringers, where appropriate, to be brought before the courts. Codes of conduct, as contemplated by Article 16 of the Directive, have a useful role to play in this. Secondly, the terms used in the consultation are highly ambiguous. Any extension of current exceptions for activities so designated would risk the creation of new business models for pirate enterprise.

Accordingly the MPA opposes the extension of limitations of liability at this time. An important goal of the E-Commerce Directive is to facilitate cooperation from service providers to combat effectively online piracy. Unfortunately, such cooperation has not been achieved and ensuring that it is achieved is our priority in any review of the E-commerce Directive or Member State implementing legislation.

We address below the specific questions posed by the consultation document. We shall be happy to provide any further information or comment which may be helpful.

Specific Responses

Question 1 – Do you agree with the EU Commission conclusions in their ‘First Report’ on the application of the Directive concerning Articles 12 to 14? Please give your reasons for your answer.

The Commission concluded that revision of the Directive would be premature, but that legal, technological and economic developments should constantly be monitored. In our opinion, this remains correct. As explained below, technology continues to develop ever more sophisticated means of infringement, while the correct legal treatment of Internet intermediaries is still being explored in the courts, both within and without the EU.

Question 2 - In your experience what are the advantages and/or disadvantages of the transpositions of the Member States that have already included the liability limitation cover for hyperlinks, location tool and content aggregation services? I.e. what has been the impact for service providers, rights-holders and individuals alike with regard to their transpositions?

We have insufficient experience of the operation of the supplementary exceptions in the relatively small Member States in which they have been introduced to form an opinion. We do note that co-operation with ISPs in Spain where the Directive was transposed incorrectly has been problematic. In the other Member States, meaningful co-operation to deal with Internet piracy has been limited. It should be noted that Hungary’s implementation of the E-Commerce

Directive establishes a presumption of liability on the part of ISPs for all illegal content carried by their services.

Question 3 –With other Member States transpositions in mind, which of the liability limitations in Articles 12 to 14 (if any) should apply to each of the following intermediary service providers if the UK were to go ahead and provide legislative cover?

- i) Hyperlinkers;
- ii) Location tool providers; and
- iii) Content aggregation providers.

Please give your reasons behind your answer.

Given the failure of the current exceptions to establish a stable enforcement environment on the Internet, the conditions contained in Article 14 would clearly be the starting point for exceptions specifically tailored to the above three categories of business (it being noted that the terms used cover a multitude of technologically and commercially disparate activities). In addition, the conditions of eligibility set out in section 512(i) of the Digital Millennium Copyright Act (repeat infringer policies; accommodation of “standard technical measures”) should also apply to all exceptions from liability. In the absence of consensus on these points, we are of the view that there should be no extension of exceptions.

Question 4 - Do you think that providers of hyperlinks and location tool services need the extension of any of Articles 12 to 14? If so, what liabilities would be limited? And how significant are the problems currently caused by the lack of this extension? Please explain your reasons, examples would be helpful.

We do not understand the practical need for extending a generalised exception to these uses. It is clearly for those who seek such an exemption to provide concrete instances of difficulty.

Question 5 - Alternatively, would an extension of any of Articles 12 to 14 of the Directive be detrimental to rights-holders and individuals? Please explain your reasons with examples if possible.

The extension of exceptions at this time would create uncertainty for content-based businesses and for potential investors. It would add to the cost of enforcement, which is already high in the UK. This follows from the uncertain meaning of the broad terms “hyperlinkers” and “location tool services”.

Mass piracy on the Internet currently involves many illegitimate intermediaries who try to portray their activities as the provision of links and search services. Since the popular emergence of the World Wide Web, the hyperlink has become a complex phenomenon which may be specifically configured for the enabling of pirate activity. Many pirate intermediaries offer collections of “hash-links” to infringing content. These links contain a small piece of code identifying a specific infringing reproduction of a film or television programme and automatically directing the user to another Internet location where a constantly-updated database of sources for that pirate file can be accessed. BitTorrent and eDonkey sites daily enable literally

millions of users to “share” infringing copies of copyright works. One site, thepiratebay.com (based in Sweden), boasts (as at 13-09-05) some 95,977 such links, all but a very tiny minority putting its users in touch with pirated content. The figure grows all the time. At that date, the site stated that there were 1,464,273 users connected to it sharing files. Operators of such systems make money from advertising and also solicit donations from their users.

Web sites and servers using BitTorrent, eDonkey or similar pirate intermediary systems employ a form of hyperlinking and may also comprise a form of search service. An exception for benign hyperlinks or search services would certainly be used by such illegitimate operators to justify their activities. In any case, the configuration of linking and search services continues to change. Soon each user will be able to operate as his own search engine (see, e.g., <http://www.exeem.com/download.htm>).

It needs to be remembered that the operators of such sites are not ignorant of legal developments. They clearly attempt to shape their services to fit in with their perception of developing jurisprudence. Often there will be a cynical disclaimer of liability, a notice which in fact tends to establish their awareness of the illegal activities in which they are participating.

Question 6 – If you think there is a need to extend limitations on liability to hyperlinkers and location tool providers should this be achieved by an extension of Article 12 or by Article 14 ?

Not applicable.

Question 7 –Is there any action that would give providers of hyperlinks and location tool services the protection they seek, other than through the extension of Article 12 to 14 to these services? Please explain your answer.

The usual methods of commercial risk-control, such as the use of warranties and indemnities, insurance and compliance staff, are presumably available to address any such problem, if it exists. Further, it may be possible for legitimate providers of such services to enter into sectoral arrangements with right holders to minimise the risk of liability.

Question 8 – What (if any) would be the detrimental consequences caused by the extension of Articles 12 - 14 to providers of hyperlinks and location tool services? I.e. would it seriously impact on your profits/ viability or provide a major irritation? Please explain your reasons with examples if possible.

Existing jurisprudence in the UK seems to offer no dangers to legitimate services of this type. We are aware of no concrete examples of such damage, at least in relation to intellectual property rights. It is conceivable (though we know of no concrete examples) that such operators might incur liability under other fields of the law, such as defamation or contempt of court, in which strict liability may arise. Any solution to such problems should be tailored to the specific area of law concerned.

Question 9 – Do providers of content aggregation services agree with the assumption that if they are to be covered under Article 12 – 14, then the legislative vehicle will need to be primary rather than secondary? Please explain your reasons for your answer.

Although this question is not directed to us, we observe that primary legislation would certainly be required for any extension of exceptions to hyperlinkers, location tool services or content aggregators. There is no basis in the Electronic Commerce Directive for the application of section 2(2) of the European Communities Act 1972. For reasons set out in answer to Question 16, however, we do not consider that even primary legislation would be effective to enact any further exceptions to liability for copyright infringement.

Question 10 – If you think there is a need to extend limitations on liability to content aggregation services, should this be achieved by an extension of Article 14 of the Directive? Please explain your reasons for your answer.

Any extension of exemption to content aggregators should take as its starting point Article 14 of the Directive. However, as indicated above under Question 3 above, the current conditions of exemption have proved inadequate and, if anything, should be strengthened.

Question 11 - Do you think that there is any course of action that would give providers of content aggregation services the protections they seek, other than through the extension of Article 14 to these services? Please explain your answer.

Existing jurisprudence in the UK seems to offer no dangers to legitimate content aggregators. The usual methods of commercial risk-control, such as the use of warranties and indemnities, insurance and compliance staff, are presumably available to address any such problem, if it exists. Further, it may be possible for legitimate providers of such services to enter into sectoral arrangements with right holders to minimise the risk of liability. In saying this, however, we do not exclude the possibility that, if a concrete need can be demonstrated, specific adjustments could be made in the law of defamation and contempt of court to protect aggregators who have acted innocently. However, the high complexity of both these legal areas argues against any attempt to legislate horizontally across several different fields of law.

Question 12 - Do providers of content aggregation services believe they are primary or secondary publishers? Please explain your reasons for your answer.

No comment.

Question 13 – Would parties most affected by these proposals provide in their reply to this consultation, facts and figures that illustrate the benefits and costs that you/your sector would incur if the UK Government either went ahead (or not) with a legislative measure to cover the liability of providers of hyperlinks, location tool and content aggregation services.

It is impossible to provide more than a guess as to the costs of increased piracy and enforcement activities in the UK and abroad, were the proposed exceptions introduced. The loss to the DVD

industry in the UK from Internet piracy over the two years 2003 to 2004 was estimated by TNS to be of the order of £58,000,000. The effect of piracy on retail and rental businesses is anecdotally said to be substantial. It must also be realised that ordinary street piracy is closely connected to online piracy, as the source of pre-release masters is often a download from the Internet.

Question 14 –Would service providers who provide hyperlinking, location tool or content aggregation services, please indicate the number of notices/ claims of illegal content that they have received from August 2002 to February 2005? Of these, were there any settled in a UK Court of law? If not, did the out of court settlements reached cause any major detriment to your business turnover? Please would providers give examples to show the scale of the problem for your business.

No comment.

Question 15 – Do you know of any jurisprudence in Member States of the European Economic Area on the liability of Internet service providers since August 2002, that has a direct impact on providers of hyperlinks, location tool or content aggregation services established in the UK?

Such services should not be directly affected by decisions in other jurisdictions, given the “country-of-origin” principle. However, the Norwegian Supreme Court’s decision in the *Bruvik* case (“napster.no”) in January 2005 seems to take a similar view to that expressed by the United States Supreme Court in its July 2005 *Grokster* decision. Neither *Bruvik* nor *Grokster* offer any difficulty for legitimate operators in this field. In Germany, a number of preliminary injunctions have been granted against operators of eDonkey sites.

Question 16 – Are there any other issues the UK Government should take into account when considering its policy on liability cover for providers of hyperlinks, location tool and content aggregations services?

Any re-examination of the liability of ISPs must take into account the obligations of the UK under the Community *acquis* and international treaties, such as the Berne Convention and TRIPs Agreement. In particular, Article 5 of Directive 2001/29/EC on Copyright in the Information Society contains an exhaustive list of permitted exceptions and limitations to the exclusive rights of the copyright owners listed in Articles 2 and 3 of that Directive. Any such exceptions or limitations to copyright owners’ exclusive rights must also pass the three-step test in Article 5.5 of the Directive. While the Copyright Directive is without prejudice to the Electronic Commerce Directive (see Recital 16), EU Member States are not competent to introduce new exceptions to copyright, absent a revision of one or other Directive. If there were new horizontal exceptions, they would have explicitly to exclude copyright to avoid non-compliance with Article 5 of the Copyright Directive.

Furthermore, Article 13 of the TRIPs Agreement requires that any limitations on exclusive rights be confined “to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder” (see also, Article

5.5 of the Copyright Directive). Any exemption of ISPs from liability for copyright infringement, which further restricts the scope of the exclusive rights of copyright owners (and at the same leads to the economic betterment of ISPs), will necessarily conflict with normal exploitation of copyright works on the Internet and unreasonably prejudice the legitimate interests of the copyright sector in exploiting that content online, something MPA members are already beginning to achieve through diverse Video-on-Demand services. This is a complex development for the audio-visual industry and any further exemption from liability for competing illegitimate services could be damaging to this effort.

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