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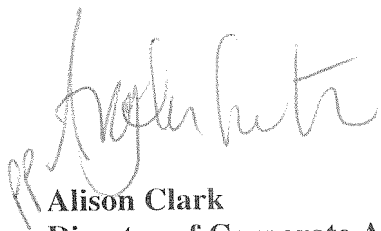
Dear Mr Walcott,

**DTI Consultation Document on The Electronic Commerce Directive:
The Liability of Hyperlinkers, Location Tool Services and Content Aggregators
September 2005**

Please find enclosed News International Limited's response to the above consultation.

If you have any questions, please do not hesitate to get in touch.

Yours sincerely,



Alison Clark
Director of Corporate Affairs

encl.

**DTI CONSULTATION DOCUMENT ON
THE ELECTRONIC COMMERCE DIRECTIVE:
THE LIABILITY OF HYPERLINKERS,
LOCATION TOOL SERVICES AND CONTENT AGGREGATORS
SEPTEMBER 2005.**

Response from News International Limited (NI)

About NI

News International Limited subsidiary companies, Times Newspapers Limited and News Group Newspapers Limited are, respectively, the publishers of The Times, The Sunday Times, News of the World and The Sun.

In addition to Rights interests in traditional publishing, NI offers access to, and owns content in, significant on-line services and other 'new' media such as telephony, mobile and digital audio. NI is the owner of over 400 registered trade marks.

Summary

1. NI does not believe we should be extending the limitations on liability when in fact provisions of the Directive have been of little practical use in dealing with the unlawful dissemination of copyright works on the internet. Current exemptions, by exempting ISPs from liability, have created an obligation for content owners to actively police and monitor the entire internet.
2. NI oppose any further erosion of the basic tenets of copyright law: that permission is required for access to, and reproduction of, material. Whilst NI may not indeed wish to do so, it strongly believes that rights holders should clearly be able to refuse such access (and reproduction) if they so choose.. Access to copyright material should be conducted by way of contractual arrangements, mitigated by provisions such as warranties, indemnities and insurance. NI has had dealings with many companies who have in the past gained, and continue to gain, unauthorised access to our content and re-use such content without permission in order to grow their own businesses
3. Considerable improvement is needed in relation to the way ISP's currently conduct their business with both their end users and with aggrieved complainants. ISP's should be regulated under clear guidelines/protocols/legislation in relation to the verification of *meaningful contact information* on users, *reasonable* time-limits to respond to notice and take-down, revision of existing data protection laws and establishment of sound business practices, to prevent ISP's from hiding behind the release of important data that would enable the infringed to seek remedy and restitution. The existing default position of ISP's of non-cooperation should be curtailed. Such requirements would ensure access to justice for *all* content owners, however small in terms of size or financial muscle, rather than a denial of such access through being forced to seek hugely costly injunctive relief via the courts before ISP's will take-down infringing material (see an example of such a situation in question 8).

4. NI wish to remind the DTI that one of the one of the main reasons that ISP's were granted limited liability for hosting material was the argument that such businesses would die at birth or suffer catastrophic losses through court actions over copyright and defamation. On the contrary it would seem that such businesses have 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 chosen to operate a policy of poor identification of users and slow response to rights-holders complaints.
5. NI asserts that there should be no "right to aggregate" created, which would move away from the permissions-based principles of copyright. Aggregators make commercial gain from exploiting 3rd party content and should assess the risk if they do not wish to run their businesses having obtained *prior* permission to perform such tasks as 'spidering' websites or reproducing or summarizing copyright content.
6. NI believes that there may be merit in examining a limitation on liability in relation to certain criminal liabilities which cannot be mitigated contractually (specifically and solely contempt of court or financial markets fraud) that may arise from automated *authorised* feeds received by content aggregators and which cannot reasonably be reviewed in advance of processing.

NI Responses to the consultation questions

- 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 reasons for your answer.**

NI believes that the report (which concluded that there was as yet no need to adapt the Directive) supports the NI view that any extensions to the existing exemptions are premature and case-law does not support the need for such exemptions.

- 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?**

Since the Directive does not define what is meant by the expressions "hyperlink" or "location tool services", there is a marked lack of uniformity as to the adoption by some Member States of a) the exemptions and b) the way those exemptions have been categorised. NI is not aware of any significant case-law in the relevant Member States that would be helpful in providing examples of the impact on the transpositions.

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 ahead and provide legislative cover?

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

Please give reasons behind your answer

NI does not think that the limitations in Articles 12 to 14 should apply to any of the intermediary service providers listed above. One of the main planks upon which the limitations on liability in Articles 12-14 were concluded and upon which consensus was (exhaustively) reached was that the providers would not be gaining any additional economic benefit from such transmission. All the intermediary providers listed above seek to utilise content in order to maximise their revenues, grow their businesses and exponentially promote their services to end users. Such commerciality can be in direct competition with NI's own primary publishing services and can actively damage our business products. NI has dealt with many cases of unauthorised use of content from both hyperlinkers and content aggregation providers. Both providers can be seen to be cannibalising revenue streams from our internet and hard-copy publications, attempting to woo readers away from reading the newspapers (and from our relationship with advertisers) and ingraining habits of acquiring news or other content from multiple media outlets, thus jeopardising the loyalty of readers that NI works hard to maintain. While this negative effect is not universal, and in some cases we choose to authorise certain activities (with relevant liabilities agreed in a contract), we should be entitled to stop them or decline to authorise them in the same way as other proposed exploitation of our content. More specific examples can be seen in questions below.

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.

NI does not believe that hyperlinkers or location tool services need the extension of any of Articles 12 to 14. NI does not believe such providers have experienced any meaningful problems by the lack of this extension (that are not attributed to normal commercial risk for choosing to run their type of business).

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.

NI believes that an extension of any of the Articles would be detrimental to us. Examples are numerous but here are two in particular:

- a) A hyperlinker or content aggregator "spiders", without permission, the TimesOnline website and creates a database of news-links, summaries, cached copies and/or extracts which are offered as a package to however many hundred or thousands of end-user individuals or companies. The Times receives a legal complaint regarding libellous matter

in one of its on-line articles. The Times has strict procedures in relation to such a complaint and would immediately remove or request the removal of, the entire offending article (regardless of merits of the complaint) from all databases (both internal and external, such as Lexis Nexis). Under the Duke of Brunswick case of 1849 (and confirmed by the Court of Appeal in 2001 in *Loutchansky v Times Newspapers Ltd*) each publication is a fresh cause of action with its own limitation period. Therefore unauthorised internet publication, once taken out of our control, increases risk of contempt of court and could result in civil or criminal sanctions against us which should properly be applied against the unauthorised publisher. Hyperlinkers and content aggregators both present real dangers to us on this point. In fact, a lawyer at Times Newspapers was summoned to court to explain to an extremely irate judge why the complainant solicitors were able to find and access an article which was subject to a removal order by the court and which we were obliged to comply with.

- b) Location tool providers offer far more than merely 'search engine' capabilities and services. One only has to look at Google or Yahoo to see the range of collateral services that have sprung up – including Google Talk (free internet telephony), Google News, the Google 'world archive' plan, Yahoo Music and Yahoo Property- to see that these providers offer considerable diversity in the nature of their services.

One such major location tool provider, which also provides a variety of hosting services, offered a photo service whereby it partnered with a fulfilment company to sell prints of photographs uploaded by users which could then be purchased on-line by any user via the provider's website. The provider took a cut of the sale and the fulfilment company printed and sent out the photographs. NI found clearly infringing material offered for sale by an individual (the images had our logos on them) but the provider was unable to provide us with information on the seller since they only had an IP address and had not bothered to seek to obtain or verify any of his or her personal details. In any event, they said that without a court order they would refuse to give any data to us, despite such disclosure being authorised by their own terms and conditions, and in law under the Data Protection Act. In addition, the provider refused to acknowledge any culpability (despite making money from the enterprise) since they relied on the hosting exemption and said that they (presumably deliberately) did not police the material on the site, so they could have no constructive knowledge. So in this instance we had suffered quantifiable damage but had no recourse against either the infringer or the enabler of the infringement (the provider). We ended up £4,000 out of pocket since we were forced to take legal advice as to our remedies (which proved nil). This situation presents an obvious lacuna in available remedies for the infringed party and which could easily allow material damage (including legal costs) to go completely uncompensated despite an identified third party having facilitated and profited from the infringement. In our experience, the provider's behaviour in this episode was wholly in keeping with their general stance of non-co-operation and/or evasion of liability.

- 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 14?**

NI do not believe that at this point in time the law needs to change. It is too premature to consider any extensions.

- 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.**

Firstly, NI is surprised that hyperlinkers and locations tool services feel they need further protection, since NI is not aware that either of these providers are regularly finding themselves the butt of civil litigation or at the wrong end of court judgements (and if they are being ruled against, it would suggest that they are clearly causing material damage to the complainant and could mitigate their risk by improving their governance). To our knowledge there has been no significant reported civil or criminal case against either of these types of providers.

Secondly, existing laws, most specifically contract, are the basis upon which all authorised commercial dealings should take place. The providers can be protected by indemnities and warranties, and can even take out insurance to cover risk. If they are not able to negotiate such terms, then they proceed at their own risk, and cannot complain if they become liable as secondary infringers.

- 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.**

While NI accepts that many websites and content owners may be happy to embrace some or all of the activities that the providers supply, it does not follow that all websites should be obliged to embrace them. There are good and valid reasons why they may not, and their right to determine the fate of their content should be theirs and theirs alone, consistent with copyright law. It is abundantly clear that the law as it stands has been no obstacle whatsoever to the commercial and popular success of companies which seek additional protection from the law. It should be remembered that companies such as Google, with a market capitalisation of over \$80bn, have achieved their success substantially through the exploitation of third party content for which they have paid nothing. While content owners provide the investment in the material, Google reserve all the direct commercial gains from their “location tool” for themselves, providing only indirect benefit to content owners via the additional traffic they gain. If content owners judge this to be a fair trade, then it can continue without interruption. If they judge it not to be, or wish to simply be excluded, that should be their absolute right.

News Group has an ongoing legal case against a company who are providing hyperlinks, location tool services and content aggregating, making money from banner advertising and premium rate diallers. The company owns a website containing over 130,000 stills, video grabs, and other content, all of which were obviously infringing (there was a notice on the site stating “we do not own the copyright in any of the material on this site – we hope you will think by us linking and reproducing the material that this will be adequate recompense”). Many of the images were of a hard-core pornographic nature, mixed up with innocent celebrity photographs. The owner refused to take down all the material that we indicated belonged to us, and the ISP refused to take any action whatsoever unless we could individually identify each infringing picture, at which point the ISP obligation would have been merely to remove the content. In a small team of three, it was impossible for (and, given the subject matter of the site, unreasonable to expect) the IP department staff to search through those 130,000 images. The ISP continued to host the site despite it being an overwhelmingly clear case of large scale and commercial copyright infringement. NGN were

forced to seek (and successfully obtained) an interlocutory injunction against the website. However, this came at considerable price (over £10,000 and rising and not including in-house legal costs) and would not be available to smaller businesses or individuals without significant financial resource. The ISP only gave notice to the customer once we had sent them a copy of our injunction, and even then it was apparent that they did so because they did not wish News Group to give them any bad publicity. From the date of first notice to the ISP and website to the date the ISP removed the infringer (who just immediately set up on a different server and host and continues in business to this day) 18 months elapsed. All the while some of our copyright material remained on the website.

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.

NI agrees with the assumption in the DTI consultation document that provisions to address the changes to the liabilities of content aggregation services linked to any extension of Articles 12 to 14 of the Directive cannot be done by regulations made under section 2(2) of the European Communities Act 1972. Therefore, any provision would need to be covered by primary legislation.

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.

NI does not believe there should be, or there is need for, an extension to content aggregation services.

There is some sympathy for the situation of certain providers who receive **authorised** automated feeds and who cannot contract out of (criminal) liability (eg contempt of court and financial regulatory fraud). However, before any such limited extension could be contemplated, there would need to be extensive discussion on the definition of the providers who could claim exemption. "Content aggregation services" is far too broad a term to be applied to the recipients of such a potential exemption.

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.

Please see answers to 7 and 10 above

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

n/a

13) Would parties most affected by these proposals provide in their reply to the 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.

The NI IP department deals with over 200 serious infringements per year (we are aware of innumerable others which we do not have the resources to action). In the vast majority of cases which are resolved we are unable to recover damages or costs. A significant proportion of our time is spent in dealing with unauthorised access or use of our copyright or trade marks. An extension to the current exemptions would present a charter for wide-spread, serious infringement which would have an undoubted economic impact on our business models (for example, content aggregators using our content at will, profiting from it, and taking our readers with it). We would estimate that those 200 serious infringements would at least quadruple, and would dramatically increase the cost of policing and monitoring infringing activities, as well as opening NI up even further to the risk of defamation and contempt complaints.

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.

n/a

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?

No

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 aggregation services?

UK Government should consider the suggestion 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?

There is a risk that in pursuance of the laudable desire to ensure that the UK digital economy is competitive and successful, legislation could stray (and to an extent has already strayed) into inappropriate areas and give rise to perverse outcomes.

One example of this possible perversity would be an exemption which actually incentivises poor corporate and operational governance. We can see from the various examples above how this is already happening, where ISPs are gaining a competitive advantage by ignoring user behaviour, failing to identify users, and thus scoring a “double whammy” against content providers who carry both the legal and administrative cost of dealing with the infringement and the operational cost of lost business – both entirely innocently incurred.

Another example would be an exemption which creates a special environment for certain types of businesses who are given “legal exempt” status which means they are unencumbered by the legal and regulatory environment of their competitors. For instance, unauthorised aggregators and location tool services who wish to have free access to the content owned and paid for by others, but also want to be able to pass back to their unwitting suppliers any costs or liabilities arising from their appropriation of content.

If any such special treatment is justified by the special characteristics of the new digital environment, it should always be designed to provide the minimum level of protection needed, and should always be subject to reasonable and appropriate qualifying criteria to prevent such unwarranted legal and competitive outcomes undermining the legitimate interests of others.

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