

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

I am writing with Reuters response to the DTI's consultation document on content aggregation. We are very grateful that DTI is consulting on this issue.

Introduction

(i) The importance of content aggregation

Content aggregation is an increasingly common activity among online publishers. Aggregating content from third parties is an important method of creating "stickiness" to attract and maintain Internet users' loyalty. The UK is home to some of the world's leading publishers, many of whom both generate their own material and aggregate content from third parties. HM Government should therefore strive to ensure that this important activity is supported by the best possible regulatory environment.

Reuters welcomes the renewed focus of the European Union, through the i2010 programme, on boosting Europe's digital economy, and in particular the pledge to promote "*rich and diverse content*." If the EU is to meet its goal of being "*the most competitive and knowledge-based economy in the world by 2010*", it is particularly important to get the regulatory framework right for activities such as content aggregation that are so central to successful online services. This is especially crucial for the UK, which has long been a centre of publishing excellence, as it faces up to increasing global competitive challenges. As Alun Michael said at the i2010 conference earlier this month:

In today's world, Europe risks falling behind the other advanced economies with whom we compare ourselves – the US, Japan, South Korea and the rest; and faces the challenge of relative newcomers to the ICT revolution, such as India and China.

We cannot and must not be complacent. We must lift our game.

It is in that light that we urge DTI, in continuing its review of the important area of content aggregation, to not only examine the regulatory situation in other EU Member States, but to also consider the position of aggregators under legislation in the United States, which retains global e-commerce leadership.

(ii) Reuters as a content generator and aggregator

Reuters is a UK based global publisher of news and information to the world's financial and media markets. It is the only media firm to be ranked in Interbrand's 2005 Best Global Brand survey.

Reuters has over 2,300 editorial staff around the world who between them produce more than eight million words in 19 languages. In 2004, Reuters filed over two and a half million news items from 209 countries around the world, published in 18 languages. It is one of the most viewed news sources on the World Wide Web. Reuters is therefore a significant producer of original news content.

Reuters revenue derives principally from providing realtime information and transaction services to the world's professional financial markets, where at present there are about 350,000 end-users of Reuters services. In order to make sense of global financial markets, investment firms rely on online publishers such as Reuters to aggregate market news, prices and other financial data¹. An example of such a product is Reuters 3000 Xtra².

Third party data is therefore a key component of Reuters services and a "must have" for global market participants. Reuters acquires third party data under licence from its suppliers. The commercial model is

¹ By way of example, a user can type in <RTR.L> in Reuters a product (the code for Reuters listing on the London Stock Exchange), and from there access aggregated information on the company such as research reports, share price performance, news by Reuters and third parties.

² <http://www.about.reuters.com/productinfo/3000xtra>

generally a 'fee per user' subscription basis or a flat fee licence arrangement. Our major rivals, which are all U.S. based, operate on a similar model.

Third party data is automatically coded to help Reuters users find it as efficiently as possible. Reuters does not delay publication of third party data, but publishes it in realtime. To delay publication, for example, for the purpose of checking the information for compatibility with civil or criminal laws may breach financial services regulations by delaying market sensitive information reaching the markets as swiftly as possible, and thereby leading to unlevel and disorderly financial markets through some markets participants having access to markets data before others.

Examples of the third party financial markets data on Reuters services include:

- Exchange data sourced in realtime from a stock or futures exchange. Reuters carries financial information from over 300 exchanges and over-the-counter markets.
- Specialist data is sourced from a third party other than an exchange. This could include pricing data from brokers.
- Company research, sourced from and hosted for almost 1,000 third parties.
- News from third parties whether it is news stories – for example from Dow Jones – or press releases from governments or specialist providers such as PR Newswire.
- Contributed Data, i.e. price and other markets data supplied by Reuters own customers in the financial services sector. The data has many variants and includes content such as real time foreign exchange rates. More than 4,000 Reuters clients across the world contribute prices, opinions and analysis relating to the financial or commodities markets.

At peak market hours, data on Reuters is updated more than 23,000 times per second. With the exponential growth in market data rates, we are working to cater for 250,000 updates per second by 2007.

In summary, Reuters itself produces a huge amount of proprietary content daily. We therefore have a significant interest in ensuring our intellectual property rights are not undermined. However, we are also a large electronic aggregator of content, almost all of it under licence from third parties.

We choose which third parties' content to aggregate, but having made that initial choice, we have no subsequent opportunity to assess that the content has all requisite permissions and/or is not in some way in breach of civil or criminal law. The content is received by us in realtime and there is no practical opportunity for us to vet it. In this respect, we are much like the case of a bookseller who chooses which books to stock on his shelves, but has no idea whether the content of those books is legally problematic.

Answers to specific questions³

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 report noted that, whilst it was not mandatory for Member States to extend the provisions of Articles 12 to 14 to cover hyperlinks and location tool services to correctly implement the Directive, those that did so would develop legal security by so doing. We support this view.

We were, however, disappointed that the Commission did not specifically acknowledge the problems faced by content aggregators that are caused by failing to extend to them the liability limitations.

More and more online publishers are using content aggregation to meet customer demand for comprehensive publications, and as a key means to create “stickiness” for their online offerings.

Under the current regime, aggregators are liable for damages from the moment they automatically aggregate content; ISPs that cache or host are only liable once they become aware that the content is problematic. This disparity is illogical, since both types of intermediary will normally have no knowledge of problems in the content they aggregate unless they are notified of the problems.

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?

Reuters is not aware of any disadvantages where Member States have decided to widen the liability limitation cover.

From a business perspective, the increased legal certainty is however welcome.

We believe that a more relevant and important comparison than between EU Member States is with the United States, the global leader in the knowledge-based economy – a position to which HMG aspires.

Comparing the legal position of content aggregators in the United States with that in the UK is therefore instructive.

Reuters believes the U.S. situation is more satisfactory. There the position of intermediaries for IPR infringement is dealt with under section 202 of the Digital Millennium Copyright Act; section 230 of the Communications Decency Act deals with all other problematic forms of content.

DMCA, s202:

A service provider⁴ shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user material that resides on a system or network controlled or operated by or for the service provider, if the service provider—

(A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

³ N.B. Whilst Reuters supports the extension of the liability limitations to providers of hypertext links and location tool services, our responses focus on our area of primary concern, namely automatic aggregation of third party content under licence with the content owner.

⁴ Defined as a “provider of online services or network access, or the operator of facilities therefor”

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

CDA, s230:

No provider or user of an interactive computer service⁵ shall be treated as the publisher or speaker of any information provided by another information content provider⁶

Case law makes it clear that content aggregators fall within the safe harbours for intermediaries. See for example *Corbis vs Amazon.com* (2004) with regard to the DMCA.

U.S. law provides a massively more secure legal environment for online content aggregators than the UK. In Reuters view, the minimum objective for HMG must be to remove the wide discrepancy with the United States, and the consequent U.S. competitive advantage.

We note that some publishers have raised concerns about apparent risks from extending concessions to aggregation. We believe that these fears are misplaced and that this can be demonstrated by the real experience in the United States. If the world's largest and most innovative publishing market thrives on having adequate protection for content aggregators, the question may fairly be asked why UK publishers should stumble if the UK were to align its regime with that of the United States.

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.

We believe Article 14 provides an appropriate basis for extending legislative protection from liability to content aggregation services.

At present Article 14 fails to adequately cover content aggregation because it only limits exemption from liability for third party content to content provided by a "recipient" of the service. So, as currently implemented in the UK, service providers like Reuters that electronically aggregate content under licence from third parties that are not their customers remain liable for content that is in some way problematic (e.g. defamatory, fraudulent, negligent, breaches confidentiality undertakings, breaches someone else's copyright, is in contempt of court, and/or falls under any other of the myriad categories of problematic content). However, if such content originated from one of their customers, the liability provisions would apply.

⁵ The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services operated by libraries or educational institutions.

⁶ The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

The distinction is entirely illogical and haphazard.

By way of example: Reuters aggregates material under licence from Publisher A and Publisher B. Publisher A also subscribes to Reuters products (i.e. is a “recipient of the service” in ECD terminology) but Publisher B does not. Reuters would have no liability for problematic material aggregated from Publisher A until put on notice, but liability would attach the moment it received material from Publisher B. This is nonsensical.

The practical problems for publishers that aggregate are therefore essentially the same as for ISPs. The difference is that, under the current UK regime, aggregators are liable for damages from the moment they automatically aggregate content; ISPs that cache or host are only liable once they become aware that the content is problematic. As discussed above, this disparity is illogical, because both automated aggregators and ISPs that cache/host normally have no knowledge of problematic content on their services until they are notified. U.S. case law provides a useful illustration of the position of aggregators:

High technology has markedly increased the speed with which information is gathered and processed ... While CompuServe [here acting as an aggregator] may decline to carry a given publication altogether, in reality, once it does decide to carry a publication, it will have little or no editorial control over that publication's contents.

[...]

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store or newsstand would impose an undue burden on the free flow of information.⁷

Notwithstanding the strong support we would have for a horizontal approach to all types of liability, we are aware of, and must take account of, those publishers who fear for the impact on intellectual property rights of extending liability limitations to additional form of intermediaries.

Reuters recognises these concerns and therefore encourages DTI to limit extending the liability concessions to (1) automated aggregation that is (2) under license, and (3) for all liabilities other than IPR.

As noted in our answer to Question 2 above, this solution would align with the United States, where liabilities relating to IPR infringement are covered under one regime (the DMCA) while the Communications Decency Act, and the cases following from it, address liability in respect of all other forms of delict content.

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.

The choice of legislative vehicle is a choice for government. We do however believe that there may be flexibility for HMG to make very minor drafting amendments to the definition of “recipient” that would have the effect of removing the anomalies illustrated above, while remaining within the scope of the E-Commerce Directive.

⁷ Cited in *Cubby vs CompuServe*, 1991

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.

See our response to Question 3 above.

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.

As stated above in our response to Question 3, and as noted in paragraph 6.2 of the DTI paper, Article 14 of the ECD would already cover content aggregation services were it not for the limitations of the term “recipient of a service”. U.S. legislation does not create the anomalies now arising, which very clearly undermine the competitive position of the UK as a centre for aggregators. The clear and well-functioning liability regime for aggregators that exists in the United States will continue to encourage content aggregation services to be developed there, rather than in the UK.

It is illogical for information provided by “customers” to fall within the concession, while information received from others under licence should not, when the practical difficulties posed by each are usually identical.

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

Secondary in relation to third party content aggregated. We are primary publishers for the content that Reuters originates.

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 sometimes suggested that aggregators could address the problems they face through contract. As the DTI consultation paper recognises, this is insufficient because:

- It is impossible to indemnify against criminal liability;
- Large data sources, including governments licensing public sector information, often refuse to provide indemnities;
- Indemnities from smaller publishers are often insufficient to meet any liabilities that may arise.

An extension in liability limitations to publishers that aggregate under licence would thus remove a significant business risk.

As noted in previous correspondence with DTI, Reuters regularly has to resource responding to issues arising from problematic third party content, covering a myriad of liabilities. It would be highly desirable for aggregators to operate according to a standard regime across liabilities.

Question 14 - Would service providers who provide either 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?

We will respond to this question in separate correspondence with DTI.

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 aggregation services?

The current regulations relating to liability of intermediaries do not establish a sufficiently clear notice and take down regime to prevent unauthorised publishers exploiting unreasonably the liability concessions. We believe DTI should amend the existing regulations to provide greater clarity and certainty to put an end to abusive practices.

In our view, establishing greater clarity and certainty to the notice and take down regime, would reduce some of the fears expressed about extending the regime to legitimate aggregators such as Reuters. Discomfort with the practical operation of the present regime in relation to ISPs has, in our view, increased opposition to extending it more widely. A key objective therefore is to establish a more certain and clearer regime.

We hope this response is useful.

Ben Wilson
Government & Regulatory Affairs
Reuters Group PLC

The Reuters Building, South Colonnade, Canary Wharf, London E14 5EP
T: +44 20 7542 2191 E: ben.wilson@reuters.com

September 2005