

**The draft Electronic Commerce (EC Directive) Regulations 2002**

**British Music Rights Submission to the DTI**

**2 May 2002**

British Music Rights (BMR) is pleased to comment on the draft Electronic Commerce (EC Directive) Regulations 2002 published by the DTI in March 2002, including the draft Interim Guidance and draft Partial Regulatory Impact Statement. British Music Rights is the consensus voice of composers, songwriters, music publishers and their collecting societies. The members of British Music Rights are the British Academy of Composers and Songwriters, the Music Publishers Association, the Mechanical Copyright Protection Society and the Performing Right Society, which together represent over 34,500 composers and songwriters and 2,500 music publishers.

In its November 2001 response to the DTI Consultation document on implementation of the Electronic Commerce Directive (ECD) in the United Kingdom, British Music Rights noted three principal respects in which implementation of the Directive will affect its members. Firstly, because consumer demand for digital access to music is rapidly growing, due to proliferation of file-sharing services like Napster and its progeny; secondly because BMR members are already suppliers of electronic services and generally qualify as micro firms or as SMEs; and thirdly, because as rightholders BMR members are affected by the limitations on liability of service providers for content in Articles 12 to 15 of the Directive. In its response to the earlier Consultation document, British Music Rights made a number of comments and suggestions concerning UK implementation that flowed from these general observations, some but not all of which are reflected in the draft Regulations. The Government is taking an overall minimalist approach to implementation of the Directive, with near literal transposition of its provisions into the draft Regulations in most areas. Accordingly for purposes of the present Consultation we shall focus our attention on the issues of most immediate concern to British Music Rights, namely the conclusion of contracts by electronic means and the limitations on liability of service providers, including the availability of notice and takedown (NTD) procedures.

**Conclusion of contracts by electronic means**

Article 9 of the Directive, which requires Member States to ensure that their legal systems allow contracts to be concluded by electronic means, has not been included in the draft Regulations. According to the Interim Guidance the Government believes that the majority of UK statutes already allow for contracts to be concluded electronically, but the Guidance also states that hard-copy requirements will be retained for transfers of real estate and export controls (Interim Guidance, paragraphs 5.12 and 5.14). Sections 90(3) and 92(1) of the Copyright, Designs and Patents Act (CDPA) require that assignments and exclusive licences of copyright be in writing, and British Music Rights

restates its earlier view that implementation of the ECD in the UK should not change these formal requirements. In addition to serving evidentiary purposes of critical importance to rightholders in the current environment of rampant online piracy of musical content, the 'in writing' requirements also protect individual rightholders who are often in a weaker bargaining position in contractual settings. We therefore request that paragraph 5.14 of the Guidance make clear that contracts for the transfer of copyright may not be concluded by electronic means.

### **Liability of service providers**

Draft Regulations 17 to 19 establish conditions for the limitation of liability of service providers for damages in respect of 'mere conduit' transmission (Regulation 17), caching (Regulation 18) and hosting (Regulation 19) of content. These provisions incorporate Articles 12, 13 and 14 of the ECD almost verbatim with one interesting change, namely, provision in all three Regulations that "the service provider (*if he otherwise would*) shall not be liable ...". (italics added). We do not see how addition of this new language is useful and suggest that it be deleted. The issue of limitations on service provider liability is among the most controversial in the Directive, and Articles 12 to 14 were subject to extensive debate and negotiation over precise wording. Most Member States are reportedly incorporating these provisions virtually unchanged into their domestic law or regulation. In our view, including the phrase '*if he otherwise would*' in an otherwise literal transposition into the UK Regulations creates needless uncertainty regarding the scope of the limitations, and is arguably inconsistent with the relatively harmonised approach being taken across Europe.

### **Notice and takedown**

Regulation 19 provides a limitation on liability for hosting where the service provider acts expeditiously to remove or disable access to content upon obtaining actual knowledge that it is illegal, or upon obtaining awareness of facts or circumstances from which it would have been apparent to the service provider that the activity or information in question was illegal. The Regulations do not specify how a service provider obtains 'actual knowledge' or 'awareness', or what is meant by 'expeditiously' in relation to the timing of a service provider's obligation to remove or disable access to content. Significantly, the Regulations also fail to establish a framework for removal or disabling of access to content through notice and takedown procedures. According to the Interim Guidance (paragraph 6.9), this omission is due to Government's belief that "industry self-regulation and codes of conduct have not yet been shown to be inadequate to the task" and that "sectoral approaches [to notice and takedown] would be more appropriate to the different circumstances ... in each case than the horizontal provisions that would have to be set out in the Regulations."

In its earlier submission British Music Rights emphasised the importance of efficient, cost-effective and fast procedures for removal of material infringing copyright from the service of an internet service provider (ISP) or other intermediary. Based on recent experience with notice and takedown in the copyright field, we believe that the development of horizontal notice and takedown procedures through industry self-regulation may prove difficult or impossible absent some form of legislative backing or incentive to conclude them. British Music Rights continues to support self-regulatory approaches to notice and takedown. However for the reasons below we restate firmly our recommendation that Government take powers, in the draft Regulation implementing

the ECD, to act in the event that codes of conduct or similar voluntary NTD measures cannot be agreed by all stakeholders, and to ensure that ISPs electing not to participate in a voluntary system are not enabled thereby to facilitate the avoidance of copyright obligations by their customers.

In the copyright area, notice and takedown practice in Europe at present consists mostly of direct notices sent by larger rightholders to ISPs, followed by usually rapid takedown of content. These rightholder-ISP relations seem to work because the parties are known to each other, because the volume of notices is not yet extensive and takedown is not overly-burdensome to ISPs, and perhaps most important because ISPs are comfortable that they incur little or no risk by acting on takedown notices received from a reputable and relatively closed set of rightholders. While these informal, bilateral NTD procedures might be viewed as 'self-regulation' at its most basic level, they are neither generalised – ie they are used only by large and well-financed rightholders, not by SMEs or individual rightholders – nor standardised – ie industry-wide standard notices, rules, and codes of conduct are virtually non-existent.

In a recent unpublished paper on notice and takedown prepared for EU Member States, the EU Spanish Presidency points out that industry experiences with self-regulation of NTD across Europe to date are tentative and inconsistent. While mechanisms ranging from self-certifying bodies to hotlines are being attempted (for example the Internet Watch Foundation in the UK for takedown of illegal pornography), the most noteworthy characteristic is the lack of a single NTD model or procedural uniformity. In the United States by contrast, the Digital Millennium Act of 1998 (DMCA) provides a statutory NTD procedure applicable to copyright, compliance with which provides a *safe harbour* immunising ISPs from liability for damages for copyright infringement as well as for the consequences of wrongful takedown. By most accounts the US rightholder and ISP industries are satisfied with the results obtained under the DMCA system.

Members of British Music Rights are active in RightsWatch, a two-year EC-funded project that is exploring the development of NTD procedures for copyright in keeping with the policy preference for self-regulation expressed in Article 16 of the E-Commerce Directive. Intensive negotiations took place during the second half of 2001 between copyright owner and ISP interests within RightsWatch to develop a code of conduct that would support a UK-based pilot to test NTD procedures. The code proved impossible to agree, however, and the pilot was not launched, due in part to *lacunae* in the ECD that are now being carried forward wholesale in the draft UK Regulation. Among these gaps are the following:

- definitions or guidance on the meaning of 'actual knowledge' and 'expeditiously';
- guidance on the minimum elements of takedown notices;
- clarification of the relationship between data protection rules and NTD procedures (eg circumstances under which ISPs must provide right holders with information relevant to copyright infringement, including contact details of ISP customers); and
- clarification of the rules applicable to stakeholders that do not adhere to voluntary codes, including sanctions for ISPs' failure to act on takedown notices.

While some of these gaps may be filled by industry self-regulation without more, both the RightsWatch experience and inconclusive attempts thus far to develop NTD procedures Europe-wide lead us to fear that differing approaches to how the limitations on liability are given practical effect in domestic law – eg by providing a DMCA-style *safe harbour* – may impede attempts to develop horizontal NTD procedures on a voluntary basis without appropriate statutory support. If voluntary agreement could be reached on NTD procedures dealing with the issues above as part of sector-specific codes of conduct, recognition of a statutory *safe harbour* conditioned on review and approval of such codes by designated Government entities might be appropriate in future. The US DMCA model of a combined NTD procedure and *safe harbour* should be carefully examined in this regard.

Efforts to develop self-regulatory NTD procedures are ongoing, and will continue following legislative implementation of the E-Commerce Directive across Europe. At European level the Spanish Presidency is putting forward key issues to be addressed by Member States in encouraging the development of balanced, horizontal NTD procedures, and the European Commission will report in July 2003 on the need for ‘adaptation’ of the ECD in several areas related to the liability of service providers, including NTD procedures. RightsWatch will also continue to work towards developing consensus on discrete elements of copyright-based NTD procedures for deployment across Europe, even if full-blown codes remain elusive in the present environment.

In the UK, Government has accepted the obligation to ensure that the benefits of e-commerce are not denied to UK business, particularly SMEs, through unclear legal rules. The draft Partial Regulatory Impact Assessment (PRIA) states that the new Regulations are intended to “create a framework within which UK business (particularly SMEs) and consumers will have the legal certainty needed to take full advantage of the opportunities offered by e-commerce” (PRIA, point 2.(i)). Failure to harmonise the conditions for limitations on service provider liability for content is identified as a potential threat to competitiveness (*ibid.*, point 2.(ii)(d)). From the perspective of British Music Rights, a real risk to competitiveness would arise if inconsistent NTD procedures were to apply in different European territories. For example, ISPs might defend their failure to act on specific notices by arguing that the notices were not submitted in accordance with the correct NTD procedure for the country in which the relevant server was located. We believe that the borderless character of the Internet requires development of similar or identical NTD procedures within the European Union, if not globally, to prevent such problems from arising. It bears repeating that study of the US DMCA model should be part of this effort.

British Music Rights defers to Government’s view that for the time being industry self-regulation in the area of notice and takedown ‘ha[s] not yet been shown to be inadequate.’ But if voluntary codes are not developed and widely accepted by industry and SMEs within a reasonable timeframe, Government may be required to act. We urge that it take powers to do so in the current draft Regulations.