
**THE RESPONSE OF THE BRITISH PHONOGRAPHIC INDUSTRY
LIMITED TO THE DEPARTMENT OF TRADE & INDUSTRY ON
THE DRAFT IMPLEMENTING REGULATIONS FOR THE E-
COMMERCE DIRECTIVE AND THE GUIDE TO BUSINESS – THE
ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS
2002**

**THE RESPONSE OF THE BRITISH PHONOGRAPHIC INDUSTRY LIMITED ("BPI")
TO THE DEPARTMENT OF TRADE & INDUSTRY ("DTI") ON THE DRAFT
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GUIDE TO BUSINESS – THE ELECTRONIC COMMERCE (EC DIRECTIVE)
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Introduction

The BPI represents the views of around 295 British record companies, which account for 90% of recorded music output in the United Kingdom. The BPI and its members, which include both members of multi-national groups and SME's are actively involved in online activities. The industry is facing challenges of developing new methods of distribution against a background of a massive increase in piracy facilitated by the online environment.

The BPI generally supports the implementing regulations but has comments on the implementation of the Country of Origin Principle

In addition we wish to confirm our support for the Government's view in respect of self regulation of 'notice and takedown' procedures. Our views differ in some respects from the views submitted to you by the Digital Content Forum (DCF).

Notice and Takedown

The BPI is a member of the Cyber crime IAG of the DCF and has reviewed a paper being submitted by that group.

The DTI will see from that paper that the BPI does not agree with the approach put forward by this IAG of the DCF and we set out the reasons below.

The BPI supports the Governments position in the draft Regulations and agrees with the principles set out on paragraph 6.9 of the Guide for Business favouring self regulation.

ISP members of the IAG have argued for additional safe harbour provisions to protect them from claims from customers whose services are taken down after the ISP has obtained actual knowledge of infringement. The liability provisions in the E-Commerce Directive provide sufficient framework for the development of flexible and efficient solutions in day to day practice. At this stage there is neither a need nor would it be beneficial to go any further.

We would like to share with you some of our experience in enforcing our members' rights in the online environment to illustrate why we support the approach taken by DTI:

The online environment is a new developing market and we all have little experience. The record industry has been one of the first industries to be seriously damaged by on-line piracy.

We are not aware of any litigation being commenced in relation to any notices the BPI we have given to ISP's.

Copyright infringers are unlikely to claim damages for removal of a site when they have been carrying out an illegal activity on their site. There is a low risk of claims and these issues can easily be dealt with by ISP's and are dealt with today in contracts with customers.

It has been suggested that there should be a mechanism for government approval and review of agreed codes of conduct coupled with a power to review those codes. In practice, the BPI finds increasingly that different ISP's want notices to include information in different ways. We are not developing one Code of Conduct to suit all ISP's for infringement of sound recordings but are talking to individual companies and working together to establish a way of meeting both sides needs which differ in each case.

The most prominent project addressing the issues of notice and take-down, the Rightswatch project funded by the European Commission, has over the years tried to find a code that suited all rights holders and ISP's and it proved to be an impossible task.

In our view especially at this early stage of development of the market there is a need for complete flexibility at a business to business level and Codes will not be developed even on a sector basis initially. The needs of specific businesses can differ even if they have similar rights ownership in common. Approving and reviewing a plethora of individual arrangements between business entities would be difficult and expensive task. Rightswatch has shown us already that this is not yet achievable and it is possible that general codes of practice may never be a solution. Certainly, at this stage an approval and review process subject to government intervention would be ill-advised.

Regulation 7 – Internal Market

Country of Origin:

BPI believes that the country of origin principle in Article 3.1 and 3.2 of the Directive is of vital importance for the development of all industries involved in electronic commerce. The UK government should adopt a strong and clear country of origin principle in implementation of Article 3.1 and 3.2 of the Directive. As a result, service providers based in the UK should, as far as the areas of law covered by country of origin principle are concerned, be able to rely on the UK legal environment even as regards to action whose consequences are felt in other Member States. This objective is clearly set out in Recital 22 of the Directive.

Article 3(1) of the Directive in no way refers to enforcement authorities and covers all areas of government. Yet Regulation 7(1), as drafted, only covers the activities of enforcement authorities. We are concerned that Regulation 7(1) falsely reduces the country of origin principle to a mere supervision and enforcement provision. This is not fit to cover the various areas of law and

practice in the co-ordinated field given that in many areas the legal framework will be set by legal precedent rather than the executive branch.

Therefore, the current version of Regulation 7(1) falls short of a complete implementation of Directive and would disadvantage established service providers relative to their counterparts in the rest of the EU by not giving them legal certainty that the Directive intends to provide.

Consequently, Regulation 7(1) has to be reworded in order to meet the standard set by the Directive. In revisiting this section, it should be taken into account that countries that have already adopted their implementation of the Directive, such as Austria and Germany, have opted for a clear and streamlined approach giving a high level of legal certainty.

The German implementation of the Directive in translation states: -

Part 1.§4(1) “Service providers established in the Federal Republic of Germany and the teleservices thereof shall be subject to the requirements of German law even if the teleservices are offered or rendered commercially in another state within the scope of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particularly electronic commerce, in the internal market (OJ 178, p.1).”

Even clearer is the Austrian implementation:

Part. 6. Par. 20 (1): “In the co-ordinated field (par. 3(8)) the legal requirements for a service provider established in a Member State shall be determined in accordance with the law of such state.”

As a minimum the newly drafted Regulation should provide that information society services established in the United Kingdom shall be subject to the requirements of UK law even if the services are offered or rendered in another Member State.

The Guide for Business must be adjusted accordingly to reflect these changes.

Pre-contractual Relationship with Consumers

The following comments relate to the interpretation of Regulation 7 (3) disapplying Regulations 7 (1) and 7(2) to contractual obligations concerning consumer contracts.

Whilst the Directive limits the carve-out to the contractual relationship, it remains silent on the pre-contractual relationship, an omission also reflected in the Regulation. The possibility of including pre-contractual matters as a derogation was discussed and rejected when the Directive was negotiated. Nothing in the Directive, and certainly not Recital 56 require extending the derogation for contractual obligations concerning consumer contracts to pre-contractual matters.

Despite the fact that clarity and legal certainty as regards to pre-contractual matter is of high importance in particular to the UK industry, the Guide for Business section on exclusions, paragraph 4.8, bullet 3, sub-bullet 2 / 3, state: -

“[The exclusion applies to]

-
- *essential information that has a determining influence on the decision to contract, which must be provided in accordance with the requirements of the consumer’s member state, and*
- *requirements applicable to such contractual obligations, including requirements to do certain things before entering into a contract.....”*

The Guide for Business is misleading on these points as these provisions can be read to extend the scope of the exclusion to pre-contractual relations and obligations going beyond the context of an individual contractual relationship.

Paragraph 4.8, bullet 3, sub-bullet 2 picks up an issue from a Recital to the Directive putting it into a different context. In any event, if bullet 3, sub-bullet 2 was maintained it needs to be clarified that ‘determining influence on the decision to contract’ applies to specific concluded contracts only, and, to the extent that it may apply to pre-contractual discussions, only to those leading to a concluded contract.

In the same manner, Paragraph 4.8, bullet 3, sub-bullet 3 should be re-drafted deleting all references to requirements ‘to do certain things’ before entering into a contract.

If you wish to discuss any of the issues raised contact Judi O’Brien, Director of Legal Affairs at the BPI.

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Judi O’Brien
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