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Mr Guy Russell

Communications & Information Industries Directorate

Department of Trade & Industry
151 Buckingham Palace Road
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25 May 2002

Dear Guy Russell

DRAFT ELECTRONIC COMMERCE (EC DIRECTIVE) REGULATIONS 2002

The following comments are submitted on behalf of The Publishers Association, the representative body of book, journal and electronic publishers in the United Kingdom. They follow our comments previously submitted on 13 November 2001, in response to the DTI's Consultation Paper on UK implementation of the E-Commerce Directive generally. In this response we will limit our remarks to those Regulations of particular concern to publishers at this time:-

- Regulation 5: Private International Law
- Regulation 7: Internal Market
- Regulations 17-21: Liability of ISPs

Regulation 5: Private International Law

In our response of 13 November we repeated our strong support for the "country of origin" principle, and reiterated our belief that exposing e-publishers to 15 member states' sets of rules would be a disproportionate and unjustified burden (a burden which will rapidly increase with EU Enlargement). It is therefore disappointing to note that Regulation 5 expressly excludes any effect on the existing rules of private international law. These rules might in some cases specify that the applicable law regulating UK ISPs should be the country of origin, but not all (particularly in consumer disputes where services are actually targeted to another member state). This falls some way short of the general "country of origin" regime which it was hoped and believed the E-

Commerce Directive
was intended to put in

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place. In particular, there is no express provision that information society services established in the UK will be subject to the laws of the UK.

UK publishers are, of course, no strangers to legal liability in foreign jurisdictions, whatever the chosen law of publishing contracts may be, since the business of publishing in itself involves a number of external legal risks such as libel or obscenity, as well as commercial trading laws, which are subject to a whole range of jurisdictions worldwide. Publishers have always faced this legal risk underlying international trading, even in the print on paper world, and UK publishers are not expecting Internet or electronic trading to be any safer or easier. They were hoping, however, to have at least a level playing field with other EU member states.

We gather from our colleagues in the advertising industry (see Interactive Advertising Bureau letter of 30 April 2002) that the following 11 member states have all included specific country of origin provisions in their implementing laws: Austria, Germany, Luxembourg, France, Spain, Denmark, Sweden, Finland, Belgium, Ireland and Portugal, leaving Britain more or less out on a limb. "Out on a limb" is not where publishing businesses trying to do electronic business in the EU want to be.

We urge the UK Government to reconsider whether a failure to specify "country of origin" provisions for UK e-businesses will not be dangerously inconsistent with other member states' laws, and put UK e-businesses at an immediate trading disadvantage - the exact opposite of the UK's stated political objectives.

Regulation 7: Internal Market

We note with concern the broad wording in Regulation 7(4), giving any "enforcement authority" (itself widely defined) an overriding right to intervene to restrict freedom to provide information services on wide grounds of, inter alia, public policy and public security. We note that the examples set out under public policy at (4)(a) are "in particular" (but not only) the examples given, and the examples of public security given at (4)(c) are "including" (but not limited to) national security and defence. This leaves dangerously wide scope for government intervention to inhibit or prevent freedom of e-commerce in the UK. As publishers, freedom to publish is a major concern of ours, both within the UK and internationally, and we urge the Government to consider whether clearer wording (limited to specific risks) could not be found here.

Regulations 17-21: Liability of ISPs

The Publishers Association currently chairs the Digital Content Forum's Cyber-crime Industry Action Group to address the issue of Notice and Takedown (NTD) and the forthcoming e-Commerce Regulations. Our discussions have been informed by the excellent work done in the Rightswatch project. *We welcome the government's recognition of the importance of industry self-regulation. However we believe that in order to enable industry self-regulation to work effectively in this context government must provide a certain degree of legislative support. The primary issue is that of safe harbour, i.e. protection*

from legal liability for ISPs who remove content in good faith following a verifiable complaint.

The government's position on self regulation in this area is set out in the interim guidance notes, para 6.9 of which states:

6.9 The Regulations do not establish statutory procedures governing the removal or disabling of access to information (so-called "notice and take-down" procedures). The Government believes that industry self-regulation and codes of conduct have not yet been shown to be inadequate to the task and that, even if this were to be the case, sectoral approaches would be more appropriate to the different circumstances that will be relevant in each case than the horizontal provisions that would have to be set out in the Regulations.

Clearly self-regulation is the best way to deliver a flexible solution which can adapt to changing technology. Further the broad range of types of illegal content leads to an understanding that each type must be addressed vertically. However to be effective self regulation in this context needs a legislative platform from which to operate. Both rightsholders and ISPs agree that self regulation can never work without a statutory provision for safe harbour to underpin it. Although codes of conduct are the most flexible answer, they must be Approved Codes under the supervision of the Secretary of State. How can an ISP act expeditiously if every time he receives a notice he has to weigh up the threat of two different law suits and make a commercial judgement as to the option of least risk?

Publishers would therefore like to see an additional horizontal regulation, exempting ISPs from liability for any removal of information done in accordance with a relevant industry code of conduct approved by the Secretary of State. Such codes of conduct would be vertical in nature, each addressing a specific type of illegal content. In the interests of natural justice and to take account of recital 46 of the Directive, which states in part that "the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level;" such provision would extend the current limitation on ISP liability in R 19 to cover information which was restored by the ISP (so called "put back") according to the same code.

Naturally, codes must observe freedom of expression principles and should distinguish between material which is improper and material an individual may want to be removed but which is being published for legitimate reasons. To this end any code should also provide a mechanism for "counter-notice", i.e. a procedure whereby a content provider may dispute a take-down notice, and the course of action to be followed in such a case.

We believe that for these reasons, and for the reasons set out below, the Directive provides sufficient authority for the government to include safe harbour provisions in the Regulations, to enable and thereby underpin industry-led notice and take-down procedures.

The Directive states in Article 17.1

1. Member States shall ensure that, in the event of disagreement between an information society service provider and the recipient of the service, their legislation does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means.

Further Recital 51 reads:

51) Each Member State should be required, where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders.

And Article 14.3 goes on:

... nor does it [this directive] affect the possibility for member states of establishing procedures governing the removal or disabling of access to information"

The Rightswatch pilot project has taught us many things. One of the key lessons is that, while self-regulation is infinitely more flexible and adaptable in an e-environment, it does need the security of government approval. We do not believe that the UK needs to go as far as the USA has done, with a detailed code set out in its Digital Millennium Copyright Act (DMCA), but Regulations which ignore NTD altogether will fall seriously short of the mark.

Publishers were therefore very disappointed to find scarcely any mention of NTD, or safe harbour, in the draft Regulations, and we believe that this defect must be remedied before the UK can arrive at an NTD system compatible with the USA's DMCA system, which has already been in (successful) operation for some three years (in the most litigious country in the world).

We do not believe that provisions for NTD and safe harbour need be more detailed than a straightforward enabling Regulation, which could easily be added as new Regulation 22. It will, of course, need precise drafting by Parliamentary Counsel, but we attach a specimen draft Regulation as an Appendix to this letter, to illustrate what the industry (including ISPs) believes might work.

It is important that procedures for the take down of different content types contain as many common elements as possible. The guidance should set out what information should be contained in a notice. For example: a notice should, at least (1) be made in writing (2) addressed to a relevant person in the ISP (e.g.: individual or department named in the legal notices where given), (3) clearly identify the subject of the complaint, (4) establish the right of the complainant to make his/her claim, (5) gives details of the nature of the claim, and (6)

provide reasonable evidence to allow the ISP to assess the validity of the complainant's claim.

The appendix attached gives some illustrative drafting and is intended to outline the shape such a regulation might have were it to be appended to the current draft regulations.

Hugh Jones
Copyright Counsel

Rob Hamadi
Head of Communications

Appendix

Notice and Takedown

22 (1) The Secretary of State may by order approve, and from time to time seek revision of, one or more industry or professional codes of practice which establish:

- (a) a form of notice sufficient to constitute actual knowledge of the presence of infringing or otherwise illegal material on a relevant service or site ("Notice"),
- (b) the circumstances required for removal or disabling of access to such material ("Takedown") and
- (c) the basis upon which the content provider may object to or prevent a Takedown or cause a reinstatement of material.

(2) Before approving or issuing an Approved Code, the Secretary of State shall consult with those persons to whom the Code will apply (and may do so by consulting with one or more persons who, it appears to him, represent those persons).

(3) A code of practice under (1) above ("an Approved Code") may be restricted to a particular class of material, infringement or liability.

(4) An Approved Code may apply:

- (a) to service providers bound by or subscribing to a specific set of professional rules;
- (b) to all service providers of a description specified in the Code; or
- (c) to all service providers generally.

(5) An Approved Code shall specify the following matters:

- (a) The requirements for a valid Notice;

- (b) The actions necessary for Takedown, and what response time may be deemed expeditious for the purposes of Regulations 18(b)(v) and 19(b);
 - (c) The conditions necessary for any counter-notice, and its expiry;
 - (d) Any other consequential duties or liabilities, howsoever incurred and
 - (e) any procedure(s) which may be required for the resolution of disputes.
- (6) Where a service provider arranges for Takedown or reinstatement of any material in compliance with either R 18(b)(v) or R19(b), and a relevant Approved Code, he shall be protected from any liability to any person for claims based on his having removed, disabled access to or reinstated the material.