

# THE PUBLISHERS ASSOCIATION

**29b Montague Street  
London WC1B 5BW**

**T +44 (020) 7691 9191**

**F +44 (020) 7691 9199**

**mail@publishers.org.uk**

**http://www.publishers.org.uk**

## **Publishers Association response to the DTI Consultation Document on the E-Commerce Directive: June 2005**

### **Introduction and Summary**

The PA is the trade body of book, journal and electronic publishers in the United Kingdom. It has today approximately 200 members, representing some 80% of the total revenue from book, e-book and learned journal publishing in the UK. The combined turnover of the publishing trade from all sources, including 160,000 new and revised titles last year, is now almost £4.5 billion, 30% of which is export earnings. An increasing amount of this turnover is derived from e-publishing or online sales.

The PA welcomes this opportunity to respond to the DTI's June 2005 Consultation Document on the E-Commerce Directive ("the Directive"), with particular reference to the Liability of hyperlinkers, location tool services and content aggregators.

In summary, the PA believes that it would be dangerous and premature at the moment to widen the exceptions already provided under Articles 12 to 14 of the Directive. These exceptions, for mere conduit, caching and hosting respectively, were carefully and narrowly defined at the time after considerable debate – and compromise on both sides – and although none of them are perfect they have so far provided a reasonable safe harbour for legitimate internet service providers ("ISPs") across the EU. To extend these carefully-drawn exceptions to wider and less certain categories such as "location tool services" would in our view

- a) threaten the reasonable level of certainty and harmonisation already achieved;
- b) open the door to potential (eg copyright) infringers; and
- c) fail to take account of the rapidly developing technology in this area.

We do support consideration being given to the emergence of activities within an "information society service" which involves receipt of information from a third party for inclusion in the service within "aggregated content" in such a way that the service provider has no practical means of gaining actual knowledge of whether the information is misleading, defamatory, or in contempt of any rule of law,

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Registered Office 2 Bloomsbury Street, London

WC1B 3ST

unless and until the service provider is provided with knowledge or awareness of a potential claim, but we do not believe that the horizontal approach of the eCommerce Directive is the appropriate vehicle for this.

We have had the opportunity to see the response of the Digital Content Forum and warmly endorse the points made there, together with their conclusions.

### **Threats to Copyright**

The copyright regime which increasingly applies across the enlarged EU is remarkably harmonised, not only with respect to exclusive rights (including access and communication to the public rights) but also dealing specifically with IP enforcement, for both civil and criminal infringements. The UK government is in the process of consulting on implementation of the EU Enforcement Directive, on which we shall comment separately, but there is no doubt that IP enforcement is increasingly important within the EU and worldwide, in accordance with TRIPS treaty requirements.

Against this, the development of the internet has seen a corresponding increase in threats to IPR as a whole, and copyright in particular, from academics, librarians or other users who see it as “locking up content” or otherwise standing in the way of free circulation of ideas, or from business interests who see wider copyright exceptions as a means to develop their own online business. The recent **Grokster** and **Napster** litigation in the US has made it clear that courts worldwide are having to grapple with repeated pressure on the rights of copyright owners, not just from individual infringers but increasingly from internet intermediaries whose own business models depend on stretching copyright exceptions as far as possible – and often into clear infringement. A more recent example has been the Google Print for Libraries project, under which Google – an immensely powerful global search engine – is still currently proposing to digitally scan entire libraries of literary works (many of them still in copyright) without first seeking consent from rightsholders, on the basis that the rightsholders can then “opt-out”. The reasoning is that the resulting search facilities are for the public benefit and may count as “fair use” in the USA.

It is a seductive line of argument, but it turns the whole system of copyright on its head, and places an impossible burden on rightsholders (many of whom are SMEs) to request and enforce individual take-downs, if they can. Any extension of the exceptions under the E-Commerce Directive would only serve to make this scenario even worse. There is no doubt that bad actors would use extended exceptions to erode vital UK and EU copyright interests ever further.

### **Technological change**

In this context the challenge of implementing legislation in a technology neutral manner becomes particularly acute. The rapid pace of technological evolution leads to words changing their meaning almost as quickly as we write them. This consultation is a case in point. When the term “hyperlinkers” was first coined the Internet was in its infancy, and a hyperlink was merely a means of navigating from one web-page to another. Today the world has moved on and hyperlinks underpin many new forms of technology, such as Bit Torrent, a peer to peer file sharing protocol, with both legal and infringing uses. Any attempt to create broad, horizontal, limitations of

liability predicated on out-dated terms such as “hyperlinker” risks opening the door to legitimisation of illegal conduct such as electronic piracy. Where a case is made for any specific limitation it is our belief that any such intervention should be made vertically, ie narrowly and specifically. The e-Commerce directive quite correctly recognised that horizontal legislation could only go so far. Any attempt to extend it risks punishment at the hands of the law of unintended consequences.

As regards the specific questions raised in the consultation document, we are happy to echo the responses of the DCF, which we fully support.

Hugh Jones

Copyright Counsel

Rob Hamadi

Head of Communications