



**EUROPEAN COMMISSION**  
Directorate-General for Trade

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**- ACTA NEGOTIATIONS -**

**Purpose:** For information

**Attached:** 1. **EU draft paper summarising the EU legislation on matters relating to the internet (in reaction to the US non paper).**

**NON-PAPER**  
**INTERNET & TECHNOLOGY PROVISIONS: QUESTIONS FOR DISCUSSION**

**A. Copyright Infringement on the Internet**

The EU legal framework is currently fragmented between EU harmonized competencies and Member States residual competencies.

This answer will only be touching upon the EU harmonized legal framework where three main pieces exist:

- Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal Market (Directive on electronic commerce)
- Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
- Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights

Directive 2000/31/EC creates a legal framework for electronic commerce in Europe. The Directive covers all information society services allowing on-line electronic transactions (interactive telesales of goods and services and on-line purchasing centers in particular). The Directive applies solely to service providers established in the European Union (EU). However, to avoid affecting global electronic commerce, the Directive seeks to avoid incompatibilities with legal trends in other parts of the world. (see also section 2)

Directive 2001/29/EC has a horizontal impact. It harmonizes the core rights relevant to uses of copyright material in the information society and e-commerce, namely the rights of reproduction (copying) and communication (electronic transmission, including digital broadcasting and "on-demand" services) as well as exceptions to these rights such as making copies for private purposes. It also provides protection for technological measures used to safeguard rights or identify material (such as copy protection systems or digital watermarks). (see also section 3)

Directive 2004/48/EC harmonizes the laws of the Member States on the means of enforcing all intellectual property rights (via sanctions and remedies). The Directive covers infringements of all intellectual property rights, such as trade marks, designs, patents, copyright etc and relates exclusively to civil measures such as injunctions, searching, seizure, evidence and damages, publication of decisions, etc. (see also ACTA proposal of the civil enforcement chapter)

**B. Secondary Liability / Internet Service Provider Liability**

The Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) provides a light and flexible legal framework for e-commerce and addresses only those elements which are strictly necessary in order to ensure the proper functioning of the Internal Market in e-commerce. It is drafted in a technologically neutral way to avoid the need to adapt the legal framework constantly to new developments. It covers a wide variety of services provided online (so called "information society services") which includes online selling of various products. As the Directive encompasses the trade in goods, it applies to the illicit vending of counterfeited and pirated products via the

Internet like audio CD's, video DVD's, software, pharmaceuticals, cosmetics, luxury goods, sportswear, consumer electronics (mp3 players, hardware etc.) etc.

The Directive applies horizontally across all areas of law which touch on the provision of information society services, regardless of whether it is a matter of public, private, or criminal law. Furthermore, it applies equally both to business-to-business (B2B) and business-to-consumer (B2C) e-commerce.

The cornerstone of the Directive is the Internal Market clause which creates the legal certainty and clarity needed for information society service providers to be able to offer their services throughout the entire Community. The provisions on the liability of intermediaries create legal certainty for intermediary service providers and thus help to ensure the provision of basic intermediary services in the internet.

The question of the liability of intermediary service providers, in particular hosting services, is a sensitive issue. It is important to establish the extent to which intermediary service providers can be held liable for the illegal and harmful content of material published on their network or server.

In order to remove the legal uncertainty, the Directive exonerates intermediary service providers from any liability where they have played a passive role in transmitting information from a third party. It also limits the liability of providers of other intermediary services such as the storage of information. In other words, providers of infrastructure services and access services cannot be held liable for the information transmitted, provided that they do not initiate the transmission and do not select the recipient of the transmission or the information it contains.

The question whether the activities of an information service provider fall under the liability regime of an intermediary service provider as defined in Section 4 of the Directive, cannot be answered in a simplistic and general manner. The analysis should look at the different functions and economic activities which the information society services provider exercises, e.g. provision of access to a communication network, simple storage or transmission of information provided by third parties and hosting.

Actually, it is appropriate to distinguish, on the one hand, the activities of storage and, on the other, the different activities proposed in particular in relation to the use of stored information, activities which cannot be treated as simple conservation and presentation of data provided by third parties.

As far as information society service providers are concerned, who benefit under different titles, from the responsibility exemption in accordance with Article 12 to 14 of the Directive on e-commerce, it is advisable to recall that although the website operators in question cannot be subject to a general obligation of monitoring information which they transmit or store nor a general obligation actively to seek facts or circumstances indicating illegal activity (under the terms of Article 15 (1) of the Directive), they can nevertheless be obliged to inform without delay the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or to inform the competent authorities of information leading to the identification of the owners of the hosted pages (Article 15 (2) of the Directive).

As far as economic activities accompanying the storage of information are concerned and which are not limited to the mere hosting of information, the privileged liability regime as laid down in the Directive can not necessarily include other services than the simple storage of information.

However, we would like to stress that the fact that such an activity does not involve the concept of hosting under Article 14 of the Directive and therefore does not involve the responsibility exemption envisaged by the same provision, does not evidently mean *ipso facto* that a Member State could impose on the person providing such an activity a general obligation of supervision of the information that he transmits or a general obligation actively to seek facts or circumstances indicating illegal activities. Indeed, such a general supervision obligation can reveal impracticable in a numerical world.

### **C. Technological Protection Measures / Rights Management Information**

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society provides protection for technological measures used to safeguard rights or identify material (such as copy protection systems or digital watermarks).

#### **Legal protection**

The Member States are obliged to provide legal protection against the circumvention of any effective technological measures covering works or any other subject matter. This legal protection covers technological measures as such, independently from copyright and relates to "preparatory acts" such as the manufacture, import, distribution, sale or provision of services for works with limited uses. Nevertheless, for some exceptions and limitations, in the absence of voluntary measures taken by rightholders, Member States are to ensure the implementation of an exception or limitation for those who may benefit from it. The Member States may also take such measures with regard to the exception for private use, unless reproduction for private use has already been made possible by rightholders.

The definition of "circumvention" is left to national Courts but, in order to enjoy the legal protection, technological measures need to be "effective" and achieve the protection objective.

#### **Protection of rights-management information**

Technological measures are distinguished from "rights-management information" meaning any information provided by rightholders which identifies the work or other subject-matter covered by the Directive, or information about the terms and conditions of use and any numbers or codes that represent such information.

Member States are to provide for legal protection against any person knowingly performing without authority any of the following acts:

- the removal or alteration of any electronic rights-management information;
- the distribution, broadcasting, communication or making available to the public of works or other protected subject matter from which electronic rights-management information has been removed.