

## **PUBLIC CONSULTATION ON THE FUTURE OF ELECTRONIC COMMERCE IN THE INTERNAL MARKET AND THE IMPLEMENTATION OF THE DIRECTIVE ON ELECTRONIC COMMERCE (2000/31/EC)**

(Period of consultation 10/08/2010 – 5.11.2010)

### **EUROCOPYA & EUROKINEMA** Contribution

#### **EUROCOPYA**

EUROCOPYA is the European organization of cinema and television producers' collecting societies in charge of private copy (blank media & equipment) rights management. Our statutory members are the societies representing producers from Austria, Belgium, Denmark, France, Germany, the Netherlands, Spain, Sweden and Switzerland. EUROCOPYA, represented by Yvon Thiec and Nicole La Bouverie, is mandated to advise its members on EU copyright matters. <http://www.eurocopya.org>

#### **EUROKINEMA**

EUROKINEMA, Association of Film and Television Producers, has a twin role:

- to form a body to represent the interests of film producers to the European Communities, concerning all the issues directly or indirectly affecting film production (intellectual property rights, audiovisual regulation, telecoms, information society, Media programme)
- to establish continuing consultation with organisations representing film producers in other Member States of the Community, and define a common platform of principles and positions, enabling effective promotion of the European film industry within the framework of the European Community. <http://www.eurocinema.eu>

The main question EUROCOPYA and EUROKINEMA want to comment is the overall effect of the provisions governing the **liability of Internet Services Providers (ISPs)** in the Electronic Commerce Directive (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 particular electronic commerce, in the Internal Market (Directive on electronic commerce)

For this ground EUROCOPYA and EUROKINEMA will focus on Articles 12-15 of the electronic commerce directive (see section 4 – Liability of intermediary services providers). Articles 12 – 15 of the electronic commerce directive in relation with the provisions in directive 2001/22/EC on copyright in the information society were intended to provide a legal framework for the liability of Internet Service Providers (ISPs) with regard to copyright infringements and consequently these provisions aim to foster cooperation between right holders and ISPs in the field of online copyright infringement.

The aim of the specific rules governing the liability of intermediaries is to stimulate the development of legitimate cross-border e-business. The provisions were by **no means** intended to **create a safe harbour for illegal online services**. Prerequisite for the

application of the liability privilege under the electronic commerce Directive is that the activities carried out by the intermediaries are of a mere technical, automatic and passive nature and that the provider is neutral vis-à-vis the content, i.e. has neither knowledge of nor control over the content transmitted or stored. Injunctions are not affected by the liability privilege.

Consequently, even in a case where the provider is neutral with regard to the content transmitted or stored, he may still be liable for an injunction to remove illegal content or block access to it as he is often the best placed to do so. As a result, the Directive provides tools for relevant parties to deal with illegal content and as mentioned above, **online services involved in the illegal dissemination of works should in principle not benefit from the liability privilege** provided for under the Directive.

However, problems are arising due to the implementation by Member States or interpretation by Courts at national level. One question is set by the criteria used by national courts to **differentiate** providers who **should benefit from the liability privilege** and **those who should not**: no **harmonized criteria** applied as each legal system presents its own specific interpretation of the Directive. In some legal systems, illegal services have been qualified as 'mere conduits', 'caching providers' or hosts as a result of an application by the courts of the legal definitions in Articles 12 - 14 of the Directive as transposed in national law. Such services could have thus been **eligible to benefit from the liability privilege**.

Another question is related to the interpretation by Member States or Courts of the **knowledge requirement** (article 14a of the EC Directive). From our EUROCOPYA members' testimony, it seems that interpretation by Member States or Courts is inconsistent and may conduct to different interpretation.

Another potential problem arises out of **the ban on a general obligation to monitor** (article 15 of the Electronic Commerce Directive). Where courts have granted injunctive relief with regard to the prevention of future infringements of the same kind, this has been challenged by providers as **being contrary to the ban on a general duty to monitor**.

In addition to the knowledge problem mentioned above, the E-Commerce Directive provides a tailor-made defence for illegal services in legal proceedings brought against them. This complicates and delays the possibilities for right holders to obtain speedy action against Internet piracy. Moreover, the liability regime causes all kinds of ISPs, whether legal or illegal, to resist any form of co-operation with right holders. In some cases, they assert that the E-Commerce Directive **prevents co-operation or that cooperation** would cause them to **lose the privilege**. Finally, right holders are often not able to obtain meaningful injunctive relief due to the lack of clarity as to the dividing line between specific and general monitoring (note however that the Directive includes key/clear recitals on this issue – including recitals 47, 45, 40). This is an issue that could usefully be clarified or improved in several respects.

In conclusion, EUROCOPYA and EURO CINEMA believe that the objectives of the specific liability regime under the E-Commerce Directive have not been fully achieved by the current implementation by some Member States or interpretation by courts, and would therefore benefit from further discussions.