Response

to

EU Consultation on E-Commerce Directive

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1.1. Summary

ARTICLE 19 believes that the current system under the E-Commerce Directive regarding liability of intermediaries has generally been useful but needs additional protections which fully recognise the interests of free expression as protected by Article 10 of the ECHR.

The provisions relating to hosts need to be extended to ensure that freedom of expression is not unnecessarily limited in response to concerns about liability, as is currently the case. New policies should focus on the provider of information rather than the intermediary. We also caution against proposals to adopt systems for filtering and blocking and liability for linking.

1.2. Introduction

ARTICLE 19 welcomes the opportunity to comment to the European Commission on the E-Commerce Directive.[1] ARTICLE 19: Global Campaign For Free Expression (ARTICLE 19) is an independent human rights organisation based in London, which works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, develops long-term strategies to address them and advocates for the implementation of the highest standards of freedom of expression,

[1] Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC). http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm

nationally and globally. It frequently intervenes in cases before the European Court of Human Rights and other international and domestic tribunals on issues of freedom of expression.

ARTICLE 19 is responding to questions raised by Issue 5 of the consultation relating to intermediary liability under the Directive.[2]

It is well recognised that the growth of the Internet has greatly expanded the ability of individuals, groups and others to enhance their freedom of expression rights to seek, receive and express information as recognised under international human rights laws. The right to freedom of expression - which is fundamental for democracy and the enjoyment of virtually all other rights - applies as much to the Internet as to the more traditional forms of media - press, radio and television.

Internet intermediaries play a key role in facilitating the connections between the providers of information and the users. Today, they are the new postal service, telephone network, local newspaper and broadcast station. But the rules and practices which govern acceptable limits on speech in these new forums have not been as fully developed as for previous technologies and FOE is often being unacceptable limited where it could not legally be done before.

There appears to be a growing trend in Europe, regardless of the E-Commerce Directive, where intermediaries are being required to intervene on behalf of governments or corporations to block access to or remove information without any due process of law. We believe that the bypassing of traditional legal measures on the banning of materials by using technical rules and threats of liability is unlawful and bad policy, which is likely to harm the development of the Internet as an economic tool, as well as the free speech rights of its users.

Any system which places the decision and power to remove information solely with the intermediaries, and/or self-regulatory organisations, rather than by courts of law, is unlawful and violates free expression rights under Article 10 and Article 6 on the right to a fair trial under the European Convention on Human Rights.

Under the ECHR, speech can only be limited under Article 10 to protect a legitimate interest under Article 10(2), must be proscribed in law, and must be "necessary in a democratic society" in response to "a pressing social need". As noted by the European Court of Human Rights,

> Where there has been interference in the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the importance of the rights in question; the importance of these rights has been stressed by the Court many times. The necessity for restricting them must be convincingly established.[3]

We believe that if material is to be removed and liability is to be imposed on Internet-related speech, it should be directed at those who created the speech (content providers) rather than 3rd parties (intermediaries) and follow well established rules as set down by the European Court of Human Rights relating to restrictions on free expression.

[2] See http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm
[3] Autronic AG v. Switzerland, judgment of 22 May 1990, Series A No. 178

As a general matter, we express some concern at the tone of the questions raised by Issue 5 of the consultation. They appear in many cases to be making presumptive judgements towards issues such as liability and filtering and enforcement of IP with little recognition of freedom of expression. In addition, the 2007 survey released by the Commission is too out of date to properly reflect the current situation and we would urge the Commission to develop a new survey and release it more promptly. We wonder why it was withheld for so long before release.

1.3. Liability of Internet Intermediaries Acting as "Hosts"

Under Article 14 of the Directive, intermediaries can be held liable if they are made aware of unlawful materials and do not quickly respond in removing them. This section raises the most concern for freedom of expression, as in practice, its imposition (as adopted into domestic law) often results in perfectly lawful information being removed hurriedly and without any legal process or accountability.

We do not believe that 'notice and takedown' adequately protects freedom of expression as protected by the ECHR.

As currently practiced in the UK and many other Member States, an organisation providing hosting services will typically receive an email from a person, or a letter from a law firm representing an individual or company, alleging that some user generated content (UGC) violates their rights, generally relating to defamation or violation of intellectual property law. In most cases, the hosting company does not conduct an investigation on the merits of the case, either because of costs involved or lack of expertise, but merely removes the information immediately, fearing rightly that they would face substantial liability if they did not do it. This has had a profound effect on freedom of expression and there have been numerous cases where information has been removed with no legal process and based on dubious assertions.[4] In the UK, there has been considerable debate over the Digital Economy Act, which will authorise the cutting off of internet connections after a number of unproven allegations of violations of intellectual property.[5] This was found by the French Constitutional Court in 2009 to be a violation of the Constitution.[6]

Any mechanism which provides mere or even enhanced notice to the intermediaries and creators (such as "Notice to Notice"), even with detailed description of the alleged violations, is not adequate. Any decisions on removals would still be ultimately done by the intermediaries who would be constantly reminded that a wrong decision would result in their liability. Thus, there is a strong incentive to act conservatively and remove all information for their own interests. It is often said that "safe harbours make for overzealous harbour masters".

These forms of informal censorship are not in compliance with the ECHR. The European Court of Human Rights has held that States are under a positive obligation to take action

[4] See e.g. Boris Johnson becomes a victim of crossfire in internet war, *The Times,* 22 September 2007, Gina Ford accepts five-figure sum over libel claim on Mumsnet site, *The Times*, 10 May 2007, The day the music blogs died: behind Google's musicblogocide, *Ars Technica*, 15 February 2010. http://arstechnica.com/tech-policy/news/2010/02/the-day-the-music-blogs-died-behind-googles-musicblogocide.ars
[5] Digital Economy Act 2010, §9.
[6] Décision n° 2009-580 DC du 10 juin 2009.

where a threat to freedom of expression comes from a private source. It is now well-established that:

> [I]n addition to the primarily negative undertaking of a State to abstain from interference in Convention guarantees, 'there may be positive obligations inherent' in such guarantees. The responsibility of a State may then be engaged as a result of not observing its obligation to enact domestic legislation.[7]

What is needed is a new system which ensures that intermediaries are not required to remove information without a proper legal process.

One approach would be to limit the liability of the companies acting as hosts (including most social media) to only cases where they were actively involved in creating the materials. In the United States, hosts are given strong protections under §230 of the Communications Decency Act. It states:

> "No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[8]

Similarly, in Singapore, the recently adopted Electronic Transactions Act 2010 gives strong protections to innocent providers:

> 26. —(1) Subject to subsection (2), a network service provider shall not be subject to any civil or criminal liability under any rule of law in respect of third-party material in the form of electronic records to which he merely provides access if such liability is founded on —
>
> (a) the making, publication, dissemination or distribution of such materials or any statement made in such material; or
>
> (b) the infringement of any rights subsisting in or in relation to such material.[9]

As noted by the Singaporean government:

> Liability of network service providers: Singapore recognises the importance of network service providers in providing information infrastructure and content. The government also realises that it is impractical for network service providers to check all the content for which they merely provide access. To create a transparent legal environment conducive to the growth of network service providers, the ETA specifies that network service providers will not be subject to criminal or civil liability for such third-party material, in relation to which they are merely the host. The clause, however, will not affect the obligations of a network service provider under any licensing or other regulatory regime established under the law.[10]

While this may appear to some to be overly broad, it does not stop liability from being imposed on the generators of the content or in some cases on the intermediary when they actively were involved in the creation of it.[11] It also does not limit and indeed encourages the

[7] *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94
[8] 47 U.S.C. § 230(c).
[9] Electronic Transactions Act (No. 16 of 2010)
[10] IDA Singapore, Electronic Transactions Act. Available at http://www.ida.gov.sg/Policies%20and%20Regulation/20060420164343.aspx
[11] See e.g. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 521 F.3d 1157 (9th Cir.

responsible behavior of intermediaries when informed of possibly unlawful material to remove it.

This position also has the support of the special rapporteurs on freedom of expression of the United Nations, the Organisation for Security and Cooperation in Europe and the Organisation of American States who stated in 2005:

> No one should be liable for content on the Internet of which they are not the author, unless they have either adopted that content as their own or refused to obey a court order to remove that content.[12]

Following from this, it would still be possible to ensure that unlawful information is removed but only following a legal process to produce an order to remove. This would require a proceeding before an independent tribunal such as a court. As an alternative, it might be possible to use a less formal and quicker mechanism, such as the one used for domain name disputes, but to be lawful under the ECHR, it would have to be independent from governments and corporations and be fair.

In addition, the Commission should consider procedures for sanctions for providing inaccurate information that results in the unjustified removal of information. There appears to be a great deal of information removed merely to stifle criticism or "reputation management".

The US Digital Millennium Copyright Act (DMCA) §512 has a useful provision which creates a system of accountability for those making accusations of violations. Section f imposes liability on those who demand the removal of information knowing that it the material not unlawful:

> (f) Misrepresentations — Any person who knowingly materially misrepresents under this section —
> (1) that material or activity is infringing, or
> (2) that material or activity was removed or disabled by mistake or misidentification,
>
> shall be liable for any damages, including costs and attorneys' fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorised licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it.

In practice, this section by itself will not be sufficient to protect FOE rights given the cost of initiating a lawsuit to enforce the rights. So it does not obviate the need above for a legal mechanism to review to removal of information.

1.4. Blocking and Filtering

2008).

[12] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005. http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2005.pdf

We support the strong limits on liability for intermediaries and others acting as "mere conduits" as currently found in Article 12. Intermediaries, especially ISPs, are not, and should not, be held liable for the activities of their users in these cases any more than the postal service should be held responsible for delivering the mail or telephone companies for the content of calls made by their subscribers. In the UK and many other countries, this has been strongly recognised by the courts.[13]

Similarly, they should not be placed in a position to be forced to block sites to prevent access. We have concern with questions 59 and 60, which seem to indicate an interest by the Commission in promoting blocking and filtering websites. We note that a number of member states have ordered the blocking of websites outside their jurisdiction (but often still within the EU) relating to copyright, gambling and for other reasons.[14] We believe that this raises grave concerns relating to access to information under the ECHR and due process of law. To block an entire domain removes access to a considerable amount of lawful materials and would not be justifiable in an offline environment (i.e. shutting down a broadcaster, newspaper, or the only bookstore in a town because of one news broadcast or a page in one book). Even those sites that may have been blocked for substantial violations of intellectual property may contain legal material which is also blocked and thus violating the rights of EU citizens to access information protected by the ECHR.

Internationally, the trend of courts in other democracies has been to reject blocking. In Australia, the Federal Court of Australia rejected demands to require that ISPs block access to sites that allegedly violate IP.[15] Similarly, the South African High Court in Witwatersrand ruled that it would violate free expression to block sites based on a defamation claim.[16]

The filtering systems we are aware of are problematic. In the UK, there is quasi-voluntary system run by Internet Watch Foundation sponsored by the ISPs and the EU. However, the system for determining which sites are blocked is highly un-transparent and major sites such as Wikipedia and the Internet Archive have been improperly blocked in the past 2 years by a combination of decisions of the IWF and poor technical measures by major UK ISPs. In Turkey, YouTube has been blocked on and off for over two years based on dubious claims by the government.

There have been serious concerns raised about filtering. The international special rapporteurs on freedom of expression stated in 2005 that:

> Filtering systems which are not end-user controlled - whether imposed by a government or commercial service provider - are a form of prior-censorship and cannot be justified. The distribution of filtering system products designed for end-users should be allowed only where these products provide clear information to end-users about how they work and their potential pitfalls in terms of over-inclusive filtering.[17]

[13] See e.g. Bunt v Tilley & Ors [2006] EWHC 407 (QB) (10 March 2006).
[14] See Akdeniz, Y., To Block or Not to Block: European Approaches to Content Regulation, and Implications for Freedom of Expression, (2010) *Computer Law and Security Review*, Vol. 26(3), May, 260-273.
[15] Roadshow Films Pty Ltd v iiNet Limited (includes summary) (No. 3) [2010] FCA 24 (4 February 2010). http://www.austlii.edu.au/au/cases/cth/FCA/2010/24.html
[16] Tsichlas and Another v Touch Line Media (PTY) LTD 2004 (2) SA 112 (W).
[17] Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 21 December 2005. http://www.article19.org/pdfs/igo-documents/three-mandates-dec-2005.pdf

As a secondary matter, we also believe that a move to create a technical infrastructure for filtering or blocking for enforcing intellectual property would likely be quickly expanded to include other issues as political necessity dictated. Already, there has been considerable variance across the EU Member States over what material is justified to be blocked. We believe that any decisions relating to this subject are too important to be determined based on seemly offhand questions in a limited technical consultation such as this one.

It would also encourage those countries that the EU and Member States are currently engaged with on human rights discussions - such as Turkey, China, Belarus, Azerbaijan and Kazakhstan - which continue to block legal political and social speech and social media platforms such as Facebook and Twitter, to maintain and even extend their blocking. If the EU sets up its own blocking system, this then would be a major setback for freedom of expression globally, and would legitimise the blocking activity taking place in less democratic countries. We urge the EU through the European Commission not to develop or encourage blocking measures.

1.5. Liability of Intermediaries Acting as "Caches"

Under Article 13 of the Directive, intermediaries acting as "caches" are exempt from liability. We support this provision and believe that providers of cache materials should not be expected to monitor the vast quantities of information which they do not generate and only have a limited time in their systems. As noted by the Canadian Supreme Court '"Caching" is dictated by the need to deliver faster and more economic service, and should not, when undertaken only for such technical reasons, attract copyright liability.'[18]

We believe that this category should be strengthened and clarified to include services such as search engines which act in an automated manner and are designed to facilitate the ease of access to information.[19]

1.6. Active Monitoring of User Generated Content

We support the current structure in the Directive under Article 15 that intermediaries are not required to actively monitor user activity to identify possible violations. We believe that it is inappropriate for intermediaries to monitor a wide range of material and make judgements of the legality of material, much of which they would have little or no formal knowledge about. In many of the larger systems, it would be highly impractical to monitor millions or even more of messages and other content generated daily. The only response would be to either shut down or severely limit the communications, which would have a profound effect on free expression and possible serious economic ramifications, or to develop potentially costly systems of monitoring which, given the wide range of possible materials, would then still have to be reviewed by humans or subjected to mass automated removal of information, in violation of the free speech rights.

[18] Society of Composers, Authors and Music Publishers of Canada *v.* Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, 2004 SCC 45

[19] for a recent UK case, see Metropolitan International Schools Ltd v Google Inc. and others, [2009] EWHC 1765 (QB).

We believe that it is the role of the government or other bodies to identify possible violations (perhaps using such mechanisms as hotlines) and then initiate proper legal processes to consider the possible removal of the material.

1.7. Linking Liability

We are also concerned with suggestions in question 62 relating to liability for linking. A primary question is whether imposing liability for the mere linking to information is lawful. In a recent case in Canada, the British Columbia Court of Appeals ruled that users could not generally be held liable for links.[20]

Secondly, there is the issue that once a link is in place, if the materials changes, will the user then be held liable for the changed materials that they have no control over? It would clearly be unlawful under the ECHR to expect persons to constantly monitor all links that they previously made to ensure that they have not been changed and ensure that the changes may result in liability.

In addition to the general concerns about imposing liability on users for linking, we are also concerned that this is raised in the context of a review of intermediary liability. As a primary matter, any liability for links should solely be imposed on the user. An intermediary cannot be expected to review the content of user generated content, much less every link that the UGC includes. An enforcement of this rule would result in links being banned for fear of liability, which would greatly hamper the utility of the web, if not eliminate it all together.

1.8. Conclusion

The current system of imposing liability on intermediaries acting as "hosts" has resulted in the substantial removal of legal information with no legal process. Any revisions to the E-Commerce Directive need to fully take into account the freedom of expression requirements of the European Convention on Human Rights and other international obligations.

Proposals to improve or extend filtering or blocking systems should not be adopted. Similarly, proposals to consider liability for linking should be rejected.

[20] Crookes v. Newton, 2009 BCCA 392. Available at http://www.courts.gov.bc.ca/jdb-txt/CA/09/03/2009BCCA0392err1.htm

About the ARTICLE 19 Law Programme

The ARTICLE 19 Law Programme advocates for the development of progressive standards on freedom of expression and access to information at the international level, and their implementation in domestic legal systems. The Law Programme has produced a number of standard-setting publications which outline international and comparative law and best practice in areas such as defamation law, access to information and broadcast regulation. These publications are available on the ARTICLE 19 website: http://www.article19.org/publications/law/standard-setting.html.

On the basis of these publications and ARTICLE 19's overall legal expertise, the Law Programme's operates the Media Law Analysis Unit which publishes around 50 legal analyses each year, commenting on legislative proposals as well as existing laws that affect the right to freedom of expression. The Unit was established in 1998 as a means of supporting positive legal reform efforts worldwide, and our legal analyses frequently lead to substantial improvements in proposed or existing domestic legislation. All of our analyses are available online at http://www.article19.org/publications/law/legal-analyses.html.

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