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Brussels, 18 April 2007

COMMENTS ON THE LIABILITY REGIME OF INFORMATION SOCIETY INTERMEDIARIES - COMMISSION STUDY

The Creative and Media Business Alliance (CMBA) is an informal grouping gathering some of Europe's top media and creative businesses and industry associations. It was launched in November 2004 to give the sector a strong and united voice at the level of the European Union. The CMBA notably calls upon the European Commission, the European Parliament and the 27 EU Member States to focus on the creative and media businesses in their joint efforts to foster innovation, growth and employment in the Information Society. The sectors represented by the CMBA are more than a mere driver for technology development or an "added value" to the Lisbon Agenda for European competitiveness. They are the true value of the Information Society.

CMBA's members have all been involved in the debate leading up to the adoption of the e-Commerce Directive and are all directly concerned by the proper functioning of the Directive and, in particular, the aspect relating to the role and responsibilities of information society intermediaries. CMBA therefore wishes to take the opportunity to submit its joint observations on that aspect in the light of the study currently undertaken on behalf of the European Commission¹.

The Functioning of the Directive

The e-Commerce Directive has created a robust legal framework and a sound basis for electronic commerce in Europe, which includes the provision of a wide range of creative content services from music downloads to online newspapers, including – importantly – the advertising which supports these services. The scope of the Directive is appropriately defined both in terms of its application overall and the application of the internal market clause.

The e-Commerce Directive in general and the provisions on ISP liability (Art. 12-15) in particular have in most cases been faithfully implemented by the Member States, however with a few exceptions. Furthermore, most aspects of the e-commerce Directive as implemented in the Member States have worked effectively. We believe that the current success of the e-Commerce Directive rests upon a balance of interests that has been carefully crafted and considered and which would be disrupted and degraded by introducing new "safe harbours" and further exceptions to limit liability of additional activities such as search and content aggregation.

However, the members of the CMBA still wish to draw attention to a number of issues which have proved to be problematic, partly due to the

¹ European Commission Questionnaire on the Liability Regime of Information Society Intermediaries

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evolution that has taken place in the on-line environment since the adoption of the e-Commerce Directive and which would, consequently, need to be addressed.

Key issues of concern to the creative industry

One area of considerable concern is the existence of services providing access to the Internet and, thereby, albeit sometimes inadvertently, enabling P2P infringement. The e-Commerce Directive does not in itself provide the necessary solutions since this aspect of ISP activity is subject to a broad and sweeping safe harbour (Art. 12) as far as damages and criminal liability are concerned. ISPs have relied on this in refusing to provide the cooperation and responsible business practices that are needed. Obviously, in 2000 when the e-Commerce Directive was adopted, most content was hosted and P2P file trading was barely on the horizon. However, with the move of internet piracy towards more dynamic dissemination of files and in particular P2P networks, the cooperation of ISPs who provide access to internet users has become more and more critical, both to remove infringing material quickly from the Internet or block access to it and to enable legal action to be brought against infringers. ISPs are in a key position allowing them to assist right holders in legitimately enforcing their rights in the on-line environment and the ISPs should therefore have certain responsibilities and play a role in the fight against growing on-line piracy.

One of the reasons which made policy makers tolerate liability safe harbours (no monetary damages, only injunctive relief) for one particular industry was the assumption that direct infringers would remain liable. The intention was not to legalise any unlawful acts just because they happened to be committed online. It is crucially important to achieve a proper balance between privacy through data protection and the opportunity for ISPs and right holders to process data on individuals who have been clearly identified as infringers. Otherwise the accumulation of safe harbours and overreaching interpretations of privacy laws create an online environment in which effective enforcement is either impossible or only possible through criminal pursuit, which, while an important option, reduces the victims' right to redress substantially. Internet subscribers are often surprised to learn that it is not uncommon for their ISP to prefer pointing victims of the subscribers' online behaviour to criminal prosecution instead of passing on warnings that such steps could be taken against them or, with recidivists, to enforce already existing contractual terms to terminate repeat infringers.

Processing of data on on-line lawbreakers is a necessary tool for ISPs and victims of unlawful behaviour to effectively enforce their rights in the on-line environment. The right to privacy is itself subject to rights of others as recognised by the Data Protection Directive, cf. Article 13(1)(g) and Article 8 of the European Convention on Human Rights.

Ironically, the telecommunications industry obtained a specific clarification amplifying the above principles under Article 15 of the Electronic Communications Privacy Directive in order to fight the

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"unauthorised use of an electronic communications network" – this should be clarified to include all unlawful behaviour violating the rights of others.

It is therefore unjustified and extremely worrying that a large number of Member States are stripping existing provisions of their effect ("effet utile") by denying processing of personal data in civil cases by reference to the alleged supremacy of privacy rules. Such interpretations of national rules and/or practices create an environment where rights can practically not be enforced through civil procedure. Any cooperation of Internet Service Providers is not only subject to potential competitive disadvantages but also, according to what members of CMBA are encountering in the market place viewed by the legal departments of these companies as not sufficiently clearly allowed by law. It is worth noting that this problem can concern any rights of third parties under law that could be enforced through a civil procedure and although it is important to the intellectual property community it is actually a general systemic gap created through overreaching interpretation that should be closed through clarification in the Electronic Communications Privacy Directive.

Finally, we note some problems with ISPs providing hosting services in a couple of countries (Spain and Italy for instance). This is mainly due to an incorrect implementation of Article 14 of the e-Commerce Directive in national law, as Spanish law requires "effective knowledge" for civil liability of hosting services, and Italian law requires knowledge "upon notification of a competent authority". This is not compatible with Article 14's standard of actual knowledge or awareness of facts or circumstances from which infringement is apparent. Moreover, these additional requests seriously undermine the efficiency and speed in the removal of unlawful content and the possibility to have efficient means to fight piracy on the internet. "Notice and Takedown" procedures should in all Member States enable right holders to make use of simplified procedures to pursue infringements of their legitimate rights. The problem related to Italy and Spain should therefore be resolved by a revision of the relevant national legislation and if necessary the Commission should commence infringement procedures to achieve this.

The above only highlights the key issues of concern to the creative industries. Many of the CMBA members have submitted individual comments to the Commission study outlining additional concerns and pointing out separate issues of concern at national level.

Final remarks

Whether or not the Commission decides to reopen the e-Commerce Directive it is imperative that the above issues constituting major barriers to effective enforcement be addressed in an appropriate manner. A satisfactory solution, which allows right holders to properly enforce their rights on-line is also vital to the further development of a flourishing and well-functioning legitimate on-line market in digital content.

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We therefore call upon you to address the issues highlighted in this submission by setting the necessary framework, which allows and obliges Member States to introduce clear ISP obligations and rules allowing right holders to effectively enforce their rights in the on-line environment.

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Please send your reply and/or other requests regarding the CMBA to:

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