



**CONSULTATION DOCUMENT ON
THE ELECTRONIC COMMERCE
DIRECTIVE: THE LIABILITY OF
HYPERLINKERS, LOCATION
TOOL SERVICES AND CONTENT
AGGREGATORS**

Government response and
summary of responses

DECEMBER 2006

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1 Government introduction

1.1 Background

- 1.2 The Electronic Commerce Directive¹ limits the liability of intermediary service providers where they act as mere conduits, caches or hosts of information. In its response to the public consultation on the Electronic Commerce (EC Directive) Regulations 2002² (the principal regulations that implement the Directive), the DTI said that it did not propose to limit the liability of categories of intermediary beyond the requirements of Articles 12 to 14 of the Directive. However, the Department said that it would review with stakeholders, at a later stage, whether there was a need to extend the protections to intermediary service providers who provide hyperlinks, location tool and content aggregation services.
- 1.3 In June 2005 the DTI published a consultation document seeking the views of UK business, consumers and other organisations on questions relating to whether the UK should extend the limitations of liability to providers of hyperlinks, location tool and content aggregation services. This consultation sought views on:
- a) whether the current law creates problems for providers of hyperlinking, location tools or content aggregation services;
 - b) if it does, the nature of these problems;
 - c) whether the extension of the limitations on liability in Articles 12 to 14 of the Electronic Commerce Directive to providers of these services is an appropriate remedy for the problems identified;
 - d) if it is, how this should be achieved; and
 - e) if by doing so, there would be adverse impacts in any other business sectors.
- 1.4 The DTI has received a total 38 responses to this exercise, of which three were marked confidential. We are grateful to everyone who has responded. The views expressed have been carefully analysed and helped in drawing up our response.

¹ 2000/31/EC – the Electronic Commerce Directive

² SI 2002/2013 – the Electronic Commerce Regulations

1.5 Summary of government response

- 1.6 Although there have been good arguments made both for and against the granting of an extension of the limitations on liability to providers of hyperlinks, location tool services and content aggregation services, the DTI, mindful of its obligation for evidence based-regulations, has reached the conclusion that there is currently insufficient evidence to justify any extension to these limitations.
- 1.7 The second review of the Electronic Commerce Directive by the European Commission is due in 2007 and the DTI will encourage the Commission to take on board the important issues raised during this consultation.

1.8 Further information

- 1.9 Further information about the consultation is available on the DTI's website: <http://www.dti.gov.uk/sectors/ictpolicy/ecommsdirective/page10133.html>

2 Summary of responses

QUESTION 1

Do you agree with the EU Commission conclusions in its 'First Report' on the application of the Directive concerning Articles 12 to 14? Please give reasons for your answer.

Summary

Although the respondents on the whole agree with the conclusions of the EU Commission's First Report, their interpretation appears to differ depending on the sector in which the respondent's business is based. For example, ISPs (Internet Service Providers) are keen to see the liability of providers of hyperlinks and search engines limited. Rights-holders, on the other hand, are worried that this would allow unwarranted protection for technologies used to erode the permission-based approach on which Intellectual Property is based.

Sample comments

"The implementation of the Electronic Commerce Directive in the UK has provided a successful framework for the development of vigorous competition by creating the legal certainty of limited liability for intermediaries. The importance of this legal certainty cannot be underestimated. Currently, the uncertain state of the law in the UK on liability in this area means that all ISPs and other providers of hyperlinks and location tool services face uncertain and unquantifiable risks. In particular, given that hyperlinks and search engines constitute some of the basic building blocks of the internet and facilitate in particular the navigation of the vast amount of information on the internet, providers of these services should also benefit from similar legal certainty."

"The Commission's report noted that, whilst it was not mandatory for Member States to extend the provisions of Articles 12 to 14 to cover hyperlinks and location tool services to correctly implement the Directive, those that did so would develop legal security by doing so. We support that view. We were, however, disappointed that the Commission did not specifically acknowledge the problems faced by content aggregators that are caused by failing to extend the liability limitations to them. More and more online publishers are using content aggregation to meet customer demand for comprehensive publications,

and as a key means to create 'stickiness' for their online offerings. Under the current regime, content aggregators are liable for damages from the moment they automatically aggregate content; ISPs that cache or host are only liable once they become aware that the content is problematic. This disparity is illogical, since both types of intermediary will normally have no knowledge of problems in the content they aggregate unless they are notified of the problems."

"We agree with the Commission that it has to recognise how e-commerce is quickly evolving, and that related legal, technical, and economic developments need to be constantly monitored and analysed. We believe that this further analysis is particularly important concerning the law of defamation, the law applicable to contempt of court and rules governing the provisions of misleading financial market data, to the extent that these provisions fall within the 'Coordinated Field' to which the provisions of the Directive apply. However, the way in which the Directive applies horizontally across all areas of law within the coordinated field of the Directive, regardless of whether it is a matter of public, private or criminal law, should be a matter for particular review in the context of this continuing analysis."

"We agree with the general conclusion of the report which refers to 'very little practical experience on the application of Articles 12 to 14' highlighting the lack of conclusive jurisprudence in Member States following the implementation of the Electronic Commerce Directive. Any further expansion of Articles 12 to 14 in the UK would at this time be premature and unwarranted, due to the technological developments which have and will continue to have an impact on the conduct and subsequent liability of the internet intermediaries. It is also premature to revise limitations in such a way that will catch future types of technologies when the future uses are not always possible to predict. A more flexible approach is required under which case law should be allowed to develop; this allows legal principles to adapt in line with changing circumstances."

QUESTION 2

In your experience, what are the advantages and/or disadvantages of the transpositions of the Member States that have already included the liability limitation cover for hyperlinks, location tool and content aggregation services? i.e. what has been the impact for service providers, rights-holders and individuals alike with regard to their transpositions?

Summary

There appears to be very little evidence to suggest that where Member States have limited the liability limitation to providers of hyperlinks and location tool providers it has made any significant difference. There appears to be very little case law in these Member States to ascertain their effect.

Sample comments

“We are not aware of any conflicting case law in those countries that gives rise to legal uncertainty. This is in stark contrast to countries such as Germany, where no such provisions have been introduced, and where the courts are regularly called to decide on issues of intermediary liability, often with mixed results. Legal certainty results in increased confidence to online businesses, which in turn leads to greater investment in e-commerce in general, and consequently benefits consumers”.

“Article 21.2 of the Directive provides that reports on the need for any adaptation of the Directive should analyse the need for proposals concerning the liability of providers of hyperlinks and location tool services, ‘notice and take down’ procedures and the attribution of liability following the taking down of content. However, the Directive does not define what is meant by the expressions ‘hyperlink’ or ‘location tool service’. As a result, the way in which some Member States have adopted certain additional elements in their national laws, not covered by the Directive but relating to the liability of hyperlinkers and search engines, may work against the Internal Market aims of the Directive in the longer term. This is particularly because the concept of what is meant by ‘hyperlink’ and ‘location tool service’ has evolved and become much more sophisticated since the Directive was adopted. So the Member States that have attempted to ‘fix’ definitions and provide for new rules on liability against an understanding of the expressions at the time the Directive was adopted, now find themselves with regulations potentially removing liability from hyperlink or tool search engine activities which potentially directly damage the business interests of other online services, in ways that work against the interests of the Internal Market.

We comment further about the importance of distinguishing the elements within any definitions of these expressions below.”

“Disadvantages of the transpositions of the Member States that have already included the liability limitation cover for hyperlinks, location tool and content aggregation services include:

- (a) the lack of uniformity already established within the EU concerning a sensitive area, which the Commission itself has acknowledged would benefit from review in the light of technical and economic developments within the Internal Market which the Directive sought to promote;*
- (b) potential conflict between the way in which individual Member States, and the courts within Member States, apply the liability provisions within the ‘coordinated field’ covered by the Directive against different levels of subsidiary regulations;*
- (c) restricting the need for the e-commerce market to distinguish responsibilities for different types of hyperlinks, location tool services and aggregation services as the understanding of the expressions changes with developments in technology;*
- (d) potentially removing from the courts the opportunity to take into account the economic intentions of those providing the links or services, the practical business procedures which are developing, and the importance of the protection and respect for copyright and other intellectual property rights.*

“At present no significant case law appears to have been established which exacerbates the above concerns. However, we believe that this is a matter for continued review, and would suggest that developments in this area within the United States should also be considered. The potential concerns are likely to be aggravated if the United Kingdom increases the lack of uniformity by introducing its own additions to the liability provisions under Articles 12 to 14 at this early stage.”

“We are not aware of any disadvantages where Member States have decided to widen the liability limitation cover. We believe that a more relevant and important comparison than between EU Member States is with the United States, the global leader in the knowledge-based economy – a position to which HMG aspires. We believe the US situation is more satisfactory. There, the position of intermediaries for IPR infringement is dealt with under Section 202 of the Digital Millennium Copyright Act; Section 230 of the Communications Decency Act deals with all other problematic forms of content. We note that some publishers have raised concerns about apparent risks from extending concessions to aggregation. We believe that these fears are misplaced and that this can be demonstrated by the real experience in the United

States. If the world's largest and most innovative publishing market thrives on having adequate protection for content aggregators, the question may fairly be asked why UK publishers should stumble if the UK were to align its regime with that of the United States."

QUESTION 3

With other Member States' transpositions in mind, which of the liability limitations in Articles 12 to 14 (if any) should apply to each of the following intermediary service providers if the UK were to go ahead and provide legislative cover?

- i) hyperlinker;**
- ii) location tool providers; and**
- iii) content aggregation providers.**

Please give the reasons behind your answers.

Summary

Those in favour of limiting liability by means of legislative cover are in favour of providing such limitation to cover all three providers. Those who are against it, namely rights-holders, do not want to see any further cover granted.

Sample comments

"We do not believe that the liability limitations in Articles 12 to 14 should apply to any of the stated intermediary service providers in the UK. The liability limitations in Articles 12 to 14 of the Directive were eventually agreed (after very extensive debate) on the basis that:

- a) the service providers were not gaining any additional economic benefit from the transmission of the information to which the limitations of liability applied;*
- b) the information to which the limitations of liability applied was originated or provided for transmission by the recipients of the service (as distinct from the service provider).*

"The 'intermediaries' about whom the DTI consultation seeks views do not satisfy the above tests. The Directive EC 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society has been important in this respect. Case law is beginning to develop against the background of implementation of the provisions of this Directive within Member States. It is important that these developments are not confused or devalued by general changes to Articles 12 to 14 of the Electronic Commerce Directive."

“In our opinion the most appropriate basis for the extension of the current liability limitations to hyperlinkers and location tool providers is Article 14. We also recognise that Article 12 could be used as a basis for limiting the liability of providers of hyperlinks and location tools, as has been the case in certain other EU Member States.”

QUESTION 4

Do you think that providers of hyperlinks and location tool services need the extension of any Articles 12 to 14? If so, what liabilities would be limited? And how significant are the problems currently caused by the lack of this extension?

Please explain your reasons; examples would be helpful.

Summary

As with Question 3, the views are divided with service providers supporting an extension and rights-holders against.

Sample comments

“We not believe that ‘hyperlinks’ and ‘location tools services’, in the form of the generic groups described in the DTI consultation paper, need an extension of Articles 12 to 14 of the Electronic Commerce Directive. However, we would suggest that it is important to consider ways of distinguishing the evolving activities on information services that make intermediary use of information through the use of hyperlinks and location search tools. The consultation paper refers to three types of hyperlink. However, many links already facilitate access to the use of unauthorised or illegal material within the coordinated field to which the Directive applies. In particular, links to unauthorised copyright material can incite and promote illegal or unauthorised use at levels causing damage to rights-owners that far outweighs the copyright position of those who use hyperlinks, and their copyright liability is assessed against established law, or provisions such as Section 97(1) Copyright, Designs and Patents Act 1988 already in place.”

“Hyperlinking in general terms have benefits and disbenefits, depending on the use to which it is put. To consider a general sweeping exemption from liability is therefore inappropriate. In our experience, although the law is unclear, in practical terms, if linking enhances traffic to a site with no commercial loss to another, or indeed with gains to both parties, no issue arises, whatever the legal situation. If it is operated to enable

diversion of traffic from one site to another with unapproved loss to the former (as in the Shetland Times case), there is an issue, which could usefully be legally clarified. The solution in our mind lies not in creating broad exemptions from liability for all such activity, only some of which is benevolent, but perhaps in addressing the issue through the concept of unfair competition laws as in the case, for example, in France. The same applies to search engine activity”.

“Providers of hyperlinks and location tools services do need the extension of Articles 12 to 14. Fear of potential liability has several important consequences. It interferes with the development of online services to a material and detrimental extent because it impedes the use of intermediaries of hyperlinks and location tool services as they behave cautiously. Providers are inevitably cautious in the way they manage these services as it is in practice impossible for the provider to monitor whether the content linked to is in breach of copyright or defamatory, or contains any illegal content. Given that the hyperlinks and search engines’ results constitute some of the basic building blocks of the internet, which enable end users to navigate the internet with ease, any interference in their use has serious consequences. If the provisions of Article 12 to 14 are extended, we believe that ISPs themselves would need further clarity, given that they may be hosting websites that provide hyperlinks and possibly search engines and location tools”.

QUESTION 5

Alternatively, would an extension of any of the Articles 12 to 14 of the Directive be detrimental to rights-holders and individuals? Please explain your reasons, with examples if possible.

Summary

Polarised views depended on whether respondent was an ISP or a rights-holder.

Sample comments

“We do not see any effects detrimental to rights-owners or individuals that could be caused by the extension of Articles 12 to 14 to hyperlinking or location tool providers. The immunity being extended only covers intermediaries who a) do not deal in the infringing material and b) have no knowledge of it, and thus the possibility to bring proceedings against the direct infringer is in no way changed or limited. Moreover, action against the intermediaries would only be limited to the

extent that the intermediary has no knowledge of the infringing material. The general benefits of a more vibrant e-commerce sector as a result of the greater legal certainty engendered by the extension of the liability limitation provisions will accrue as much to the rights-owners and individuals as to the other actors in the e-commerce value chain.”

“We agree that any general extensions to Article 12 to 14 of the Directive would be detrimental to rights-holders. Some online businesses take part in a number of activities which promote the unauthorised use of intellectual property and we believe that further exemptions will encourage this activity. We believe that an extension of Articles 12 to 14 across the horizontal areas of law currently relevant to the provisions would be premature and damaging to the interest of legitimate information service providers.”

QUESTION 6

If you think there is a need to extend limitations on liability to hyperlinkers and location tool providers, should this be achieved by an extension of Articles 12 or by Article 14?

Summary

Although the rights-holders do not wish to see an extension, there appears to be a mixture of views expressed by other respondents.

Sample comments

“Any extension of liability needs to take into account the nature of the providers of hyperlinks and location tools. The solution is more complex than just extending one or other of Articles 12 or 14. An Article 12-type exclusion should protect both the provider of the links and the ISP hosting those links. Given that the mischief of concern is perpetrated by the content owner and not by the hyperlink or location tool provider, nor by the ISP hosting the relevant site, a notice and takedown process, with its possible imposition of liability, is inappropriate. Consequently, the preferred option is Article 12-type exclusion with clarity surrounding the ISPs’ exclusion of liability in hosting a site.”

“Hyperlinkers should be covered by Article 12. Location tool and content aggregators should be covered by Article 14. However, our support for such new liability limitations is conditional on the understanding that any modification of UK legislation will lead to no change in the liability situation of hosting service providers that store pages containing hyperlinks on behalf of third parties.”

“We do not believe that at this time, the current laws need to be changed. We believe that any change to Article 12 would be inappropriate: both hyperlinks and search engines involve the service provider in much closer use of copyright content than the provision of mere conduit services. In the case of hyperlinks, the operator frequently intentionally directs users to the content for his own profit. In the case of search engines, the operator typically uses technical measures to select and give prominence to some results over others, again for purposes of profit.”

“By applying an Article 12 limitation of liability then no provider of hyperlinks can be held responsible for links. As hyperlinking can be done on any website, not just search sites, this would mean that no responsibility for the linking will fall with the content provider. It is important therefore that such protection is afforded also to ISPs who may host such services; without this ISPs could be held responsible for the content, if it was found that the link (which is hosted on the server) is illegal.”

QUESTION 7

Is there any action that would give providers of hyperlinks and location tool services the protection they seek, other than through the extension of Article 12 to 14 to these services? Please explain your answer.

Summary

Rights-holders suggest licensing agreement or contracts. However, the ISPs would like to see either an extension to Article 12 or Article 14. There is also support for a statutory notice and takedown scheme.

Sample comments

“We believe that there are no other solutions available to provide service providers with the level of legal protection they need in order to develop their businesses. The creation of a simple and clear ‘notice and takedown’ procedure could further reduce the problem of legal uncertainty in the e-commerce sector.”

“It is in fact counter-productive, and damaging to the interests of content providers, service providers, rights-holders and others, to place service providers in a situation where they are expected to make a judgment on the legality of a particular piece of content. Even though larger providers might in theory have the means to make the judgment, albeit with significant costs, it is not feasible to expect smaller providers to be able to do the same.”

“We believe that a statutory-backed notice and takedown policy would help ease the legal uncertainty of hyperlinkers and location tools, but would not provide the proper legal protection they seek.”

“The diversity of content, which may infringe such a diverse range of law, means that the only way to provide suitable protection is to extend Article 12. Without this, hyperlinkers and search tools will face the same problems as ISPs do with hosting.”

“The existing legal framework deals adequately with the situation. Providers of hyperlinks and information location tools are free to enter into licensing agreements to authorise any activity in which they are involved that may imply copyright liability. As companies whose business depends upon the exploitation of content, this is a reasonable requirement to impose. In any event, where providers of hyperlinks or general purpose search engines do not point the user directly to infringing content but provide a more general service, it is likely that no liability under existing UK copyright law would arise. Current UK copyright law draws the line appropriately between conduct that encourages and profits from illegal activity, which should be subject to legal sanction, and conduct that provides a general public service that does not encourage illegal activity, where liability is unlikely to arise. Introducing new exceptions from liability would disturb this careful balance.”

QUESTION 8

What (if any) would be the detrimental consequences caused by the extension of Articles 12 to 14 to providers of hyperlinks and location tool services? i.e. would it seriously impact on your profits/ viability or provide a major irritation? Please explain your reasons with examples if possible.

Summary

The service providers do not believe that any detrimental effects would be caused by any extension of Article 12 to 14. However, the rights-owners are concerned about infringement of their intellectual property rights, as well as the effect such an extension will have on the policing activity that must be undertaken by right-owners.

Sample comments

“We are clear in our belief that increasing the exemptions would encourage infringement and that the rights-holders, conversely, would be responsible for policing the illegal activity. This would be particularly damaging for SMEs. Litigation is costly and therefore not available to everyone who may have a legitimate complaint. By way of example, the online businesses taking advantage of the unauthorised use of copyright works and other intellectual property would undoubtedly claim exemption under any exceptions for hyperlinkers or search engines. BitTorrent services, e.g. thePiratebay.com, includes a website and server offering special links that connect the user to infringing copies of copyright works. On 9 August 2005, the ‘Piratebay’ claimed to offer 86,831 such links (called ‘torrents’). This system involves a form of hyperlinking that allows users to search for other users who are offering infringing material. There are many BitTorrent sites devoted to infringement. BitTorrent (which in principle can also be used for non-infringing activities) is only one system that is widely misapplied for piracy. eDonkey and DC++ are others of equal concern. The BitTorrent activities are now more prevalent, and recently developers have announced new forms of BitTorrent technology enabling each user to become their own search engine. It should also be noted that software development in this field is not innocent of legal consequences. Persons wishing to make money by facilitating piracy will build their systems to exploit any perceived ambiguity or weakness of the law. In the current circumstances, any extension of the defences available against infringement claims would be inopportune”.

“We believe that an extension to these two Articles would not be detrimental to its business. On the contrary, it would improve legal certainty and make it easier for companies to expand their businesses.”

“Existing jurisprudence in the UK seems to offer no dangers to legitimate services of this type. We are aware of no concrete examples of such damage, at least in relation to intellectual property rights. It is conceivable (though we know of no concrete examples) that such operators might incur liability under other fields of the law, such as defamation and contempt of court, in which strict liability might arise. Any solution to such problems should be tailored to the specific area of law concerned.”

“TNS estimates that illegal peer-to-peer filesharing has cost the UK record industry £654m in lost sales in the 2003 and 2004. This figure does not include additional losses from websites hosting infringing content and from hyperlink sites. Introducing exceptions from liability for hyperlinks, search engines and content aggregation services would lead to a proliferation of infringement of music content on the internet, hosted from the UK, that the record industry would not be in a position to prevent. It would therefore significantly increase the very substantial losses that the UK record industry is already enduring and could be expected to seriously affect the future of the record industry in the UK.”

QUESTION 9

Do providers of content aggregation services agree with the assumption that if they are to be covered under Articles 12 to 14, then the legislative vehicle will need to be primary rather than secondary? Please explain the reasons for your answer.

Summary

This question produced a mixture of views, with ISPs suggesting that, with changes, secondary legislation may be possible but rights-holders stating that this would be difficult.

Sample comments

“The choice of legislative vehicle is a choice for government. We do, however, believe that there may be flexibility for HMG to make very minor drafting amendments to the definition of ‘recipient’ that would have the effect of removing anomalies, while remaining in the scope of the Electronic Commerce Directive.”

“Our members believe that primary legislation would be required.”

“It would appear that provision would need to be covered by primary legislation unless any agreed changes could be linked to other existing law that would enable secondary legislation to apply.”

QUESTION 10

If you believe there is a need to extend limitations on liability to content aggregation services, should this be achieved by an extension of Article 14 of the Directive? Please explain the reasons for your answer.

Summary

Responses showed opposing views.

Sample comments

“We believe that providers of content aggregation services should be equated with hosting providers, and thus provided with the same limitation in liability as the latter are provided with at the moment. Protection is needed as current technological and commercial developments in the content aggregation sector are hindered by the legal uncertainties in respect of liability.

“A case in point is the increasing demand for technologies that allow users to freely choose the content they want syndicated on the provider’s site. For example, ‘X’ offers its users the possibility to aggregate news headlines from other sources on their ‘X’ page. A problem that arises from this is that because users can choose themselves what content they want to see on their ‘X’ page, it is impossible for ‘X’ to know what material is being aggregated. If a syndicated article, or only the headline, is in some way offending, there is a risk that ‘X’ will be sued, even though it, as a mere intermediary, had no control, nor knowledge, of the offending material.”

Latest technologies have opened up a multitude of new ways of providing consumers with the news they wish to see, but the fear of a legal backlash is holding back this development amongst service providers. If the providers of these services would be extended the same liability limitations as, for example, apply to hosting providers, the development of syndication technologies and the resulting services would expand rapidly. Content providers such as the BBC, The Financial Times and the New York Times have already embraced this new technology. However, in order for the potential to actualise, there is a need to ensure that companies distributing such syndicated content, to the extent that they distribute it automatically as mere intermediaries without knowledge of the content, should not be held liable for the legality or otherwise of the content.”

QUESTION 11

Do you think that there is any course of action that would give providers of content aggregation services the protection they seek, other than through the extension of Article 14 to these services? Please explain your answer.

Summary

As before, differing views were divided along rights-holders/ISP lines.

Sample comments

“The extension of Article 12 to these content aggregation services is the most efficient way to gain protection. Alternatively, specific legislation e.g. the Copyright Act etc would have to be amended.”

“We believe that current law, together with existing possibilities of licensing and insurance, provide all the protection that aggregators could reasonably require. Our preferred course of action is that the laws do not change at all.”

“Bearing in mind the concerns already expressed by the Law Commission over the relationship between the 2002 Regulations implementing the Directive, the wider issues affecting the law of defamation and contempt at international level, it would seem that any adjustment to Article 14 to equate such ‘automated processing’ with caching would need very careful definition. It is not thought that any such definition could apply to a generic group described as ‘content aggregation services’.

“Article 14 of the ECD would already cover content aggregation services were it not for the limitations of the term ‘recipient of service’. US legislation does not create the anomalies now arising, which very clearly undermine the competitive position of the UK as a centre for aggregators, and so will continue to encourage content aggregation services to be developed there, rather than in the UK.”

QUESTION 12

Do providers of content aggregation services believe they are the primary or secondary publishers? Please explain the reasons for your answer.

Summary

Different views were expressed. There was a call in some quarters for further consideration to be given to how certain automated processing of information by content aggregation services might be distinguished from those processing the content created by the aggregator, or content owned by third parties requiring clearance for use.

The responses indicate that providers of content aggregation services can be both primary and secondary publishers.

Sample comments

“We aggregate content that has been edited by the primary publisher. Furthermore, we are prohibited from altering any content or giving any comment on behalf of the primary publisher. On the basis of these activities, we regard ourselves as a secondary publisher on the Broadband Plus content platform because of its limited editorial control.”

“An area of concern involves the processing of information which may amount to ‘publication’ by a content aggregation service, but due to other legal requirements (such as Financial Service obligations to ensure that there is no delay in making market information available), it is not reasonably practical for the content aggregation service to double-check the validity of all the information in advance of processing, and the terms of commercial contracts entered into between the suppliers of information and the content aggregation service cannot exclude potential liability for the tortious claims concerning the release of misleading market information, defamation, or possible contempt.”

QUESTION 13

Would parties most affected by these proposals provide in their reply to this consultation, facts and figures that illustrate the benefits and costs that you/your sector would incur if the UK Government either went ahead (or not) with a legislative measure to cover the liability of providers of hyperlinks, location tool and content aggregation services?

Summary

There was little offered by way of empirical evidence on either side of the argument that directly addressed this question.

Sample comments

“We believe that the extension of existing exemptions would exacerbate the problems which the music industry already faces from illegal file-sharing and sites linking to unauthorised content on the internet. The overwhelming majority view of reputable third-party research shows that illegal file-sharing has been a key factor in the recording industry’s 22% decline in worldwide sales between 1999 and 2004 (source:IFPI), and the halving in sales of the British singles market between 1999 and 2004. Research also confirms that the substantial effect of illegal file-sharing on music purchasing substantially outweighs any promotional effect. A two-year study by TNS tracking the purchasing habits of downloaders against non-downloaders revealed that over time, downloaders bought less music; amounting to a loss of an estimated £654m over the two years.”

“It is difficult to put costs on the existing limitation of liability, let alone with any future extension; it is noteworthy that the MCPS Anti-Piracy Unit which investigates infringements on behalf of UK composers and music publishers now spends 96% of its time and resources on internet-related infringements (as compared to 25% five years ago). This puts a considerable strain on its resources. Additionally, most composers and music publishers are SMEs and do not have the financial, technological or human resources themselves to monitor and subsequently pursue internet infringements. We are concerned that intermediaries providing legitimate services will have to compete with intermediaries claiming to be within the limitations of liability but providing illegitimate services; this is detrimental to the development of a legitimate market for intermediaries.”

“It is sometimes suggested that aggregators could address the problems they face through contract. As the DTI consultation paper recognizes this is insufficient because:

- it is impossible to indemnify against criminal liability;
- large data sources, including governments licensing public sector information, often refuse to provide indemnities;
- indemnities from smaller publishers are often insufficient to meet any liabilities that may arise.

An extension in liability limitations to publishers that aggregate under licence would thus remove a significant business risk.”

QUESTION 14

Would service providers who provide hyperlinking, location tool or content aggregation services please indicate the number of notices/claims of illegal content that they received from August 2002 to February 2005? Of these, were there any settled in the UK Court of Law? If not, did the out-of-court settlements reached cause any major detriment to your business turnover? Please would providers give examples to show the scale of the problem for your business.

Summary

There were two confidential responses to this question.

Sample comments

N/A

QUESTION 15

Do you know of any jurisprudence in Member States of the European Economic Area on the liability of internet service providers since August 2002 that has a direct impact on providers of hyperlinks, location tool or content aggregation services established in the UK?

Summary

Examples were given by ISPs of jurisprudence in other Member States that might have an impact on providers of location tool and hyperlinks established in the UK.

Sample comments

“The French collecting society, SACEM/SDRM, has informed us of the three cases in which criminal proceedings were brought successfully against hyperlinkers who were found to infringe copyright. Although only one of these cases post-dates August 2002 and none of them have been shown to have any impact on UK services, it is an indication of how rights-holders rely on the general provisions of civil and criminal law in their fight against piracy. Our contacts at the French Society believe that any limitation of hyperlinkers’ liability would greatly undermine the ability of copyright owners to take action for copyright infringement. Regarding the liability of location tool providers, in a decision issued by the Appeal Court of Paris (15 May 2002), a search engine was deemed not responsible for the infringement of copyright by a website to which it gave access.”

“We have regularly monitored case law in the EEA countries concerning hyperlinking and are greatly concerned by the current situation. There have been numerous cases dealing with the liability for hyperlinks generally, but applicable to location tools, and possibly also to content aggregation service providers as well. Due to the cross-border nature of the internet, and the uncertainties regarding the scope of the country of origin principle in the Electronic Commerce Directive, all of these are in principle applicable to providers established in the UK.

“Although in many instances courts have held hyperlink providers not liable for linking to illegal third-party content, a number of cases have, nevertheless, resulted in finding of liability. The mixed rulings by the different courts have created a situation where hyperlink providers are

not in a position to plan their business operations in a manner that would negate or minimise the risk of liability for hyperlinking (and consequently also for location tools and possibly content aggregation services).

“Examples are numerous: in the Heise case, a German court held an online newspaper liable for the provision of a surface link from a newspaper article to another website offering illegal material. In our view, the decision is in direct conflict with the Supreme Court decision in the Die Welt case, where the publisher of the newspaper Die Welt was held to have acted legally when it provided next to its article a hyperlink leading to a website offering illegal gambling. The cases are difficult to reconcile, and make for uncertain law. The situation becomes even more confusing when one considers the Norwegian Finn Eiendom case, where the Trondheim District court held that as a matter of principle, provision of surface links is not illegal.

“Similar uncertainties exist in other areas. For example, in France the 2002 judgment in the Altavista case shows how the courts experience difficulties in applying current law to online intermediaries. Altavista was, in the first instance, held liable for providing, via its automated search engine, a link to a website offering illegal material. The Appeals Court reversed the decision, stating that the liability of the search engine provider was ‘questionable’, but did not settle the matter conclusively. In Norway in the 2003 Start siden decision, the Norwegian court came to the opposite conclusion, holding an internet portal not liable for the provision of deep links to file-sharing programmes.

“Liability for deep linking has in general given rise to conflicting decisions in the Member States. In its Paperboy judgment, the German Supreme Court held the owner of a new search service that provided users with deep links to third-party news articles, not liable for infringement of copyright or unfair competition law. However, in the Newsbooster case in Denmark, the Copenhagen Court came to the opposite conclusion, holding the news search service Newsbooster.com, on facts comparable to the Paperboy case, liable for the provision of deep links to third-party news articles.

“The above cases are merely examples of the conflicting jurisprudence in the Member States. Thus legal clarity is needed, and we hope the DTI takes the opportunity to ensure that it will at least be provided in the UK.”

QUESTION 16

Are there any other issues the UK Government should take into account when considering its policy on liability cover for providers of hyperlinks, location tool and content aggregation services?

Summary

A number of issues were raised, again splitting along rights holders/ISPs lines so far as the need (or otherwise) of taking action in this area is concerned.

Sample comments

“The UK Government should consider the suggestion that, as a general rule, any exemptions should be subject to certain qualifying criteria. For example, if an ISP is to be protected by law from the actions of its users, should it not at the very least be able to identify who such users are so that they can be pursued? Similarly, if an aggregator is protected by law from the possibility that some of the third-party content they carry might give rise to civil or criminal sanctions, should they not have had the authority of the content owner to aggregate the content in the first place?”

“The factual changes of the circumstances in which internet intermediaries offer their services since the adoption of the Electronic Commerce Directive in 2000 in fact justify the reduction of the scope of Articles 12 to 14, rather than its extension. This needs to be addressed during the next review of the Electronic Commerce Directive. The current scope of Articles 12 to 14 is too wide and the UK Government should advocate a reduction of the scope in view of the changed circumstances. The limitation of liability for intermediaries was provided in the Electronic Commerce Directive because it was felt necessary at the time to facilitate the development of the then nascent market for intermediaries. The position now is very different, with several intermediaries being in a strong economic position, particularly in comparison to individual composers and music publishers who are struggling to protect and enforce their rights in the online environment. In hindsight, it is evident that the limitation of liability provided in Articles 12 to 14 was disproportionate and unduly geared towards the supposed needs of intermediaries. We strongly suggest that a thorough review of the current provisions is undertaken before any extension of the limitation of liability is even considered.”

“Any re-examination of the liability of ISPs must take into account the obligations of the UK under the Community acquis and international treaties, such as the Berne Convention and TRIPs Agreement. In particular, Article 5 of Directive 2001/29/EC on Copyright in the Information Society contains an exhaustive list of permitted exceptions and limitations to the exclusive rights of copyright owners listed in Articles 2 and 3 of that Directive. Any such exemptions or limitations to copyright owners’ exclusive rights must also pass the three-step test in Article 5.5 of the Directive. Whilst the Copyright Directive is without prejudice to the Electronic Commerce Directive (Recital 16), EU Member States are not competent to introduce new exceptions to copyright, absent a revision of one or other Directive. If there were new horizontal exceptions, they would have explicitly to exclude copyright to avoid non-compliance with Article 5 of the Copyright Directive.

“Furthermore, Article 13 of the TRIPs Agreement requires that any limitations on exclusive rights be confirmed ‘to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights-holder’.”

“Generally, a statutory framework for notice and takedown, that would provide more certainty for all participants, would be beneficial, as would a putback regime similar to that employed in the Digital Millennium Copyright.”

“We are greatly encouraged that the DTI is seeking to provide clarity over the liability of those who link to websites as this will add to the confidence of those who seek to invest and utilise e-commerce in the UK who support the limitation of liability to hyperlinkers, location tool services and content aggregators. They hope that DTI recommends the new legislation is made ‘prospective’ and not ‘retrospective’, as otherwise it will produce a heavy burden on them due to the sheer volume of information they hold at any one time. They also recommend that takedown notices are as specific as is technologically possible. Furthermore, they propose that a counter-notice procedure is formulated within the Directive so as to enable users to appeal if they believe their listing should not have been removed (as in the US), and this should be extended to hyperlinkers to deter complainants from ‘overreaching’ (as the owner would have an opportunity to respond to any allegations).”

“We believe that the Government must maintain the status quo as there is no technical infringement which requires the extension of the mere conduit limitation of liability. It submits that extending mere conduit may create a legal loophole and erode the permissions-based approach on which copyright is built, allowing infringing content to proliferate in a digital world where copyright owners may become unable to control unauthorised exploitation. A reasonable balance exists between rights-holders and users within the existing framework of Articles 12 to 14. If Government moves to extend mere conduit, then disqualifying conditions must be included to protect the legitimate interests of the UK’s creative industries.”

“An important issue the Government should pay attention to is the implementation of a clear and balanced notice and takedown regime. Doing so would contribute beneficially to the growth of the online industry due to the increased certainty it brings, and would also reduce the number of inaccurate, auto-generated and vexatious takedowns.”

3 UK Government's response

3.1 UK Government's response to the consultation on granting an extension to providers of hyperlinks and location tool services

- 3.2 In their responses to the UK Government consultation on the implementation of the Electronic Commerce Directive, providers of hyperlinks and location tool services raise concerns that the failure to extend the limitations of liability in Articles 12 to 14 to the services they provide would create legal uncertainty, and would stunt the growth of electronic commerce in the UK. The DTI therefore facilitated a consultation process on this issue to ascertain whether in the three years since the implementation of the Directive, there was any evidence that failure to extend was harming the UK electronic commerce. In their responses, the ISPs and right-owners adopt polarised positions on the need for an extension of the limitations of liability.
- 3.3 ISPs argue for the extension on the basis that providers of location tool services are very similar to those who host content, and therefore they should be provided with Article 14-type protection. Similarly, providers of hyperlinks are very similar to 'mere conduits', and so Article 12-type protection should be afforded to them.
- 3.4 Some providers of hyperlinks and location tool services say that they are inevitably cautious in the way they manage their services because of the impracticability of monitoring whether the linked content infringes copyright or is defamatory, or otherwise contains illegal content. Given that hyperlinks and search engine results constitute some of the basic building blocks of the internet that enable end users to navigate the internet with ease, the providers' view is that any interference in their use would have serious consequences.
- 3.5 Providers of hyperlinks and location tool services have a contractual relationship with their subscribers and will be liable if they provide a service that breaks the terms of the contract.
- 3.6 A location tool provider also states in its response that there would be no detrimental effect caused to rights-owners or individuals if the limitations of liability were extended to hyperlinking and location tool providers. It states that the immunity being extended only covers intermediaries who: (a) do not deal in the infringing material; and (b) have no knowledge of it. Thus the possibility to bring proceedings against the direct infringer is not changed or limited. Moreover, liability against the intermediaries would only be limited where they have no knowledge of the infringing material.

- 3.7 In contrast, the right-holders' strongly oppose any extension of the limitations of liability to providers of hyperlinks and location tools. The main argument against the extension is that the scope of Articles 12 to 14 was eventually agreed (after very extensive debate) on the basis that: (a) the service providers were not gaining any additional economic benefit from the transmission of the information to which the limitation of liability applied; and (b) the information to which the limitations of liability applied was originated or provided for transmission by the recipients of the service (as distinct from the service provider). The 'intermediaries' (providers of hyperlinking, location tool and content aggregation services) do not satisfy those tests.
- 3.8 Another of the right-holders' arguments is that the extension proposed would seriously hamper the copyright system, which requires any user of copyright material to obtain a licence in **advance** from the copyright owner. The extension would mean, they suggest, copyright material could be used with impunity by third parties unless, and **until**, enforcement action is taken by copyright owners. They add that given the scale of copyright infringements, this would seriously undermine the ability of rights-owners, in particular SMEs, to take effective action to protect the value of their rights.
- 3.9 A number of responses point out that providers of both hyperlinks and location tool services have developed very successfully over the past three years notwithstanding the absence of liability exemptions. They argue that existing copyright law already draws the correct balance between the rights of users of copyright material and copyright owners. They go on to express their view that it would be very undesirable from a policy perspective to create exceptions from liability that would shelter businesses that seek to profit from mass copyright infringements.
- 3.10 In terms of copyrights and licensing intellectual property rights, there is also a general belief amongst a number of rights-owners that contract law provides for commercial terms to be negotiated with original rights-owners and publishers which can include indemnity provisions in line with normal commercial practice, and accepted business risks.
- 3.11 Having evaluated both sides of the argument for and against an extension of liability limitation to providers of hyperlinks and location tool providers, the government view is **that currently there is no substantial evidence to support the case for an extension** to be afforded to these service providers. In particular, there has been no significant legal action in the UK since the Directive's implementation in July 2002.

There has been little evidence forthcoming on the scope of any out-of-court settlements or notices received by providers of hyperlinks and location tool services that shows that significant legal uncertainty is currently experienced by these providers. It can only be concluded, therefore, that both of these areas are within the business tolerance levels for these types of businesses operating in the UK online market.

- 3.12 There also appears to be little economic impact on the service providers who are presently not covered by Articles 12 to 14, who in the case of the main search providers operating in the UK market seem to have benefited from good growth in their businesses since 2002.
- 3.13 However, the Government has also noted that the situation in some other European Community Member States (i.e. France and Germany) is less legally certain as there have been a number of contradictory court cases since July 2002 involving hyperlinks and location tool services providers. Therefore, the Government will await the view of the European Commission on this issue when it publishes its second review paper on the Electronic Commerce Directive in 2007.
- 3.14 The Government is also persuaded that there are disadvantages in Member States individually extending the limitations of liability as this hinders the development of any uniform approach, with the knock-on effect of increasing uncertainty for providers. It would be much better for the European Commission (if it deems fit in its second review of the Directive in 2007) to propose such additional liability limitations that would, after negotiations, be uniformly transposed into the national laws of all Member States.
- 3.15 It is noted in a number of responses that since the Directive was negotiated in the late 1990s/early 2000, technology supporting information society services has moved on considerably with the effect of it becoming increasingly difficult to draw distinctions between the various categories of service provider. It is hoped that the European Commission in its second review of the Directive will look at this issue and whether Articles 12 to 14 fully reflect all of these new types of information society services.
- 3.16 The Government has also noted from some of the responses received from both ISPs and the rights-owner community the support for a formal notice and takedown regime, possibly with some sort of legislative underpinning. The DTI is currently considering sponsoring an independent study on the need for a legislatively-backed notice and takedown and putback regime within the UK.

3.17 The Government has noted the question raised by rights-holders regarding the compatibility of extending the limitations on liability with European and international law on copyright. It is hoped that the European Commission in its second review of the Directive will consider this issue.

4 UK Government's response

4.1 UK Government's response to the consultation on granting an extension to content aggregation services

- 4.2 Like hyperlinkers and location tool providers, content aggregators consider that they are vulnerable to claims because they are more able to satisfy any judgment made against them than some of the providers of the information. In addition, content aggregators have a contractual relationship with their subscribers and may be liable if they provide a service that breaches the terms of that contract.
- 4.3 A content aggregator in its response says that it believes that there may be flexibility to make very minor drafting amendments to the definition of 'recipient' by replacing it with 'third parties' which would remove anomalies it feels exist in the present regulatory framework, while remaining in the scope of the Directive. It believes that Article 14 of the Directive provides a useful model for extending legislative protection from liability to content aggregation services, and only fails to adequately cover such services at present because liability concessions for 'third-party' content are restricted to material provided by a 'recipient of the service'. It also points out that the vast majority of its working processes is done in an automatic way, and in the few instances where it is not, the manual editing relates only to improving presentation and layout; the content itself is not substantially modified.
- 4.4 Another content aggregator in its response says that it does not support any horizontal broadening of the protections. However, it states that it routinely takes down problematic material on notice from its suppliers. It also points out that it has not had any instances of being pursued for criminal liability for third-party content. However, if this were to occur, contractual indemnities from content suppliers would not provide any defence. In these circumstances, it believes that the stigma of criminal charges against a responsible and professionally-run and law-abiding business is unfair and unacceptable. Therefore, it says that it would support the suggestion that this issue should be reviewed, with particular reference to certain laws with strict liability for criminal sanctions. In the interest of fairness, liability in these circumstances should be limited to failure to takedown once on notice, rather than strict liability regardless of behaviour.

- 4.5 A number of rights-owners say that the primary business of content aggregators is the exploitation of content and it is entirely right that such businesses should be required to respect copyright in carrying out their business. Content aggregators like those in the music field (e.g. iTunes and Napster), and many other large and small music services already do so. They argue that to shift the burden of copyright compliance onto copyright owners in this situation would conflict with the most basic principles of copyright law. They also believe that non-commercial aggregators should also be required to obtain licences to use copyrighted material. If this is not the case, they feel that this will undermine and potentially destroy the value of the legitimate online market, whether music, publishing or other content.
- 4.6 However, some rights-owners say that whilst not affecting intellectual property law, further consideration should be given to the way in which automated processing of information by content aggregation services might be distinguished from processing of content created by the aggregator or content owner by third parties for which the aggregator is responsible for obtaining clearance for use. They also argue that bearing in mind the concerns already expressed by the Law Commission over the relationship between the Electronic Commerce Regulations implementing the Electronic Commerce Directive, and the wider issues affecting the law of defamation and contempt of court at an international level, it would seem that any adjustment to the limitations of liability to equate such 'automated processing' with caching would need very careful definition. In their view, any such definition could not apply to a generic group described as 'content aggregation services'.
- 4.7 Rights-owners also make the point that it is entirely reasonable that companies or individuals that exploit creative content should be required to ensure that it is licensed before it is made available to millions of internet users. In addition, existing copyright law does not impose liability in circumstances where it would be unreasonable to do so (see section 97(1) of Copyright, Design and Patents Act 1988), therefore there is no need for additional protection. They add that content aggregators are able to enter into licences and obtain insurance cover for content they carry over their systems.

- 4.8 Having looked at both sides of the argument for and against an extension of liability limitation to providers of content aggregation services, the UK Government's view is that **currently there is no substantial evidence to support the case for an extension** to be given to content aggregation service providers. As for hyperlinkers and location tool services, there has been no significant legal action in the UK, and no information on the scale of out-of-court settlements or notices have been forthcoming to show the problems caused by legal uncertainty currently being experienced. There also appears to have been little economic impact on these providers not having the liability limitation since 2002.
- 4.9 The question of whether (and, if so, how) Articles 12 to 14 of the Electronic Commerce Directive should be amended is a matter for the European Commission when it next reviews the Directive in 2007.

Annex A

LIST OF RESPONDENTS
AFA
Alliance Against IP Theft (but excluding British Software Alliance)
Aslib Information Management
Association of Online Publishers (AOP) UK
BBC New Media and Technology
British Copyright Council
British Music Rights
British Phonographic Industry (BPI)
British Software Alliance
British Telecommunications Plc
Confederation of British Industry (CBI)
Digital Content Forum
eBay
Entertainment Leisure Software Publishers (DG)
Entertainment Leisure Software Publishers Association (ELSPA)
Federation Against Software Theft
Internet Service Providers Association (ISPA) UK
Libraries and Archives Copyright Alliance (LACA)
Martin Bryan
Mobile Broadband Group
Motion Picture Association (MPA)
News International Ltd
Newspaper Society
NTL
Ordnance Survey

Periodical Publishers Association
Publishers Association
Paul Pedley
Reed Elsevier
Reuters
Schillings
Small Business Service
Society of College National and University Libraries (SCONUL)
Thus Plc
UKERNA
UK Film Council
Wanadoo
Yahoo! Europe

