

## **Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive 2000/31/EC of 8 June 2000 on electronic commerce**

SAA Contribution  
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The Society of Audiovisual Authors (SAA) is a new association of European collective management societies representing audiovisual authors. Through its 24 members in 17 countries, SAA represents over 100 000 film and television European screenwriters and directors ([www.saa-authors.eu](http://www.saa-authors.eu)).

SAA's main objectives are:

- To defend and strengthen the economic and moral rights of audiovisual authors (screenwriters and directors);
- To secure fair remuneration for audiovisual authors for every use of their works;
- To develop, promote and facilitate the management of rights by member societies.

SAA welcomes this public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce. Ten years after the adoption of the Directive, it is in deed of an utmost importance to assess the practical application of the Directive in the Member States and the possible difficulties generated. SAA will therefore pay great attention to the results of the consultation.

However, taking into account that the consultation aims mainly at collecting stakeholders' views on the implementation of the electronic commerce Directive in their own Member State and the pan-European nature of SAA, SAA contribution will concentrate on general principles related to the implementation of the Directive and leaves it to its members' societies to address the implementation in their own Member State (see for example contributions from SABAM in Belgium and SACD in France).

SAA contribution is therefore addressing two main issues: issue 2 related to the copyright derogation from the internal market clause and issue 5 on the interpretation of the provision concerning intermediary liability, in order to reaffirm important principles which are still valid and necessary to better develop in the digital era.

## ISSUE 2: QUESTIONS CONCERNING DEROGATIONS FROM ARTICLE 3

36. *In your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services?*

37. *In your view, are there other rules or practices which hinder the provision or take-up of cross-border on-line services? If so, which?*

The electronic commerce Directive includes in its Article 3 the so-called “internal market clause” or country of origin principle, which allows information society service providers to offer cross-border services whilst remaining subject to the legislation of their Member State of establishment. However, as provided in the annex, the country of origin approach of the Directive does not apply to copyright and neighbouring rights. The reason for this is the territoriality of copyright, protected and implemented by national laws, even if European harmonisation has developed common standards. The principle of territoriality, along with contractual freedom, exclusivity and enforcement, govern international copyright treaties and are at the heart of the copyright *acquis communautaire*.

In the audiovisual sector, the territorial nature of copyright is coupled with a structurally European fragmented market due to the linguistic and cultural specificities of the national markets. This market fragmentation goes a long way to explaining why European audiovisual content is licensed primarily on a territorial basis, as demonstrated in the KEA and Cerna study on the multi-territory licensing of audiovisual works in the European Union commissioned by DG Information Society and Media<sup>1</sup>: *“media products are “experience” goods. Cultural and linguistic versioning is therefore essential to create consumer demand for each film or television programme. The investment associated with linguistic versioning, and more generally with the marketing of each audiovisual work, is specific to each territory”*.

Copyright is therefore not a bottleneck to the emergence of a single market; it is essential to the success of Europe’s audiovisual sector. Audiovisual content markets are undergoing significant transformations due to digital technology. Video on-demand (VOD) is on the rise and close to 700 on-demand and catch-up services exist in Europe. VOD turn-over in Europe is expected to grow to approximately € 2.2 billion in 2013. However, there are important factors that inhibit a rapid roll out of VOD services which are primarily connected to limited market demand and related gaps in finance. In this context, while policy debates concerning the challenges to developing a digital single market for audiovisual content in Europe mainly focus on copyright and its territorial exercise, they do not take sufficient notice of real obstacles, such as limited pan-European market demand, lack of financing, insufficient harmonisation regarding copyright enforcement, VAT rules, etc.

## ISSUE 5: INTERPRETATION OF THE PROVISIONS CONCERNING INTERMEDIARY LIABILITY IN THE DIRECTIVE

Section 4 of the electronic commerce Directive covers the responsibility of intermediary service providers. It defines the conditions for exemptions of liability of intermediary Internet service providers for certain activities: “mere conduit” (Article 12) “caching (Article 13) and “hosting” (Article 14). Article 14 leaves open the possibility of notice and take down procedures to be agreed between parties and Article 15 provides for the prohibition of a general obligation on providers to monitor the information they transmit or store and to actively seek facts indicating illegal activities. These articles use concepts such as “actual knowledge” of an infringement and “expeditious” response. The Commission, as mentioned in the consultation document, notices that it has, alongside with national courts and administrations, frequently been called on to interpret these concepts.

<sup>1</sup> [http://ec.europa.eu/avpolic/doc/library/studies/multiterr/final\\_rep\\_en.pdf](http://ec.europa.eu/avpolic/doc/library/studies/multiterr/final_rep_en.pdf).

In the preparation of its contribution on this very important topic, SAA can only deplore that the study on the liability of internet intermediaries commissioned by DG Internal Market and Services in 2006 and finalised in November 2007, which is the only comprehensive study of the implementation laws, courts and administrative decisions on this issue, has only been published in August 2010 as part of the current consultation process and without having been updated with recent legislations and court cases. This situation limits any possible overview of the situation in the European Union for stakeholders.

However, thanks to its members' societies information on the current situation in their own countries related to the intermediary liability, SAA comments are able to focus on three main issues:

- Definition of actual knowledge and notification procedures of illegal content
- Filtering, monitoring, and cooperation between parties
- The adaptation of the Directive to technological developments

### **1. Actual knowledge and notification procedures of illegal content**

The contrasted experiences of France and Spain on the definition of actual knowledge and notification procedures of illegal content demonstrate the need for a procedure agreed between the parties in order to establish the actual knowledge or awareness of illegal content by the provider. As the directive does not regulate the detail of such procedure, it is currently up to Member States to establish it or to encourage the interested parties to agree on a procedure.

The French implementation law of the Directive<sup>2</sup> has defined a voluntary notification procedure of illegal content to hosting providers which allows, when it is used by rights holders, to establish the actual knowledge of illegal content. French courts have developed the importance of the notification in case of violation of copyright as the absence of notification or of one of the elements of the notification provided by the law prevent the possibility to engage the liability of the hosting provider for lack of actual knowledge of the illegal content.

On the opposite, the defective Spanish implementation of the Directive<sup>3</sup>, which has restricted the actual knowledge notion to the existence of a court order to establish the illegal status of the content, has deprived rights holders to the possibility to use this kind of notification procedure. It is one of the numerous difficulties for rights holders in Spain due to the defective implementation of the Directive.

However, even the French notification procedure has a too limited impact. Contrary to the US notice and take down procedure, it does not lead to an automatic take down of the illegal content. It only contributes to the establishment of the actual knowledge of the illegal content by the provider. In addition, it does not prevent the reappearance of the illegal content or another illegal content from the same protected work on the same platform.

Therefore, in line with French and German precedents and to take into account these concrete problems that rights holders face, it would be useful to extend the impact of notification procedures in order to develop:

- True notice and take down procedures of illegal content,
- Notice and stay down, to avoid the reappearance of the said illegal content on the platform,
- Notice and keep off, to avoid another illegal content based on the same protected work to appear on the platform.

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<sup>2</sup> Article 6-I-5 of the Law 2004-575 of 21 June 2004 to foster trust in the digital economy.

<sup>3</sup> Law 34/2002 of 11 July 2002 on information society and electronic commerce services.

The extension of the impact of notification procedures would be facilitated by filtering technologies developed by platforms at the stage of the uploading of content by users on their servers, based on databases of fingerprinted works which have been notified, with a view to identify and to block illegal content.

## **2. Filtering, monitoring and cooperation between parties**

German courts<sup>4</sup> impose on providers to take down illegal contents and to prevent new infringements based on the same protected works with the help of filtering measures. In this context, the actual knowledge of the illegal content (based on an injunction or a formal notification procedure) combined with adequate filtering measures make it possible to contemplate an obligation to prevent new infringements (keep off).

Such an obligation to prevent new infringements would not imply a general obligation to monitor or to actively seek illegal content as prohibited by Article 15 of the electronic commerce Directive. It would only cover specific protected content and not all the information hosted by the providers and would be based on an identification process carried out by rights holders and not providers.

In this context, cooperation between rights holders and providers is key to develop such databases of protected content and should therefore be encouraged. Article 16 on the drawing up of codes of conducts to contribute to the proper implementation of Article 5 to 15 could be used.

## **3. The adaptation of the Directive to technological developments**

Whereas Article 21 provides for implementation reports every two years, to analyse in particular the need for proposals concerning notice and take down procedures and the attribution of liability following the taking down of content or the need for additional conditions for the exemption from liability in the light of technical developments, this consultation process is the first exercise in this direction. Courts in the different Member States have been left alone in the interpretation of the different liability exemptions of the Directive and in their adaptation to new forms of information society services, which inevitably led to divergent precedents.

In the European digital market, positive precedents in some Member States are not satisfactory for rights holders if they suffer from limitations to enforce their rights in other Member States.

In this context, SAA calls for an adaptation of the Directive in order to guarantee its uniform application and the availability of appropriate tools in all Member States in order for rights holders to be able to defend their intellectual property rights all over Europe. It would be useful in particular that the important concept of the actual knowledge of the Directive be well defined and that notification procedures be developed towards notice and take down, notice and stay down and notice and keep off to ensure an effective implementation of the Directive which takes into account the technological developments.

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<sup>4</sup> And some French courts: TGI Paris of 19 October 2007 *Zadig v. Google*, TGI Paris of 10 April 2009 *Zadig v. Dailymotion* and CA Paris of 9 April 2010 *Flach Films v. Google*.