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Safe harbour provisions and online service providers

A Discussion Paper by

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1. INTRODUCTION

1.1 During my time as the Prime Minister's Adviser on Intellectual Property from September 2013 to October 2014 I produced 3 key reports:

1.1.1 Search Engines and Piracy¹

1.1.2 'Follow The Money': Financial Options To Assist In The Battle Against Online IP Piracy²

1.1.3 Copyright Education and Awareness³

Whilst there is much to cover in the area of intellectual property, I always felt that one specific topic had not been fully debated or challenged – the role of Internet Service Providers (ISPs) and other similar online intermediaries in the fight against piracy.

1.2 This is a discussion document intended to inspire dialogue and challenge the perceived boundaries we currently have. Whilst I personally think the answer is that the ISPs should indeed do much more than they currently do to reduce illegal traffic on the internet, I accept that the counter argument is strong and the whole issue needs much more debate – and then action. The fight against piracy is a difficult one and I believe we do need the ISPs to be part of the battle to protect creators' rights, and protect against illegal activity. I hope I have achieved a balance of argument in this paper to stimulate debate.

1.3 This paper considers the 'safe harbour' provisions under the 2000 E-Commerce Directive (see footnote) and how they apply to internet service providers (ISPs) and other providers of online services in the UK.⁴

1.4 The safe harbour provisions are described at length in Section 2 but in short, they allow providers of certain online services in certain circumstances to be exempt from liability for illegal activity which takes place on their service.

1.5 Opinions are divided on how the safe harbour provisions under the E-Commerce Directive, which were introduced in June 2000, should be applied in practice in the present day. Some stakeholders (such as ISPs and online service providers) consider them to be sufficiently flexible for the modern age and an essential means of managing risk (particularly for services which allow users to upload content); whilst others, typically right holders, consider them to be no longer 'fit for purpose' and the level of protection currently afforded by safe harbours to be too wide.

1.6 Online services have clearly flourished and proliferated in a manner no one person could have predicted since the safe harbour was introduced in 2000 and the ways in which customers consume content and otherwise use the Internet has changed drastically during that time. It is important to acknowledge that

¹ <http://www.mikeweatherleymp.com/2014/05/29/search-engines-and-piracy-a-discussion-paper-by-mike-weatherley-mp/>

² <http://www.mikeweatherleymp.com/2014/06/25/mike-publishes-report-on-tackling-advertising-revenue-from-illegal-websites/>

³ <http://www.mikeweatherleymp.com/wp-content/uploads/2014/06/11.pdf>

⁴ The relevant Directive is 2000/31/EC. The E-Commerce Directive was implemented in the UK by the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) (2002 Regulations).

these changes have come about at least in part because the safe harbours under the E-Commerce Directive have allowed online services to adopt new business models to meet customer demand and to assess risk more easily, particularly in relation to content uploaded or generated by end users.

1.7 This paper will:

- first look at the background to the safe harbour provisions in the UK, the reasons why they were introduced and also how the safe harbour differs from that in the US.
- secondly, it will consider how safe harbour provisions are perceived by various sectors within the UK, and what the key issues are for stakeholders impacted by the safe harbour provisions in the UK.
- thirdly, it will ask whether or not the safe harbour provisions are working for online service providers, rights holders and the individual consumer alike.
- and finally, the question of 'moral responsibility' will also be discussed.

I welcome all feedback from this paper to myself at mike.weatherley@outlook.com – all replies will also be forwarded to the IPO for their consideration and inclusion in further submissions to the EU. You can contact the IPO directly on any issues at information@ipo.gov.uk.

2. SAFE HARBOUR UNDER THE E-COMMERCE DIRECTIVE

- 2.1 The E-Commerce Directive was introduced across the EU in 2000 to create a legal framework for electronic commerce in Europe. The aim of the E-Commerce Directive was to avoid over-regulation, base itself on the free internal market, take account of commercial realities and provide efficient protection for objectives in the general interest. The E-Commerce Directive also sought to remove disparities between case-law in the Member States so as to introduce a level of security which encourages the confidence of consumers and enterprise and allow companies to flourish online.
- 2.2 Amongst other things, the E-Commerce Directive provides for information society services to be exempt from liability where they are hosting, transmitting or caching illegal content, subject to certain conditions. These are commonly referred to as the 'safe harbour' provisions as they give information society service providers certain immunity and protection in relation to illegal content and activities.
- 2.3 An information society service is widely defined by Directive 98/34/EC as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". This definition is very broad and captures the services provided by many online service providers, although there are some specific exceptions, such as radio broadcasting and certain television broadcasting services. An information society service provider ("**ISSP**") – which includes ISP's - also does not have to derive income directly from the end-user, and so services which derive their revenue from an advertising model are still covered by the definition.
- 2.4 One of the drivers behind the introduction of the E-Commerce Directive was to encourage the growth of technology companies online, as Recital (2) of the E-Commerce Directive explains: "*the development of electronic commerce within the information society offers significant employment opportunities in the Community...and will stimulate economic growth and investment in innovation by European companies, and can also enhance the competitiveness of European industry*".
- 2.5 In order to encourage the development of online services and to control the level of risk which service providers might otherwise be exposed to by the actions of their service recipients, the E-Commerce Directive provides certain defences for ISSPs. The defences under the E-Commerce Directive (i.e. the safe harbour provisions) aim to balance the concerns of ISSPs (and their ability to provide online services) and those of rights holders (and their exclusive right to exploit their content), although the protections afforded by the safe harbour go beyond copyright infringement but also protect from liability for criminal actions, such as obscenity (including indecent images), hate speech etc.
- 2.6 The three defences attach to the following specific activities carried out by ISSPs: transmission, caching and hosting. The defence will afford an ISSP immunity from liability in damages etc, but does not preclude a rights holder obtaining an injunction against the ISSP to prevent the ongoing illegal activity - as Recital (45) of the E-Commerce Directive makes clear.
- 2.7 **Hosting** (*Article 14, E-Commerce Directive*)

An ISSP will not be liable where it is storing information at the request of an end user, provided that the ISSP:

- does not control or have actual knowledge of the illegal activity or information⁵; and
- once it is made aware of it, acts expeditiously to remove or to disable access to the information.

2.8 **Transmission or “mere conduit”** (*Article 12, E-Commerce Directive*)

Where the ISSP consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, the ISSP will not be liable for the information transmitted where it:

- did not initiate the transmission,
- did not select the receiver of the transmission, and
- did not select or modify the information contained in the transmission. In other words, there is no liability where the ISSP is a “mere conduit” for the transmission of information.

Transmission also includes the automatic, immediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission.

2.9 **Caching** (*Article 13, E-Commerce Directive*)

An ISSP will not be liable where the relevant information is cached; that is, where it is the subject of automatic, intermediate and temporary storage for the sole purpose of ensuring efficient onward transmission to recipients on request, and the ISSP:

- does not modify the information;
- complies with conditions of access;
- complies with any rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
- does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
- acts expeditiously to remove or disable access to the information on obtaining actual knowledge that the information has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2.10 In addition to the immunities for hosting, transmission and caching, it should be noted that Article 15 of the E-Commerce Directive provides for a general principle of “no monitoring” whereby there should be no

⁵ Imputed knowledge or constructive knowledge has been applied to cases of safe harbours in American case law, namely in *A&M Records v. Napster (2001)*

general obligation on ISSPs to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2.11 In the US, corresponding safe harbour provisions can be found in the Digital Millennium Copyright Act 1998 (DMCA). The E-Commerce Directive broadly mirrors these (noting that the DMCA covers Search Engines whilst the E-Commerce Directive does not), save that:

2.11.1 the DMCA expressly provides that intermediaries cannot take advantage of the safe harbour where they have “financially benefited from the copyright infringement”; and

2.11.2 the DMCA immunities apply only to liability for copyright infringement, rather than liability more generally.

2.12 According to the Internet Services Providers’ Association (ISPA), an additional distinction between the US and EU safe harbours is that:

“unlike the DMCA, the E-Commerce Directive does not provide online intermediaries with an actual safe harbour. The E-Commerce Directive merely sets out the conditions under which online intermediaries can be held liable without, however, providing the procedural rules (e.g. what constitutes a valid notice), disincentives for filing wrongful notices (pain of perjury) or limitations to liability for actions that intermediaries take in response to notices that the DMCA provides.”

Many, but not all, of the objections to the operation of the safe harbours today are a direct result of the lack of clarity in these provisions as highlighted by ISPA.

2.13 I have also been following with interest the recent developments in the USA concerning net neutrality, where the Federal Communications Commission has recently introduced new rules which guarantee net neutrality. The same issues are being debated in Europe on the context of new rules for telecoms companies. I don’t wish to become drawn into the broader debates about net neutrality, which are beyond the scope of this paper, but I would not wish any concept of net neutrality to operate as an excuse to stop companies taking whatever responsibility for pirate content being distributed over their networks is considered appropriate.

3. CONCERNS WITH THE SAFE HARBOUR

E-Commerce Directive is outdated

- 3.1 According to rights holder groups who have provided evidence to me, a distinction should be made within the wide definition of ISSP between (on the one hand) ISPs and other true intermediaries, and, (on the other) service providers which are publishing and profiting from infringing content. This view advocates that, at an EU level, it should be clarified that where online service providers: (i) deliver an organised and targeted service, which is optimised to enable users to upload, search for and stream copyright content, and (ii) deliver a service which generates revenue by placing adverts on or around that content, then they should not qualify for safe harbour under the E-Commerce Directive.

Recommendation 1: *The EU Commission should undertake to clarify the definition and scope of the term ISSP for the purposes of the Directive.*

- 3.2 It has been explained to me that the rationale for this position is that the E-Commerce Directive was designed to provide legal certainty in the form of immunity against civil and criminal liability for ISSPs which were engaged in technical, automatic and passive activities of storage, transmission and hosting (Recital (42)). Since 2000, digital services have proliferated and new business models have developed, such that the safe harbour protections provided by the E-Commerce Directive now apply to ISSPs in ways and to types of online services which were not envisaged at the time the legislation was introduced. This has led to what UK Music describes as the “*parasitic growth*” of online content distributors which have profited from the value in copyright works (at the expense of rights holders) by drawing in users, encouraging them to upload content and selling ever-increasing amounts of advertising in and around such content. This has redefined the value chain and value has transferred from copyright owners and creators.

- 3.3 The Music Publishers Association (MPA) is another to express similar concerns on the commercial relationship between ISSPs and copyright owners:

“the broad interpretation of Articles 12 – 15 of the E-Commerce Directive is currently benefiting (often large and mainly US based) internet companies and service providers to the detriment of rights holders (very often small companies or individuals) such as publishers, authors, composers – who do not have the resources to deal with all the unlicensed uses of their work. This imbalance is leading to a transfer of value from creators and the content industries into the technology sector.”

Recommendation 2: *The wording of Safe Harbour provisions should be amended to ensure ISSPs are accountable for adequately managing content on their services (with ‘adequately’ requiring definition).*

- 3.4 Such groups look at companies like YouTube to illustrate their concern. YouTube, a service which launched in 2005, five years after the E-Commerce Directive, is expected to have generated an estimated \$5.9 billion of revenue in 2014, an increase of about 50% over last year’s figures.⁶ By contrast, the music industry ad-supported streaming revenues, a significant part of which comprise royalties paid by YouTube,

⁶<http://variety.com/2014/digital/news/YouTube-may-be-worth-more-than-netflix-wall-street-analyst-says-1201298893/> September 2014.

made up just under \$500 million globally in 2013. There is a substantial difference between those figures, despite music videos being the most watched type of content on YouTube, and YouTube also being the most popular music service in many markets. In fact, research puts music consumption at around 40% of all views of YouTube content.⁷

- 3.5 Rights holder bodies, such as the BPI and MPA, observe that the scope of the safe harbour provisions now goes far beyond neutral and passive intermediaries to protect content distributors who draw significant financial benefit from advertising alongside copyright content. This safe harbour has distorted the value chain and impacted commercial negotiations of licence fees between copyright owner and platform provider. The BPI identifies a contrast between the amounts per view paid on YouTube and the amounts per stream on services like Spotify and Deezer, even where the sums relate to the same content. The reason for the lower amounts per view, I am told, is that services like Spotify and Deezer only provide access to content which they have licensed themselves and do not have the privilege of being able to rely on safe harbour provisions.
- 3.6 The MPA, in particular, has urged me that there needs to be urgent clarification as to which ISSPs should be free to benefit from safe harbour provisions. According to the MPA, *“it was never the intention that the safe harbour provisions should discourage service providers from properly managing the content on their sites in order to generate revenues for themselves.”*
- 3.7 Likewise, the British Academy of Songwriters, Composers and Authors (BASCA) advocates the need for clarification over what the safe harbour should cover and what it should not, particularly in relation to content platforms. BASCA sees there as having been ‘scope creep’ of the safe harbour provisions for content platforms and would like this to be clarified.

Technology advances mean ISSPs can take a more pro-active role in dealing with copyright infringement

- 3.8 Some rights holder groups argue that advances in technology mean it is now easier and more feasible for ISSPs to filter out infringing content and to provide more co-operation to rights holders when it comes to detecting infringement. At the time the E-Commerce Directive was introduced in 2000, this was often impractical and unduly expensive for ISSPs to do, but some contend that this is no longer the case.
- 3.9 One example of a technological improvement is The Copyright Hub which is creating technology which will facilitate machine-to-machine interactions about copyright. They claim:

“it will soon become possible for an automated process to check whether a piece of content is infringing before it is published, rather than waiting for the copyright owner to discover the infringement and issue a notice after the fact...The principal effect of this change would be to progressively shift the work of checking licences away from an expensive, manual and impractical duty falling separately on each rights owner to a very low cost, automated and efficient process implemented as part of the online publishing process.”

⁷<http://www.thevideoink.com/features/special-issue/the-youtube-musicconomy-just-how-big-is-it-infographic/#.VLZciHvfmpD>

- 3.10 The Copyright Hub envisages that with the mass take-up of its technology and as technical capabilities of ISSPs improve, the scope of the safe harbour provisions should automatically reduce. The ISSPs have become more capable of playing a role in actively managing content, checking rights before publishing content, and better co-operating with rights holders on detection of infringement and take downs.

Recommendation 3: *There should be an urgent review by the UK Government of the various applications and processes that could deliver a robust automated checking process regarding illegal activity being transmitted.*

- 3.11 BASCA also sees the burden and responsibility for detecting copyright infringement is too much on the rights holders at present and there is not enough onus on the ISSPs hosting the infringement. The current 'take down' procedure is unduly expensive and time consuming for rights holders and there:

"needs [to be] a quick and cost effective process to help permanently remove infringing content from websites that does not financially penalise the rights holders. Sending out takedown notices can be an extremely time consuming task, in fact it can be a full-time job, and often our members give up in the face of such extreme proliferation of their works. There has thus sprung up a necessity for rights holders to pay out a proportion of their incomes in order to protect their works online through such technological services such as MUSO."

- 3.12 Article 15 of the E-Commerce Directive expressly prohibits a general obligation being imposed on ISSPs to monitor the information which they transmit or store or for ISSPs to actively seek facts or circumstances indicating illegal activity. The MPA highlights that one of the reasons behind this prohibition was that a general monitoring obligation would place an excessive economic burden on ISSPs and was impracticable for ISSPs at the time. However, according to the MPA:

"this aim has become less relevant as monitoring becomes easier and cheaper and it is certainly more cost efficient for a site with technology (such as content ID) to monitor its content than it is for rights holders."

Recommendation 4: *Consider a change to Article 15 which better reflects the scope and capabilities of today's technology.*

ISSPs should have a duty of care when it comes to hosting infringing content

- 3.13 The MPA also suggest that the take down by an ISSP of a single infringing URL or the item of content in question is too narrow for rights holders. To ensure that notice and take down is effective from a rights holder's perspective, the MPA would like to see the notification of an infringement to an ISSP trigger actual knowledge of the infringed work and not just the specific copy of the work uploaded. This view is supported by the Society of Audiovisual Authors (SAA) and UK Music. This would mean ISSPs actively taking down multiple copies of the same work which are hosted on its services, not just the individual copy which is subject to the complaint. The MPA believe this principle could be extended further still to ensure that all copies of the infringing work are not just taken down by ISSPs but stay down by ISSPs putting measures in place.

- 3.14 Rights holder groups point to Recital (48) of the E-Commerce Directive which envisages:

“the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.”

Recommendation 5: *ISSPs to be more proactive in taking down multiple copies of infringing works, not just the specific case they are notified of.*

- 3.15 The MPA and UK Music have each called for legislative changes to clarify the duty of care that the CJEU (Court of Justice of the European Union) has referred to, and for parameters to be set on what is expected from an ISSP in the context of copyright infringement prevention and take down.

Recommendation 6: *A ‘duty of care’ to be laid down as part of any forthcoming revision of the EU copyright legal framework.*

The meaning of “actual knowledge” and “expeditious” take-down should be clarified

- 3.16 The terms “actual knowledge” and “expeditious” take-down are used in the hosting defense in Article 14(1) of the E-Commerce Directive, such that the ISSP hosting infringing content must expeditiously remove the content once it has actual knowledge of the infringement. The words have been interpreted differently by Member States, depending on the context of the hosting and nature of the infringement.
- 3.17 Rights holder groups are now seeking for these terms to be defined and consistently applied across Member States. According to SAA, there is a need for a procedure to establish actual knowledge or awareness of illegal content. The E-Commerce Directive does not prescribe how rights holders should give ISSPs actual knowledge of the infringement and therefore it is up to individual Member States to establish a procedure or to encourage interested parties to agree upon one. Rights holder groups argue that this makes for an unnecessary and time-consuming hurdle to overcome before they are able to block an infringement of copyright.
- 3.18 The standard of “expeditious” take down is also open to interpretation and what is expeditious may be circumstantial, depending on the nature of the infringed content and the way in which it is being infringed. The Assistant Director of INTERPOL and Head of the INTERPOL unit dealing with traffic in illicit trade and counterfeits, has stated that it is his personal view that ISSPs should be legally bound to respond immediately to requests for assistance and supports *“proposals for homogenized legislation that requires ISSPs to keep data for 12 months and make it available within 7 days of a formal request being received.”* However, there is little consensus on what is ‘expeditious’ either within (or amongst) industries.

Recommendation 7: *Change the word ‘expeditious’ to ‘immediate’ and define it narrowly and unequivocally.*

4. SUPPORT FOR THE SAFE HARBOUR

Positive impact of the safe harbour provisions on online services

- 4.1 The safe harbour principles in the E-Commerce Directive have been a fundamental and essential building block in the development of the Internet and online services within the EU. It also goes to one of the central tenets of the EU: free movement of services.
- 4.2 The safe harbour provisions have enabled online and offline companies to innovate whilst allowing for a proportionate and sensible way to seek redress against content wrongly hosted on the Internet. Their importance is increased further when taking into account that almost every economic sector is nowadays fundamentally dependent upon internet connectivity and online services.
- 4.3 It is clear that a key function of the Internet and online services is the provision of intermediary services. ISSPs frequently act as an *enabler, facilitator and supporter* of other industries and business sectors. The provision of corporate hosting or email services, for example, allows other companies to run their businesses more efficiently and grow. The provision of blogging platforms and legitimate online sales channels has allowed artists to tap into new revenue streams and forms of communication. It is important that the legal framework allows and maintains the role of an ISSP as a facilitator which supports industry.
- 4.4 The E-Commerce Directive was drawn up after extensive consultation between key stakeholders such as ISPs, online service providers, creatives and EU institutions. Recital (41) of the E-Commerce Directive explains that the E-Commerce Directive “*strikes a balance between the different interests at stake and establishes principles upon which industry agreements and standards can be based*”. In this context, the intermediary liability provisions of the E-Commerce Directive have been drafted with a view towards balancing the role of internet services as economic and cultural facilitators and the fact that such services can be misused and abused. ISSPs are largely of the view that the balance continues to be achieved in 2015 with online services and the creative industries both flourishing.
- 4.5 ISPA notes that:
- “even though [the E-Commerce Directive] does not provide intermediaries in the European Union with a full scale Safe Harbour, they have been vital in allowing the Internet and internet services to develop into the role of an enabler, facilitator and supporter. It is very likely that a large number of services that consumers and businesses rely on today would not have been developed if the principles had not been applied.”*
- 4.6 To the extent that future reform efforts are undertaken in relation to the safe harbour, ISPA would rather seek a full-scale safe harbour for online intermediaries in the EU which would clarify and elaborate on the safe harbour provisions currently in the E-Commerce Directive. This may include, for instance, protections on intermediaries from incurring secondary liabilities when they react to a notice, as well as clarifying notice requirements, the conditions for valid notices and notification processes.
- 4.7 The concern for ISSPs is that any further removal or restriction of intermediary liability principles risks undermining the intermediary role of online services and effectively changing ISSPs from enablers to

gatekeepers. This would, they argue, fundamentally undermine the ability of companies to innovate, the risk profile of ISSPs and the utility of the Internet and its benefit to the economy and society as a whole.

Successful introduction of Section 97A injunctions

- 4.8 In the UK, under Section 97A of the CDPA, internet service providers can be required to prevent users from accessing copyright infringing websites despite the internet service provider being classified as a *mere conduit* (under the safe harbour defence). This has been tested at UK Courts and a process has been developed that allows for the blocking of websites by internet service providers, where the website has been identified as facilitating online copyright infringement. Specifically, it is a judge, rather than the content owner or online intermediaries, which is determining the legality of the content and the proportionate measures to be taken by the internet service provider.
- 4.9 Section 97A codifies in UK law the right for content owners in the UK to seek an injunction against those ISSPs which are immune from liability under the E-Commerce Directive as '*mere conduits*'. This means the safe harbour provisions do not allow ISSPs to wilfully not respond to take down requests and ignore copyright infringement. Once they have actual knowledge of an infringement, content owners can take out injunctions against ISSPs which require them to bring down (or block access to) infringing content.
- 4.10 There have been a number of cases in this area over the last five years in the UK, particularly in the context of infringing content on torrent websites. During this time, the process for bringing injunctions under Section 97A has become ever more efficient and effective. This is partly because the UK Courts have become more familiar with the types of technical requirements which need to be set out in such an injunction. The specific terms of an injunction must be technical, specific and targeted and set out the precise practical and technical steps which a '*mere conduit*' ISSP (as defendant) must take to comply with the injunction. To some extent, the UK Courts must tailor each injunction to the specific infringement but as Section 97A injunctions become more common place, the procedure for bringing down content has (and is likely to continue to) become more fine-tuned and straightforward for content owners who are seeking to stop an infringement.
- 4.11 Section 97A injunctions show that measures have successfully been introduced and developed over time in the UK and, importantly, have the necessary oversight from the UK Courts. Although, I am told, Section 97A injunctions are perhaps expensive and time-consuming, such measures allow safe harbour provisions to remain and ISSPs to continue providing their services, whilst giving content owners an effective means of recourse in the event of copyright infringement of their content.
- 4.12 The question many rights holders have asked however is whether the process could be more efficient and quicker by the ISSPs if they were to recognise infringing material, undertaking action earlier as if there was an official Court notice but by another means. For example, whether a trusted third party application or procedure could be used to identify sites that would normally have an injunction granted by Court. Such third party activity would of course need to be fully accountable – probably to Government directly – with the ability to be independently audited at any time. A number of systems have been developed that should be considered as part of the debate in my view. (See Recommendation 3)

Voluntary initiatives across industries

- 4.13 There are voluntary cross-industry initiatives which have been taken up which show that a collaborative approach to combatting copyright infringement is perhaps the most effective one. Whilst the immediate effect of copyright infringement is felt most by the rights holders themselves, everyone in the content delivery chain benefits from a legislative framework which supports content creation and allows the development of services online. It is therefore right that there should be cross-industry initiatives which address copyright infringement and the UK Government encourages this type of co-operation and dialogue between stakeholders and continues to support such measures.
- 4.14 For instance, Creative Content UK, which was formalised last year, is an agreed understanding between the Motion Picture Association of America (MPAA), the BPI and the four largest internet service providers in the UK. In collaboration with rights holders, the internet service providers and the UK Government have agreed to invest substantial sums of money to implement a customer-focused educational programme about intellectual property infringement. The scheme is intended to raise awareness of copyright by informing those whose internet connections have been used to illegally share copyright material and help them find compelling, legal alternatives to infringing copyright.
- 4.15 The Creative Content UK (CCUK) scheme, as well as running educational programmes, also involves alerting end users when their accounts are believed to have been used for unlawful file-sharing. Creative Content UK is welcomed by the UK Government as a means of tackling copyright infringement and is a fine example of key stakeholders in this area collaborating and addressing copyright infringement together.
- 4.16 The scheme follows a similar partnership between the movie and music industries and internet service providers in the United States. The Centre for Copyright Information was established in the US to help direct consumers to the growing array of legitimate online creative content and send out alerts to internet service provider subscriber accounts that have been used illegally to share films and music.
- 4.17 The weakness of CCUK scheme is that whilst it provides for education, there is no mechanism to stop the infringing taking place if notices are ignored. It does however provide the precedent that infringers of copyright can be identified by ISSPs and action taken. The CCUK scheme will also allow for rich data to be collected in assessing what impact these measures actually produce (if only to be proven ineffective).

Recommendation 8: *In relation to CCUK, review the effectiveness of the ‘three strikes’ rule applied in the USA to notifications.*

Recommendation 9: *With the precedent now set via CCUK, review (probably by IPO) how else information collected by ISSPs can be used in the fight against piracy.*

5. THE MORAL DIMENSION – author’s discussion note

- 5.1 Much of this paper has discussed the relative merits of an open, safe harbour, system for freedom, equality of access and legal definitions. Two questions that needs to be asked however:
- i. ‘Is there a moral responsibility on any company to report, or take action against, illegality done by others’?
 - ii. Is Article 15, relating to ‘no monitoring’ a hindrance in the fight against piracy?
- 5.2 It was noted earlier that there is a difference between ‘knowing’ of a crime and ‘finding out’ if a crime has been committed. In point 2.7 it is noted that an ISSP is not liable if they ‘do not control or have actual knowledge of the illegal activity.
- 5.3 This seems entirely sensible to me in that if you don’t know if a crime has been committed, you cannot be expected to report it or take any other action. But, do companies have a responsibility to proactively check?
- 5.4 Let me take the example of someone who rents a garage out to a third party. The landlord cannot be held liable for what goes on in that garage no matter what the activity is (and I am talking in general terms here and in the moral sense – I accept there are situations where the law requires that certain checks are undertaken). It is not the landlord breaking the law and it is hidden from his view. In some respects, that is the case for ISSPs (the landlords in this case) and what they actually know to be going through their conduit lines.
- 5.5 But if the landlord is told that the garage is being used for illegal activity, and that this information is from a totally reliable source, then does the landlord have a moral obligation to report it? I would argue that it is the duty of every citizen or company to do what they can to stop illegal activity and therefore the answer is, yes, the landlord should report the activity.
- 5.6 Now add in an extra dimension that if it is not reported, then other third parties who use and trust that company’s service will be directly impacted by the illegal activity, then there is an even more compelling case, morally.
- 5.7 And this is then where it gets interesting. We do currently have the ability, via third party applications, to inform the ISSPs about illegal activity. Indeed, they can check it themselves as was noted in 4.17. The question is whether they wish, as independent commercial companies, to undertake this task. There may be a distinction here between a private individual acting voluntarily providing a service and a commercial enterprise. Where a company or person is renting garages as a commercial operation, perhaps they should have an obligation to check no matter how beneficial the service may be in other respects (as indeed banks do for new account holders and in other situations where the Financial Services Act requires it). In general, society would not tolerate a company setting up and operating if part of that company’s activities was to facilitate crime, even if they were not actually committing the crime themselves.
- 5.8 There is also the question as to whether society will want to have their private activities monitored (even if automatically and entirely confidentially) and whether the trade off to a safer, fairer internet is a price worth paying to clamp down on internet illegal activity. My ‘vote’ would be “yes” if via an independent body that is

a third party that can be absolutely confidential, trusted and fully auditable – and only used for reasons that are known in advance by all users.

5.9 I include this section, as with other parts of this paper, to stimulate debate. If the law with ISSPs is to be changed, then inevitably the question of morality and privacy will need to be debated.

6. SUMMARY AND CONCLUSION

- 6.1 It does appear to me that the scope of the E-Commerce Directive today is much broader than was envisaged at the time by those drafting it. I would urge the next UK Government to enter into a dialogue with the Digital Single Market team at the EU Commission with a view to considering whether the balance remains fit for purpose.
- 6.2 Creators and the creative industries deserve proper reward for their investments and I am concerned that the effect of the safe harbour is that services maybe underpaying for their ability to use content, which has a knock-on effect on the ability of rights holders to obtain appropriate rewards from other service providers.
- 6.3 I also have sympathy with the rights holders' arguments that the whack-a-mole nature of the notice and take-down is not within the spirit of what the legislation was seeking to achieve. I believe that responsible service providers could take greater steps to ensure that legitimate content is more accessible than unlicensed content. We should all worry about how unlicensed content is delivered. To achieve this end, I would support clarification of the processes of actual knowledge and expeditious action, as articulated above.
- 6.4 However, I do understand that it is all too easy to put the onus on the ISSP's and simply demand they take on the role of policemen. That is neither in their business model nor is it right to abrogate all responsibility to a third party. To this end, I hope ISP's will take a proactive role in finding solutions, rather than simply relying on the potentially out of date 2000 EU Directive to do nothing.
- 6.5 As mentioned in the Introduction, the fight against piracy is a difficult one and I believe we do need the ISPs to be part of the battle to protect creators' rights, and protect against illegal activity. They could do more in my opinion and in the opinion of many of the contributors to this paper.
- 6.6 **If there was one final conclusion from developing this paper it is that proceeding with the same rules as set out originally in 2000 would not be correct – an update is needed. The only question is 'to what degree?'**
- 6.7 A summary of Recommendations follows.

7. RECOMMENDATIONS

Recommendation 1: *The EU Commission should undertake to clarify the definition and scope of the term ISSP for the purposes of the Directive.*

Recommendation 2: *The wording of Safe Harbour provisions should be amended to ensure ISSPs are accountable for properly managing content on their sites.*

Recommendation 3: *There should be an urgent review, by the UK Government, of the various applications and processes that could deliver a robust automated checking process regarding illegal activity being transmitted.*

Recommendation 4: *Consider a change to Article 15 which better reflects the scope and capabilities of today's (and future) technology.*

Recommendation 5: *ISSPs to be more proactive in taking down multiple copies of infringing works, not just the specific case they are notified of.*

Recommendation 6: *A 'duty of care' to be laid down as part of the forthcoming revision of the EU copyright legal framework.*

Recommendation 7: *Change the word 'expeditious' to 'immediate' (in Article 14(1) of the E-Commerce Directive) and define it narrowly and unequivocally.*

Recommendation 8: *In relation to CCUK, review the effectiveness of the 'three strikes' rule applied in the USA to notifications.*

Recommendation 9: *With the precedent now set via CCUK, review (probably by IPO) how else information collected by ISSPs can be used in the fight against piracy without breaking privacy for those using the internet legally.*

Some of these recommendations are for the EU Commission and some call for the UK Government lead. All require IPO interaction to progress forward. The IPO can be contacted at information@ipo.gov.uk or by post to Concept House, Cardiff Road, Newport, South Wales, NP10 8QQ.

8. ACKNOWLEDGEMENTS

I would like to thank the following organisations and individuals for their co-operation on this discussion paper. However, I should make clear that all opinions expressed in the paper are mine:

ISPA (www.ispa.org.uk), in particular Andrew Kernahan,

BPI (www.bpi.co.uk), in particular Ian Moss,

PRS for Music (www.prsformusic.com),

Motion Picture Association of America (MPAA) (www.mpa.org/),

Music Publishers Association (MPA) (www.mpaonline.org.uk), in particular Harriet Finney,

IMPALA (www.impalamusic.org), in particular Matthieu Philibert,

EDRi (<https://edri.org>),

Premier League (www.premierleague.com),

IPKat (<http://ipkitten.blogspot.co.uk/>),

SAA (www.saa-authors.eu), in particular Mélanie Amilhat, Cécile Despringre and James Taylor,

UK Music (www.ukmusic.org), in particular Tom Kiehl,

BT (www.bt.com), in particular David Pincott,

Copyright Hub (www.copyrighthub.co.uk/), in particular Dominic Young,

BASCA (www.basca.org.uk), in particular Vick Bain, and

INTERPOL (www.interpol.int)

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