A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries

Meta Informations

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<th>Creation date</th>
<th>05-09-2012</th>
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</thead>
<tbody>
<tr>
<td>Last update date</td>
<td></td>
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<tr>
<td>User name</td>
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<tr>
<td>Case Number</td>
<td>625560107241524912</td>
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<tr>
<td>Invitation Ref.</td>
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</tr>
<tr>
<td>Status</td>
<td>N</td>
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<td>Language</td>
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</tr>
</tbody>
</table>

Introduction

I. Background information

1. Please indicate your role for the purpose of this consultation:
   - Business federation
   - Other

Please specify:
ECTA, the European Communities Trade Mark Association, was formed in 1980 and numbers approximately 1,400 members, coming from all the Member States of the European Union with associate members from all over the world. It brings together all those persons practising professionally in the Member States of the European Community in the field of trade marks, designs and related IP matters.

2. Please indicate your place of residence or establishment:
   - Belgium

3. Please provide your contact information (name, address and e-mail address):
   ECTA- European Communities Trade Mark Association Secretariat Rue des Colonies 18/24, 9th Floor BE - 1000 Brussels, Belgium Telephone: + 32/2-513 5285 Telefax: + 32/2-513 0914 E-mail: ecta@ecta.org Ewa.Grabiak@ecta.org

4. Is your organisation registered in the Interest Representative Register?
   - No

5. What is / are the category / ies of illegal content of greatest relevance to you in the context of N&A procedures?
   - Illegal offer of goods and services (e.g. illegal arms, fake medicines, unauthorised gambling services etc.).
   - Infringements of copyright and related rights
   - Infringements of trademarks
## II Notice and Action procedures in Europe

6. To what extent do you agree with the following statements on notice-and-action procedures?

<table>
<thead>
<tr>
<th>Statement</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action against illegal content is often ineffective</td>
<td>I agree</td>
</tr>
<tr>
<td>Action against illegal content is often too slow</td>
<td>I agree</td>
</tr>
<tr>
<td>Hosting service providers often take action against legal content</td>
<td>I disagree</td>
</tr>
<tr>
<td>There is too much legal fragmentation and uncertainty for hosting service providers and notice providers</td>
<td>No opinion</td>
</tr>
</tbody>
</table>

7. To what extent do you agree with the following statements on Article 14 of the E-commerce Directive?

<table>
<thead>
<tr>
<th>Statement</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>The exact scope of ‘hosting’ is sufficiently clear</td>
<td>No opinion</td>
</tr>
<tr>
<td>The terms “actual knowledge” and “awareness” are sufficiently clear</td>
<td>No opinion</td>
</tr>
<tr>
<td>The term “expeditiously” is sufficiently clear</td>
<td>No opinion</td>
</tr>
</tbody>
</table>

The public consultation on e-commerce of 2010 has demonstrated that most stakeholders consider hosting of websites to be hosting, but that there is less unanimity on other services that could be hosting. The CJEU has stated that hosting may in principle be the services of online market places, referencing services and social networks.

8. In your opinion, what activities should be considered as 'hosting'?

- Other

Please specify

The listed activities above should only be considered "hosting" services under the condition that they consist of the storage of information (in the sense of passive, technical activity with no control over the content) by the service user.

## III. Notifying illegal content to hosting service providers

9. To what extent do you agree with the following statements?

<table>
<thead>
<tr>
<th>Statement</th>
<th>Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is easy to find pages or tools to notify illegal content</td>
<td>I disagree</td>
</tr>
<tr>
<td>It is easy to use pages or tools to notify illegal content</td>
<td>I disagree</td>
</tr>
</tbody>
</table>

10. Should all hosting service providers have a procedure in place which allows them to be easily notified of illegal content that they may be hosting? | Yes |

Some hosting service providers have voluntarily put | Yes |
in place mechanisms to receive notifications of illegal content. Some of these providers have complained that their mechanisms are not always used and that concerns about content are not notified in a manner that would be easy to process (e.g. by fax, without sufficient information to assess the alleged illegal character of content etc.). Providers also claim that this creates delays in taking action against illegal content, because the hosting service provider would for instance have to contact the notice provider to ask for additional information.

11. If a hosting service provider has a procedure for notifying illegal content (such as a web form designed for that purpose) that is easy to find and easy to use, should illegal content exclusively be notified by means of that procedure?

Although the CJEU indicated that a notice should be sufficiently precise and adequately substantiated to have effect, it has not indicated how these requirements should be met for this purpose. Nor has this been specified in the E-commerce Directive.

12. Do you agree with the following statements?

| Statement                                                      | Agree
|----------------------------------------------------------------|-------
| A notice should be submitted by electronic means               | No    |
| A notice should contain contact details of the sender          | Yes.  |
| A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) | Yes.  |
| A notice should contain a detailed description of the alleged illegal nature of the content | No    |
| A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act | No    |

Can you please specify why you do not agree with the statement: “A notice should be submitted by electronic means”

There may be good reasons to serve other notice other than by electronic means. Fax may be appropriate, or even personal service in some circumstances. If there are no details for how to send electronic notice, then an alternative will be essential.

Can you please specify why you do not agree with the statement: “A notice should contain a detailed description of the alleged illegal nature of the content”

A notice should contain only necessary information presented in a brief manner because the procedure should be kept quick, simple and cost effective. It should contain necessary information presented in a brief manner which identifies the rights, infringing content, right holder and, if available, the content provider.

Can you please specify why you do not agree with the statement: “A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act”

The sender should have the choice to contact either the content provider or the hosting service provider without being compelled to contact either of them in a given order, particularly given that it is not always possible to readily identify the content provider.
Both civil rights organisations and hosting service providers have complained about a significant proportion of unjustified or even abusive notices. Some stakeholders have proposed more effective sanctions and remedies for this purpose.

13. Should there be rules to avoid unjustified notifications?

Please explain

Yes, but "unjustified" is lacking in sufficient clarity. We believe that only where there notifications lacking in proper legal basis and there are sufficient indications of abusive use should trigger any such proposed rules.

14. How can unjustified notifications be best prevented?

Please specify:

The only sanctions to be available to the hosting service provider should be the right to refuse to take action, if it appears that there is a proper legal basis to refuse.

IV. Action against illegal content by hosting service providers

15. Should hosting service providers provide feedback to notice providers about the status of their notice?

Multiple choice

The hosting service provider should send a confirmation of receipt.
The hosting service provider should inform the notice provider of any action that is taken.

16. Should hosting service providers consult the providers of alleged illegal content?

Multiple choice

Once any action against the content is taken. If it appears that the content was actually legal, it should be re-uploaded.

Please specify

In order to avoid any damage to the rights holder and to keep the procedure as simple as possible.

According to the E-commerce Directive, the hosting provider should act "to remove or to disable access to the information"

- One may interpret "removing" as permanently taking down or deleting content.

- "Disabling access" can be understood as any technique that ensures that a user does not have access to the content. Some hosting service providers for instance use geo-software to impede access exclusively to users with an IP address from a country where the content is question is considered illegal. Similarly, some hosting service providers firstly impede access to all users without

The hosting service provider should first disable access to the illegal content
permanently deleting it. This can for instance allow law enforcement authorities to further analyse the alleged illegal content in the context of criminal investigations. If deleting would not any longer hinder the investigation, the hosting service provider may still remove the content.

17. Assuming that certain content is illegal, how should a hosting service provider act?

Several providers may host the same content on a particular website. For instance, a particular ‘wall post’ on the site of a social network may be hosted by the social network and by the hosting service provider that leases server capacity to the social network. It may be that this hosting service provider that leases server capacity is in a position to act against the alleged illegal content, but not without acting against other (legal) content.

18. When the same item of illegal content is hosted by several providers, which hosting service provider should act against it?

As soon as the illegal nature of certain content has been confirmed, the E-commerce Directive requires the hosting service provider to act "expeditiously" if the provider is to be exempted from liability. However, the Directive does not further specify the concept of "expeditiously". Some stakeholders consider that a pre-defined timeframe for action should be established, whereas others consider that the required speed of action depends on the circumstances of the specific case. In a specific case it may be difficult to assess the legality of content (for instance in a case of defamation) or it may be easy to do so (for instance in a manifest case of child abuse content). This may have an impact on the speed of action. Similarly, what is expeditious for a specific category of content may not be sufficiently expeditious for another. For instance, the taking down of content within 6 hours will generally be considered very fast, but may not be sufficiently fast for the live-streaming of sports events (that are not any longer relevant once a match is finished).

19. Once a hosting service provider becomes aware of illegal content, how fast should it act?

<table>
<thead>
<tr>
<th>Please specify</th>
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<tbody>
<tr>
<td>A predefined time period sets clear obligations and expectations but individual circumstances may require longer periods in order to act, unless it’s easy for the service provider to resolve quicker than a fixed time period. In individual cases, law enforcement authorities may ask hosting service providers not to act expeditiously on certain illegal content that are the subject of criminal investigations. Acting expeditiously could alert law infringers of the existence of criminal investigations.</td>
</tr>
</tbody>
</table>
In individual cases, law enforcement authorities may ask hosting service providers not to act expeditiously on certain illegal content that are the subject of criminal investigations. Acting expeditiously could alert law infringers of the existence of a criminal investigation and would impede analyzing the traffic on a particular site.

20. Should hosting service providers act expeditiously on illegal content, even when there is a request from law enforcement authorities not to do so?

| Yes |

Please explain:

If it is possible to achieve denial of public access without impeding any investigation that option would be preferred.

Civil rights organisations complain that hosting service providers sometimes take down or disable access to legal content. They claim that some hosting service providers automatically act on notices without assessing the validity of the notices. In this context, the CJEU has held that blocking of legal content could potentially undermine the freedom of expression and information.

21. How can unjustified action against legal content be best addressed/prevented?

| By providing easy and accessible appeal procedures |
| By publishing (statistics on) notices |
| By providing for sanctions against abusive notices |
| Other |

Please specify

It may be worth considering alternative dispute resolution mechanisms.

Some hosting service providers are hesitant to take pro-active measures to prevent illegal content. They claim that taking such measures could be interpreted by courts as automatically leading to “actual knowledge” or “awareness” of all the content that they host. This would accordingly lead to a loss of the liability exemption they enjoy under the respective national implementation of the E-commerce Directive. In at least one national ruling, a court has interpreted actual knowledge in this sense. At the same time, the CJEU has held that awareness can result from own initiative investigations (Judgment of the Court of Justice of the European Union of 12 July 2011 in case C-324/09 (L’Oréal - eBay), points 121-122).

22. In your opinion, should hosting service providers be protected against liability that could result from taking pro-active measures?

| Yes |

Please explain

Such protection for service providers might help keep a system efficient without penalizing those providers who are proactive. However, much depends upon what “proactivity” means and how the service provider implements it.
VI. The role of the EU in notice-and-action procedures

23. Should the EU play a role in contributing to the functioning of N&A procedures? Yes

Please specify:
- By encouraging self-regulation
- By providing non-binding guidelines
- By providing some binding minimum rules
- By providing binding detailed rules

Article 14 of the E-commerce Directive does not specify the illegal content to which it relates. Consequently, this article can be understood to apply horizontally to any kind of illegal content. In response to the public consultation on e-commerce of 2010, stakeholders indicated that they did not wish to make modifications in this regard.

24. Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures? No

VII. Additional comments

25. Do you wish to upload a document with additional comments? Yes