

**EDiMA experiences and views regarding notice-and-action procedures:  
Response to corresponding Commission questionnaire**

The EU's intermediary liability regime serves as one of the cornerstones of the digital economy. It is responsible not only for significant economic growth, but also the establishment of basic principles ensuring fundamental users' rights online, such as freedom of expression and the right to access information services. EDiMA recently asked Copenhagen Economics to assess the economic impact of the current online intermediary liability regime in the e-Commerce Directive (2001/31/EC). The final report<sup>1</sup> of this assessment concluded that online intermediaries in Europe directly contribute €160bn to European GDP per year as well as productivity gains worth €150bn per year, creating a total annual contribution of €310bn.

According to Copenhagen Economics, one of the main reasons Internet platforms are able to contribute to the European economy at this scale is because of the liability limitation provisions of the EU's E-Commerce Directive. If online intermediaries were to be held liable for linking to or hosting or transmission of 3rd party content, the resulting responsibilities and legal uncertainty created would have an adverse impact on innovation and hinder value creation by the Internet economy. **As such, all initiatives put forward by the European Commission should not only uphold the current legal framework set-out by the e-Commerce Directive, but should also aim at further reducing legal uncertainty for online intermediaries.**

In this context, the European Digital Media Association (EDiMA)<sup>2</sup> welcomes the opportunity to respond to the Commission's questionnaire on notice-and-action procedures (N&A procedures). For the provision of specific data, EDiMA defers to the individual responses of its members and limits its comments here to those questions relating to its views and experiences with respect to N&A procedures<sup>3</sup>.

\* \* \* \* \*

**7. Can notices be provided by any means (e.g. e-mail, letter) or do you require or suggest a standard form? Please specify. If a standard form is optional, what is the percentage of notices that use the standard form?**

It should be acknowledged that most Member States lack formal notice procedures. However, some exceptions exist, as procedures are set out to implement legislation or codes of conduct in (at least) Finland, France, Hungary, Iceland, Lithuania, Portugal and the Netherlands. All of them require the plaintiff to send a notice to the online intermediary. In addition some require the online intermediary to forward the notice to the user, before (e.g. Lithuania) or after (e.g. Hungary) the online intermediary has taken action to remove the allegedly illegal content. At the same time, many content platforms and other intermediaries have developed their own notice-and-action practices based on experiences specific to their varied businesses.

<sup>1</sup> Copenhagen Economics (2012); *"Online Intermediaries, assessing the Economic Impact of the EU's online liability regime"*

<sup>2</sup> EDiMA, the European Digital Media Association, is an alliance of Internet platform businesses whose members include Amazon EU, Apple, eBay, Expedia, Google, Microsoft, MIH Group, Nokia, Yahoo! Europe, Orange and others. EDiMA's members provide Internet and new media platforms offering users a wide range of online services, including the provision of audiovisual content, media, E-commerce, communications and information/search services. EDiMA represents Internet platform businesses in EU policy formation and matters affecting the online environment, and believes EU policy should maximise the development of new online services and business models to the benefit of innovators and EU consumers.

<sup>3</sup> Considering its traditional position on the necessary validation of a notification by a public authority, ORANGE can not support the paragraphs dealing with the assessment of lawfulness by online intermediaries (point 7, question 7, page 2 and last bullet point, question 7, page 5)

EDiMA considers therefore that an optional, appropriate, and uniform EU-wide notice procedure could be highly beneficial for all stakeholders. This would help facilitate the removal of illegal content while safeguarding the rights of plaintiffs, users and online intermediaries, and would allow intermediaries to leverage their existing processes. EDiMA would highlight the following basic principles which should be applied to such a uniform notice procedure, and which no national procedures currently cover:

1. Plaintiffs should be encouraged to make a reasonable effort to contact the user in question where possible, using the means and information publicly available, to have the alleged illegal content removed before or simultaneously with approaching the online intermediary. This approach could help educate Internet users to understand their responsibility and liability for the content they put online. Moreover, it is also useful to convince plaintiffs to not immediately initiate actions against online intermediaries, who are not responsible for originally providing the content. The French law, for example, imposes on the plaintiffs the requirement to indicate in their notice whether the user has already been contacted.
2. The online intermediary is exempted from liability where none exists under the applicable law, thus serving the online intermediary a notice where it is not liable (for whatever reason) does not create a liability, unless the applicable law provides otherwise. For example: (a) under the applicable law, contrary to what plaintiffs claim, the online intermediary may be neither liable as a direct tortfeasor nor under an accessory theory; (b) in the context of defamation it has been decided in the UK that certain types of intermediaries are not considered publishers and as such do not have any actual knowledge of the illegal activity or information in question; (c) under IPR law the validity of the plaintiff's rights could be challenged, or the online intermediary could fall within a statutory exception or exclusion, etc.
3. Plaintiffs must give sufficient information in all notifications, including the exact URL of each item related to the complaint. This could be achieved by specifying the requisite information that a plaintiff's notice should contain. More details can be found below in our response.
4. In case (a) the notice has not been served, or (b) the notice does not provide requisite information, or (c) the illegality of the content is not apparent (whether from the notice or otherwise), then no liability should be placed upon the online intermediary and it should be entitled to ignore such defective notices (those that lack required information such as contact information, good faith statements regarding infringing activity, or attestations regarding the accuracy of such information).
5. The online intermediary should be allowed, where feasible and without liability, to forward any notice served, or the information contained therein, to the user in question.
6. In situations where there is an intermediary hosting the material, rights holders should also attempt to use the notice and action process by directing notices to such online intermediaries. Where the online intermediary allows it, the user in question should be given the chance to send an objection to the plaintiff and the online intermediary or else the online intermediary would be excluded from seeing the user's counter-arguments and could not be in a position to determine whether removal is appropriate.
7. After the online intermediary receives proper and sufficient notification and therefore obtains actual knowledge of specific and precisely defined alleged infringements, in cases where the circumstances create a clear basis for the online intermediary to rely on the claim of alleged infringement, taking into account any objections from the users in the online intermediary's reasonable discretion, the online intermediary should then take reasonable, expeditious action to disable public access to the precisely identified content. Online intermediaries, however, are not in a position to determine illegality and should not be expected to make such evaluations.

8. Additionally, when online intermediaries act in good faith and follow notice-and-action procedures they should be exempted from liability. For many years EDiMA members have had specific notice-and-action procedures in place for their services.<sup>4</sup>
9. Finally, it should be emphasized that online intermediaries are not in a position, and should not be required, to pre-screen third party content to determine whether it contains any potentially infringing material. Content owners must take responsibility for policing the use of their IP.

Accordingly, EDiMA considers that well-designed notice-and-action processes need to:

1. **Be encouraged:** As mentioned above, many intermediaries have already developed dispute processes specific to and optimized for their particular platform. EDiMA proposes that, to the extent an online intermediary provides a sufficient online form or process that allows a claimant to provide the required information, such claimants should be required to use those methods for their claim to be effective. Policy-makers should support, encourage, and where appropriate facilitate the widespread use and adoption of N&A as the primary, albeit not the only, scalable and effective means of tackling alleged illegal content.

Frequently it's the case that plaintiffs and potential plaintiffs do not attempt to get information about or are reluctant to use existing notice-and-action procedures. Also, even if plaintiffs are encouraged by courts to use established notice-and-action procedures, they hinder the process by refusing to use the disputes processes properly, for example by ignoring automated notice systems optimised for bulk notifications. Similarly, complainants have sent photocopied URL listings rather than editable versions, which forces companies to input each and every URL manually. Complainants also submit large lists or vague descriptions of illegal content to an online intermediary without verifying that such material or activity is actually present on the intermediary's systems. Many plaintiffs also refuse to identify the content that they claim allegedly infringes their rights, as they do not consider this their task. Each of these examples offends the spirit of Article 15 by forcing the intermediary to undertake monitoring steps to seek out potential illegal activity. Yet in spite of Article 15 of the e-Commerce Directive, some plaintiffs believe that online intermediaries should locate, and should be able to locate, relevant infringing content.

Regarding notifications related to copyrighted material, additional problems arise from the fact that content could be composed of different works by different owners, or one work with different owners, and potentially conflicting rights associated with those works. One of EDiMA's members has been placed in the situation where one alleged copyright owner requested a certain video to be removed, whilst at the same time another alleged copyright owner wanted the video to stay online. Situations such as these put online intermediaries in an impossible position, and at risk of being held liable by one side or the other depending on its action or inaction. Therefore, EDiMA believes that in case of wrongful or bad faith notice, the liability should lie with the plaintiff and the intermediary should be shielded from liability.

2. **Have a single point of contact:** It is neither efficient nor effective for online intermediaries to have to process notices in various locations and in different formats. The majority of online intermediaries typically indicate their contact details and the notification process on their websites. The plaintiff should always use these contact details for their notification to be considered valid.

---

<sup>4</sup> Google: <http://www.google.co.uk/dmca.html> (setting out DMCA-style notices); Youtube: [http://www.youtube.com/t/copyright\\_notice](http://www.youtube.com/t/copyright_notice) (describes the YouTube content management procedures, including a Content ID system); eBay: <http://pages.ebay.com/vero/intro/index.html> (describing mechanism to easily report listings on eBay that infringe IP rights); MIH Companies: <http://allegro.pl/RightsProtectionCooperationProgram.php?country=0>

3. **Request a minimum amount of information from the party serving the notice:** For example, under the US Digital Millennium Copyright Act (DMCA)<sup>5</sup> online service providers can be put on notice through the copyright holder's written notification of claimed infringement to the online service providers' designated agent. A notification then includes the following:
- I. A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
  - II. Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
  - III. Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material (in case of online content, the URL).
  - IV. Sufficiently reasonable information so as to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
  - V. A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
  - VI. A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

However, the DMCA notice-and-takedown regime is specific to copyright infringements. Other good examples of what notices should include can be found in Europe, where the Internet Watch Foundation has a specific reporting tool<sup>6</sup> available regarding the reporting of child abuse and criminally obscene material. Furthermore, an OECD Report<sup>7</sup> from June 2011 on the role of Internet intermediaries in advancing public policy objectives emphasizes through various case studies the divergence in approaches depending on the area at stake (*e.g.* the global free flow of information, security, child protection, copyright, counterfeiting, Internet gambling, consumer protection).

From a more generic perspective, if notice could be given directly by a user or any other interested 3<sup>rd</sup> party to an online intermediary it should comprise at least the following information:

- **Identity of the person giving notice;**
- **Exact location (including URL) of the alleged illegal material;**
- **Evidence demonstrating the alleged illegality** (to be interpreted differently depending on the nature of the illegality) and in case of an IPR claim, evidence that the rights holder serving the notice owns the copyright or trademark in question (including a specific description of the rights holder's intellectual property enabling the online intermediary to identify it) and an attestation by the rights holder that, to the best of his knowledge, the content infringes the rights holders intellectual property rights;

---

<sup>5</sup> **The Digital Millennium Copyright Act, 1998;** 1Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

<sup>6</sup> Internet Watch Foundation Reporting Tool - <https://www.iwf.org.uk/report>

<sup>7</sup> OECD (2011); The Role of Internet intermediaries in Advancing Public Policy Objectives. OECD Publishing.

- **Take into account the nature of the online intermediary’s activities.** This principle has been rightfully set in place in the e-Commerce Directive and has been confirmed by various cases in front of national courts and the European Court of Justice. The approach towards notice-and-action should depend on the type of intermediary being notified, whilst content hosts could have the ability to take down particular content items, conduits, such as Internet Service Providers (ISPs), are not in the same position. Moreover, even if ISPs wanted or were requested to block specific content this would require them to use deep-packet inspection or other costly and highly privacy-invasive techniques. Similarly, requesting ISPs to block entire websites would also be considered problematic in terms of freedom of speech and would thus not even meet the test of proportionality (see response to Question 18 below regarding blocking);
- **Take into account the nature of the alleged illegal content.** Alongside taking into account the type of online intermediary involved, policies should also depend on the nature of the content being notified. While some types of content can be easily identified as illegal, others require nuanced legal judgment, which cannot necessarily be left at the discretion of an online intermediary, and therefore may require a judicial or administrative intervention. Online intermediaries, for example, lack the full context and the expertise to judge whether particular content is to be deemed defamatory or if it is in violation of a 3<sup>rd</sup> party’s privacy).

***10. Do you receive unjustified notices? Can you give an estimation of the percentage of notices that were unjustified and/or that were submitted in bad faith?***

Notice-and-action regimes require safeguards against abuses and should be carefully developed to avoid unwarranted and unsubstantiated claims that impair the free-flow of legitimate content. Third party complainants have filed disputes that are procedurally deficient, are aimed solely at impairing competition, or have included errors that could have resulted in a substantive interruption of a legitimate firm’s business.

Abusive notices tend to find more response if the legal framework threatens online intermediaries with legal penalties if they don’t block or remove content on a virtually automated basis whenever served a notice. EDiMA believes that an adequate safe harbor for online intermediaries will translate to greater equilibrium in the dispute process. Therefore, notice-and-action regimes should consider the potential impact of such abusive notices and should not promote casual and frequent removal of content over less drastic actions.

Furthermore, guidance would be welcomed to ensure that new user-generated content hosting providers can fully benefit from the protections set out in Article 14 of the e-Commerce Directive. At the moment, the conflicting interpretations and case law in various Member States has resulted in legal uncertainty for new types of social media services hosting content for 3<sup>rd</sup> party users.

***11-15. What safeguards should be in place to avoid undue take down by intermediaries that received notice and should the procedures for takedown be public or not?***

EDiMA underlines also that safeguards could encompass penalties for abuses, including penalties for serving wrongful notices. In the end, if the notice-and-action process implies a takedown then there should be a mechanism available to online intermediaries through which users can appeal this decision or ‘put back up’ the content if they believe the notice was served wrongfully or deceptively.

Evidence shows that there are issues with the so-called counter-notice approach in the US most likely due to (1) its complexity and (2) the lack of requirements for ISPs to inform their users of its existence. ‘Chilling

Effects'<sup>8</sup>, a private initiative, notes that whilst Google has taken hundreds of websites out of its index due to DMCA requests, not a single person has filed a counter-notice nor did it receive a counter-notice from any other online service provider. This could result from an inherent imbalance in prerequisites for the original notice and the counter-notice. In order to have content removed, copyright holders are only required to claim a good-faith belief, without penalties for perjury, that neither they nor the law have authorized the content's use. In comparison, for the content poster to get the content re-enabled he must claim good-faith belief under penalty of perjury that the content was wrongfully removed. As such, this empowers copyright holders to send out take-down notices without incurring severe liability risks, whilst to get the content back online the user might need to expend considerably more resources.

In addition, in the US ISPs have a tendency to remove allegedly offending content immediately, whereas there is a 10 to 14 day delay before ISPs re-enable access to it in response to a counter-notice. Intermediaries should be protected from liability if they re-enable content immediately after receiving a counter-notice.

**18. When you block, at what level is it executed (for instance: at IP address, DNS or URL level)?**

The blocking of illegal material should not be confused with take down or deletion. Taking down illegal content after being served with a proper notice is considered appropriate, while blocking content raises more issues than it intends to solve. The mechanism for disabling public access to allegedly infringing content, however, may differ for each intermediary based on their systems and practices, as well as the nature of the content involved (e.g. a user's post in a discussion group, a mobile application available for sale in a hosted marketplace, or an entire website).

\* \* \* \* \*

Successful notice-and-takedown procedures rely on cooperation from intellectual property rights holders and on the expertise they bring to bear about their content and the protection of intermediaries to prevent abuses by unscrupulous firms. The starting point for this cooperation must always be that IP rights are private rights and the primary responsibility for policing and enforcing them lies with the right holder. An EU-wide approach to notice and action procedures could be highly beneficial for all stakeholders and help facilitate the removal of illegal content while safeguarding the rights of plaintiffs, users and online intermediaries. However, any such initiatives or N&A procedures must be marked by appropriate standards for different forms of potentially illegal content and the specific consideration therein. Furthermore, any proposals or changes to relevant legislation should of course be done proportionately, efficiently, and in full compliance with the principles of the E-commerce Directive regarding limited intermediary liability so as not to hinder the economic benefits and innovation for which these principles are responsible.

---

<sup>8</sup> <http://www.chillingeffects.org/> - Acts as a clearinghouse whereby the project invites recipients and senders of cease and desist notices to send them to 'Chilling effects' as a central point so they can receive information about their legal rights and responsibilities..