



**Towards a workable and  
balanced environment for  
online intermediaries**

# A balanced legislative approach to the online intermediary's liability regime

Online intermediaries play a crucial role and an important enabling function in Europe's economy, in both online and offline industries<sup>1</sup>.

As the role of online intermediaries continues to integrate with Europe's economy, there is a vital need to rely on a measured liability regime in order to provide online services in an efficient and coherent manner.

The widespread and low-cost availability of digital economies has enabled companies and consumers, buyers and sellers, to engage in transactions at much lower cost than was previously the case.<sup>2</sup>

Preserving and improving the regulatory framework governing online intermediaries in the EU will underpin the economic growth generated by online intermediaries. Conversely, any adverse changes to the current liability regime – including increased legal obligations on intermediaries – could have adverse impacts on innovation, creativity and the economic activity of online intermediaries, putting the added economic value at risk. Any improvements to the liability regime must be balanced and future proof to ensure that online intermediaries maintain the flexibility to adapt and develop to future challenges.

Today, the current liability regime is enshrined in Articles 12-15 of the EU's Directive 2000/31/EC on electronic commerce (henceforth the e-Commerce Directive). The e-Commerce Directive

provides a sensible legislative framework for online intermediaries in Europe, which includes search providers, e-commerce platforms, social networks and cloud computing providers. The current legislative landscape recognises that through ensuring a well-functioning and future-proof legislative environment allows online innovation and new-business models to prosper and flourish within Europe.

This is achieved through ensuring a balanced approach that both protects online intermediaries from liability for the misuse of their services by users and third parties, as costs associated with general monitoring would hinder the generation of new online entrepreneurs and start-ups and stifle competition and future growth in the European online sector, and allows the intermediary to act expeditiously to remove or disable access to illegal information upon receiving actual knowledge of it, as on the other hand unlimited liability for monitoring

illegal content and goods online is not a practical or realistic approach in the online world.

In total, intermediaries' activities in the EU contributed around €430 billion to the GDP of the EU27 in 2012.

The limited liability regime is not only necessary for the functioning and growth of online intermediaries, but it is also beneficial to the European economy as a whole. In terms of figures, intermediaries' activities in the EU contributed around €430 billion to the GDP of the EU27 in 2012. This is comprised of a direct GDP contribution of €220 billion, and equally as important, a long-term indirect GDP

The significant contribution of online intermediaries to the economy would not be possible without limited liability.

contribution due to the productivity impact of intermediaries on other firms of €210 billion.<sup>3</sup>

Indeed the current EU's liability regime provides the basis for online intermediaries to run and develop their activities – technically and commercially – and the intermediaries' contribution to the economy would not be possible at the current level without the liability regime as it is currently designed.

Intermediaries' activities: a direct GDP contribution of €220 billion and along-term indirect GDP contribution of €210 billion.

1 2012 Copenhagen Economics study on Online Intermediaries: Assessing the Economic Impact of the EU's Online Liability Regime and 2013 Copenhagen Economics study update on the Impact of Online Intermediaries on the EU Economy

2 CCA (2013) The Internet: the enabling force of the 21st century.

3 2013 Copenhagen Economics study update on the Impact of Online Intermediaries on the EU Economy

# The proportionate implementation of EU policy on IPR Enforcement (and infringement)

The current legal framework of the EU's intellectual property rights (IPR) policy should be grounded with the support and inclusion of all relevant stakeholders across the value chain. In addition, the growth and progress made in the digital economy should be recognised and considered as one of IPR policy's primary objectives in Europe.

An example where this has been the case is in Article 11 of the IPR Enforcement Directive (IPRED), which provides for the possibility of injunctive relief for IPR, as well as Article 3 (2) which stipulates that "any injunctions must be fair, proportionate, not excessively costly, and that they may not create barriers to legitimate trade."

A consistent approach and harmonised implementation in Europe is vital in the context of IPRED and should be respected and reflected upon in future case and rulings.

It is necessary to take into account and reference the limitations placed on filtering and monitoring obligations outlined in *Sabam vs. Scarlet* (2011) and *Sabam vs. Netlog* (2012). In particular, intermediaries must not be subjected to broad injunctions requiring general monitoring of their sites, a concept which is enshrined in the current legal framework provided by the e-Commerce Directive (See Articles 12-15). Online intermediaries need to rely on this principle in order to evolve in an environment with a clearly defined liability regime. One that outlines fair and appropriate obligations for online intermediaries and allows for limited liability when monitoring content or products published or made available

online. A consistent approach and harmonised implementation in Europe is vital in the context of IPRED and should be respected and reflected upon in future cases and rulings.

The European Commission must ensure that discussions and proposals regarding IPR enforcement avoid overlap, for example on issue of 'Notice and Action', and any actions taken must always be proportionate and flexible. It is also important to note that it is often impossible for any individual stakeholder to take decisive action alone and a cooperative approach is generally far more beneficial. Therefore, a multi-stakeholder dialogue with the objective of developing voluntary measures directly targeted at reducing the demand for, and supply of, infringing content would be a more effective and proportionate way to tackle commercial scale infringements.

The role of the Observatory for Harmonization in the Internal Market (OHIM) is also essential in fostering an environment where IPR can be discussed in a constructive manner between all stakeholders. OHIM must also remain an objective facilitator to the stakeholder discussions to ensure a constructive dialogue, alongside raising greater awareness on existing tools and campaigns available in the private and public sectors and developing joint initiatives to fight against piracy and counterfeit products. The European Commission, OHIM, and all contributors and stakeholders, need to collectively collaborate towards a common objective: to maintain a well-functioning and future-proof legal framework, ensuring that IPR policy is adequately applied across the European Union in a proportionate and efficient manner and in full compliance with the principles of the e-Commerce Directive.

The legal framework of the EU's IPR policy must be developed with the support of all relevant stakeholders across the value chain, notably consumers.

EDiMA members already work closely with stakeholders across the value chain towards a highly functional IPR policy, for example, by developing systems allowing rights owners to notify infringements of their rights, providing innovative technological solutions to help rights owners to better protect their rights online and providing clear and effective procedures to take down illegal content online. EDiMA members provide commercially and technologically practical solutions to harness the opportunities and address the challenges that emerge in a fast-changing online environment. EDiMA continues to support greater collaboration between all stakeholders to address emerging challenges and is committed to cooperating towards the objective of promoting the opportunities offered by the online environment to ensure online consumers enjoy the widest possible choice of legitimate products and services.

The European Commission, OHIM and all relevant stakeholders need to collaborate to ensure that IPR policy is adequately applied across the European Union.

# EDiMA recommendations for the next European Commission:

1. To maintain a balanced and future-proof liability regime that allows for online intermediaries to flourish and prosper in Europe; and that they are not subjected to unreasonable and unworkable obligations with respect to the e-Commerce Directive legal framework;
2. To consider the role and activities of online intermediaries in the online sector as a key factor in the European online economy;
3. To ensure a consistent approach and implementation of IPR policy across the European Union;
4. To support more collaborative initiatives between all actors across the value chain in the IPR context including consumers, civil society, rights owners, national enforcement authorities, Internet services providers, etc.;
5. To accurately interpret existing EU case law with regard to the limitations placed on filtering and monitoring obligations and take it into account for future rulings and reflection;
6. To introduce clear guidance to EU Member States to ensure that the IPR scope is adapted to the technical and commercial realities in which intermediaries operate;
7. To foster effective stakeholder dialogue facilitated by an objective OHIM;
8. To take proportionate action and adopt a cooperative approach in the N&A context.