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 Food Law
 E-Commerce Law

Intermediary Liability In The E-Commerce Directive: So Far So Good, But It's Not Enough (Draft)

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INTRODUCTION

To what extent are on-line intermediaries responsible for third party material put on the Internet by users of their facilities? The Directive on certain legal aspects of electronic commerce in the internal market, among other things, answers this question by establishing a liability regime for on-line intermediary activities^[1]. The set of rules contained within articles 12 to 15 of the E-Commerce Directive clarify the liability standards that will apply to the various on-line intermediary players as a result of their involvement with illegal or infringing material put on their Internet facilities by third parties. In particular, the Directive covers three categories of on-line intermediary functions: First, the "mere conduit activity", which includes both the role of transmitting information (for example, providing cables, routers, etc.) and the provision of access to a communication network such as the Internet. Second, it covers the activity of proxy caching, which consists of storing on a local server copies of high demand material that originates from remote servers^[2]. Finally, the Directive provides a liability limitation for the provision of a server, upon which the provider rents space for content uses, such as a Web page. Of course, an on-line intermediary can carry out one or more of these functions.

Generally speaking, the liability regime seems to provide a balanced solution that prevents on-line intermediaries from being held liable without knowledge of the existence of the illegal or infringing content, while at the same time properly protecting potentially aggrieved parties. However, a closer look to the Directive shows that it leaves unsolved certain important issues, which eventually may render meaningless the merits of the solutions embodied by it. In particular, the E-Commerce

Directive does not establish circumstances and requirements under which "private notices" given to host service providers alerting them of the existence of unlawful material in their facilities are reliable enough for on-line intermediaries to act thereon, thus cutting access to the materials. Furthermore, the Directive threatens Internet service providers with damages liability if upon acquiring knowledge of the existence of unlawful material, for example through the receipt of notices, they do not remove immediately the alleged unlawful material. As a result, on-line intermediaries have an incentive to systematically take down material, without hearing from the party whose material is removed, thus preventing such a party from its right to evidence its lawful use of the material. Obviously, this practice conflicts with the right to freedom of expression and may hinder competition on the Internet. Following a description of the Directive's liability limitations, this article will analyze the issues identified above. In particular, it will suggest different approaches to address the issues mentioned above.

AN OVERVIEW OF THE LIABILITY REGIME

The E-Commerce Directive limits damages liability of information society service providers when they act in one of the intermediary roles identified by the Directive, i.e, mere conduit, caching, and hosting [3]. Before describing the liability standards that apply to each of these functions, it is important to make some general comments that apply to all three standards. First, the liability limitations are established in a horizontal manner, so that they apply to all kinds of illegal material provided by third parties, including copyright, trademark, defamatory statements, pornography, etc. Second, as regards the types of liability covered by the Directive, it should be noted that the liability limitations apply not only to civil but also to criminal liability. Third, it is also important that the liability limitations apply only to damages liability. Thus, the Directive does not prevent injunctions from being imposed upon on-line intermediaries. The later versions made this more clear by moving the wording on injunctions to a separate paragraph within each of the Articles 12-14. In particular, the new wording emphasizes that Member States can impose *all types of injunctions* upon on-line intermediaries, instead of merely prohibitory injunctions, as previous versions stated, and a new recital specifies that injunctions issued by administrative authorities are covered, in addition to those issued by courts[4].

Articles 12 through 15 of the Directive

As regards the mere conduit function, Article 12 of

the Directive excludes transmission providers from damages liability provided that they do not modify the content transmitted except for manipulations of a technical nature enabling the transmission of the information. Article 13 deals with the caching function. In particular, it establishes that information society service providers engaging in caching will not be liable for the damages unless they have actual knowledge either that the information at the initial source of the transmission has been removed, that access to it has been disabled, or that a competent authority has ordered such removal and they fail to remove or disable access to the information upon obtaining this knowledge. According to Article 14, providers that store third party content on their servers may not be held liable for damages, unless they fail expeditiously to block access to the information upon obtaining actual knowledge of the illegal activity or information or upon becoming aware of facts or circumstances from which illegal activity or information is apparent. The latter standard is referred to as "constructive knowledge". With the Common Position, a new paragraph to this Article was added, according to which Member States may oblige host service providers to inform authorities of alleged illegal activities or content in their servers. Finally, Article 15 stresses that a duty to monitor may not be imposed upon online intermediaries. In other words, Member States cannot impose upon on-line intermediaries an obligation to monitor the information which they transmit or store, nor can Member States require intermediaries to seek facts or circumstances indicating illegal activity.

Despite this strong and clear statement, surprisingly, the final version contains a recital which appears to contradict Article 15. The new recital 48 establishes that Member States may impose upon intermediaries a *"duty 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"*. Thus, Article 15.1 prohibits to impose an obligation to monitor, while recital 48 at the same time permits to establish a duty to detect unlawful material. It remains to be seen how these provisions can be reconciled.

To fully understand the implications of recital 48, several possible consequences following from its wording should be highlighted. First, could the duty of care mentioned in the recital require intermediaries to implement and operate filtering and control mechanisms? Second, could those service providers who fail to implement such mechanisms be held liable for failure to comply with the mentioned duty of care? Third and more importantly, will host service providers be held

liable if they fail to detect and remove material that, according to certain (yet undefined) standards, they should have been able to identify? Indeed, an aggrieved party could argue that the failure of a host service provider to identify allegedly infringing material was due to a negligent implementation or operation of filtering mechanisms. Finally, as will be discussed further below, the recital might broaden the ways by which host service providers may be deemed to obtain the requisite knowledge to render them liable.

Also, the new paragraph added to each of Articles 12-14 covering injunctions provides a possibility to order Internet service providers to terminate or *prevent* an infringement. The interpretation of this wording is left to the national legislatures and courts. However, the possibility to issue "preventive" injunctions may imply that injunctions could be imposed on Internet service providers, which require them, for example, to monitor the activities of a specific person or site that has previously been identified as engaging in illegal acts. Along the same lines, another new recital, also introduced with the Common Position, permits Member States to allow national authorities to impose "monitoring obligations in specific cases", as opposed to monitoring obligations of a general nature^[5] .

FREEDOM OF EXPRESSION AND FAIR COMPETITION CONCERNS *VIS-A-VIS* THE E-COMMERCE DIRECTIVE

A Description Of How The Directive's Liability Regime Might Hinder Freedom Of Expression And Fair Competition

Generally, host service providers may become liable for damages if they acquire actual knowledge or become aware of unlawful activities carried out by users of their servers. In principle, they could obtain such knowledge or awareness from notices sent by interested third parties alerting them of the existence of the unlawful material. Indeed, and in light of the "no-monitoring" provision of Article 15.1, private notices are likely to be the most common way to obtain the required knowledge. Most likely, Member State courts will find that this is sufficient knowledge or awareness for the purpose of the Directive when a provider is notified of the content residing on its servers^[6] .

To the extent that, by virtue of Article 14, host service providers may be held liable for damages if, upon receipt of notifications, they do not remove such material from their servers, it is likely that host service providers will automatically and systematically take down the allegedly unlawful

material when a notification is received. The new recital 48 has even broadened the ways in which host service providers may be deemed to obtain the requisite knowledge to render them liable. If, according to recital 48, a duty to detect unlawful material is implemented by national legislation or found by the courts, host service providers would apply screening technologies in observance of that duty, and thus, possibly obtain the knowledge that will trigger liability by monitoring their subscribers' activities. As it is a natural tendency to avoid uncertainties, intermediaries are likely to be extremely cautious and cut access to web sites or remove the material they believe may be unlawful upon a slight suspicion.

Of course, the implications on freedom of speech are great. To begin with, one should realize that host service providers will eliminate material without giving the person to whom the material belongs the possibility to protest and demonstrate that the publication was lawful. Thus, freedom of expression and fair competition may be severely hindered, not to mention that principles of due process might be violated. Furthermore, the existence of such a duty may entice host service providers to be more discriminating in deciding to whom they will rent space on their servers, as a result of which less well respected parties may have trouble using the Internet as a means of expression.

The Directive, perhaps aware of this danger, intends to prevent it by adding the following recital^[7] :
"Whereas, in order to benefit from a limitation of liability, the provider of an Information Society service, consisting of the storage of information, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or disable access to the information concerned; whereas the removal or disabling of access has to be undertaken in the respect of the principle of freedom of expression and procedures established for this purpose at a national level". While the reference to freedom of expression is to be welcomed, it would be naive to expect that host service providers will not remove material that might be unlawful in order to serve freedom of expression concerns. Clearly, it is not the task or duty of online intermediaries to guard the freedom of information.

A disincentive for a service provider to take down material that is not clearly infringing could be that the web site owner may have grounds to hold him liable for the damages suffered as a result of the unjustified removal of the material. However, most hosting service providers will have included provisions in the contracts with their customers, establishing their right to take down material at any

time, and without any responsibility deriving from such action. Given the threat of damages liability for failure to take material down, on the one hand, and the absence of any risk of liability to the person whose material is taken down on the other, the choice will naturally be to remove the material.

Concerns about freedom of expression and fair competition arise not only in relation to host service providers, but also in relation to other on-line intermediary activities. Mere conduits, for example, may face expensive court proceedings seeking injunctions if they do not react upon a request to block access. Thus, they too have an incentive to systematically block access to allegedly unlawful material, thereby preventing the person whose material is taken down from defending himself. But of course the problem is all the more pressing with regard to host service providers because they will be exposed not only to injunction proceedings, but also to damages liability if they fail to remove the material.

All in all, it can be said that the Directive has created a liability regime which places upon on-line intermediaries the burden of deciding whether or not to remove suspicious material. If they fail to block material which eventually turns out to be unlawful, they will lose the liability limitations and thus will be subject to damages liability. Consequently, the legal regime established by the Directive may *force* host service providers to be very cautious and indiscriminately remove material from their servers, even if it is extremely doubtful that it actually violates a law or infringes a right. Needless to say, freedom of expression would thereby unduly suffer.

In the next paragraphs we will further illustrate why on-line intermediaries and host service providers, in particular, are unsuited to decide whether the alleged unlawful material should be taken down from the Internet. We will also try to show in more detail the consequences likely to follow from having on-line intermediaries making these choices and thus policing the Internet.

Reasons Why It Should Not Be Up to On-Line Intermediaries To Decide What Should And What Should Not Be On The Internet

Experiences taken from daily practice show that Internet access or host service providers receive multiple complaints about allegedly illegal material found on or disseminated over their systems. It is foreseeable that the number of received notices will grow significantly in the coming years.^[8] Most of these demands to remove allegedly illegal material or prevent access to it are through private claims

and not through court orders or other official channels. Those who believe their rights are being infringed by material disseminated over the Internet naturally see the ability to make complaints to Internet service providers and to obtain quick removal or denial of access to such material as a convenient way of protecting their rights. At first sight, such private mechanisms for eliminating allegedly illegal material from the Internet would appear to be effective and appropriate.^[9] Thus, it could be said that by directing private complaints to on-line intermediaries who promptly act thereon, copyright holders and other potentially aggrieved parties have found an expeditious way to redress illegal activities.

However, this is not the end of the story, and things are not quite so simple. While some, indeed perhaps many, cases of clearly illegal activity exist, many others are not so straightforward. In some cases, complainants might conclude without any ill intent or negligence and in good faith that their rights have been violated, but they are merely mistaken. However, if the complaint to a service provider leads to removal of a web site, the party who relies upon exploitation of the web site for his livelihood will have been unjustifiably harmed. Take, for example, the case brought by Apple against Microsoft in the mid-1980s alleging that Microsoft's Windows software infringed Apple's copyright in its graphical user interface software.^[10] Apple clearly believed, without bad faith or negligence, that its copyrights had been infringed by Microsoft, but eventually, after years of litigation, the court concluded otherwise. It is interesting to contemplate what might have been had this case not arisen in the mid-1980s, but in the Internet age, and had Apple not sued Microsoft in court, but rather complained to service providers disseminating Microsoft's software. Microsoft would have been deprived of what is likely to become the predominant distribution channel for software products.

The last example illustrates that cases of copyright infringement are often not at all straightforward. Courts often struggle mightily with questions such as the following: Who owns the copyright? Has the duration of any copyright expired? Does the alleged infringer have a license to publish the allegedly infringing work? What is the scope and duration of any such license? Does the allegedly infringing act fall within any copyright exception or defense?^[11] Similar difficult legal and factual questions arise in cases involving defamation, fraud, misleading advertising, unfair competition, and the like. In short, the same legal and factual questions that arise in resolving many off-line disputes arise also in disputes concerning alleged on-line activities. It

would be naive to assume that complaints about illegal activities in the Internet context will all - or even mainly - be straightforward cases involving clearly unlawful conduct. Surely they will be subject to the same legal and factual intricacies and human frailties as disputes in the analogue, off-line world. However, whereas in the physical world one needs a court order to stop the distribution of an information product which a court will issue only if it feels the complaint (is likely to be) justified, in the virtual world it will be enough to merely claim material is unlawful to stop it from being disseminated.

Furthermore, complaints made to Internet service providers may not only be based on a good faith, but mistaken belief that one's rights are infringed. Indeed, demands for removal of allegedly illegal material are sometimes made to shut down Web sites for illegitimate purposes, such as to hinder legitimate competition, stifle debate, and the like. For example, Car Company X may not especially appreciate a competitor company making a link on its site to another web site listing Car Company X's less impressive prices or safety test results. Car Company X may be tempted to shut down the Web site by appealing to the host service provider to remove the material with an assertion, for example, that it infringes unfair competition or advertising laws.

Apart from stifling competition, complaints to on-line intermediaries can be used to try to hinder public discussion or criticism. The landmark US Netcom case of 1995 is one example. In this case, former members of the Scientology Church, with the intention of expressing their opinions about the Church, posted several documents written by the Church's founder in a newsgroup. Scientology held the copyrights to the documents and used them as a basis to sue not only the former church members, but also Netcom, a U.S. service provider, for having provided access to the Internet newsgroup. The Court ruled that there can be no duty to block access if the web site operator has a possible fair use defence.^[12] The US fair use defence is intended, *inter alia*, to allow for quotations necessary in public debate and for the purpose of criticism. Many European copyright laws have a similar rule. Two Dutch courts ruled, for instance, that the quotations fell within the limits of the statutory permission to quote and that only if it is obvious that third party unlawful activity take place the provider may have a duty to block access^[13]. In the Dutch cases, the provider concerned had, for idealistic reasons, refused to take down the content, but most service providers will be inclined to take down the material, although a copyright exemption may apply. If the provisions in the E-Commerce Directive incite a provider to block access upon

reception of a notification even in cases of doubt, the Church of Scientology would in similar circumstances succeed in preventing criticism.

As the above examples show, on-line intermediaries are continuously faced with difficult decisions either to take down material, and therefore to grant the claims of the complainant, or to respect the site owner's interests, and even those of society as a whole in an open public discourse, in keeping the material posted. Moreover, while disputes about allegedly illegal material are often difficult even for courts to resolve, it goes without saying that on-line intermediaries are not at all well-equipped to deal with such issues. In this regard, it is important to keep three things in mind. First, Internet service providers, as technical intermediaries, are not at all like publishers. Unlike publishers, they do not have any say over the allegedly illegal material, the decision to publish it, or the persons placing such material on their systems. It is therefore inappropriate to equate complaints made to Internet intermediaries to complaints made, for example, to newspaper publishers. The latter have a completely different relationship to the allegedly illegal material and to its source; instead of a merely technical intermediary role, the publisher typically will have, among other things, an employment relationship with the source of the material or a contract to procure and publish the material, and its business relates to *content* rather than to the provision of technical facilities for the dissemination of content^[14] .

Second, Internet service providers, as private providers of technical facilities, do not have the skills, knowledge, or personnel necessary to evaluate whether any particular material among the millions (perhaps billions) of bytes flowing over their facilities is infringing or illegal. In particular, this task may prove virtually impossible for the small Internet service providers that until now remain prevalent in Europe. Third, and most importantly, Internet service providers have neither the ability nor the obligation to take into account the myriad of legal and public policy considerations that must be considered by a court in deciding any case of allegedly illegal information. They have neither the obligation nor the ability to, for example, evaluate whether certain allegedly defamatory material must remain open to public access in order to preserve freedom of expression and public discourse.

Indeed, a legal regime that threatens Internet service providers with liability based upon "constructive knowledge" obtained from private complaints and possibly even from monitoring would, without appropriate limits, encourage the virtually automatic and systematic removal by

intermediaries of material from the public domain. A legal system that not only permits, but also encourages, on-line intermediaries to indiscriminately eliminate any material from the Internet upon receipt of virtually any notice from third parties will unduly threaten freedom of expression and fair competition.

POSSIBLE SOLUTIONS TO PRESERVE FREEDOM OF SPEECH AND COMPETITION ON THE INTERNET

When trying to reconcile the right of freedom of expression with the legitimate interests of copyright owners and other stakeholders, several possible solutions can be considered. The first and absolutely essential step to preserve freedom of speech and fair competition on the Internet consists in interpreting narrowly recital 48, which purports to impose a "duty of care which can reasonably be expected ... in order to detect and prevent certain types of illegal activities" upon host service providers. Clearly, such duty may lead to a world in which, to avoid liability, providers are likely to be extremely cautious and will, upon even a slight suspicion of the material being unlawful, cut access to web sites or remove the material. This could, for example, lead to the extinction of the word 'sex' in the online environment. A service provider could screen all hosted sites for that word and automatically delete all of the sites in which it is used, even though it is clear that not every site which contains it will be unlawfully pornographic. It goes without saying that the freedom of speech will be unjustifiably hindered by such a measure. Member States should recognize the inconsistency of a broad interpretation of Recital 48 with the terms of Articles 14 and 15, as well as with the fundamental social goals and legal obligations of preserving freedom of speech and fair competition in the Internet environment.

A second step could be to adopt a notice and take-down regime similar to the one included in the US Digital Millennium Copyright Act of 1998. Alternatively, special bodies, the composition of which should be carefully defined and the *modus operandi* of which should ensure a fast and efficient decision, could also be considered. Both possible solutions have the final goal of defining very carefully the circumstances under which on-line intermediaries should accede to demands to take down third party material residing in their facilities. Let us examine such solutions and the Directive's provisions in relation to them.

Notice and Take-Down Procedures Similar to Those Established by the United States Digital Millennium Copyright Act

The United States' Digital Millennium Copyright Act (DMCA), implemented in article 512 of the US Copyright Act, which includes a liability standard for host service providers similar to the one of Article 14 of the E-Commerce Directive^[15], tries to solve the above described problem by including an elaborated "*notice and take down procedure*". Under this procedure, a provider will escape liability if, upon receiving a notice of claimed copyright infringement, he expeditiously blocks access to the material concerned. These notices have to fulfill certain formal requirements and include certain minimal content, for imposing on an on-line intermediary a duty to remove the allegedly unlawful material^[16]. By requiring notices with a list of specified elements, the DMCA permits the on-line intermediary to identify the material, thus, to a certain extent avoiding errors. The Act also establishes to whom a notification must be directed to trigger a duty to block access. As a result, the provider does not have to react to any vague notification sent to any of its employees.

In addition to the "*notice and take down procedure*", the DMCA includes a "*put-back procedure*" which establishes under which circumstances the person whose material has been taken down can object and have his material put back on the Net by the on-line intermediary^[17]. To remain immune for all claims a hosting service provider who removes material upon notification must promptly notify the subscriber that access to his web page has been disabled and put the content back up upon receipt of a "counter notification" from the web site owner. Clearly, the latter provision may be viewed to serve the freedom of information, as it gives the site operator an opportunity to object. Finally, the DMCA's procedure includes a rule, according to which the provider has to remove the material again from the system, if the person who submitted the first notification subsequently files an action in court seeking to restrain the owner of the site from engaging in infringing activities. If the intermediary fails to do so, he may be held liable for the damages incurred subsequent to the filing of the action.^[18] In order to reduce the number of notices and counter notices given for illegitimate reasons, the DMCA establishes that any person who knowingly misrepresents that material is infringing or mistakenly removed is liable for the damages incurred as a result of a service provider acting upon such misrepresentation^[19].

Pros and Cons of the US Notice and Take-Down Regime

When looking at these regimes, the question inevitably arises whether it would be appropriate to add similar provisions to the EU Directive or

whether, alternatively, Member States should institute similar procedures in their national laws.

In fact, Article 14.3, according to the new wording introduced with the Common Position and included in the final version, leaves Member States with the discretion to establish "notice and take down" procedures. Clearly, the addition of this new subsection reflects the intention of some Member States to introduce such procedures.

Certainly there are many positive aspects to be highlighted from the "notice and take-down and put-back procedures" as established in the US. But also, in evaluating whether to implement such procedures, one should likewise realise their various shortcomings and eventually the manner to overcome them.

Among the positive aspects of the "notice and take-down and put-back procedures" is the fact that the law would provide some guidelines as to the form and contents of a notice for an on-line intermediary to act thereon. Particularly, it will require a detailed notice accompanied with sufficient documentation of the claim from the person, who says that his rights have been infringed. Demanding such formal and content requirements would probably help to reduce unfounded notices or notices sent for improper objectives which shut down debate or prevent fair competition.

Second, and insofar as even notices complying with certain strict form and content requirements can nonetheless be unfounded, or even purposefully misleading, inclusion of a "put-back procedure", which gives the person whose material has been taken down the possibility to object and have the material put back on the Net, should be carefully considered. By giving to the site owner the opportunity to object to the take-down, the procedure guarantees that the right to freedom of speech and fair competition is to a certain extent taken into account^[20]. The most important feature of the 'put back up procedure', however, is that it establishes that on-line intermediaries are not threatened with damages liability by virtue of putting back up the material. Such a threat can only be dealt with by law.

As good as it may sound, whether the US put back up procedure will serve its purpose in practice remains to be seen. For example, at a WIPO workshop held in Geneva in December 1999, Greg Wrenn of Yahoo estimated that 5 to 10 percent of the notifications received by Yahoo raises doubts as to its sincerity. Of course, to avoid liability, Yahoo is statutorily required to block access to the sites concerned. In Yahoo's experience, however, very

rarely do people take advantage of the statutory possibility to object and have the removed material put back up, even in cases where the removal is blatantly unjust. Private persons in particular appear unaware of the possibility to object and less inclined to send a counter notification.^[21] Thus, even if 95 percent of the notifications are justified, a large number of people is still wrongly hampered in their right to freedom of information and expression.

Another question raised by the US procedures is that, if the person who claims his rights are infringed files a court action the on-line intermediary must remove the material from the Internet, thus rendering the material inaccessible upon a mere claim and *pending* a judicial decision. Consequently, the person who claims his rights are infringed gets the benefit of the doubt - even if there is a good reason to doubt whether the removal is justified - over the person who is frustrated in expressing his thoughts or conducting his business. Remarkably, under the US "prior restraint doctrine" a reversed situation exists. US courts are generally reluctant to grant preliminary injunctions in cases where a restraining order affects the freedom of speech. If it is considered that the notice and take down procedures will, in many cases, replace preliminary injunctions - in fact, with this solution, rights holders have gained a way to obtain injunctive relief relatively quickly and easily, and even before a judge has determined whether the material is indeed (likely to ultimately be found to be) infringing - one may ask whether the US Act goes too far. It is true that in copyright cases, where the mentioned US procedure applies, the "prior restraint doctrine" is of less importance and injunctions are routinely issued. However, if a similar procedure were introduced with regard to claims of defamation or allegedly unlawful pornographic material, to which a procedure introduced on the basis of the 'horizontal' E-Commerce Directive's liability regulations may apply, it is not at all inconceivable that US courts would find such a procedure in conflict with the First Amendment^[22] .

In this context, the question may be asked whether the obligation of Article 18 of the Directive, which requires Member States to provide for preliminary injunctions in order to stop cases of *alleged* infringement, is merely a slip of the pen. Should an injunction be granted even if it is unlikely that success on the merits of the case will follow? Clearly, this would depart from existing law in most, if not all, Member States.

Existing law contains several safeguards intended to prevent unjust claims for preliminary injunctions.

For instance, under Spanish law, for an interlocutory injunction to be granted for copyright violations, certain precautions are taken to prevent filings for unfounded injunctions. In particular, the claimant has to show ownership of the right, immediate infringement, or probability for it to occur, and finally, in some cases, the court may require a deposit to cover damages if the interlocutory court injunction in the end reversed under an injunction procedure. Furthermore, the defendant has the right to oppose the plaintiff's claim^[23]. Similar precautions are taken in defamation cases^[24]. What's more, one could argue that the removal by the on-line intermediary of material upon a mere claim or pending a judicial decision could violate fundamental rights established by the Spanish Constitution. In particular, such practice could go against art. 20, which lays down the right of citizens to express their opinions by any means of diffusion and which says that this right may not be limited by any form of censorship. Moreover, Article 20 provides that no publication, recording or information medium may be confiscated without a court order.

Therefore, it is easy to see that stake holders whose rights might be infringed on the Internet, with the new system established by the Directive, will have a smoother path to follow to obtain the removal of the alleged unlawful material than using the traditional procedures. Thus, one can expect the expanded use of private notices to Internet service providers, which are likely to in many cases replace preliminary court injunctions. Unfortunately, by doing so, legal warranties embodied in national intellectual property and procedural laws that ensure the right to oppose a claim are being circumvented.

In light of the freedom of information and expression, one way to improve the procedures introduced in the US could be to oblige the intermediary to put back up the content if the web site operator objects and only to require the service provider to block access again *after* a court ruling, not *pending* one. This would return the final decision to the courts, who are naturally the best suited to take into account the myriad of legal and public policy considerations that must be considered when deciding any case of allegedly illegal or infringing material.

Another issue that should be considered by the European legislator is the liability standard that will apply to those who send notices to on-line intermediaries which lead to an unjustified removal of material. The DMCA imposes liability upon the misleading notifier when there is misrepresentation, this is to say, an *intentional* false notification. Within

the E-Commerce Directive there are no provisions dealing with this issue. Accordingly, and absent specific provisions, national liability laws will apply to this situation. To the extent that, generally speaking, most liability laws are based on fault, if courts find that the notice leading to an improper take-down was sent to the intermediary imprudently or purposefully knowing of its falseness, courts will hold the misleading notifier liable for damages. Conversely, if fault is not found, the person who issued a false notification will not be held liable, which is a result similar to that of the DMCA.

Having said this, one may question whether the with-fault liability standard is appropriate in this situation. In particular, if one views a notice and take down procedure as an alternative or equivalent to the provision of injunctive relief, this question arises. Generally, a person who was awarded injunctive relief which in the end is judged to be unjustified will have to bear the consequences and compensate for the damages that his counter party suffered as a result of the court order. For example, under both German and Spanish Law, if a person files for an injunction, obtains and enforces it, and it is subsequently reversed on appeal, this person will be liable for any damages incurred by the defendant as a result of enforcing the injunction no matter whether they were incurred in fault. In other words, a rule of objective, no-fault liability applies. Of course, if the relief is obtained by issuing a private notice and if the material taken down later proves to have been non-infringing, the statutes that impose objective liability on those who enforce injunctions will not apply because the statute has to do only with court-imposed injunctions. To the extent that the person who files for a court injunction which later is reversed is always responsible for damages, it clearly discourages those who do not have a "strong case", thus diminishing cases filed without real legal basis. If the latter result is regarded as positive, perhaps it should be considered to enact a rule matching the liability standard that applies to court injunctions to unjustified private notices given to on-line intermediaries.

Alternative Solution: The Creation of Special Bodies

One of the drawbacks of the solutions proposed above is that aggrieved parties may lose a fast and cheap means of redress, for example, if content should be put back up upon reception of a counter notification until a court decides it is indeed unlawful.

An alternative solution, previously proposed by one of the authors of this article, which might address

such problems and at the same time foster freedom of information interests, would be to establish a "special body" to which all complaints about the distribution of unlawful material over the Internet should be directed. This body, the composition of which should be carefully defined, would have to obtain and verify certain information concerning allegedly illegal or infringing material and judge whether a claim of infringement should lead to a duty to block access[25] . If after considering all circumstances, the special body decides that the claim is justified, it would require the on-line intermediary to take down the information. Also, the notifications should follow certain formal requirements. The creation and operation of this body could be statutorily regulated or privately based. Indeed, Article 16 of the Directive could be read to encourage such self-regulatory approaches [26] .

In fact, a similar system based on an obligation to remove material upon notification by a special body has been established by way of self-regulation in several European countries where allegations of child pornography are concerned. The British Internet Watch Foundation (IWF), for instance, serves as such a special body. If a person finds illegal pornography online, he can complain with the IWF's public hotline. The IWF verifies the complaint in accordance with police guidelines, and if it feels it is justified, subsequently sends a take down notice to the intermediary concerned who will react upon the request. In Argentina a similar procedure is envisaged with regard to claims of copyright infringements[27] .

In light of the freedom of information, an advantage of such a solution, especially as opposed to the absolute lack of regulation, is that unjustified notifications would be filtered out by the special body, and thus would not lead to access being blocked. It will not be up to the intermediary to decide what should be or not be on the Internet, but up to a specially designed body, which would provide more warranties in respect to freedom of speech. Finally, this body could react and come to decisions much faster than courts often do. Moreover, even if in many Member States injunctions can be obtained within a matter of days, it would be much cheaper to obtain redress through a special body than by bringing an action in court. A drawback of the proposed procedure could still be that one's right to freedom of expression will be hindered before a magistrate has determined whether the claim is justified.[28]

THE DIRECTIVE'S POSITION VIS-A-VIS THE SUGGESTED SOLUTIONS

The E-Commerce Directive does not really elucidate on each of these solutions but merely contains vague references to them. In particular, the Directive appears to take two possible approaches: first, it gives Member States the possibility to enact by law "notice and take-down procedures"; second, it promotes codes of conduct and private solutions.

The self-regulatory solution is included in Article 16 of the Directive, which establishes that *"Member States and the Commission shall encourage: (a) the drawing-up of codes of conduct at Community level, by trade, professional and consumer associations or organizations, designed to contribute to the proper implementation of Articles 5 to 15"*.

The adoption by Member States of a statutory notice and take-down procedure, on the other hand, is contemplated in Article 14 when dealing with the liability standard for host service providers. In particular, Article 14 establishes that the liability limitation does not affect *"the possibility for Member States to establish procedures governing the removal or disabling of access to information"*. The new recital 46 adds that this *"has to be undertaken in the respect of the principle of freedom of expression and procedures established for this purpose at a national level"*.

The Directive's approach may create several problems. First, insofar as it does not provide guidelines as to how these procedures should be designed, they are likely to differ from country to country. This will clearly affect the goal of harmonization. Some countries will have statutory notice and take down procedures in their national laws, with or without a "put back procedure". Others might by way statute create special bodies designated to "filter" improper notices. Finally, some Member States will leave it to the interested parties to design some procedure by way of self-regulation. The result could be that a great variety of "procedures" will exist.

One very important issue in implementing by Member States a statutory "notice and take-down regime would be the link of such regimes with Article 14.1 of the Directive. In other words, will Article 14.1 still apply to host service providers if they do not react to any notification except to those issued by the designated special body or received through a statutory notice and take down procedure - i.e., will intermediaries be assumed to have obtained the required knowledge or awareness and become liable if they do not block access, upon receipt of a notification that does not fulfill statutory requirements or does not come from a special body?

Obviously if this were the case then

implementation of some special body or notice and take-down procedure either by way of self-regulation or statute will not discourage host service providers from indiscriminately removing material insofar as the lack of doing so would still entail liability. Thus, the positive effects on preserving freedom of expression brought by the implementation of such regimes would be diluted. The parties involved in a self-regulatory procedure will typically take it upon themselves not to bring an action against a provider respecting these procedures, but an intermediary may still fear liability from third parties not bound by the code of conduct and may therefore act upon notifications that were not received through the established channels. This is all the truer, if the possibility opened by recital 48 were used and an obligation to detect and prevent illegal third party activities were inserted in national law.

CONCLUSIONS

Whereas the liability standards in the E-Commerce Directive seem to respect the interests of on-line intermediaries while at the same time properly protecting copyright owners and other potentially aggrieved parties, they have disregarded the right to freedom of speech and fair competition on the Internet.

By threatening Internet service providers with damages liability if upon acquiring knowledge of the existence of unlawful material they do not remove immediately the allegedly unlawful material, host service providers are likely systematically to take down any accused material, without hearing from the party whose material is removed. What if such material were perfectly lawful? What if the person who alerted the host service provider wanted to rid itself of a competitor by shutting down its business? What if a sect wanted to avoid criticism by contacting a provider and alleging defamatory statements? In all these cases, the providers will be inclined to act upon such claims and block access, even where blatantly unjustified, thus threatening freedom of speech and fair competition. Furthermore, as the Internet becomes the predominant means by which information is disseminated, and private notices addressed to Internet service providers will effectively replace court proceedings, this issue will become more and more acute.

Indeed, serious questions arise as to the constitutionality of such laws that permit (indeed encourage) the elimination of information from the public domain without proper consideration of the consequences for freedom of expression. Apart from their validity under Member State constitutions, one

can doubt the consistency of Internet liability regimes such as those evolving in Europe with Article 10 of the European Convention on Human Rights.

Even though the E-commerce Directive virtually turned a blind eye to this issue, there is still hope that in implementing the Directive, Member States will take care of the problems sketched above, either by implementing appropriate procedures on notice, take-down and put-back, or by establishing special bodies that ensure respect for freedom of expression and fair competition.

[1] -The Directive has made its way through the legislative process, namely the co-decision procedure, which requires the approval of the Directive by both the European Parliament and the Council of Ministers. The European Parliament adopted its first reading opinion in February 1999, and the European Commission issued an Amended Proposal in August 1999. On February 28, 2000, the internal market Council reached a Common position of the Council with a view to the adoption of a Directive on electronic commerce. On May 4, 2000, the European Parliament approved of the text of the Common Position and a final version is expected to be published shortly. The Common Position, the text of which will not alter in the final version, is available at http://europa.eu.int/comm/internal_market/en/media/electcomm/index.htm. *Return to [Text](#)*

[2] - In particular, under the caching function, the Directive refers to the so-called "proxy caching technique". This technique consists of storing in local servers copies of high demand material that originates on remote servers with the ultimate purpose of speeding the access time to Web-sites. Indeed, by using this technique, when an end-user requires certain material from a particular Web-site, the document is transmitted from the copy stored in the local server instead of from the source computer. As a result, the data has less distance and time to travel and therefore places less of a burden on the Internet infrastructure as a whole. Given currently available bandwidth, the Internet would cease to function properly without such caching. *Return to [Text](#)*

[3] - For an analyses of upcoming and existing legislation on online intermediary liability in Europe and the United States, see: KOELMAN, K.J., *Online Intermediary Liability*, in: HUGENHOLTZ, P.B. (ed.), *Copyright and Electronic Commerce*, The Hague/London/Boston: Kluwer 2000, p. 7-58, KOHLER, C.; BURMEISTER, K., *Copyright Liability on the Internet Today in Europe (Germany, France, Italy and the E.U.)*, *European Intellectual Property Review*, Vol. 20, Issue, 10, 1999, p. 485-499. For a comparison between the European Proposal and the United States Digital Millennium Copyright Act, see: JULIA-BARCELO, R., *On-Line Intermediary Liability Issues: Comparing EU And US Legal Frameworks*, *European Intellectual Property Review*, Vol. 21, Issue 4, 2000, p. 106-119. *Return to [Text](#)*

[4] - The Common Position has also added a recital which makes clear the ability of Member States to impose injunctions. In particular, the recital says as follows: "Whereas the limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; whereas such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it." *Return to [Text](#)*

[5] - Recital 47. *Return to [Text](#)*

[6] The Court of First Instance De Hague, for example, found that fault on the part of the provider may be found if he is notified of unlawful third part content residing on his servers. Court of First Instance De Hague 9 June 1999 (*Scientology vs. XS4all*), Informatierecht/AMI 1999, p. 112. [Return to Text](#)

[7] - Recital 46. [Return to Text](#)

[8] See, e.g., the account of the 'Copyright Control Services', which issued over 3400 take-down notices in one year on behalf of the joint pro-audio software producers. The account is available as an Annex with BORTLOFF, N. & HENDERSON, J., *Notice and Take-Down Agreements in Europe* (1999), WIPO Document OSP/LIA/3, available at: http://www.wipo.int/eng/meetings/1999/osp/doc/osp_lia3.doc [Return to Text](#)

[9] - For example, it would seem appropriate for owners of the copyright in computer programs to obtain quick removal by a host service provider of infringing programs available on "WareZ" sites residing on one of its servers. [Return to Text](#)

[10] See on these cases HAYES, D.L., *Apple v. Microsoft Under a Microscope* (1992), available at http://www.fenwick.com/pub/apple_v_microsoft_microscope.htm. [Return to Text](#)

[11] - SKELTON, T., *Internet Copyright Infringement and Service Providers: The Case for a Negotiated Rulemaking Alternative*, San Diego Law Review, Vol. 35, 1998, p. 219-340. [Return to Text](#)

[12] The Court held: "Where a BBS operator cannot reasonably verify a claim of infringement, either because of a possible fair use defence, the lack of copyright notices on the copies, or the copyright holder's failure to provide the necessary documentation to show that there is a likely infringement, the operator's lack of knowledge will be found reasonable and there will be no liability for contributory infringement for allowing continued distribution of the works on its systems. [...] [T]he First amendment argument is merely a consideration in the fair use argument." *Religious Technology Center vs. Netcom Online Communication Services*, 907 F. Supp. 1361 (N.D. Cal. 1995). [Return to Text](#)

[13] - President of the Court The Hague, 12 March 1996, Informatierecht/AMI 1996-5, p. 96 and Court of First Instance The Hague, 9 June 1999 (*Scientology vs. XS4all*), Informatierecht/AMI 1999, p. 112. [Return to Text](#)

[14] - See: Global Internet Liberty Campaign Principles, Regardless of Frontiers, <http://www.gilc.report.nl/speech/report>. [Return to Text](#)

[15] - Article 512 (c)1) of the US Copyright Act provides that a hosting service provider who expeditiously blocks access to material if he receives a notification of a rights holder claiming that the content concerned infringes his copyrights, he will avoid liability. [Return to Text](#)

[16] - This procedure is included in Section 512 (c) (2) and (3). [Return to Text](#)

[17] - The procedure is described in Section 512 (g) (2) and (3). [Return to Text](#)

[18] - Section 512 (g) (2) (c) of the US Copyright Act. [Return to Text](#)

[19] - Section 512(f) of the US Copyright Act. [Return to Text](#)

[20] - BAND, J., *The Superhighway to Jericho: Good Samaritan Laws*, Journal of Internet Law, August 1999, p. 6-12; SIEBER, U., *Responsibility of Internet Providers- A Comparative Legal Study With Recommendations for Future Legal Policy*, Computer Law & Security Report, Vol. 15, n 5, 1999, p. 291-310. [Return to Text](#)

[21] -A paper presented by Wrenn at the meeting in Geneva is available at http://www.wipo.int/eng/meetings/1999/osp/pdf/osp_lia2.pdf. OKTAY, B. & WRENN, G., *A Look Back at the Notice and Take Down Provisions of the US Digital Millennium Copyright Act One Year After Enactment (1999)*, WIPO Document OSP/LIA/2. [Return to Text](#)

[22] - See extensively on the prior restraint doctrine LEMLEY, M. & VOLOKH, E., *Freedom of Speech and Injunctions in Intellectual Property Cases (1998)*, <http://www.law.ucla.edu/faculty/volokh/copyinj.htm> (arguing that the prior restraint doctrine should be of equal importance in cases of alleged copyright infringement). [Return to Text](#)

[23] - See Articles 133 till 138 of the Spanish Act on Intellectual Property. [Return to Text](#)

[24] - Article 1428 of the Spanish Procedural Code contains the general rules regarding interlocutory injunctions. [Return to Text](#)

[25] - JULIA-BARCELO, R., *On-Line Intermediary Liability Issues: Comparing EU And US Legal Frameworks*, European Intellectual Property Review, Vol. 21, Issue 4, p. 1-18. [Return to Text](#)

[26] - Article 16 reads as follows: "*Member States and the Commission shall encourage: (a) the drawing-up of codes of conduct at Community level, by trade, professional and consumer associations or organisations, designed to contribute to the proper implementation of Articles 5 to 15*". [Return to Text](#)

[27] - BORTLOFF, B. & HENDERSON, J., *supra note 8*, p. 19-24. [Return to Text](#)

[28] - Hugenholtz, for example, feels content should only be taken down after a judicial decision, not pending one. See HUGENHOLTZ, P.B., "*Het Internet: het auteursrecht voorbij?*", (1998) 128 *Handelingen NVJ*, p. 230-231. Indeed, it would appear that in some cases experience of similar special bodies is not satisfactory. For example, in Australia a Broadcasting Services Amendment Act was passed which empowers the Australian Broadcasting Authority (ABA) to monitor for offensive material on the Internet, and upon detection of unlawful material, to issue notices to on-line intermediaries who are then obliged to remove the material. In this case, according to free speech groups, the law lacks objective evaluation criteria leaving to the ABA with too wide discretionary powers on content rating.

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