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ISPA CONTRIBUTION REGARDING PUBLIC CONSULTATION ON THE FUTURE OF ELECTRONIC COMMERCE IN THE INTERNAL MARKET AND THE IMPLEMENTATION OF THE DIRECTIVE ON ELECTRONIC COMMERCE

ISPA (Internet Service Providers Austria) is pleased that the Commission has initiated this consultation process on the future of electronic commerce. ISPA has identified challenges especially in the field of filtering and the tendency to impose monitoring obligations on ISPs, which would render the prohibition to introduce such an obligation in Art 15 ECD practically meaningless. Please find below ISPA's detailed answers to the consultation questions.

Question 36: In your view, does the purchase and sale of copyright protected works subject to territorial rights and the territorial distribution of goods protected by industrial property rights, encourage or impede cross-border trade in information society services?

1. ISPA is of the opinion that the current collective management system constitutes one of the most important impediments to the development of the Online Single Market and access to creativity.
2. Thus the EU should help to install a new, more efficient copyright clearance system which would help all market players to streamline transaction and management of costs.
3. Other barriers may derive from the complexity of the licensing systems and the fragmentation of the European Internal Market. The plurality of authors and publishers, each having an ownership interest in a given work may negatively impact the growing digital market. In this respect, the availability of "blanket licenses" (i.e. covering a full global repertoire) would be extremely helpful in assisting the development of cross-border trade in information society services.

Question 37: In your view, are there other rules or practices which hinder the provision or take-up of cross-border on-line services? If so, which?

1. The Internet is a powerful tool which allows access to creativity and the development of new business models. In the context of copyright protected works, the Article 5.2 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society actually provides meaningful measures for the fair use of works. However, harmonisation is lacking since they are based on discretionary provisions. Thus, Member States show great differences in the implementation of this Directive and in the implementation of the exception regime depending on the structure of the respective copyright laws.
2. Therefore, a new harmonisation of exceptions is a necessity if an online EU wide market is to be a reality and cross-border on-line services are to flourish.

Question 52: Overall, have you had any difficulties with the interpretation of the provisions on the liability of the intermediary service providers? If so, which?

1. While in some member states the question if the liability privileges of the ECD also cover 'non for profit organisations' appears unclear, the Austrian legislator has explicitly included in § 19 (2) ECG¹ non-commercial services into the scope of the liability privileges of § 13 – 18 ECG.

Question 53: Have you had any difficulties with the interpretation of the term "actual knowledge" in Articles 13(1)(e) and 14(1)(a) with respect to the removal of problematic information? Are you aware of any situations where this criterion has proved counter-productive for providers voluntarily making efforts to detect illegal activities?

1. There is no Austrian case law explicitly dealing with the term "actual knowledge". However the term, is according to parliamentary materials², to be construed restrictively and requires an "infringement obvious to a non-lawyer [juristische Laie] without further investigations", i.e.. an infringement whose unlawfulness is „easily noticeable“ for the intermediary like for any other person.

Question 54: Have you had any difficulties with the interpretation of the term "expeditious" in Articles 13(1)(e) and 14(1)(b) with respect to the removal of problematic information?

1. §§ 15, 16 ECG demand "expeditious" ("unverzüglich") measures upon actual knowledge. There is no Austrian case law explicitly dealing with the term "expeditious". Parliamentary materials³ however demand actions without culpable delays ("ohne schuldhafte Verzögerung").

Question 55: Are you aware of any notice and take-down procedures, as mentioned in Article 14.1(b) of the Directive, being defined by national law?

1. Notice and take-down procedures, as mentioned in Art 14 (1) b ECD, have not been implemented in Austria. Therefore questions 56 and 57 were omitted.

Question 58: Are you aware of cases where national authorities or legal bodies have imposed general monitoring or filtering obligations?

1. Such obligations have been discussed in the past, but not implemented.

¹ Federal Act of 21 December 2001 by which certain legal aspects of electronic commercial and legal transactions are to be regulated (E-Commerce-Gesetz – ECG).

² Parliamentary materials ErläutRV 817 BlgNR 21. GP 36.

³ Parliamentary materials ErläutRV 817 BlgNR 21. GP 37.

Question 59: From a technical and technological point of view, are you aware of effective specific filtering methods? Do you think that it is possible to establish specific filtering?

1. ISPA is of the opinion that filtering is by no means effective.⁴
2. Furthermore filtering methods are difficult to be efficiently implemented in a resilient environment like the Internet. The impracticability of such measures is grounded on several reasons, that are not exclusively of technical nature:
 - They bring with them obvious implications with regard to the violation of fundamental freedoms
 - not for-profit providers cannot be expected to put in place filtering technologies due to their costs
 - the needed economic investments in infrastructures and personnel are burdensome for providers
 - it exists a risk of “*mission creep*”, i.e. start addressing a specific issue and then enlarge the monitoring to other issues as well
 - it exists a risk of “*technology creep*”, i.e. the need to constantly up-to-date the filter in accordance to the technological evolution of the Internet communications (ex: encryption) with a huge economic impact on the provider.
3. It seems impossible that a technology could make a *waterproof* distinction on the basis of the legal/illegal nature of the communication, as this depends on specific considerations not directly related to the filter technology but, for instance, to the authorisation or concrete license terms granted by the author or the collecting society, and on the possible interference of statutory exceptions to copyright.
4. Please also refer to the ISPA's position paper on web filtering in relation to child sexual abuse material.⁵

Question 60: Do you think that the introduction of technical standards for filtering would make a useful contribution to combating counterfeiting and piracy, or could it, on the contrary make matters worse?

1. ISPA is of the opinion that the establishment of any kind of barrier on the internet will not only be finally overcome but also creates additional stimulus for finding ways for circumventing such barriers.
2. ISPA does not believe that there is an effective and proportionate way to apply filtering measures to prevent online copyright infringements. The real question facing policy makers and industry is whether existing filtering measures are a proportionate, cost-effective, efficient approach to dealing with online copyright infringements in a way which will not have considerable unintended consequences outside the scope of the problem being addressed.
3. In general, ISPA believes that the development of innovative content services which meet consumer expectations and needs is the most effective way to prevent online

⁴ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), COM/2003/0702 final, FN 73.

⁵ ISPA Positionspapier: Zugangssperren gegen Kinderpornographie <http://www.ispa.at/know-how/positionspapiere/zugangssperren-gegen-kinderpornografie/>.

copyright infringement and is far more effective than measures aimed at restricting the rights of users to access online information.

4. As the costs of Internet access providers will be increased in case every user's data needs to be filtered, this cost will ultimately be borne by consumers – including the vast majority of users who do not infringe copyright. In this context it is difficult to imagine another scenario where consumers are asked to pay to have their own legitimate use of a service monitored, in order to protect the interests of third parties with whom they have no relationship.

Question 61: Are you aware of cooperation systems between interested parties for the resolution of disputes on liability?

1. The Austrian Internet Service Providers Association (ISPA) has developed a code of conduct which specifies the conditions under which *notice* ("Kenntnis") can be assumed.
2. Signatories of the code are informed about illegal contents by an internet-hotline⁶ which is managed by the ISPA and serves to receive reports of illegal contents on the internet (concerning sexual child abuse material and national socialistic offences). After verifying the reported contents, the hotline forwards information about illegal content to the relevant providers as well as to relevant national and international authorities
3. Upon information, signatories of the code immediately stop access to the allegedly illegal contents (by means of possible and reasonable actions), or if the relevant server is within the sphere of influence of their customers, demonstrably undertake the necessary steps to immediately stop access to these contents. In both cases signatories of the code secure evidence.⁷

Question 62: What is your experience with the liability regimes for hyperlinks in the Member States?

1. The Austrian legislator has introduced a special liability privilege for hyperlinks in § 17 ECG, which is based on the regulations for host providers (§ 16 ECG = Art 14 ECD) and exempts ISP under the same conditions which apply for hosting in § 16 ECG.

Question 63: What is your experience of the liability regimes for search engines in the Member States?

1. The Austrian legislator, different from most other European countries, has introduced a special liability privilege for search engines in § 14 ECG, which is based on the regulations for access providers (§ 13 ECG = Art 12 ECD) and exempts search engines under conditions from liability which apply in § 13 ECG for access providers.

⁶ For more information see: <http://www.stopline.at/>.

⁷ See § 4 of the ISPA Code of Conduct. <http://www.stopline.at/index.php?id=340&L=9>

Question 64: Are you aware of specific problems with the application of the liability regime for Web 2.0 and "cloud computing"?

1. So far ISPA has not observed any issues regarding the application of the liability regime for Web 2.0 and cloud computing.

Question 65: Are you aware of specific fields in which obstacles to electronic commerce are particularly manifest? Do you think that apart from Articles 12 to 15, which clarify the position of intermediaries, the many different legal regimes governing liability make the application of complex business models uncertain?

1. Intermediaries wishing to develop new services and business models face licensing and levy problems related to (ancillary) copyright laws. While big corporations have sufficient funds to address this legal uncertainty and are finally able to overcome it, smaller players usually do not.
2. While the clearing of rights for copyright protected works, even for one country is difficult due to the number of collecting societies one has to negotiate with, it becomes practically impossible to receive global licences for works which are used for business purposes on the internet.

Question 66: The Court of Justice of the European Union recently delivered an important judgment on the responsibility of intermediary service providers in the Google vs. LVMH case. Do you think that the concept of a "merely technical, automatic and passive nature" of information transmission by search engines or on-line platforms is sufficiently clear to be interpreted in a homogeneous way?

1. ISPA welcomes the ECJ's guidance on this matter and appreciates the clarifications brought on similar matters, but *-for now-* remains sceptical if the principles laid out above will prove sufficient to instantly make national courts to apply them in a homogenous way (e.g. for search engines).

Question 67: Do you think that the prohibition to impose a general obligation to monitor is challenged by the obligations placed by administrative or legal authorities to service providers, with the aim of preventing law infringements? If yes, why?

1. In a case concerning an online-guestbook⁸ the Supreme Court of Justice upheld a claim to refrain from defamations of business reputation (§ 1330 (2) ABGB) on the grounds that the operator of the an online-guestbook had violated a (*special*) obligation to examine as *-after the removal of an offensive statement-* another statement was posted soon after affirming the previously removed one. The decision by the Supreme Court of justice however did not establish a *general* obligation to examine for similar infringements, but only a special obligation which depends to the details of the case.⁹ The scope and the conditions for the application of such a *special* obligations still need to be substantiated and clarified by further rulings.

⁸ OGH, 21.12.2006, 6 Ob 178/04a, *Online Gästebuch*.

⁹ Positionspapier: Beauskunftung von IP-Adressen <http://www.ispa.at/know-how/positionspapiere/beauskunftung-von-ip-adressen/>, 5.1.2.

2. ISP's are generally under an obligation to disclose the identity of a copyright infringer pursuant to § 87b of the Austrian Copyright Act. In *LSG v Tele2*¹⁰ a right holder requested the disclosure of the identity of a user that allegedly committed a copyright infringement while using a temporary (dynamic) IP address. Under Austrian law temporary IP addresses are however considered *traffic data* ("Verkehrsdaten") and such *traffic data* may only be processed for certain purposes (e.g. billing) whilst the use for other purposes is forbidden. The Austrian Supreme Court of Justice found that the processing of traffic data by the ISP would be unlawful. As a consequence the ISP can not be placed under the obligation to act in an unlawful manner.¹¹

Question 68: Do you think that the classification of technical activities in the information society, such as "hosting", "mere conduit" or "caching" is comprehensible, clear and consistent between Member States? Are you aware of cases where authorities or stakeholders would categorise differently the same technical activity of an information society service?

1. As illustrated in detail in the Study on the Economic Impact of the Electronic Commerce Directive, issued by the European Commission¹², not all member states have chosen to extend the liability regime of the ECD also to hyperlinks and search engines. ISPA believes that member states should be encouraged to do so and consequently to further harmonise the laws applicable to eCommerce issues.

Question 69: Do you think that a lack of investment in law enforcement with regard to the Internet is one reason for the counterfeiting and piracy problem? Please detail your answer.

1. ISPA believes that law enforcement agencies already have the necessary powers to address problems related to counterfeiting and piracy. The problem lies with the right holders and the need for them to develop new appealing business models that are currently lacking in the market.
2. The development of markets promoting and supporting legal and non-infringing digital content constitutes a crucial prerequisite for success in addressing online copyright infringements for the benefit of the creative industries, for consumers and for all stakeholders in the online environment.
3. The EU could assist the creative industries in shifting towards more sustainable business models by moving its regulatory focus away from enforcement, restrictions and sanctions and towards regulatory measures that promote the establishment of innovative services.

¹⁰ OGH, 14.7.2009, 4 Ob 41/09x, *LSG v Tele2*.

¹¹ Positionspapier: Beauskunftung von IP-Adressen <http://www.ispa.at/know-how/positionspapiere/beauskunftung-von-ip-adressen/>, 5.1.2.

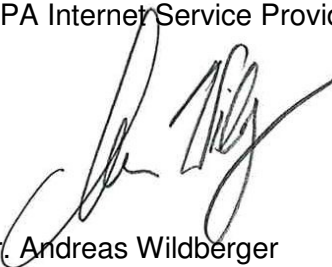
¹² Study on the Economic Impact of the Electronic Commerce Directive, 07.09.2007, 16.

4. Furthermore ISPA considers that ISPs under no circumstances should have any law enforcement role. We do not want, and do not see ourselves in the position for this “*privatisation of law enforcement*” inevitably leading to situations where cooperation between stakeholders results in an “automatic” chain of enforcement. In particular, Fundamental Rights of information, privacy and communication will become severely undermined when right holders become judges and ISPs are forced to act as prosecutors.

For further information or any questions please do not hesitate to contact us.

Sincerely,

ISPA Internet Service Providers Austria



Dr. Andreas Wildberger
Secretary General

About ISPA: ISPA is the Austrian association of Internet Service Providers, representing approximately 200 ISPs. ISPA is a major voice of the Austrian Internet industry. Our goal is to shape the economic and legal framework supporting optimal growth of the Internet and Internet services. We regard the use of the Internet as an important cultural skill and acknowledge the resulting socio-political responsibilities.