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Computer & Communications Industry Association

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Via Electronic Mail

European Commission
DG Internal Market & Services
Unit E.3 – Online Services
Rue de Spa 2
1000 Brussels

Re: Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries

Dear Sir or Madam:

On behalf of the Computer & Communications Industry Association (CCIA), I write to you to contribute to the Commission's public consultation "A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries".¹ CCIA is a not for profit trade association dedicated to open markets, open systems and open networks. CCIA represents large, medium and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies with more than \$200 billion in annual revenues. We submit this contribution on behalf of our association rather than any of its individual Members.

CCIA welcomes the Commission's aim to bring further clarification and legal certainty to this important matter for online intermediaries' operations in the EU. In contrast to the U.S. legal regime under the Digital Millennium Copyright Act (DMCA), EU laws do not prescribe what notice and takedown (NTD) procedures should look like and how they should be implemented at the national level. However, the E-Commerce Directive implies that online intermediaries should have mechanisms for NTD since otherwise they risk losing their intermediary liability protection and could be held accountable for illegal content on their sites. Some Member States have decided to establish NTD procedures; the range of different procedures has increased legislative diversity across the EU. In Member States where there are no specific procedures on NTD, it was ultimately left to the courts to interpret key provisions of national laws transposing the E-Commerce Directive leading to further variation in the rules online providers have to follow.

¹ We would like to stress that whereas it is laudable for policy to aspire to a safe, secure and lawful Internet, it is not the role of public authorities to sanitize lawful speech. The current U.S. political election as well as most European elections are a perfect example of how some decidedly 'unclean' speech can appear online, but no government should imply that it is ISP's place to decide what political speech is 'clean' or 'dirty'. Moreover, some countries seem to think all political disagreement is inherently unclean and the EU should not be seen to validate policies of sanitizing political speech.

This obviously increases the cost of doing business within the EU and undermines the benefits of a single, digital market.

As the consultation acknowledges, the terms ‘actual knowledge’ and ‘expeditious’ enshrined in Section 4 of the E-Commerce Directive should be better defined to provide for a more consistent approach. With regard to the term ‘actual knowledge’, we submit that currently there is a lot of legal uncertainty for Internet Service Providers (ISP) because of national variations. It is not clear when and on the basis of which information the ISP acquires actual knowledge and is required to act in order to keep its liability protection. This problem is not to be underestimated since, as in every situation of legal uncertainty, the intermediary will have a greater incentive to conform to a takedown request before engaging in a detailed analysis of a particular notice. In fact, such an analysis is usually very difficult to make and ISPs rely heavily on information provided by third parties to come to a decision. In the context of intellectual property rights (IPRs) e.g., it is difficult for intermediaries to know who owns the content, whether a user had the owner’s consent to upload, or whether the user has other legal rights that enable him to do so. Discussions relating to the establishment of a Global Repertoire Database for music rights illustrate that many parties responsible for licensing elements of a music track disagree, or have little information on, the ownership of specific rights. If ownership is disputed between rights holders it is clearly not possible for an online intermediary to be certain. Difficult situations also arise with regard to alleged defamatory statements and it is questionable whether ISPs are able to make sensitive and often legally disputed decisions in such circumstances.

Hence, it is crucial that notices sent to intermediaries are as precise and informative as possible. Intermediaries must be able to at least locate the content, have sufficient information on the alleged infringement and a high degree of certainty that the content is indeed infringing. The precision of a notice is significant because it is impossible for an ISP to test the alleged infringing content against all areas of law. Furthermore, in the European context such a provider would also have to test content both against its own terms of service, but also against multiple jurisdictions since what may be illegal in one Member State could be legal in another. Clearly, if Europe is to benefit from a truly single, digital market this imprecision in the current framework has to be addressed.

With regard to the term ‘expeditious’, we would like to highlight that a certain degree of flexibility should be enshrined in this concept. It is worthwhile to keep in mind that not all notices are equal in the circumstances they were issued and in the complexity of the claim. The speed with which an intermediary can act on a notice will vary according to factors like the type of content concerned, the platform hosting the content, and other business realities like obtaining legal advice, translations, or the ability to contact the user who posted the content in question. It is imperative that the reaction of the intermediary is appropriate to the case and there should not be one single process. As an example, a child abuse image can and should be removed more rapidly than a comment that is allegedly defamatory. There needs to be sufficient time for providers to come to reasoned decisions and to meet the often complex technical requirements of a takedown. Furthermore, the time should only start running once it is established that the provider has actual knowledge that the content is infringing or illegal. This makes the clarification of the ‘actual knowledge’ requirement all the more important.

In parallel with the clarification of key concepts outlined above, we submit that a uniform approach to NTD procedures across the EU is desirable. Legal certainty could be decisively enhanced if there was more clarity about what constitutes a valid notice and what steps intermediaries have to follow after they receive a valid notice. Apart from greater legal certainty, a harmonized approach would have two further benefits. First, ISPs would lose the incentive inherent in the current system to be over-cautious and take down perfectly legal material. Second, greater harmonization would also strengthen the key principle of a general monitoring prohibition enshrined in Article 15 of the E-Commerce Directive. In this context, we invite the Commission to take into account the following considerations when contemplating to develop standard NTD procedures.

Firstly, NTD procedures should aim at enabling the claimant and the person posting the content to resolve the claim between them. We believe that it is far more effective if the two parties first try to resolve the issue privately. Involving the intermediary from the beginning does not only create administrative burden and legal risks, but the rising amount of uploaded material on intermediaries' sites also makes their involvement increasingly difficult. Secondly, if the intermediary will be involved in the process at an early stage, e.g. through the reception of a notice, he should be able to forward that notice to the user in question without any risk of incurring liability. In this way he can facilitate the process of dispute resolution between the two parties concerned. Thirdly, and closely related to this, the user should have an opportunity to object to the complaint by e.g. filing a counter notice.

Fourthly, since this process can include cases where the illegality is not obvious involving complex legal assessments, we submit that the intermediary is in no position to be the judge over such cases. In this regard we believe that alternative dispute resolution (ADS) mechanisms are worthy of examination to deal with cases in an effective and independent manner. Such voluntary mechanisms should allow the parties to resolve the dispute between them in a quick and cost-efficient manner without the interference of a public authority. Fifthly, in the line with the spirit of the E-Commerce Directive, the intermediary should not be subject to liability where it follows an NTD procedure in good faith.

Furthermore, CCIA would like to state its opposition to any sort of 'notice and stay down' procedures. It is highly questionable whether such procedures are feasible from a technological point of view and in addition, they would raise serious legal questions in particular as to the Article 15 general prohibition to monitor.

In addition to these considerations, we would also like to draw the Commission's attention to a couple of problematic issues associated with NTD procedures in general and in the European context in particular. First of all, there is good reason to tackle the so-called 'Good Samaritan paradox' that describes the current situation in which an ISP could be held liable for additional, *voluntary* measures aimed at curbing illegal activities and content on its platforms. This paradox arises because these voluntary measures always require some level of activity by the intermediary which could in turn lead to the paradox situation of deciding that he does have knowledge or control over the data stored and is no longer neutral, passive and merely technical. On the basis of this, the intermediary could be harshly punished through losing his liability limitation for actually trying to curb illegal offers beyond the requirements of the law.

It is important to resolve this issue in order to further encourage stakeholders in the private sector to participate in voluntary arrangements that often prove to be far more effective than any programs imposed by public authorities. CCIA has always been a vocal supporter of voluntary arrangements between stakeholders since it is our strong conviction that where companies have the ability to cooperatively arrive at cost-effective solutions that are appropriate to their particular technology and business models the interests of all are best served. Particularly successful voluntary programs operating on the basis of cooperation with rightsholders to respond to IPR infringements online include *YouTube's* state of the art Content ID System and *eBay's* Verified Rights Owner (VeRO) Program as well as its 'fraud engine' that automatically searches for activities that violate the company's policies.

Another important issue that needs to be addressed is the abuse of NTD procedures. Here the experiences from Section 512 of the US DMCA can be instructive. Even though the NTD processes enshrined in this Section have the aim to provide for the effective and inexpensive takedown of clearly infringing content, the "process is commonly used for other purposes: to create leverage in a competitive marketplace, to protect rights not given by copyright (or perhaps any other law), and to stifle criticism, commentary and fair use".² The result of these sorts of abuse is a high incidence of flawed takedowns, which raises serious concerns as to fundamental rights like freedom of speech online and the right to conduct a business on an open marketplace.³

In September 2010 the Center for Democracy & Technology (CDT) released a report outlining how unsubstantiated copyright claims were used to interfere with user-generated content (UGC) sites to take down materials of political campaigns threatening online political speech. As the CDT report concluded the "motivations behind news networks' takedown demands appear to have little to do with the copyrights the DMCA was created to help enforce. The networks [...] seem to be taking advantage of the DMCA's notice-and-takedown system as a blunt tool to restrict use of their works in political contexts".⁴ In Europe, a Dutch association conducted an experiment by putting text of a 19th century author online that belonged to the public domain.⁵ As a next step, the association issued takedown requests with several hosting

² Urban, J. M. & Quilter, L. (2006). Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act. Summary Report, p. 15. Available online at: <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>

³ See, e.g., *Lenz v. Universal Music Corp*, 572 F.Supp.2d 1150, 1154 (N.D. Cal. 2008) (record company sent DMCA notice without considering whether video was fair use); *Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195 (N.D. Cal. 2004) (maker of voting machines alleged DMCA violation to silence critics). In *Design Furnishings, Inc. v. Zen Path LLC*, 2010 WL 4321568 (E.D. Cal. Oct. 21, 2010), a distributor of wicker furniture sent DMCA takedown notices to eBay with respect to the listings of a competing distributor of wicker furniture, falsely alleging that it had a copyright in the design of furniture. In granting the competing distributor a temporary restraining order in its declaratory judgment action, the district court said, "To withhold a TRO would allow anyone to effectively shut down a competitor's business on eBay simply by filing the notice that the seller's product allegedly infringes on the complaining party's copyright."

⁴ Center For Democracy & Technology (CDT). (2010). Campaign Takedown Troubles: How Meritless Copyright Claims Threaten Online Political Speech. Available online at: <https://www.cdt.org/report/campaign-takedown-troubles-how-meritless-copyright-claims-threaten-online-political-speech>

⁵ For more details refer to: Manara, C. (2011). Block the Filtering! A Critical Approach to the SABAM Cases. *Revue Lamy Droit de l'Immateriel*. Available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954760

providers in the Netherlands. In the end, 70% of all intermediaries removed the allegedly infringing content without a proper analysis of whether the request was justified in law.

In particular, there is a stark discrepancy between the complex area of copyright law and the seemingly simple process to issue takedown notices. In the US context authors have pointed out that copyright law “is an especially complex, nuanced and fact-specific body of legal rules. A clear, rigid, *ex ante* process such as [Section] 512 seems mismatched with a body of law that derives much of its value from flexibility and nuance”.⁶ This statement confirms the observations we made above that very often intermediaries are put in a position to take complex decisions, playing a role in which they should not be put into. Accordingly, as the Commission contemplates to introduce some standards for NTD procedures in Europe, we submit that NTD procedures should not act as an incentive to follow notices’ takedown requests where an infringement is not obvious and where it cannot be undoubtedly derived from the underlying circumstances and facts.

This is of particular importance for SMEs and start-ups. Usually these companies do not have the resources and/or costly state of the art technology to deal with complex takedown requests. Consequently, their ‘default practice’ would be to follow most takedown requests to keep their liability protection. This, however, could not only amount to private censorship on the Internet but could also constitute a great inhibition to their business development as the availability of perfectly legal content on their platform would be restricted. This in turn acts as a break to further innovation and competition in the digital environment and, hence, to economic development.

Complementary to this, there should also be penalties for claimants that knowingly misrepresent material or activities as infringing. The US experience has shown that part of the reason why there is a large portion of unsubstantiated, bogus takedown requests is that the current rules on NTD procedures provide very little deterrence against misuse. Therefore, we submit that it is worthwhile to consider the introduction of provisions that create predictable and meaningful deterrents against the abuse of NTD procedures.

We thank you for your time and consideration of these important issues.

Respectfully submitted,

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⁶ Urban, J. M. & Quilter, L. (2006). Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millenium Copyright Act. Summary Report, p. 15. Available online at: <http://static.chillingeffects.org/Urban-Quilter-512-summary.pdf>