

## **B5 DRAFT PROTOCOL ON LIMITATION OF LIABILITY OF SERVICE PROVIDERS**

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### **(a) Introduction**

#### **(b) Text**

### **(a) Introduction**

An Internet service provider offers facilities which include individually allocated spaces (“websites”) on the Internet computer network. Websites have “addresses” enabling any member of the public who has the necessary computer facilities to access the site. The person who puts material on a website to be accessed by users may be called the “content provider”. Material stored on a website can be accessed and downloaded practically anywhere in the world. Such storing, access and downloading may involve the copyright or related rights restricted acts of reproduction, distribution and communication to the public. The persons who may commit or contribute to these acts include the content provider and the service provider who offers the website facility or is engaged in the transmission operations.

Service providers claim that they are in a certain sense like the postman, and should not be liable for storing or transmitting material which they do not know is infringing. While such an approach receives general support, there are complex issues involved in agreeing the applicable conditions. How is “knowledge” of infringing material be imputed to the service provider? Once receiving that knowledge, what must the service provider do? Must he inform the content provider of the complaint received? Is the service provider liable to the content provider if he takes down or blocks access to material which it subsequently transpires is non-infringing? How quickly must the service provider act on receiving notice of alleged infringement? What penalties should apply to persons who falsely claim that material is infringing?

These and many relevant issues have been the subject of intense study in the European Union and the United States.

## **European and US legislation**

Articles 12, 13 and 14 of the E-Commerce Directive (2000/31/EC) provide, under certain conditions, for limitation of liability of service providers as regards activities classified as “mere conduit”, “caching”, and “hosting”. As regards caching and hosting, Articles 13 and 14 refer to the service provider’s obtaining of actual knowledge of certain facts, but no rules are laid down in the Directive as to what constitutes actual knowledge, or how the service provider might obtain it.

On the other hand, under the US Copyright Act 1976, section 512 (added by the Online Copyright Infringement Liability Act 1998 (title II of the Digital Millennium Copyright Act 1998)) sets out details not only of the cases in which the liability of service providers may be limited (covering mere conduit, caching, hosting and information location tools), but also of the contents of notifications to service providers concerning allegedly infringing material or activities, counter notifications by content providers and of other matters connected with service provider liability. In short, section 512 provides a legally recognised scheme embracing statutory provisions on limitation of liability and related procedures.

The provisions of section 512 thus cover areas not embraced by Articles 12-14 of the E-Commerce Directive. In addition, there is a limitation area not covered by the E-Commerce Directive, namely that relating to information location tools.<sup>1</sup>

### **Major problems: substantive, procedural and international**

Three major categories of specific problems may be identified. First, there are the substantive issues, some of which are mentioned above. Secondly there are procedural issues concerning, for instance, the form of the complaint (the “Take Down Notice”) to the service provider, and issues related to that notice. Thirdly, there is the international dimension. Material placed on a website is accessible all over the world. If the material is infringing and the service provider has the necessary knowledge, is he to be liable both in the country where the website is located, and in every country of access? Proposals concerning the third category are contained in the Draft Protocol on

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<sup>1</sup> Non-profit educational institutions are also granted certain limitations from liability (s.512(e)), but these provisions are not considered here.

Interpretation of the WIPO Treaties 1996. The following Draft Protocol on Limitation of Liability of Service Providers is particularly concerned with the first and second categories, i.e., the substantive and procedural issues.

### **The issue of harmonisation**

Proposals concerning solutions of issues of private international law (jurisdiction, applicable law and recognition and enforcement of judgements) in infringement actions are contained in the Draft International Copyright Protection Agreement. There remains, however, in relation to limitation of liability of service providers, the vital area of harmonisation of the different systems, in particular those applying in the United States and the European Union.

It is thought that it is unrealistic to expect the European Union to adopt the totality of the provisions of section 512 of the US Copyright Act, with its highly complex and detailed provisions tailored for the US situation. Conversely it is unrealistic to proceed on the basis that the United States will abolish section 512 and adopt Articles 12-14 of the E-Commerce Directive.

In addition to the basic differences between the US and EC systems, there is the consideration that throughout Europe studies are proceeding on the provisions to be adopted to implement the EC E-Commerce Directive. In this connection the RightsWatch Project funded by the European Commission may be mentioned: the Project, which completed its work in 2002, had three Working Groups, one covering Northern Continental Europe, one covering Southern Continental Europe and one covering the United Kingdom and Ireland. The Working Groups reported to the Commission at the end of 2002, and it may be expected that, following their studies, Codes of Conduct (as mentioned in Article 16 of the E-Commerce Directive) may be adopted, and that these may provide different rules for different countries. Extensive documentation, including the reports of the Working Groups, is available on the RightsWatch website at <http://www.rightswatch.com>.

The Draft Protocol here presented adopts a principle of general regulation and local application. Thus, for instance, where it is alleged that a service provider has infringed

copyright in the US, the US conditions as to limitation of liability will apply. Conversely, where the alleged infringement occurs in, say, the UK, the UK conditions will apply.

In brief, the Draft Protocol seeks to incorporate the basic principles of the US and European systems, in a way which all the countries covered by these two systems (and, it is hoped, eventually all countries) can accept.

Five forms and notices have been drafted by the undersigned for use in connection with the Draft Protocol, being the service provider contact information form, the International Take Down Notice, contestation notice etc. The texts of these forms and notices are summarised at the end of the Protocol text, and may be consulted on the RightsWatch website (see above).

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**(b) Text**  
**TEXT OF DRAFT PROTOCOL**  
**ON**  
**LIMITATION OF LIABILITY OF SERVICE PROVIDERS**  
**[Version February 9, 2004]**

**Preamble**

The Parties to the International Copyright Protection Agreement

- Wishing to agree solutions with regard to issues raised in connection with the limitation of liability of service providers,

Have agreed as follows<sup>2</sup>:

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<sup>2</sup> References in the footnotes to "EC E-Com.Dir" and "US Copyrt. Act" are to the EC E-Commerce Directive (2000/31/EC) and to the United States Copyright Act respectively.

## Part 1 – General

### Article 1 Provisions in national laws

The Parties agree that under their respective national laws, the limitations as described in this Protocol concerning the liability of service providers will apply.

### Article 2 Definitions

In this Protocol the following terms bear the meanings respectively ascribed to them:

*rights* bears the meaning ascribed to it in the International Copyright Protection Agreement.

*service provider*: a provider of on-line services or network access, or the operator of facilities therefor.<sup>3</sup>

*Central Website*: .....<sup>4</sup>

[.....]

### Article 3 Interpretation

[.....]

### Article 4 Categories of limitation of liability<sup>5</sup>

The liability of service providers will, on fulfilment of the respective conditions, be limited with respect to four categories of activity, namely (1) transitory communication (“mere conduit”), (2) intermediate and temporary storage

<sup>3</sup> Cf. US Copyrt. Act, s.512(k)(B).

<sup>4</sup> It is envisaged that the Parties will, through a Central Website (here to be defined) make available to the public all material relevant to the Protocol, including relevant legislation, forms, notices etc.

<sup>5</sup> Cf. US Copyrt. Act, s.512(a)-(d); EC E.Com. Dir Art.12. For a detailed description of the provisions of US Copyrt. Act s.512, see Nimmer on *Copyright*, Chapter 12B. Note that EC E.Com. Dir. Art.12 does not cover the limitation of liability concerning information location tools, whereas US Copyrt. Act, section 512(d) does include this limitation: in the draft, the provisions concerning limitation of liability regarding information location tools are included for the sake of comprehensive comparison with US Copyrt. Act, s.512, but the discrepancy between the two instruments in this respect will need specific consideration.

(“caching”), (3) user directed storage (“hosting”) and (4) information location tools, as described in the following Articles.

#### **Article 5 Service provider policy and standard technical measures<sup>6</sup>**

The Parties agree that service providers may be required by legislation

- (a) to adopt and reasonably implement a policy that provides for the termination in appropriate circumstances of the services they provide to subscribers and account holders of the service provider’s system or network who are repeated infringers, and so to inform such subscribers and account holders of such policy, and
  
- (b) to accommodate and not to interfere with generally agreed and generally available standard technical measures used by rightowners to identify or protect subject matter, provided such measures do not impose unreasonable burdens on service providers.

#### **Article 6 Misrepresentations<sup>7</sup>**

The Parties agree that their respective national laws will provide that any person who, in connection with procedures concerning the liability of service providers, knowingly materially misrepresents (1) that material or activity is infringing or (2) that material or activity was removed or disabled by mistake or misidentification, shall be liable for damages, including costs incurred by the alleged infringer, by any rightowner or rightowner’s authorised licensee, or by a service provider, who is injured by such representation, as a result of the service provider relying on such misrepresentation in removing or disabling access to the material or activity alleged to be infringing, or in replacing the removed material or ceasing to disable access to it.

#### **Article 7 Identification of infringers<sup>8</sup>**

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<sup>6</sup> Cf. US Copyrt. Act, s.512(i), where the respective obligations are mandatory.

<sup>7</sup> Cf. US Copyrt. Act, s.512(f).

<sup>8</sup> Cf. US Copyrt. Act, s.512(h).

The Parties agree that their respective national laws will provide for the issuing, on the request of a rightowner or rightowner's authorised representative, of court orders requiring a service provider to give details of identification of an alleged infringer.<sup>9</sup>

**Article 8 Status of other defences<sup>10</sup>**

The Parties agree that their respective national laws will provide that failure by a service provider to qualify for limitation of liability under the provisions of this Protocol shall not bear adversely on any other defence available to the service provider.

**Article 9 Protection of privacy<sup>11</sup>**

[Provisions confirming relationship of activities of service providers to national legislation protecting privacy of individuals.]

**Article 10 Separate adjudication of liability provisions<sup>12</sup>**

The Parties agree that their respective national laws will provide that the provisions of Parts 2, 3, 4 and 5 of this Protocol are to be construed and applied separately, so that failure to fulfil the criteria for limitation of one Part does not disqualify from fulfilling the criteria relating to another Part.

**Part 2 - Transitory communication ("mere conduit")**

**Article 11 Definition of limitation<sup>13</sup>**

Subject to the conditions applying by virtue of Article 12, a service provider shall not be liable for damages or action costs or, except as provided in Article 27, for injunctive or other equitable relief, for infringement of rights by reason of the service provider's acts of transitory communication, that is, either (i) acts of transmitting, routing or providing connections for (or temporarily reproducing in

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<sup>9</sup> This reflects the provisions concerning issuing of a subpoena in US Copyrt. Act, s.512(h): in other countries, rules may be agreed in the context of the Protocol as to the content and procedure concerning identification orders: cf. s.512(h)(2)(3).

<sup>10</sup> Cf. US Copyrt. Act, s.512(l).

<sup>11</sup> Cf. US Copyrt. Act, s.512(m).

<sup>12</sup> Cf. US Copyrt. Act, s.512(n).

<sup>13</sup> Cf. US Copyrt. Act, s.512(a).

the course of such activities) material, through a system or network controlled or operated by or for the service provider or (ii) acts of intermediate and transient storage of that material in the course of such transmission, routing or providing connections.

## **Article 12 Conditions of limitation<sup>14</sup>**

The conditions of limitation to which reference is made in Article 11 are those respectively applying in the countries where the service provider's acts of transitory communication respectively take place.

## **Article 13 Injunctions**

The provisions of Part 7 concerning injunctions apply under this Part.

### **Part 3 – Intermediate and temporary storage (“caching”)**

## **Article 14 Definition of limitation<sup>15</sup>**

Subject to the conditions applying by virtue of Article 15, a service provider shall not be liable for damages or action costs for infringement of rights by reason of the service provider's acts of intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider, in a case in which

- (A) the material is made available on-line by a person other than the service provider;
- (B) the material is transmitted from the person described in paragraph (A) above through the system or network to a person other than the person described in paragraph (A) above at the direction of that other person; and

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<sup>14</sup> Cf. US Copyrt. Act, s.512(a), where the conditions are specified in detail.

<sup>15</sup> Cf. US Copyrt. Act, s.512(b)(1).

- (C) the storage is carried out through an automatic technical process for the purpose of making the material available to users of the system or network who, after the material is transmitted as described in paragraph (B) above, request access to the material from the person described in paragraph (A) above.

**Article 15 Conditions of limitation**<sup>16</sup>

- (a) The conditions to which reference is made in Article 14 are those respectively applying in the countries where the service provider's acts of intermediate and temporary storage respectively take place.
- (b) Where the conditions applying in any country in respect of the limitations of liability under Article 14 include notification to the service provider, such notification shall be substantially in the form set out in Annex B hereto and shall contain the information indicated as required by the respective condition.

**Article 16 Injunctions**

The provisions of Part 7 concerning injunctions apply under this Part.

**Part 4 - User directed storage ("hosting")**

**Article 17 Definition of limitation**<sup>17</sup>

Subject to the conditions applying by virtue of Article 18, a service provider shall not be liable for damages or action costs for infringement of rights by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider.

**Article 18 Conditions of limitation**<sup>18</sup>

- (a) The conditions to which reference is made in the Article 17 are that the service provider

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<sup>16</sup> Cf. US Copyrt. Act, s.512(b)(2).

<sup>17</sup> Cf. s.512(c)(1).

<sup>18</sup> Cf. US Copyrt. Act, s.512(c)(1)(A)-(C).

- (A) (i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;
- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (b) below, responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.<sup>19</sup>
- (b) The notification to which reference is made in paragraph (a)(C) above shall be substantially in the form set out in Annex B hereto and shall contain the information indicated as required by that form.

## **Article 19 Injunctions**

The provisions of Part 7 concerning injunctions apply under this Part.

### **Part 5 - Information location tools**

## **Article 20 Definition of limitation<sup>20</sup>**

Subject to the conditions applying by virtue of Article 21, a service provider shall not be liable for damages or action costs for infringement of rights by reason of

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<sup>19</sup> Consideration needs to be given to accommodation of systems which provide for immediate take down before notice to the subscriber/account holder, and those which do not.

<sup>20</sup> Cf. US Copyrt. Act, s.512(d). See footnote 5.

the provider referring or linking users to an on-line location containing infringing material or infringing activity, by using information location tools, including a directory, index reference, pointer or hypertext link.

#### **Article 21 Conditions of limitation<sup>21</sup>**

(a) The conditions to which reference is made in Article 20 are that the service provider

(1)(A) does not have actual knowledge that the material or activity is infringing; or

(B) upon obtaining such knowledge or awareness, the service provider acts expeditiously to remove, or disable access to, the material

(2) the service does not receive a financial benefit directly attributable to the infringing activity, where the service provider can control such activity; and

(3) upon receiving notification of claimed infringement as described in paragraph (b) below, the service provider responds expeditiously to remove, or disable access to the material that is claimed to be infringing or to be the subject of infringing activity.<sup>22</sup>

(b) The notification to which reference is made in paragraph (a)(3) above shall be substantially in the form set out in Annex B hereto and shall contain the information indicated as required by that form.

#### **Article 22 Injunctions**

The provisions of Part 7 concerning injunctions apply under this Part.

### **Part 6 – Additional rules on limitation**

#### **Article 23 Replacement of removed or displaced material<sup>23</sup>**

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<sup>21</sup> Cf. US Copyrt. Act, s.512(d)(1)-(3).

<sup>22</sup> See footnote 37.

<sup>23</sup> Cf. US Copyrt. Act, s.512(g)(1)(2).

- (a) Subject to the conditions to applying by virtue of paragraph (b) below, a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing activity or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.<sup>24</sup>
- (b) The conditions to which reference is made in paragraph (a) above are those respectively applying in the countries where the service provider's acts of intermediate and temporary storage or user directed storage, as the case may be, respectively take place.

#### **Article 24 Counter notifications<sup>25</sup>**

Where the conditions applying in any country in accordance with Article 23 contain provisions concerning the furnishing of counter notifications by subscriber/account holders who contest statements in a notification made in accordance with Article 18(a)(C), such counter notification shall be a written communication provided to the service provider's designated agent, duly signed and substantially in the form set out in Annex D hereto and containing substantially the information required by the respective condition.<sup>26</sup>

#### **Article 25 Limitation on other liability<sup>27</sup>**

The Parties agree that their respective national laws will provide that a service provider's compliance with the conditions respectively applying as provided in Article 23 shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under Article 18(a)(C).

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<sup>24</sup> Cf. US Copyrt. Act, s.512(g)(1). The EC E-Commerce Directive does not contain a provision similar to s.512(g).

<sup>25</sup> Cf. US Copyrt. Act, s.512(g)(3).

<sup>26</sup> Consideration needs to be given to the circumstances in which the person giving the counter notification may, under certain laws, be required to accept the jurisdiction of a particular court (cf. US Copyrt. Act, s.512(g)(3)(D)).

<sup>27</sup> Cf. US Copyrt. Act, s.512(g)(4).

**Article 26 Designated agent<sup>28</sup> and Central Website**

- (a) The limitations on liability established under Parts 4 and 5 of this Protocol apply only if the service provider has designated an agent to receive notification of the respective claimed infringement, by making available through its service, including on its website in a location accessible to the public, and by furnishing as provided in the respective laws of the respective Parties<sup>29</sup> contact information in the form as set out in Annex A hereto.
- (b) The Parties may appoint a designated body to maintain a current directory of agents as designated in the previous paragraph, such directory to be available to the public for inspection, including through the Central Website and the Internet, in both electronic and hard copy formats.
- (c) The Parties shall make available to the public, through the Central Website and the Internet, all of their respective laws, rules, regulations, forms and notices relevant to the matters covered by this Protocol.

**Part 7- Injunctions<sup>30</sup>****Article 27 Injunctive relief: general rules**

The Parties agree that as regards court proceedings in their respective jurisdictions the respective rules of those jurisdictions apply as to the issue of injunctions.

**Part 8 – Administrative and final provisions****Article 28**

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<sup>28</sup> Cf. US Copyrt. Act, s.512(c)(2).

<sup>29</sup> The text needs to be drafted to take into consideration the laws of those countries (such as the United States) where the notification to a central office is a precondition of limitation of liability in certain cases, and those where, for instance, the service provider need only make the relevant information available on the respective website.

<sup>30</sup> Cf. US Copyrt. Act, s.512(j).

Annex: Forms and Notices (Synopses)

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**ANNEX**  
**Forms and Notices**  
**(Synopses)**

The following are synopses of the Forms and Notices to be made available to the public on the Central Website.

**A. Service provider contact information:** Form concerning contact details, giving designated agent's name, address, phone number, e-mail address.

**B. International Take Down Notice:** Form sent by the complainant to the service provider, giving details of material in which rights are claimed, claim to be owner or authorised representative of owner of specified rights, claim of infringement, details to identify relevant site, relevant details (where appropriate) of caching or linking involved, request to remove or disable access to infringing material, statement of accuracy and good faith belief, contact details etc. Witnessed physical signature or certified electronic signature required.

**C. Notification to subscriber/account holder:** Form for communicating complaint in Take Down Notice to content provider, notification of action taken or proposed, information concerning possible contestation etc.

**D. Counter notification:** Form used by subscriber/account holder to notify service provider of good faith belief that material was removed or disabled as a result of mistake, misidentification etc.

**E. Communication/Reply Form:** general form for sending communications or replies to communications.

[The text of the Forms and Notices may be accessed at <http://www.rightswatch.com> (Reports/UK and Ireland Working Group)]

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