

## **About ISPA**

1. The Internet Services Providers' Association (ISPA) is the trade association for companies involved in the provision of Internet Services in the UK with around 200 members from across the sector.

## **Introduction**

2. Safe Harbour principles have been a fundamental and essential building block in the development of the Internet. They have enabled online and offline companies to innovate whilst allowing for a proportionate and sensible way to seek redress against content hosted on the Internet. Their importance is increased further when taking into account that almost every economic sector is nowadays fundamentally dependent upon internet connectivity and online services, e.g. general business operations, marketing, consumer research, sales, new business models.
3. Some business models or sectors may feel challenged by the development of online services and the application of Safe Harbour principles, but it is important to undertake the assessment of Safe Harbour principles in the context of the economy as a whole and avoid simplistic zero sum games.
4. When assessing the legal framework within the EU, it is further important to note that unlike the US Digital Millennium Copyright Act (DMCA), the e-Commerce Directive does not provide online intermediaries with an actual safe harbour. The e-Commerce Directive merely sets out the conditions under which online intermediaries can be held liable without, however, providing the procedural rules (e.g. what constitutes a valid notice), disincentives for filing wrongful notices (pain of perjury) or limitations to liability for actions that intermediaries take in response to notices that the DMCA provides.

## **Internet services and economic and cultural facilitators**

5. A key function of the Internet and online services is the provision of intermediary services. Internet services frequently act as an enabler, facilitator and supporter of other industries and business sectors. The provision of corporate hosting or email services, for example, allows other companies, such as a local construction firm, to run their businesses more efficiently and grow. The provision of blogging platforms and online sales channels has allowed artists to tap into new revenue streams and forms of communication. Social media and video platforms have provided an entire generation with new tools to express and create, and in many cases an opportunity to monetise their creativity. More recently, established companies but also start-ups have begun developing big data and analytics solutions which are changing how consumers and businesses approach issues as diverse as healthcare, transport or banking. It is fundamental that the legal framework allows and maintains the role of intermediary as a facilitator.

### **Safe Harbour principles enable internet services to act as economic and cultural facilitators**

6. The role that internet services can play in fostering economic and cultural developments was clearly acknowledged when EU and UK lawmakers established the legal framework governing liability online. Mere conduits that transmit transient information, such as online access providers, are protected from direct and indirect liability and should not be subjected to general monitoring obligations. Hosting providers that store information are only held liable if they have actual knowledge as set out in the Directive.
7. Even though these legal principles do not provide intermediaries in the European Union with a full scale Safe Harbour, they have been vital in allowing the Internet and internet services to develop into the role of an enabler, facilitator and supporter. It is very likely that a large number of services that consumers and businesses rely on today would not have been developed if the principles had not been applied.

### **Safe Harbour principles do not put internet services beyond the law**

8. The e-Commerce Directive, which principally governs the liability of internet services across the EU, did not put online services beyond the law and indeed acknowledged that internet services can be abused and misused in the same way as offline services. This principle is also reflected in complementary pieces of legislation and has further been developed by case law. For example, under Section 97a of the Copyright, Design and Patents Act, online access providers can be required to prevent their users from accessing copyright infringing websites despite being classified as mere conduits. This has been tested in court and a process has been developed that allows for the blocking websites identified as facilitating online copyright infringement. Crucially, a judge and not intermediaries are determining the legality of content. Moreover, providers have their own terms and conditions governing the content hosted on their platforms and in enforcing their terms and conditions can go beyond legal requirements if appropriate.

### **A question of balance**

9. The intermediary liability provisions of the e-Commerce Directive have been drafted with a view towards balancing the role of internet services as economic and cultural facilitators and the fact that services can be misused and abused. At present we would argue that an appropriate balance is struck. If any future reform efforts are undertaken, we would welcome the provision of a full-scale Safe Harbour to online intermediaries in the European Union, including preventing intermediaries from incurring secondary liabilities when they react to a notice, clarifying notice requirements, the conditions for valid notices and notification processes.
10. The legal framework that has developed in recent years and the increasingly sophisticated way of handling and processing notices have made it easier than ever before to act against content that has been posted in breach of the law. The flexibility of the E-Commerce Directive has allowed processes to improve through experience as the right balance between the different actors is found. Any further removal or restriction of intermediary liability principles risks undermining the intermediary role of online services and effectively change the internet's role

from an enabler to a gatekeeper. This would fundamentally undermine the ability of companies to innovate and impact the Internet as an underpinning tool for the economy and society as a whole.

11. A legal framework and process has developed around the intermediary liability principles that works in practice and balances innovation with a limitation to liability. Any future reform should seek to maintain this balance and it is crucial that a single interest's short-term benefits do not prevail at the expense of a sector that enables growth and innovation through a modern, knowledge-based and balanced economy.