Response: Law Commission Consultation Paper No 209 Contempt of Court

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. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry.

2. ISPA membership includes small, medium and large Internet service providers (ISPs), cable companies, web design and hosting companies and a variety of other organisations. ISPA currently has over 200 members, representing more than 95% of the UK Internet access market by volume. ISPA was a founding member of EuroISPA.

General remarks

3. We welcome the Law Commission's investigations into this area of the law and support the assessment that the Internet and online publications will continue to play an important role in the way content is published and consumed. We also welcome the careful analysis of the current legal regime, in particular the assessment of intermediary liability under the Contempt of Court Act 1981 and the e-Commerce Directive.

4. We understand the rationale for the proposals in sections 3.68 to 3.86. They seem to provide a possible route to address the issues outlined in the consultation paper (particularly the issues raised by Breggs). However, whilst providing a detailed analysis of the liability landscape under the current law, the consultation paper falls short when assessing the impact on and the role of intermediaries under the proposed takedown and blocking regime. We believe that further work is necessary to ensure that the proposals are not only legally sound but also address a number of operational and technical issues. If not addressed properly, these risk undermining the effectiveness of the proposed takedown and blocking regime.

5. Below, we provide an initial outline of the issues that we feel need to be addressed in the drafting process for any new court powers in this area. We would welcome the opportunity of a meeting to discuss these concerns in greater detail.

Overall proportionality

6. Intermediaries should not be forced to perform the role of a judicial authority in relation to online content and we welcome the idea that the proposed takedown and blocking procedure has a court decision at its heart. This principle should always underpin public policy in this field and we would welcome greater adoption in other areas of the law.

7. We are, however, concerned that the wide-ranging powers proposed for the courts to make an order against intermediaries may not appropriately balance the rights of online intermediaries and those of the parties involved in the legal proceedings concerned. Section 3.81 of the consultation paper indicates that the courts will only rarely need to make order under the proposed regime but

we feel that this may underestimate the impact that the Internet had (and will have) on the way people communicate with each other and make publications (which is recognised elsewhere in the paper). Given that the provision of a new order making power will have a long-term impact on the courts, parties in the trial and online intermediaries we feel that a more thorough analysis is needed of how the rights and responsibilities of all parties involved should be balanced under the new regime.

It is unclear under what conditions an order would be made against a person other than the publisher

8. The circumstance under which a court order would be made against a person who is not a publisher within the meaning of the 1981 Act needs to be clarified. Section 3.76 refers to two situations where an order would be made against another person. They are where the author:
   a) " of a blog cannot be identified"; or
   b) "is resident abroad and not subject to the jurisdiction of the English and Welsh courts."

   The criterion that an author has not complied with a court order or takedown/blocking request is not included as a pre-requisite. As a point of principle, we believe that orders should only be contemplated against a person who is not the publisher, if the publisher has failed to comply with an order within a reasonable timeframe. For example, an author who resides abroad or is only be identifiable via an online alias may be willing to comply, especially if the order only applies for a limited time and requires the disabling of access for a specific jurisdiction.

Identifying the most appropriate online intermediary

9. If a court order is to be made against a person, who is not the author, i.e. "a person who has sufficient control over the accessibility of the material" then it becomes important to clarify against whom such an order is most appropriately made.

10. Section 3.77 states that 'control' in this context should be interpreted by the courts on a case by case basis. However, we feel that there may be merit in providing guidance (either in the drafting process or in a separate document) to ensure that the multitude and divergent nature of online intermediaries is taken into account when decisions about the proportionality and necessity of a court order are made.

11. For example, footnote 84 suggests that "*although hosting providers would be the most pertinent intermediary to approach for removal of information, access providers, and others, could clearly also be required to 'disable access to information' in order to 'prevent an infringement'."* Both of these assumptions are likely to lead to complications during the eventual implementation of the proposed takedown and blocking regime.

12. The consultation paper correctly argues that some online intermediaries, particularly access providers, are considered mere conduits. The mere conduit principle has been fundamental to the development of the Internet and blocking injunctions are only very rarely applied to mere conduits. This reflects that blocking by access providers can be a crude, technically complex and

potentially costly exercise. Moreover, given that a virtually unlimited number of access providers can be involved in allowing the public to access content online, it seems to be highly unlikely that making an order against an access provider can provide for an effective solution to prevent jurors and others from accessing publications that pose a substantial risk of series prejudice.[1]

13. We propose that a court order should be made against the person who has the highest degree of "sufficient control" over the accessibility of the material and who incurs the least amount of costs in complying with a court order. Based on our members' experience, we believe that a court, making an order, must take into account the proximity of a provider to the publication, the control of a provider over accessibility and the proportionality of asking the provider to remove or disable access (balanced against the rights of defendant etc.). The blocking of access to content should always be considered as a last resort and, as a point of principle, access providers should only be asked to block content if it has been impossible to address the accessibility of a publication via more proportionate means.

14. On a related point, we do not believe that jurisdiction need be a barrier in all cases. The consultation document rightly notes that a UK court cannot serve a notice to an entity that is not established in the UK. However, responsible non-UK based intermediaries would give due consideration to a UK court order.

Ability to re-upload

15. The consultation paper implies that the takedown/blocking order only applies for a specified time period and seems to assume that the publication in question would be re-uploaded or made accessible again after the specified time has passed. This would seem to require the material to be reinstated at the exact same location and in the exact same context as the initial publication which may not be possible due to the frequently changing nature of online platforms. Some providers also do not have the ability to re-upload content at all and others are concerned that re-uploading would have an impact on their status under the e-Commerce Regulations and other applicable regulations (e.g. would they be regarded as a publisher?).

16. This issue needs further consideration and clarification. Again, ISPA and its members would be happy to inform this discussion.

Volume of publications and monitoring obligations

17. The consultation paper proposes to amend the 1981 Act to allow a court, when proceedings are active, to order the temporary removal of publications first made before proceedings became active. This raises a number of practical and legal issues from the perspective of an online intermediary and these need further thought before recommending any change in policy.

18. In some cases, the publications first made before proceedings became active could amount to a large volume of online postings (including re-postings of original content on multiple sites). The

[1] Even a single person may use a high number of access providers to access the Internet, e.g. at home, via a mobile phone, at work, via a public hotspot or at a friend's place.

consultation does not consider this, nor how the content would be identified or how orders would be drafted to serve on an intermediary. To be consistent with the current legal framework and case law, requests would need to identify the URL of each posting and for each to be considered by the court on a case-by-case basis.

19. Consistent with Article 15 of the eCommerce Directive, we assume that there would be no obligation for a provider to monitor whether the publisher (or a third party) reposts the material once it has been taken down but we would welcome clarification. We further believe that it would be worth investigating how the proposed system should deal with cross-posted content and with situations where the court order identifies a specific publication but a similar publication is hosted elsewhere on the network.

Level of fines

20. The current maximum penalty does not seem to be appropriate for the new regime especially because the new contempt may apply to organisations who are not considered to be publishers under the current Act.

Place of publication / Jurisdiction

21. We note the concerns that section 3.87 - 3.95 express in relation to the place of publication but believe that it is not necessary to provide a statutory definition of the place of publication or the substantial measures test at the current stage. Any statutory definition would have implications that go far beyond the remit of the current consultation exercise. A separate and wider consultation would be necessary to ensure all the possible implications are considered. Each of the suggested definitions would have different implications on:
    - the volume of content that may fall under the new court powers;
    - those who should be responsible for identifying and notifying the content; and
    - the likely subjects of a court order.

22. For example, option (1) and (2) of section 3.95 would make it more likely that a court order can be made directly against a publisher whilst option (3) would make it more likely that orders need to be made against a person who has sufficient control over the accessibility of the material. As a result any statutory definition in the area would have serious resource implications on all parties involved. If there is little or no evidence that the law has been unable to deal with the matter at hand then issues, such as place of publication or the substantial measures test, should continue to be decided on a case by case basis.