

# Intermediary Liability

## March/April 2016: EuroISPA submits response to IPR Enforcement Directive public consultation

In early April, EuroISPA submitted its response to the European Commission's public consultation on the IPR Enforcement Directive. The purpose of the public consultation was to gather stakeholder feedback on the effectiveness of the Directive ahead of a scheduled legislative revision in summer 2016.

EuroISPA's participation in the consultation centred on the elements pertaining to intermediaries, in particular

- The functioning of the existing IPR legal framework
- Injunctions of intermediaries in case of IPR infringements
- The role of intermediaries in IPR enforcement and the prevention of IPR infringements

EuroISPA members provided feedback to the European Commission on the **functioning of the IPR enforcement** framework and pointed to specific improvements that could be implemented to the benefit of the IPR holder.

### Next steps

The European Commission will propose a legislative reform of aspects of the IPR Enforcement Directive in summer 2016.

# Data Protection

## March/April 2016: European Commission launches public consultation on E-Privacy Directive

The European Commission has launched a **public consultation on the EU ePrivacy Directive**. The consultation seeks to gather feedback on the implementation of the Directive and whether reform is needed as a result of new economic/regulatory developments.

More information on the initiative can be found [here](#) and the actual consultation can be found [here](#).

### **Background**

The [ePrivacy Directive](#) defines sector-specific rules for electronic communications services regarding the processing of personal data. It was originally introduced to complement the 1995 Data Protection Directive.

### **Context of review**

The new EU General Data Protection Regulation applies data protection rules *horizontally* across sectors. As such, a number of the provisions of the existing (sector-specific) ePrivacy Directive are no longer relevant.

Moreover, the spread of Internet-based communication services has led to questions as to whether the scope of the existing Directive properly captures all services that should be subject to it.

### **Consultation aims**

The Commission is seeking feedback on:

- How to ensure consistency of the ePrivacy Directive with the General Data Protection Regulation
- How the scope of the ePrivacy Directive should be amended in light of the new market and technological realities
- Whether technical advancements require enhanced measures for security and confidentiality of communications
- How to address inconsistent enforcement and fragmentation at national level

### **Timeline**

The consultation is open until **05 July 2016**.

### **Next steps**

Secretariat has begun assessing the content of the consultation to understand what scope EuroISPA has to respond

### **March/April 2016: National Data Protection authorities outline their position on new Privacy Shield framework**

The Article 29 Working Party has published the [substantive text of its Opinion](#) on the draft Privacy Shield Framework.

While considering the Privacy Shield agreement to be a substantial improvement on the old Safe Harbour framework, national Data Protection Authorities are concerned **that key data protection principles are missing or inadequately accounted for** in the draft agreement.

National DPAs highlight two major issues with the draft Privacy Shield Framework:

### **Commercial issues**

- Data transfer adequacy decisions must ensure that the third-country provides a data protection level that is “essentially equivalent” to that of the EU.
- The Privacy Shield does not ensure that because it does not properly account for several important EU data protection principles:
- Assurances that the US will respect the EU Data Retention principle is not apparent in the Privacy Shield. The principle states that data must only be kept as long as necessary to achieve the purpose for which the data have been collected.
- There is no safeguards to ensure adequate measures will be taken to protect EU citizens’ data when it is further processed in a third country (in addition to the US).

- The new redress mechanism in practice may prove to be too complex and difficult to use for EU individuals and therefore ineffective.

### **National security issues**

- The vague derogations in the new agreement compromise the safeguards against “massive and indiscriminate collection of personal data originating from the EU”
- The new redress ombudsperson may not be sufficiently independent or sufficiently empowered to provide effective privacy redress for EU citizens

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### **Next steps**

- The Opinion of the Article 29 Working Party is non-binding on the European Commission.
- EU Member States (through the Article 31 Working Party) will provide their own non-binding Opinion in the coming weeks.
- The European Commission is expected to formalise the new framework (through a data transfer Adequacy Decision) in June 2016.
- It is unclear at this point as to what extent the European Commission is willing and able to amend the Framework in response to the DPAs' concerns.
- Once formalised, the new agreement is almost certain to be challenged before the Court of Justice of the European Union, to test whether it meets the criteria of the Schrems ruling.

The full Article 29 Working Party's Opinion can be read [here](#). The supporting working document can be read [here](#)

## **Cybersecurity**

### **March/April 2016: EuroISPA engages on European Parliament Terrorism Directive discussions**

For a number of months EuroISPA has engaged intensively on the negotiations around the Directive on Combatting Terrorism. Proposed by the European Commission in December 2015, the Directive is currently under discussion in the European Parliament.

EuroISPA's engagement on the dossier has centered on the elements pertaining to tackling terrorism in the online sphere. A number of amendments proposed by the European Parliament's Civil Liberties committee have sought to a vertical liability framework for ISPs vis-a-vis terrorist content, while also mandating ISPs to undertake proactive detection of illegal content.

To ensure a directive which best allows ISPs to tackle illegal content online while safeguarding fundamental rights, EuroISPA written letters, held face-to-face meetings, and submitted amendments to influential MEPs working on the dossier.

### **Next steps**

- The European Parliament expects to adopt its position on the file in late May.
- The Parliament will then enter into “trialogue” negotiations with the EU Council (Member State government representatives) in order to agree on a joint text.
- EuroISPA will continue to engage with the Parliament to convey the European Internet industry’s position.

## Innovation and Growth

### March/April 2016: EuroISPA co-signs high-level letter on copyright reform

In early April EuroISPA co-signed a stakeholder letter to the European Commission titled “*A Digital Single Market for Creativity and Innovation: Reforming Copyright Law without curtailing Internet Freedoms*”.

The letter reiterates the need to preserve the existing intermediary liability framework as part of the discussions around modernising copyright.

Members may recall that increasing liability on ISPs for copyright infringements has been a longstanding policy aspiration of rightsholders. Most recently, EuroISPA intervened to push back on the inclusions of such measures in the 2015 European Parliament Copyright Modernisation report.

The letter was addressed to the highest political levels of the European Commission and comes in the context of Commission plans to publish a reform proposal of the EU copyright framework in September 2015.

The open letter can be read [here](#).

### March/April 2016: CJEU issues positive Opinion on status of hyperlinks in copyright infringements

High-level outcome:

- According to the Advocate General of the Court of Justice of the European Union, **the posting of a hyperlink to a website which published photos without authorization does not in itself constitute a copyright infringement**

Policy Background:

- Article 3.1 of the [EU Copyright \(InfoSoc\) Directive](#) provides rightsholders with the exclusive right to authorise or prohibit any communication to the public and making available of their works, by wire or wireless means.
- There has been a longstanding stakeholder dispute as to whether the posting of a hyperlink to a website hosting copyrighted material constitutes a communication to the public, and hence possible grounds for a copyright infringement.

Facts of the case:

- A Dutch website GS Media published hyperlinks to a third-party website in Australia that was using copyrighted material without permission of the rightsholder (Sanoma).

- When the Australian third-party website was ordered to takedown the copyrighted material, the Dutch website GS Media published new hyperlinks to third-party websites hosting the same content. (this process was repeated more than once).
- The rightsholder Sanoma alleged that the Dutch website GS Media infringed copyright by hyperlinking to protected content.
- The Dutch court referred to the case to the Court of Justice of the European Union, noting that the placement of hyperlinks by the Dutch website GS media had made access to the infringing content easier for users.

#### The CJEU Advocate General's Opinion:

- Hyperlinks placed on a website greatly facilitate the discovery of other websites, and protected works available on those sites, and as a result offer users of the first website faster and more direct access to those works.
- However, hyperlinks which lead, even directly, to protected works are not 'making them available' to the public when they are already freely accessible on another website, and only serve to facilitate their discovery.
- **The actual act of 'making available' is the action of the person who effected the initial communication.**
- Consequently: **hyperlinks which are placed on a website and which link to protected works that are freely accessible on another site cannot be classified as an 'act of communication' within the meaning of the EU Copyright Directive.**
- The **hyperlinker's motivation and the fact that it knew or should have known** that the initial communication of the photos on other websites infringed copyright **are not relevant.**
- This reasoning is based on the premise that the **photos were 'freely accessible' to all internet users on third-party sites.**
- However pursuant to the CJEU ruling in *Svensson and Others*, **if a hyperlink makes it possible for users of the site on which it appears to 'circumvent restrictions'** put in place on third-party websites to limit access to protected works, **the hyperlink in question constitutes an indispensable intervention** without which those users could not enjoy the works – **hence liable for a copyright infringement.**
- In that context, any other interpretation of the notion of 'communication to the public' would **considerably impede the functioning of the internet** and would infringe one of the principal objectives of the Copyright Directive, namely the development of the information society in Europe.

#### Next steps:

- The Opinion of the CJEU Advocate General is not binding on the court, and is designed to provide reasoned independent advice to the Court. A full binding ruling of the Court will be delivered in the coming months (we will confirm the date).

#### Potential impact on enforcement obligations for intermediaries:

- The European Commission will publish a policy white paper on platforms and illegal content in June 2016.
- The European Commission will propose a revision of the European Copyright framework in September 2016.
- In both these discussions, **rightsholders are seeking to redefine the definition of "Communication to the Public"** in order to make intermediaries liable for hyperlinking to copyright-infringing content.
- This Opinion, if upheld, will heavily undermine the calls to redefine Communication to the Public, particularly as the Opinion notes how fundamental hyperlinking is to the European Information Society.

The Court's press release is found attached and the full Opinion can be read [here](#).

## **March/April 2016: European Commission launches public consultation on Ancillary Copyright and Panorama exception**

The European Commission has launched a public consultation on the role of publishers in the copyright value chain (**i.e. ancillary copyright**) and on the 'panorama exception'.

The consultation can be accessed [here](#). Background information to the initiative can be found [here](#).

### Consultation aims:

- Understanding the challenges faced by press publishers in the digital environment vis-à-vis copyrights
- Understanding the potential impact of ancillary copyright on the publishing value chain (including categories of Internet intermediaries)
- Understanding how the 'freedom of panorama' exemption currently operates across EU Member States.

### Context

- The European Commission has faced sustained calls from some stakeholders to include ancillary copyright provisions in the upcoming Copyright Modernisation initiative.
- A copyright modernisation proposal will be launched in **September 2016**, and the results of this public consultation are likely to define whether ancillary copyright will be included within the initiative.

### Next steps

- The consultation period is open until **15 June 2016**.
- Secretariat is currently working on a draft response for members.

## **Market and Services**

### **March/April 2016: Commission publishes final results of Telecoms public consultations**

The European Commission has published full reports on the results of two public consultations on the **review of the EU telecoms framework and on broadband beyond 2020**.

The high-level findings with respect to the **telecoms framework**:

- Respondents felt that competition law principles and market power tests should continue to underpin the EU's regulation in this field.
- Ubiquitous connectivity relies on a competitive environment, giving sufficient space to competition to invest.
- The increasing role of wireless connectivity elicited views regarding predictable and coordinated spectrum management – which is seen by many as crucial in boosting digital network and services rollout, not least for facilitating and translating 5G into a success story.
- End-user specific regulation should take into account market and technological developments. The need for policy adjustment is widely recognised in order to improve connectivity and advance the internal market.

Full report can be accessed [here](#).

The high-level findings with respect to **broadband beyond 2020**:

- A majority of respondents think they will need Gigabit and low latency, fixed connectivity by 2025.
- The dynamics and patterns of mobile connectivity use make the speed of data flow and quality of features increasingly important.
- There is a high correlation between respondents who are dissatisfied and pessimistic about current and/or anticipated future network provision and those that reside in rural areas.
- Organisations expect more from the future use of the Internet than do individuals.

Full report can be accessed [here](#).

#### Next steps

- The European Commission will assess the findings of the two consultations over the coming months. They will feed into the legislative reform of the EU Telecoms Framework, that will be launched in **September 2015**.

We will continue to monitor the high-level policy lines of this topic and update members as appropriate.

## Safer Internet

### **March/April 2016: EuroISPA co-organises European Internet Forum event on Hotline funding**

On Wednesday 27 April, EuroISPA co-organised a policy breakfast in the European Parliament focused on protecting children online.

The event was hosted by the European Internet Forum, and featured panelists from Europol, Missing Children Europe, and the International Association of Hotlines (INHOPE).

The funding of Hotlines was a key topic of discussion, as well as new technological challenges in the fight against Child Sexual Abuse Online.

The event was organised with a view to the upcoming European Parliament report on the implementation of Directive 2011/93/EU, which enshrines the current legislative framework for tackling CSAM.

A video overview of the event can be found [here](#).

### **March/April 2016: Council of Europe adopts new Strategy for Children's Rights**

The Council of Europe has adopted a new [Strategy for the Rights of the Child 2016-2021](#).

The Strategy contains language on **protecting children in the online sphere**.

Key articles:

- **Article 21:** “The digital environment also exposes children to harmful content and its effects, privacy and data protection issues and other risks, **including online sexual abuse and excessive exposure to sexualised images**. In some cases, such as cyber-bullying and self-exposure, children’s own conduct online may harm others and represent a risk to them.”
- **Article 59:** “Council of Europe conventions provide a solid basis for the protection of children from potential risks to their safety, security and privacy in the digital environment. The Council of Europe will promote, monitor and support the implementation of the **Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse**, the **Convention on Cybercrime and its Additional Protocol**, and the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, the Convention on Preventing and Combating Violence against Women and Domestic Violence, the Convention on Action against Trafficking in Human Beings, as well as the relevant Recommendations by the Committee of Ministers”
- **Article 61:** “Internet and the social media are widely used to advocate hate speech, radicalisation and terrorism among young people. As a response, the **Council of Europe will continue the “No Hate Speech” campaign** and invest in a set of measures in the educational field and on the Internet as set out in the Action Plan **“The fight against violent extremism and radicalisation leading to terrorism”** adopted by the Committee of Ministers on 19 May 2015”

### Context

This new policy document has been endorsed by the governments of the 47 European countries that comprise the Council of Europe. It sets out the various actions that CoE will undertake over the next five years in the area of rights of the child. The strategy will be officially adopted at a high-level conference in Sofia, Bulgaria in early April.

The new strategy can be read [here](#).