

To the EU Commission

Response of KLYS and Copyswede to the public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)

Presentation

KLYS – The Swedish Joint Committee for Artistic and Literary Professionals - is an umbrella organisation for 18 artist organisations representing about 30 000 individual members in all artistic disciplines. KLYS' main task is to protect the importance of art in society, to work for better access to art and to safeguard and promote the rights of authors and performing artists.

Copyswede is a co-operative economic association. Its membership consists of 14 unions and organisations that represent the gamut of Swedish authors and performers. Copyswede manages several joint licenses concerning use of radio and TV material, i.e. transmission, retransmission, video, phonogram, time shift recording, making available on line. Copyswede also manages the private copying levy system in Sweden. Copyswede has highly developed co-operation relations with producers and broadcasters.

KLYS and Copyswede welcome the invitation from the EU Commission to the public consultation on the future of e-commerce in the EU. The consultation document puts forward crucial and challenging issues that affect authors' and performing artists' rights in the digital environment. It is of utmost importance that creators of the artistic and literary content online are given the opportunity to participate in and influence the legislative and standard-setting processes within the EU in this field.

Our response is of general character primarily addressing the regulation of the exemptions of the liability of intermediaries (Section 4, Articles 12 to 15).

A new point of balance regarding E-commerce in the EU

KLYS and Copyswede are very much in favour of dissemination of creative content online, since it provides new possibilities for authors and performers to reach existing and new audiences in more efficient ways. However, the legal framework, both on a national and international level, must ensure that authors and performers find it attractive to make their protected works available to the public in the digital environment. Authors, performers and other rightholders shall be able to hold someone liable to copyright infringements also on the Internet.

E-commerce has had a slow up-take in the EU despite the high hopes and claims raised in the E-commerce Directive (2000/31/EC). This is a cause of concern not only for the Commission.

According to Article 21 1. in the Directive the Commission shall bi-annually submit a report on the application of the Directive to the European Parliament, the Council and the Economic and Social Committee. This year, on the 10th anniversary, the Commission has wisely chosen to support the report by inviting to a public consultation.

The Directive states that the report shall, if necessary, be accompanied by proposals for adapting it to legal, technical and economical developments in the field of information society services.

According to Article 21 2. the report “shall in particular analyze the need for proposals concerning the liability of providers of hyperlinks” and “also analyze the need for additional conditions for the exemption from liability, provided for in Articles 12 and 13, in the light of technical developments”.

It will below be argued that it is in fact by now necessary for the Commission to propose amendments to the Directive in order for the Directive to better adapt to legal, technical and economic developments in the field of information society services.

What might be the causes of this weak development? It can be argued that the Directive itself has contributed to this, specifically through the sub-optimal point of balance that is established between Internet Intermediaries and holders of copyright.

The concept of information society services is defined in the Directive as any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. Despite the fact that this definition could be interpreted narrowly, the Commissions perception of e-commerce is broad and covers services consisting of electrical ordering of physical good and services that has to be delivered in the flesh, so to speak. However, this form of e-commerce amounts to little more than traditional mail order, a business model well established since the 19th century and it can be argued that the electronic element is not significant enough to be a driver for the public’s embrace of e-commerce as a way of living.

There are, though, true information society services, which are not only ordered, but also delivered electronically. It could be argued that this category must not be underestimated as a driver for a general up-take of e-commerce also in the broadest of senses.

Sure enough such true information society services can comprise of information not affected by copyright. However, to a large extent the creation of such information is publicly funded and thus expected to be supplied to the public on a free of charge public service basis. It consequently holds limited commercial potential.

Also sure enough there is a vast amount of content in respect of which copyright has been applicable, but not anymore. This is definitely a type of content that holds commercial promises, but at the end of the day it is content to which copyright still applies that is in acute public demand, especially brand new content.

It has to be acknowledged that copyright content is of imperative importance for the development of the information society as well as e-commerce to a level where it makes a difference for the general economic development of Europe and its position in the global competition.

At the out-set of the Directive only rightholders pointed out that granting absolute immunity to intermediaries in certain key cases was not advisable as it might prove to threaten the very foundations of copyright. Nevertheless the EU institutions seems to have been swept along with the tidal wave of telecom euphoria and went even further than the North American legislation on which the Directive was partially copied. Contrary to the American Digital Millennium Act the Directive came out completely void of any provision intended at counter balancing potential distortions emanating from this immunity.

By now, however, it must be completely clear to anyone that the functionality of the Internet is rupturing the basis for copyright and hence for professional culture production and that the intermediaries, especially the ISPs, are key players in this process. It is practically impossible for individual rightholders to protect their copyright in the Internet context. It is clear that the task of identifying culprits of infringement is unproportionally difficult even for rightholders acting collectively.

Due to the functionality of the Internet only the intermediaries have a realistic possibility to readily identify such culprits. It is to be noted that ISPs, in general or even comprehensively, have made sure that they, according to their broadband subscription contracts, are entitled to even shut off subscribers using their broadband subscription for illegal purposes. Unfortunately such contractual provisions are applied by ISPs in an extraordinarily opportunistic fashion. In Sweden at least such application is conspicuously scarce regarding copyright infringement.

ISPs are explicitly and commonly citing the Directive for the purpose of shunning any part in counter acting copyright infringements. One might suspect that this attitude has something to do with the fact that ISPs are making good money out of the ever growing broadband penetration emanating from the possibilities for members of the public to safely comit copyright infringements. It is clear that the possibility for subscribers to access illegal copyright content is one of the most, if not the most, important driver(-s) for the large scale up-take of broadband subscription in the Union. While the Commission is frustrated by the slow up-take of e-commerce, the desired and necessary e-commerce behavior and large scale exchange actually exist, but in the criminal sector. Behold a thriving sector of e-commerce of sorts! However, it could be argued that the EU has not yet applied its best efforts to establish the appropriate prerequisites for this market to go legal,

which brings us to the question in what way the Directive should be amended in order to more appropriately govern a more prosperous development in the area of e-commerce.

It could be argued that common Western Society principles for liability could readily apply to the operations of the ISPs. Such principles have since centuries, if not millenea, been found to suffice in order to supply legal security in all walks of penal and civil law throughout the Western Civilisation and KLYS and Copyswede can see no reason for the operations of Internet Intermediaries to be an exception. This would provide a healthy incentive for the ISPs to enter into serious exchange with the rightholder on the subject of counter acting copyright infringements on the Internet and other electronic networks, which all concerned, especially the public, would benefit from in the long run.

To sum up, according to KLYS and Copyswede a key element in the struggle against illegal distribution and in the promotion of a vivid e-commerce on the Internet is to revise the E-commerce Directive in order to involve ISPs in the responsibility for content distributed in their broadband infrastructure.