

2005 - DTI consultation on extending liability protection to hyperlinks, search engines and aggregation services

This is JANET(UK)'s response to the DTI consultation on the Electronic Commerce Directive: the Liability of Hyperlinkers, Location Tool Services and Content Aggregators ^[1], published in June 2005, reference 05/1245.

The JNT Association, trading as JANET(UK), is the company that runs the JANET computer network. The JANET network connects UK universities, FE Colleges, Research Councils, Specialist Colleges and Adult and Community Learning providers. It also provides connections between the Regional Broadband Consortia to facilitate the DfES initiative for a national schools' network. JANET(UK) is therefore the provider of a large private telecommunications network and, through a small website, of hyperlinks; JANET(UK)'s customers are both rights-holders and providers of hosting, caching, hyperlinking and location services. JANET(UK)'s activities concentrate on the UK and are less likely to include aggregation service providers: this response therefore does not comment on issues arising outside our area of experience.

Question 1 – Do you agree with the EU Commission conclusions in their 'First Report' on the application of the Directive concerning Articles 12 to 14? Please give your reasons for your answer.

We agree with the Commission's assessment that the Directive has provided legal clarity for the providers of those services covered by national transpositions and thereby promoted the development and use of services based on electronic communications networks. In particular we welcome the clarity of protection given to telecommunication service providers by the UK's current implementation; we believe it generally strikes an appropriate balance between rights-holders and service providers (though we noted the Law Commission's report on Defamation in 2002 and welcome the news that it is to be addressed by the Department for Constitutional Affairs (5.19)). In JANET(UK)'s case the existing Regulations allow us and the education and research communities that we serve both to provide services that are of benefit to education and research in the UK and to deal promptly with misuse of those services.

Question 2 - In your experience what are the advantages and/ or disadvantages of the transpositions of the Member States that have already included the liability limitation cover for hyperlinks, location tool and content aggregation services? I.e. what has been the impact for service providers, rights-holders and individuals alike with regard to their transpositions?

We do not provide services in jurisdictions outside the UK so cannot comment on other countries' transpositions of the Directive.

Question 3 –With other Member States transpositions in mind, which of the liability limitations in Articles 12 to 14 (if any) should apply to each of the following intermediary service providers if the UK were to go ahead and provide legislative cover?

i) Hyperlinkers;

ii) Location tool providers; and

iii) Content aggregation providers

Please give your reasons behind your answer..

We believe that in principle there should be no liability without knowledge. We also note that the targets of hyperlinks can change (for example by changes to DNS domain ownership) without the knowledge of the provider of the link; it therefore cannot be presumed that a link that now points to infringing material pointed to the same material at the time the link was created. We therefore consider that the author of hyperlink or editor of search tool should be protected from liability at least until given specific information that they are linking to material that might give rise to liability. As previously discussed, we make no comment on aggregation service providers, who are outside our experience. We believe that the communications or hosting provider for either type of service is already protected by current Regulations.

Question 4 - Do you think that providers of hyperlinks and location tool services need the extension of any of Articles 12 to 14? If so, what liabilities would be limited? And how significant are the problems currently caused by the lack of this extension? Please explain your reasons, examples would be helpful.

We believe that the lack of clarity regarding liability for hyperlinks and location services may be constraining the development of valuable services. This is based on anecdotal evidence: the fact that we have been asked about such liability by our customers, particularly with reference to the Shetland Times case (*Shetland Times Ltd v Wills* [1997] FSR 604) and reports of Intellectual Property Rights cases in other jurisdictions.

Question 5 - Alternatively, would an extension of any of Articles 12 to 14 of the Directive be detrimental to rights-holders and individuals? Please explain your reasons with examples if possible.

We believe that, far from harming the interests of rights-holders, clear law on liability would encourage providers of hyperlinking and location services to develop effective processes for removing promptly any infringing links that were reported to them. This has been the effect of the liability provisions for hosting providers contained in the existing Regulations. Thus an extension of legal clarity would be of benefit to rights-holders as well. Any effect on individuals seems unlikely to alter the situation identified by the Law Commission and to be addressed by the DCA.

Question 6 – If you think there is a need to extend limitations on liability to hyperlinkers and location tool providers should this be achieved by an extension of Article 12 or by Article 14 ?

In view of the above responses, we consider that an extension of the type of liability protection provided by Article 14 for hosting providers would be beneficial to providers of hyperlinks and location services, as well as to rights-holders.

Question 7 –Is there any action that would give providers of hyperlinks and location tool services the protection they seek, other than through the extension of Article 12 to 14 to these services? Please explain your answer.

Clear case law might be an alternative to legislation to provide some clarity, however this has been very slow to appear. The Shetland Times case is 8 years old and does not provide any precedent. We therefore consider that an extension of the existing Regulations is the approach most likely to be effective.

Question 8 – What (if any) would be the detrimental consequences caused by the extension of Articles 12 - 14 to providers of hyperlinks and location tool services? I.e. would it seriously impact on your profits/ viability or provide a major irritation? Please explain your reasons with examples if possible.

As in the response to question 5, we consider that an extension of the liability protection would allow a standard process to be developed, supported by law, to promptly remove links to infringing copies. This would be beneficial to our customers both as service providers and rights-holders.

Question 9 – Do providers of content aggregation services agree with the assumption that if they are to be covered under Article 12 – 14, then the legislative vehicle will need to be primary rather than secondary? Please explain your reasons for your answer.

Question 10 – If you think there is a need to extend limitations on liability to content aggregation services, should this be achieved by an extension of Article 14 of the Directive? Please explain your reasons for your answer.

Question 11 - Do you think that there is any course of action that would give providers of content aggregation services the protections they seek, other than through the extension of Article 14 to these services? Please explain your answer.

Question 12 - Do providers of content aggregation services believe they are primary or secondary publishers? Please explain your reasons for your answer.

Question 13 – Would parties most affected by these proposals provide in their reply to this consultation, facts and figures that illustrate the benefits and costs that you/ your sector would incur if the UK Government either went ahead (or not) with a legislative measure to cover the liability of providers of hyperlinks, location tool and content aggregation services.

Question 14 –Would service providers who provide hyperlinking, location tool or content aggregation services, please indicate the number of notices/ claims of illegal content that they have received from August 2002 to February 2005? Of these, were there any settled in a UK Court of law? If not, did the out of court settlements reached cause any major detriment to your business turnover? Please would providers give examples to show the scale of the problem for your business.

Question 15 – Do you know of any jurisprudence in Member States of the European Economic Area on the liability of Internet service providers since August 2002, that has a direct impact on providers of hyperlinks, location tool or content aggregation services established in the UK?

No comments.

Question 16 – Are there any other issues the UK Government should take into account when considering its policy on liability cover for providers of hyperlinks, location tool and content aggregations services?

We note that the individual organisations responsible for parts of a web page may not be apparent from its appearance. For example an image or active component on a web page will appear the same whether it is stored locally or referenced by a hyperlink to another organisation. However the organisation that is able to control the content of the image or active component (and should therefore attract any liability for it) will be different in the two cases. Since the component approach to websites is likely to become more common in future it is important that any legislation provides consistent protection and assignment of liability to the organisations that in fact control the content, rather than those that may appear to do so.

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Links

[1] <http://www.dti.gov.uk/consultations/page13985.html>