



Federation of the European
Sporting Goods Industry

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General comments and ideas regarding tackling illegal content online and the liability of online intermediaries

In addition to the responses provided in the Public Consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy ([Case Id: 3a127bde-39cb-490b-ac8e-4efb3ada7bc7](#)), FESI wishes to bring forward the following comments regarding the section on tackling illegal content online and the liability of online intermediaries.

I. Infringing content as a barrier to the completion of the Digital Single Market

Intellectual Property is a key driver for growth and innovation in the traditional market and also in the Digital Single Market. According to the Commission's communication 2014/0392, the IPR-intensive sectors account for around 39% of EU GDP and taking indirect 35 % of all jobs. The sale of counterfeit goods presents a serious threat to a Digital Single Market. In 2012, statistics on customs detentions for suspected violations of IPR at its external border recorded more than 90.000 cases. Around 70% of these cases related to postal and courier traffic trying to deliver small parcels, reflects the growth of e-commerce. Consumers are at a growing risk of buying counterfeit and possibly dangerous products, the economic interests of right owners are jeopardized and the efforts of online service providers to be widely regarded as safe places to buy and sell legitimate products are undermined.

Requiring a higher duty of care from online service providers will help minimize consumer confusion, protect brand owners' Intellectual Property and provide more authentic online consumer experience. It will incentivize innovation and help to promote fair competition among all the e-commerce service providers.

II. Duty of care

FESI welcomes the idea of the introduction of a general principle of duty of care for all online service providers. Recital 48 of Directive 2000/31 on electronic commerce already provided that Member States could require from hosting providers to apply *duties of care*, which can be reasonably expected from them in order to detect and prevent certain types of illegal activities. National courts and the ECJ have rendered various decisions in which clarification was given regarding the measures that could be expected from an ISP to detect and prevent illegal content (ECJ, 24 November 2011, C-70/10, Scarlett Extended; ECJ, 16 February 2012, C-360/10, Netlog; ECJ, 27

March 2014, C-314/12, UPC Telekabel Wien; TGI, Paris, 4 December 2014, RG 14/03236; High Court of Justice, Chancery Division, 28 April 2015, Case No : HC2014 – 002029; BHG, 26 November 2015, I ZR 3/14 and I ZR 174/14). It is clear from the jurisprudence that an online service provider does not only need to take action to stop illegal content, but also needs to take preventive measures.

FESI advocates that the current article 15(1) of Directive 2000/31 be revised. In the light of the evolving technologies and the aforementioned criteria, it may be proportionated and reasonable, for online service providers, to carry out a due diligence with respect to the “soundness” of the provided services by installing a monitoring system and imposing an obligation to actively seek facts or circumstances indicating illegal activities. It is rather up to the Court to decide whether or not the available technology meets these criteria. FESI is of the opinion that an obligation to actively monitor in order to prevent future infringements is not per se contrary to article 3 of Directive 2004/48.

The revision of article 15(1) of Directive 2000/31 will, moreover, be an incentive for innovation to create a competitive advantage based on the reliability of the authenticity of the offered products.

III. Measures

Combatting illegal content requires a modernization and harmonization of measures in order to be efficient and effective:

Disclosure of Information is essential, in particular in the fight against counterfeit and piracy. A person who makes commercial communications in relation to counterfeit and piracy should be clearly identifiable (See Article 6 E-Commerce Directive). However, fictitious names are often used when infringing content is posted on the Internet and online intermediaries are quite reluctant to provide the real identity for privacy reasons. Online services providers will need to incorporate in the contract with their customers, acting in the course of trade, that consent is given to provide their identity in case of a consumer complaint or a claim for intellectual property right infringement. This should also apply to domain name service registrars and in particular for privacy service providers, often used to shield identities.

Notice and Take Down Procedures. Online (sales) (social media) (auction) Platforms and hosting providers should be obliged to organize an efficient and effective Notice and Take Down system, accessible via the website or the online platform. The infringing content should be removed diligently. Under certain circumstances, for example in case of multiple or repeated infringements, the right owner should have the possibility to request a Notice and Take Down of all content listed on behalf of a certain person, rather than only on the products. In case of an inadequate Notice and Take Down system, the Court should be able to order improvements upon a penalty.

Pro-Active and Preventive Measures. With the evolving technology it is crucial that online service providers, including parking page providers, put monitoring and filtering systems in place that meet the here above mentioned criteria

Blocking. People behind websites and Internet Service Providers which given them access often operate abroad outside Europe or conceal their identity. It is important that intellectual property right holders are able to seek injunctions against ISP's in order to compel them to block the infringing content, either at ISP level, either at DNS level.

Measures against repeated infringers, such as suspension of accounts.