

**Werner Stengg**  
**European Commission**

**Subject** Questionnaire on procedures for notifying and acting on illegal content hosted by online intermediaries.

**Amsterdam**  
**4 September 2012**

Dear Mr Stengg,

1. Bits of Freedom welcomes the opportunity to provide input to the consultation on procedures for notifying and acting on illegal content hosted by online intermediaries. We submitted our answers to the online questionnaire but would like to provide you with additional comments in this letter.

#### **Liability limitations are essential to functioning of the internet**

2. Intermediaries (hereinafter also referred to as 'service providers') play an important role in the functioning of the internet, and have done so since its inception. Information on the internet, in order to reach its destination, is dependent on various intermediaries, all with a distinct role.
3. The internet cannot achieve its full potential, and freedom of information is impeded significantly, if these intermediaries, regardless of the exact service they offer, run the risk of being liable for content that may be deemed unlawful. This will lead to unjustified actions against legal content out of fear of (monetary) damages and to self-censorship. The limitations on the liabilities of these intermediaries set out in article 14 of the E-Commerce Directive (2000/31/EC) are therefore highly desirable.
4. However, experience shows that these limitations must be further clarified in order to ensure maximum access of legal information on the internet. The European Commission should therefore clarify that the 'hosting' criterium' should be interpreted broadly, in order to ensure that activities such as the offering of social networks, e-commerce



services and blog platforms – and future platforms with similar intermediary functions – are able to benefit from the liability exemption.

5. We suggest that the Commission, in order to achieve this, provides minimum binding rules regarding the scope of the hosting criterium and the functioning and requirements of notice and action procedures (hereinafter referred to as 'NA procedures'). Such rules should specifically address the importance of freedom of speech and access to information and the role intermediaries play in ensuring accessibility to information. In addition, the rules must emphasize that notice providers are fully responsible for the content of the notices they submit. Submitting a notice that suggests information is unlawful, that exaggerates the gravity of an infringement or that is plainly intimidating should lead to liability for the damages that result from such notices.

### **The impact of wrongful takedowns on on freedom of speech**

6. The disabling of access to or deletion of lawful information impedes freedom of speech including the right to receive information. Lawful information can be taken down or access to it can be impeded as a result of a mistake: the service provider did not follow the proper procedure or assessed certain information wrongly. This can also be the result of a disproportionate response to the publication of unlawful content: for instance taking an entire website offline because one of the web pages contains an unlawful image. Unlawful and disproportionate takedowns must be prevented in order to avoid infringing the right to free expression and the right to access to information.

### **A sound notice and takedown procedure for the private sector**

7. In order to ensure that the right to freedom of speech is ensured in the implementation of notice-and-action procedures, Bits of Freedom has developed a flowchart setting out the various steps which need to be taken (see **annex**). The flowchart is based on the following underlying principles:
  - **Distinguish unmistakably unlawful content.** Without a court order, a service provider can only be expected to disable access to - or remove content if it is unmistakably unlawful. This criterium was developed in Dutch case law ("*onmiskenbaar onrechtmatig*"). In order to be considered unmistakably unlawful, information must *undoubtedly* infringe upon the rights of others. For example, depictions of criminal behavior such as images of the abuse of children, or the covert distribution of computer viruses can be considered unmistakably unlawful. See p. 34 of Commission Staff Working Paper SEC(2011)1641 for a comparable notion as defined in national case law in Austria ("*manifestly illegal content*"). Actual knowledge of unlawful content in the sense of article 14 ECD can only be obtained through a notice that proves that certain content is

'unmistakably unlawful' or a court order confirming such unlawfulness. It should be underlined that this procedure is aimed at requests by civil parties against intermediaries. Requests for action by police authorities should be based on a specific authority provided for under criminal law, in order to ensure that the police does not overstep its legal powers. The police should thus not be able to use the notice-and-action procedure or procedures for notifying content which violates the terms and conditions of a service provider as if it were a civil party.

- **Take action against content in a proportionate manner.** Usually, multiple service providers are involved when access to content is offered, from providers offering server space to providers offering hosting space, to providers offering over-the-top services (such as social networking sites). To ensure that the action taken to disable access or remove content is proportionate, a notice must always be addressed to the service provider that is capable of taking action while affecting the least amount of lawful information. This is usually the service provider that has the closest relationship to the content provider. For example, a forum website administrator is in a position to technically delete a picture in a single forum post, whereas the hosting provider of the website may not be able to delete this post without deleting other, lawful content as well.
- **Allow the content provider to take action itself.** In view of the principle of proportionality set out above, if content is unmistakably unlawful but there is no pressing need for immediate action, the service provider should always forward the notice to the content provider, except under specific circumstances described below. Only after it becomes clear that the content provider does not voluntarily take action against the content, should the service provider do so. After taking action, the service provider should inform the content provider immediately about this action and his right of redress in court. It is possible that informing the content provider would seriously hinder a criminal investigation. In that case, it should be possible for the intermediary to suspend informing the content provider. This needs to be based on evidence that an investigation is taking place and that informing the content provider will seriously hinder the investigation.
- **The service provider should only take action in case of an emergency.** As an exception to the rule set out above, the service provider should remove content that is unmistakably unlawful in case of an emergency situation that does not allow for further delay.



In such cases, the service provider will disable access to the content, provided such action is possible in a proportionate manner, meaning that the amount of lawful content affected by disabling access to the unlawful content must be proportionate (see also below). This will depend on the amount of unlawful content, the amount of lawful content affected, the gravity of the unlawful content and the practical accessibility of the lawful content via other websites or other media. After disabling access, the service provider should inform the content provider immediately and inform him about his right of redress in court.

- **Disable access to information instead of deleting it.** If a service provider would indeed take action against content, it should always disable access to information instead of deleting it, unless this is not possible or not effective. Disabling of access to information is more proportionate than deleting this information, since the disabling of access can be reverted if the takedown would prove to be unjustified.
- **No action by service provider against not unmistakably unlawful content.** The service provider should not be required to take action against content which it does not deem to be unmistakably unlawful. If a service provider receives a notice regarding such content, it will forward the notice to the content provider. If the content provider does not voluntarily take action against the content, the service provider will refer the matter back to the notice provider. If the notice provider then still wants to take action against the content, he will have to obtain a court order. This of course does not prejudice the ability of the service provider to act if it deems content to be in violation of its own terms and conditions, to the extent that such provisions do not impinge on the reasonable interests of the end-user, *inter alia* in communications freedom and privacy.
- **No preset timeframe for handling applications.** It is important to recognize that there cannot be a predefined timeframe for the handling of different types of requests. As indicated above, unmistakably unlawful material can be taken down quickly, depending on the circumstances of the case. It is important that service providers are not burdened with too many tasks and responsibilities. Since every takedown case is different, fitting this process in predefined timeframe will lead to less thorough reviews by hosting providers and an increase in unjustified takedowns.
- **Distinguish the disclosure of personal data as a separate process.** The circumstances under which a provider should be required to disclose personal data of the content provider are not being discussed in this letter. It is conceivable that a notice provider in the course of notifying a service provider also requests to disclose



personal data of the content provider, for example in order to recover damages or have an injunction awarded against it. Whether such requests should be granted depends on various circumstances and such requests do not exclusively relate to issues of notice-and-actions. Therefore, these requests should be treated in a process separate from the process of notifying the service provider about unlawful content. This means, for example, that disclosure of personal data should not necessarily be considered a substitute for taking action against unlawful content.

8. **Standard procedures to enhance transparency.** The notice-and-action procedure set out above must be the leading instrument when dealing with requests for action against certain content. The use of a standard procedure will make the entire process more transparent. Hosting providers should only process notices that meet pre-defined requirements. This prevents arbitrariness and responses to takedown requests that are not properly motivated or sufficiently specific. Notices must always clearly indicate and motivate the presumed unlawfulness of certain content and specify which law is being violated by the publication of the content. This procedure should be clearly distinguished from procedures focusing on material which is in violation of the terms and conditions of the service provider.

### About Bits of Freedom

9. Bits of Freedom is a Dutch digital rights organization, focusing on privacy and communications freedom in the digital age. We fight for an internet that is open for everyone, where everyone can continue sharing information, where private communication remains private and where lawful information remains accessible. Bits of Freedom is based in Amsterdam, the Netherlands. We are active on both national and European level and are one of founders and a member of European Digital Rights initiative (EDRi). We combine a broad range of legal and technical expertise, a constructive lobby where possible, and sharp action where necessary.
10. We trust to have informed you sufficiently. Please do not hesitate to contact us should you wish to discuss this matter into more detail.

**Janneke Sloëtjes**

Bits of Freedom



