

# G E S A C

GROUPEMENT  
EUROPÉEN  
DES SOCIÉTÉS  
D'AUTEURS  
ET COMPOSITEURS

Brussels, October 26, 1999  
267ip99en

**GESAC POSITION  
ON THE AMENDED PROPOSAL FOR A DIRECTIVE  
ON CERTAIN LEGAL ASPECTS OF ELECTRONIC COMMERCE  
IN THE INTERNAL MARKET  
(Com (99) 427 final)**

**PROVISIONS GOVERNING INTERMEDIARIES' LIABILITY**

## **GENERAL COMMENTS**

Further to the adoption, in a first reading, of the opinion of the European Parliament (opinion of 6 May 1999 – A4-0248/99), on 3 September 1999 the Commission presented an amended proposal for a directive on certain legal aspects of electronic commerce in the internal market.

GESAC regrets the fact that the Commission did not take account of the Parliament's amendments concerning the provisions governing the liability of "intermediary" operators (telecommunication operators, access providers and hosting service providers – Articles 12 to 15) for the illicit contents disseminated on networks such as the Internet.

More specifically, these amendments provide more appropriate means than the initial proposal for a directive for fighting the growing and alarming phenomenon of the circulation of illegal and illicit contents on the networks, without creating excessive constraints for "intermediary" operators.

The Parliament's amendments are supported by GESAC. Twenty-four other rightholders organisations have also expressed in large measure their support for the Parliament's opinion in a document dated 13 July 1999 ("Response to the European Parliament's first reading of the proposal for a Directive on the legal aspects of electronic commerce – liability provisions"). These organisations represent film and record producers, writers, authors and directors in the radio and television media and in the visual arts, performing artists, book, magazine and book publishers, journalists, as well as the software industry.

GESAC wishes to make specific comments here on the amended proposal for a directive, in particular by shedding light on the very important improvements made by the Parliament, which were unfortunately rejected by the Commission. We shall also make a number of drafting proposals to the Council, as well as to the Parliament and the Commission for the second reading of the proposal for a directive.

## **COMMENTS AND PROPOSALS CONCERNING THE HORIZONTAL PROVISIONS OF THE AMENDED PROPOSAL FOR A DIRECTIVE**

### **I. Retention of information on recipients of services**

The Commission did not retain amendment n° 10 of the European Parliament which adds a recital clause to the text of the directive, under the terms of which the "Member States must, in accordance with Community law and with particular regard to Directives 95/46/EC and 97/66/EC of the European Parliament and the Council, lay down in their legislation that information service providers shall be able to provide all information of use in tracing and identifying providers of illegal content".

During the vote in plenary session, the Commission explained that, in its view, this amendment contravenes the EU rules concerning the processing of personal data (Directive 95/46/EC of 24 October 1995) and the protection of privacy in the telecommunications sector (Directive 97/66/EC of 15 December 1997).

GESAC do not find the Commission's argument convincing for the following reasons:

- The objective of the legislation must be to ensure that rightholders are able to enforce their rights effectively. This would be impossible if there were no way of identifying those guilty of infringing said rights;

The aim of amendment n°10 of the European Parliament is not to compel operators themselves to search actively for information they do not have, but to keep such information as they do have and to provide it to any victims of infringements, so that the latter can identify and find the providers of illicit contents, and thus protect themselves effectively.

GESAC fully approves the European Parliament's objective which aims to provide authors whose works are pirated with the necessary instruments to fight such piracy and to obtain damages for the loss they suffer from the providers of illegal contents.

- Under the terms of Articles 12 to 14 of the proposal for a directive, the service providers enjoy extensive liability exemptions. In the absence of any specific provision concerning the retention and delivery of information on providers of illicit content, service providers will not be induced to co-operate with the rightholders or any other victims of infringement to fight against the circulation of such contents on the networks.

- The amendment of the European Parliament is not incompatible with EU law.

First, it expressly reserves the compliance with the two directives concerning the processing of personal data and the protection of privacy in the telecommunication sector.

Secondly, Article 14, paragraph 1 of the directive concerning the protection of privacy in the telecommunication sector stipulates that “Member States may adopt legislative measures to restrict the scope of the obligations and rights provided (by the directive) when such restrictions constitute a necessary measure to safeguard national security, defence, public security, *the prevention, investigation, detection and prosecution of criminal offences (...)*”. Thus, the right to privacy can be restricted in order to prevent and prosecute acts that infringe an author’s rights, acts that constitute criminal offences in the legislation in force in the EU Member States.

It would be completely abnormal and inadmissible for providers of illicit contents to hide behind the above-mentioned directives to escape any proceedings initiated against them by the victims of infringements. This would have negative implications not only for the fight against piracy, but also for consumer protection, the protection of minors or the prevention of the dissemination of illicit contents (racial hatred and child pornography).

In light of these comments, GESAC calls on the EU institutions to insert in the directive a provision concerning the obligation for service providers to keep information on the identity of content providers. The need for such a provision has already been recognised in fact by certain legal systems. To enhance the significance thereof, GESAC, like the afore-cited 24 organisations of rightholders, considers that such a provision must be inserted in the body of the directive.

GESAC hereby submits to the EU institutions, for their consideration, a proposal for an amendment to prevent any ambiguity as to compliance with EU directives.

Proposal for an amendment

***“The Member States must provide, in compliance with Community law and with particular regard to European Parliament and Council Directives 95/46/EC and 97/66EC, that the judicial authorities have the authority to order service providers to expeditiously disclose to the copyright owners or the persons authorised by them, sufficient information to identify and locate the provider of presumed illegal contents, to the extent that such information can be obtained by the service provider or is otherwise available to them”.***

## **II. Compliance with technical measures for the identification and protection of works**

The European Parliament has adopted a series of amendments intended to ensure that the service providers do not compromise the efficacy and functioning of technical measures for the identification and protection of works used by the rightholders. These are amendments n° 14 (recital clause 16), 45 (Article 12, paragraph 1, point c.a. new), 47 (Article 13, point d), 53 and 54 (Article 15, paragraph 2.2 and 2a new).

The Commission has not taken account of this concern of the Parliament, a concern that GESAC, as well as the afore-mentioned 24 organisations, shares.

The rightholders are currently developing, in consultation with the parties concerned, technical measures for the monitoring, protection and identification of works on the networks. These technical measures are indispensable for the prevention and fight against piracy on the Internet.

It would therefore be expedient and justified, in order to ensure as far as possible the efficacy of these measures, to insert an additional condition of exoneration of liability of service providers in Articles 12, 13 and 14 of the directive.

GESAC therefore submits to the EU institutions, for their consideration, the following proposals for amendments:

Proposals for amendments: Insert of a new paragraph in Articles 12, 13 and 14:

*12.1 (d) accommodates and does not interfere in technical measures accepted by the industry and set up by the rightholders to identify and protect works transmitted on the networks;*

*13.(d.bis) accommodates and does not interfere in technical measures accepted by the industry and set up by the rightholders to identify and protect works transmitted on the networks;*

*14 (c): accommodates and does not interfere in technical measures accepted by the industry and set up by the rightholders to identify and protect works transmitted on the networks.*

## **III. Involvement of intermediary operators in the prevention of repeat illegal or illicit activities on the networks.**

Service providers engaged in mere conduit and hosting activities have a role to play to prevent that their “clients”, the content providers, cannot become repeat offenders of illicit activities with impunity.

The European Parliament has taken due account of this need by adopting an amendment n° 48 (Article 14 new, paragraph b.ter), imposing on providers of access and hosting to remind their customers that the latter have the obligation "to comply with the legislation, particularly on illegal content, non-pecuniary personal rights, copyright and other intellectual property rights."

The Commission did not adopt this amendment, though it is clearly justified and makes total sense.

GESAC requests that:

***In connection with a policy to prevent repeat offences of illicit activities on the networks, GESAC, like the afore-mentioned 24 organisations of rightholders, calls on the EU institutions to provide in the directive a specific provision requiring all operators to remind the content providers: 1) their duty to comply with the law and 2) that their activities will be interrupted in the event of repeated infringements.***

***This obligation to inform content providers must constitute a condition of exoneration of liability for the operators.***

#### **IV. Codes of conduct (Article 16)**

The proposal for a directive expressly encourages the participation of consumer organisations and associations in the establishment of codes of conduct. We question the reasons which led the Commission to distinguish one particular category from all the other interested parties.

Rightholders organisations also have a vital interest in the establishment of codes of conduct. These will be undoubtedly valuable instruments in the fight against piracy, an issue of serious concern for the EU institutions.

The Parliament has for that matter recognised the need by adopting Amendment no. 58, under the terms of which "organisations representing holders of literary and artistic property rights shall be involved in the drafting and implementation of codes of conduct."

GESAC calls on the EU institutions to amend Article 16, paragraph 2, and submits the following proposal for amendment for their consideration:

Proposal for amendment

***"In so far as they may be concerned, representative organisations of owners of literary and artistic property rights shall be involved in the drafting and implementation of codes of conduct drawn up according to paragraph 1, point a)".***

## **V. Notification and take down procedures (Article 17)**

Inexplicably, and although it recognised the importance of notification and take down procedures in the Explanatory Memorandum of its proposal for a Directive, the Commission did not take into account the Parliament's Amendment n° 59. This Amendment, supported by GESAC and the 24 organisations of rightholders, stipulates that the “Member States shall, in their legislation, allow the effective use of notification and deletion procedures, including by means of appropriate electronic instruments.”

It is probably not necessary to require the Member States to amend their legislation as soon as all the interested parties have concluded agreements for the effective implementation of notification and take down procedures. Nevertheless, for greater legal security, the directive should include a specific provision on the principle of such procedures.

GESAC submits to the EU institutions the following proposal for amendment for their consideration:

Proposal for amendment:

***“The Member States must ensure that effective notification and take down procedures, including by appropriate electronic means, are available.”***

## **VI. Link between the proposal for a Directive on certain aspects of Copyright and Related Rights in the Information Society (COM (1999) 250 Final of 25 May 1999 – hereinafter referred to the “Copyright” Directive) and the proposal for a Directive on certain legal aspects of Electronic Commerce.**

The Commission has proposed a separate Directive on Electronic Commerce, which deals with liability issues, including copyright liability, for intermediaries and services over network such as mere conduit, caching and hosting, subject to certain conditions (Proposal for a Directive on certain legal aspects of electronic commerce in the internal market). That is why GESAC, like the 24 rightholders organisations, considers that it is no longer appropriate to provide in the proposal of the “Copyright” Directive a provision (in this case Article 5, paragraph 1) the purpose of which is to settle a specific aspect of these questions.

The two proposals for Directives (“Copyright” and Electronic Commerce) are at the same procedural stage in the Council. The legal void that concerned telecommunication operators and other service providers in the information society as to questions of liability in regard to pirated contents that circulate on the network has now been addressed by the e-commerce Directive.

The questions of liability have been clearly posed and settled by the directive on electronic commerce. Providing a specific clause on these questions in the Copyright Directive is a source of legal insecurity and is not justified.

***We believe it is obvious that the questions of liability fall under the exclusive scope of the Directive on the legal aspects of Electronic Commerce and not of the Copyright Directive.***

## **COMMENTS AND PROPOSALS CONCERNING THE SPECIFIC PROVISIONS OF THE AMENDED PROPOSAL FOR A DIRECTIVE AMENDMENT ON THE LIABILITY OF “INTERMEDIARY” OPERATORS**

### **I. Liability of mere carriers – Article 12**

#### **1. Article 12, paragraph 1**

In a general manner, any operator aware that illicit contents are being transmitted on the networks, who has the technical possibilities to interrupt the dissemination of said contents, should intervene so as not to be held liable.

The very wide exoneration of liability provided by Article 12 can be justified only by the purely passive character of operators in relation to the information conveyed.

Now Article 12 includes in its scope of application two different categories of activities: the mere transmission on communication networks and the provision of access to networks. Distinct conditions of exoneration should logically ensue from this difference.

Access providers are themselves distinguished from providers of the infrastructure, and are defined as operators whose activity consists of enabling a user to gain access to contents.

Although within the strict framework of the latter activity, they are not content providers and do not create the content to which they give access, these operators are in a better position than providers of the infrastructure to prevent the widespread dissemination of illegal material to their subscribers.

In practice, access providers make selections of news-groups they want to include in their use-net (for example to prevent the creation of news groups on themes such as child pornography or racial hatred). This is merely an example to demonstrate that they have a relationship with their subscribers that cannot be compared with the relationship between telecommunication companies and the end-users of the services.

Whereas the a priori monitoring of all the contents is technically and economically still difficult to conceive, access providers do already monitor communications between their subscribers and external websites, be it simply to check whether the requested information is already situated at the provider's proxy server. This practice by access providers demonstrates that they are not merely passive intermediaries and that, if they know or were in a position to know that illicit contents are being transmitted on the networks, they have the possibility of intervening and remedying the situation.

In this respect also, the access provider plays a role that is totally different from the strictly technical service of the “mere conduit” service provider.

Furthermore, in connection with on-line services from third countries (90% of the content comes from the USA), putting an end to the dissemination of illicit activities in Europe can in practice be exercised only by access providers established in Europe. It is therefore essential not to assimilate them to mere conduits on the networks (owners of infrastructure) as regards liability, because they are a key link in the fight against such illicit activities.

The fact that it will still be possible to visit blocked sites from other access providers situated in the European Union or elsewhere is not an argument that may justify a passive attitude on the part of access providers.

It is therefore essential to be able to question the liability of access providers when they know or were in a position to know that they give access to illicit contents and that they nonetheless remained passive.

The European Parliament had measured the importance of the role of access providers in the management of the information society networks, by subjecting these operators to the same conditions of exoneration as hosting service providers (see our comments below under Article 14, page 12 ff.).

GESAC requests that:

***The scope of application of Article 12#1 must be strictly limited to the provision of activity consisting of the mere transmission on the communication networks of information provided by third parties, to the exclusion of the provision of access.***

## 2. Article 12, paragraph 2

The European Parliament adopted Amendment 46 which provides that all necessary steps must be taken by service providers to ensure that the automatic, intermediate or transient storage of information used for transmission is not accessible to persons other than the intended recipient. This amendment supplements in a useful manner the criteria for ensuring that operators covered by Article 12 are non other than totally passive participants, and that they cannot benefit from exoneration of liability if they store information in such a way as to make it generally accessible. This amendment was supported by GESAC and the afore-cited 24 organisations.

GESAC requests that:

***GESAC calls on the EU institution to reinsert in Article 12, paragraph 2 the criterion proposed by the Parliament specifying that the automatic, intermediate and temporary storage of information used for the transmission, is accessible only to the intended recipient.***

## **II. Liability of caching system providers – Article 13**

Article 13 exempts from all liability, under certain conditions, service providers whose activity consists, in connection with the transmission on a communication network of information provided by a recipient of the service, of the storage of this information *in an automatic, intermediate and temporary manner performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request*.

This form of caching excludes all choice on the part of the operator regarding the contents (sites or parts of sites) reproduced. The information to cache is chosen automatically by an appropriate software application that the operator uses, where appropriate, in accordance with “caching instructions” sent on-line by the content providers. These caching instructions are recognised, read and carried out automatically by the network. Thus, whereas the decision to cache the information is deliberate, this information is stored automatically, without the operator having any possibility of affecting its choice or its contents.

According to the Commission, the terms *automatic, intermediate and temporary manner, for the sole purpose of making subsequent transmission of such information more efficient*, used in Article 13, are intended to cover what is commonly known as "proxy caching".

It can be accepted that, although carrying out acts of reproduction that fall under the principle of reproduction right, operators who undertake this type of activities are assimilated to intermediaries, and that in consideration of the economic and technical constraints as well as the competition that they often face, they benefit from more flexible liability regimes than the content providers themselves.

This is not the case for operators who carry out "mirror caching" activities. This form of caching actually implies a choice for the operator as to the content cached. This content is cached under the terms of a contract concluded with the party whose information is hosted (content provider), which provides it, and chosen on the basis of the interest it represents for the users. The operator here can no longer be considered as a simple *intermediary, and mirror caching remains subject to the common law of liability*.

According to the Commission, Article 13 does not therefore intend to cover what is commonly known as "mirror caching".

Nevertheless, the distinction between the two forms of caching, proxy caching and mirror caching, does not come out clearly in the wording of Article 13.

GESAC requests:

***GESAC calls on the EU institutions to clarify the scope of application of Article 13 officially in a recital.***

In light of the foregoing comments, it is also important to clarify in the text of Article 13 that it only applies to the operator who caches information in order to make its subsequent transmission more efficient and has no choice about the information, the sites or the contents of the sites which are involved in the caching operation.

GESAC thus suggests the insertion in Article 13, point a) of the condition stipulated in Article 12, point c), and submits to the EU institutions, for their consideration, the following proposal:

Proposal for amendment:

***“(a) The service provider does not modify or select the information”.***

Finally, as for the provision of access, operators which undertake temporary acts of reproduction covered by Article 13 must be held liable when they know or are in a position to know that the activity of the recipient of the service is illicit or, knowing that, they nonetheless take no action.

GESAC requests that Article 13 point e) be modified and submits to the EU institutions, for their consideration, the following proposal:

Proposal for amendment:

***e) “The provider does not know, or was not in a position to know, that:***

- ***the activity of the recipient of the service is illicit ;***
- ***the information at the initial source of the transmission has been removed from the network;***
- ***access to it has been barred;***
- ***a competent authority has ordered such removal or barring***

***and that, upon obtaining such knowledge, acts expeditiously to remove or to bar access to the information”.***

### **III. Liability of hosting service providers – Article 14**

#### **1. Scope of application of Article 14**

The European Parliament adopted Amendment 48 which makes access providers subject to the same conditions of exoneration as hosting service providers.

It is highly regrettable that the Commission did not adopt this Amendment, supported by GESAC.

The fact remains, however, that access providers, while remaining intermediaries, are nonetheless involved in the information that circulates on the networks – an involvement closer to that of hosting service providers than to mere telecommunication operators. They are in a better position therefore, in particular as regards copyright, to prevent or put a stop to the dissemination of pirated contents (see our comments under Article 12#1, pages 8ff. supra).

Nevertheless, given the specific nature of their activity and the size of the data flows which operators have to face, it is clear that the implementing conditions of liability of access providers will be assessed differently by the courts. Thus it is only in particular circumstances that victims of infringements will be able to show the lack or negligence of vigilance on the part of access providers, and assert that they were in a position to know that they give access to illicit contents. Their obligation should moreover be limited to blocking the access to information, whereas hosting service providers will have to proceed to withdraw the information.

GESAC urgently calls on the EU institutions to reconsider Article 14 in the light of the foregoing comments, and submits for their consideration the following proposal:

Proposal to amend Article 14#1:

***The Member States shall provide in their legislation that where an Information Society service is provided that consists in the provision of access or in the storage of information provided by a recipient of the service, the provider shall not be liable, otherwise than under a prohibitory injunction for the information rendered accessible or stored at the request of a recipient of the service, on condition that (...)***"

## 2. Criterion of knowledge by the operators referred to in Article 14

Amendment 48 of the Parliament also strengthens the knowledge standard of hosting providers by stipulating that such providers shall be exonerated of liability on condition that “they did not know, or were not in a position to know, that the activity is illicit.”

This proposal is of vital interest to authors and to victims of infractions in general. More specifically, this criterion has an objective character, which makes it easier for victims of infraction to prove the fault of the operator concerned. It is less difficult to show that a service provider “was in a position to know that the activity (of the recipient of the service) was illicit” (based on objective elements), than to show that the hosting provider “had knowledge of facts or circumstances by which the illicit activity was apparent” (subjective criterion). It is extremely regrettable that the Commission did not adopt this amendment.

GESAC calls on the EU institutions to strengthen the criterion of knowledge by providers and submits, for their consideration, the following proposal concerning Article 14, point a).

Proposal for an amendment:

***“a) The provider does not know, or was not in a position to know, that the activity is illicit.”***

#### **IV. Liability of providers of hyperlinks and location tool services - Article 24.2**

***GESAC approves that the Commission included in Article 24#2 new the Amendment 67 (Art. 24bis) of the European Parliament,*** under the terms of which the report on the application of the directive which the Commission will have to submit in 3 years after the adoption of said directive will have to analyse “the need for proposals concerning the liability of providers of hyperlinks and location tool services (...).”

#### **V. Exhaustive character of liability limitations**

For reasons of legal security and the functioning of the internal market, ***it is regrettable that the proposal for a directive does not expressly provide that the limitations of liability are exhaustive*** and that the Member States cannot introduce more favourable arrangements than those implemented by the Directive. This position is also supported by the afore-cited 24 organisations of rightholders.

With the comments and proposals above, GESAC calls on the Council, the European Parliament and the Commission to continue the discussion in order to improve the Directive on questions of the liability of service providers an improvement which is necessary for the harmonious and balanced development of the Information Society.