

Draft Resolution Question B

Recognising

(1) that it is impractical in the present state of the law and in the light of the present EU discussion on the general harmonisation of non-contractual liability to seek in this resolution to harmonise, whether generally or as to indirect (or accessorial) liability in particular, and whether in civil law or under criminal law, the grounds of liability of online intermediaries for infringement of intellectual property rights such as copyright and trade marks and liability for acts of unfair competition

(2) that it is neither necessary nor practical, especially given the scope for rapid technological development and the creation of new business models, to seek to define with too much precision the concept of an online intermediary

(3) that in so far as an online intermediary does nothing more than provide access to a communication network its status differs, as a matter of public policy, from that of other online intermediaries and so it is appropriate to exclude such access providers from the scope of this resolution

(4) that courts have taken account of various factors in determining the liability of online intermediaries, including the influence over infringing users, involvement with infringement, knowledge of infringement, substantial non-infringing uses, the availability of notice and takedown procedures and the operation of notice and takedown procedures;

Recommends

(1) that there be a harmonisation as to the availability of 'safe harbours' against liability for online intermediaries, taking into account, inter alia, the following factors

(a) a 'safe harbour' based on the implementation of a reasonable notice and takedown system should be available to online intermediaries faced with any claim for unfair competition or infringement of copyright, trade marks, or other intellectual property

(b) such notice and takedown system should be reasonably effective in apparent cases in promptly taking down infringing and/or unfair content, or removing

reference to infringing material, upon specific and sufficient notice, and in imposing additional measures against users of online intermediaries services for repeated acts of infringement; and

(c) such notice and takedown system should provide for a timely process by which the takedown of allegedly infringing content, or removal of reference to allegedly infringing material, can be contested by interested parties who identify themselves

(2) that there be harmonisation as to the availability of injunctions as against online intermediaries that is independent of any finding of fault on the part of the online intermediary, taking into account the following factors;

(a) Injunctions should

- (i) Be effective, proportionate and dissuasive
- (ii) Strike a fair balance between rights of owners of intellectual property or of rights in unfair competition, online intermediaries, and users of the online intermediary (including consumers)
- (iii) Be accompanied with a fair attribution of costs as between the parties

(b) Injunctions may in particular provide for

- (i) Suspension of an infringer from the services of the online intermediary
- (ii) Disclosure of the identity of infringers, subject in the case of natural persons to considerations of privacy
- (iii) Not only bringing to an end existing infringements of intellectual property rights or acts of unfair competition, but also preventing further identical infringements or acts

(c) Injunctions should not

- (i) Impose a generalised obligation actively to monitor
- (ii) Create barriers to legitimate trade and in particular, for online marketplaces, should not impose a general and permanent prohibition on selling of goods bearing a trade mark already infringed
- (iii) Create unjustified barriers to freedom of expression and information