Electronic Commerce and Intellectual Property Developments in Europe

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The paper discusses the electronic commerce and its importance in the context of intellectual property developments in Europe. It also covers legal situation and the problems faced by the electronic commerce field in Europe. This might be of some interest for other countries.

As India is a country where electronic commerce is growing rapidly and a legal framework has been and is being created, it could perhaps be of some interest to see how the issue has been solved in one of India's trading partners, namely the European Union. That Union consists of 15 member states and is developing a unified legal framework in several important areas, among them also electronic commerce. This is achieved through so-called Directives adopted by the European Parliament and the Council of Ministers. Those Directives are set out rather in detail how the laws of member states have to be harmonized in important areas.

The purpose of the European Union is to create a common market for goods and services without internal frontiers with the main aim of ensuring economic and social progress. It is felt that the development of the Information Society without such internal frontiers is vital to the elimination of the barriers between the European peoples and is vital to creating employment and enhancing the competitiveness of the European industry. As electronic commerce is developing rapidly, the differences between the legal provisions governing electronic commerce in the various member States are seen as an obstacle to the full development of these activities and thus the need arises for the approximation of the national provisions in this respect.

It is against these considerations that a Directive has been elaborated which is ready as regards all its essential aspects. (Directive 200/31/EC on Electronic Commerce of 8 June 2000, adopted by the European Parliament and the Council of Ministers).
The areas of law which the Directive deals with concern in particular establishment and commercial communications issues, the conclusion and treatment of contracts, liability of intermediaries, and implementation, for instance in the form of codes of conduct. Some aspects are explicitly outside the scope of the Directive, such as copyright and neighbouring rights dealt with in other Directives as well as industrial property rights.

The Directive contains first about 70 Recitals which is indeed a lot and which reflects the political difficulties, which some member States had with some of the issues. The main body of the Directive contains 26 Articles. Some of those are of particular importance for the operation of the Directive. For instance, the definition of "Information Society Services" by which is meant a wide range of services on-line, normally provided for a remuneration, by means of electronic equipment for the provision of goods and services at the request of a consumer. Articles 4 and 5 exclude prior authorization of Information Society Providers and also contain an obligation for the service provider to provide recipients of the services with some basic information about for instance his name and address. Articles 6 to 8 deal with commercial communications (i.e. publicity) for instance in the sense that such communications shall be clearly identifiable as such. Important provisions concerning contracts concluded by electronic means are included in Articles 9 to 11, for instance on providing information to consumers on how contracts are concluded electronically. Articles 16 to 21 deal with implementation issues, for instance concerning the drawing up of codes of conduct. The Directive does not deal with private international law issues, such as the law applicable to such services; on the other hand, the control of such services is, in principle, entrusted to the source, i.e. the country where the service provider is located.

Of particular importance in the context of intellectual property are the provisions in Articles 12 to 15 on the liability of intermediary service providers. These provisions cover three situations, namely "Mere Conduit" (Article 12), "Caching" (Article 13), "Hosting" (Article 14) and prohibition against general obligations to monitor the information provided (Article 15).

It should be stressed that the provisions are of a horizontal nature and cover all kinds of liabilities, including for instance criminal liability for aspects of the information other than intellectual property aspects. It is in respect of this "immunity" of service providers that some Member States objected in the course of the final political discussions on the draft Directive which led to some modifications of the provisions (briefly mentioned below).

**Liability for Mere Conduit**

Mere conduit is the situation when transmission occurs in a communication network of information which is provided by the recipient of the service, i.e. the person who uses an information society service for seeking information or making it available. The service provided plays a purely passive role in such context and Article 12, paragraph 1, prescribes that the Member States shall ensure that the service provider shall not be liable for the information transmitted if certain conditions are met. Those conditions are: (a) that the service provider does not initiate the transmission (but the recipient of the service), (b) does not select the receiver of the transmission, and (c) does not select or modify the information contained in the transmission.
The absence of liability covers all aspects of such liability, criminal as well as civil, and is due to the fact that the service provider does not in fact play any active role whatsoever in respect of the information, whatever is, contained in the transmission. Transmission means not only the conduit itself of the information but also, according to paragraph 2, the automatic, intermediate and transient storage of the information but only on two conditions, namely, that it is made for the sole purpose of carrying out the transmission and that the storage occurs for a time which is no longer than is reasonably necessary for the transmission. Thus, this absence of liability covers much of the same situation as is envisaged in Article 5.1 of the Information Society Directive in respect of certain temporary copies which remain outside the notion of "reproduction." However, there may be situations where those temporary copies will not be outside the right of reproduction; if such is the case, the service provider will be exempted from liability for those copies if the conditions in Article 12.2 of the Electronic Commerce Directive are met.

This provision was somewhat controversial and the discussions resulted in amendments of the Recitals (new Recitals 43 to 45). It is underlined in those Recitals that the absence of liability operates only if the activity is of a mere technical, automatic and passive nature implying that the service provider has neither knowledge nor control over the information, which is transmitted or stored. Also, it is underlined that the requirement that the service provider does not modify the information that he transmits does not cover technical manipulations of a technical nature as they do not alter the integrity of the information contained in the transmission.

During the discussions about the Directive also a new paragraph 3 was inserted (both in this Article and in the Articles dealing with caching and hosting). That provision prescribes that the Article does not affect the possibility for a court of an administrative authority to require a service provider to terminate or prevent an infringement. This Article aims at making possible injunctions of different kinds, as explained in the new Recital 46.

**Liability for Caching**

This situation does not, as the previous situation, concern transmission in itself but instead certain acts of storage performed for facilitating or making more effective such a transmission. Caching means the automatic, intermediate and temporary storage of information on condition that it is performed for the sole purpose of making more efficient the onward transmission of the information to other recipients of the service. Caching is a very important element in the information society context, because it makes possible the storing of frequently used information closer to the users of the services instead of necessitating access at the original source and thus overloading the Internet. There are various types of caching, for instance, memory caching at the user's computer and proxy caching in a server close to the user.

In order for the absence of liability to operate, five other requirements must be met. These are: (a) the provider does not modify the transmission; (b) he complies with conditions on access to the information; (c) the provider complies with rules regarding the updating of the information in accordance with industry standards; (d) the provider does not interfere with industry standards concerning the lawful use of technology to obtain data on the use of the information
Liability for Hosting

Hosting means the storing of information by the service provider on a more permanent basis than the storage effectuated under Articles 12 and 13, for instance in so-called Bulletin Board Services (BBS).

The service provider shall not be liable for the information provided by a recipient of a service and stored at the request of such a recipient. Two basic conditions must, however, be met. The first one is that the service provider does not have actual knowledge of the illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent. The other one is that the provider, upon obtaining such knowledge or awareness acts expeditiously to remove or disable access to the information. As a consequence of the discussions, certain new elements were introduced in the text (Recital 47). Thus, such removal or disabling of access has to be undertaken in respecting the principle of freedom of expression and of procedures established for this purpose at the national level. It is also said that this provisions does not affect Member States possibility to establish specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

According to paragraph 2, the absence of liability does not - naturally - operate when the recipient of the service is acting under the authority or the control of the provider.

In paragraph 3 is included the same safeguard as regards the possibility to provide for injunctions; it is also possible for Member States to establish procedures governing the removal or disabling of access to information.

Obligations as to the Monitoring of Information

The main principle is that service providers should not be obliged to monitor the information they transmit. This is also the rule under Article 15.1 which prescribes that Member States shall not impose a general obligation on service providers to monitor the information which they transmit or store, nor must there be any general obligation to seek actively facts and circumstances which may indicate illegal activity.

These obligations in respect of monitoring were a particularly sensitive item at the December 1999 Internal Market Council meeting which resulted in some new provisions in the Directive. Thus, Article 15.2 prescribes that Member States may establish obligations for service providers to promptly inform the competent public authorities of alleged illegal activities or information undertaken by customers or to communicate to public authorities, upon request, information which would enable the identification of recipients of their services with whom they have a storage agreement. In the new Recital
48 is underlined that the provisions in Article 15 do not concern monitoring obligations in specific cases and, in particular, do not effect orders by national authorities in accordance with national legislation. In another new recital it is stated that the Directive does not affect the possibility for Member States to require service providers who host information provided by recipients to apply duties of care which can reasonably be expected from them and which are specified by national law in order to detect and prevent certain types of illegal activities. These provisions seem to have come into being because of certain Member States concern that the possibilities to take action against for instance pornography on the Internet would otherwise be too restricted.

**Conclusion**

The description given above of the legal situation in the electronic commerce field in Europe concerns of course only the European situation. Other solutions have been found in other countries. The European experience has, however, shown that there are some issues, which are of global importance, such as the liability issue, and thus the discussions on those problems at the European level could perhaps also be of some interest for other countries.