

**GLOBAL BUSINESS DIALOGUE ON ELECTRONIC COMMERCE**



**INTELLECTUAL PROPERTY RIGHTS  
MODEL IPR-SPECIFIC NOTICE AND TAKEDOWN PROCEDURES**

**SEPTEMBER 26, 2000**

Issue Chair: Michael Eisner  
Chairman and CEO  
The Walt Disney Company

Issue Sherpa: Preston Padden  
Executive Vice President  
The Walt Disney Company

Cindy Rose  
Vice President  
The Walt Disney Company  
Tel: + 32 2 412-0838  
Fax: + 32 2 412-0848  
email: [cindy.rose@disney.com](mailto:cindy.rose@disney.com)

Contact Point:  
(Asia/Oceania): Shigehiko Suzuki  
Senior Vice President and Member of the Board  
NTT

Contact Point:  
(Asia/Oceania): Jorma Ollila  
President and CEO  
Nokia Corporation

## **I. IPR WORKPLAN FOR 2000-MODEL IPR-SPECIFIC NOTICE AND TAKEDOWN PROCEDURES**

In 1999, the GBDe Liability Issue Group and the IPR Issue Group considered issues relating to the liability of e-commerce stakeholders for unlawful activities on the Internet and the protection and enforcement of intellectual property rights in the digital environment. The conclusions of the Liability Issue Group and the IPR Issue Group are set forth in Annexes 1 and 2 attached hereto. Notably, the Liability Issue Group concluded that all stakeholders, including content providers, service providers acting as intermediaries and end-users have a common interest in fighting illegal activities in the digital environment and establishing a predictable, efficient legal and business framework to ensure the full development of an electronic marketplace. In addition, it was agreed that any framework should encourage the development of self-regulation and market solutions through widely adopted voluntary codes of conduct to promote responsible online behavior and recognition of the need for shared responsibility among all parties.

In 2000, the members of the GBDe decided to continue their efforts to develop the consensual principles and recommendations of the Liability and IPR Issue Groups. In particular, the GBDe members felt that they could make a significant contribution toward achieving the objective of developing self-regulatory market based solutions in the area of "notice and takedown." Last year, the Liability Issue Group recommended as a general matter that the issue of liability be addressed, where feasible and appropriate, in a horizontal manner. We note, for instance, that the US has not addressed the issue of liability in a horizontal manner, whereas the EU has. The GBDe has decided that it would be feasible and appropriate, in the first instance, for this year's Intellectual Property Rights Working Group to develop and recommend for adoption voluntary self-regulatory model IPR-specific notice and takedown procedures.

The procedures set forth in this document are specifically designed to deal with materials that are alleged to infringe intellectual property rights. However, the GBDe recognizes the importance of developing voluntary self-regulatory notice and takedown procedures for use in situations in which other types of unlawful materials reside on a service provider's system or network. The GBDe intends to form a parallel working group to give preliminary consideration to the development of notice and takedown procedures that would apply to other forms of illegal content.

The DMCA<sup>2</sup> and the E-Commerce Directive<sup>3</sup> are good models to be followed in seeking a balanced approach to the issue of liability. Both the DMCA and the E-Commerce Directive establish a regime in which eligibility for specific limitations on the liability of stakeholders is determined in relation to specific and well-defined intermediary activities and functions. For the purposes of determining eligibility for these liability limitations, these intermediary activities and functions (i.e., storage of material at the direction of a

---

<sup>2</sup> United States Digital Millennium Copyright Act

<sup>3</sup> European Union Directive on Certain Legal Aspects of Electronic Commerce

user, caching and acting as a mere conduit), are defined in terms of compliance with a number of reasonable pre-conditions which are related to each such specific activity or function. If the conditions are not met, then the limitation on liability does not apply (in which case a service provider's potential liability for damages would be assessed under applicable law).

Both the DMCA and the E-Commerce Directive provide that eligibility for the above mentioned limitations on liability is conditional upon a service provider "expeditiously" removing or disabling access to allegedly unlawful material residing on a service provider's system or network either upon obtaining actual knowledge that the material or activity is unlawful (by receipt of an adequate takedown notice or otherwise) or, in the absence of actual knowledge, upon obtaining awareness of facts and circumstances from which unlawful activity is apparent. The notice and takedown procedures proposed below are not intended to prejudice the applicability of these conditions.

Under the DMCA, a service provider need not generally monitor its service or affirmatively seek facts indicating infringing activity in order to claim the limitation on liability. However, if a service provider has actual knowledge of an infringement or becomes aware of a "red flag" from which infringing activity is apparent, then it will lose the limitation on liability if it fails to take expeditious action. This balance is designed, in part, to protect the privacy of Internet users. The notice and takedown procedures proposed below are not intended to prejudice the applicability of those principles.

Notice and takedown procedures can either be legislatively codified or agreed to through industry self-regulation or can combine elements of both. Irrespective of the mechanism by which notice and takedown procedures are implemented, the GBDe believes that some of the unique problems presented by the Internet can best be resolved by the adoption of faster more streamlined voluntary notice and takedown procedures that operate in addition to the traditional court systems.

As noted above, the GBDe believes that the DMCA could serve as a good basis for the development of model IPR-specific notice and takedown procedures. In the European Union, the E-Commerce Directive explicitly contemplates self-regulatory solutions to issues such as notice and takedown. In Asia, Africa and parts of the Americas, many countries are just beginning to consider these issues. In the meantime, however, the Internet and E-Commerce are growing exponentially and in the absence of workable notice and takedown procedures, rightholders who are aggrieved by allegedly infringing online material must either seek legal remedies from the courts or privately negotiate with service providers on an ad hoc basis to take down or block access to such material. In the latter case, both rightholders and service providers generally concur that it is preferable to have an agreed set of IPR-specific N&T procedures which provide for predictability and minimize exposure, than it is to negotiate privately on an ad hoc basis each time there is an alleged infringement.

In the area of intellectual property right infringements on the Internet, exclusive reliance on courts can present a particularly unique challenge for rightholders. The court system may be an appropriate forum in which to seek legal remedies for certain intellectual

property right infringements, however, with the Internet it is likely that before any court could take effective remedial action the allegedly infringing material may be distributed to a worldwide audience at the click of a mouse. At this point the damage is largely done. The GBDe believes that effective notice and takedown procedures are one way in which this problem can be ameliorated.

The GBDe, therefore, recommends the voluntary adoption of the model IPR-specific notice and takedown procedures set forth below by e-commerce stakeholders in countries and regions where such procedures do not currently exist. Furthermore, the GBDe recommends that governments take measures that may be necessary to acknowledge the legitimacy and validity of such voluntary self-regulatory procedures within their national frameworks, as appropriate. The GBDe acknowledges that these procedures may need to be adapted slightly in order to accommodate different national legal systems. However, we would at the same time caution against the proliferation of several different and potentially conflicting sets of procedures, as this will prove unworkable given the global nature of the Internet. The GBDe believes that the adoption of such model IPR-specific N&T procedures will provide a basis for cooperation amongst stakeholders to work together in fighting online piracy and establishing a predictable, efficient legal and business framework to ensure the full development of an electronic marketplace.

Last year, the GBDe Liability Issue Group concluded that, “any legal framework, including notice and takedown procedures, should provide a safe harbor provision exempting service providers from liability and/or damage claims resulting from taking down or blocking access to allegedly unlawful material.”

The GBDe recommends that the operation of the model IPR-specific notice and takedown procedures set forth below be contingent upon the adoption of a safe harbor. The GBDe recommends that governments acknowledge the legitimacy of such a safe harbor within their national legal frameworks.

## **II. TAKEDOWN NOTICE**

Notification of an alleged infringement should be in writing. For this purpose, a “writing” could either be a physical writing or an electronic communication.

(b) Notification of an alleged infringement should be communicated to a lawfully designated agent authorized to communicate the notice to the service provider. The name, address, telephone number, e-mail address and any other appropriate contact information of such agent should be made available in a reasonably accessible location. It would be appropriate for a national or regional authority with competence in this area to assume responsibility for maintaining a current directory of agents available to the public for inspection, including through the Internet. The manner in which an agent may be designated should be determined in accordance with the laws of each relevant jurisdiction.

Adequate takedown notification should substantially include the following:

the signature (physical or electronic) of a person authorized to act on behalf of the owner of an exclusive intellectual property right that is allegedly infringed;

identification of the work allegedly infringed, or if multiple works at a single online site are covered by a single notification, a representative list of such works allegedly infringed at that site;

(iii) identification of allegedly infringing material or material that is to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate such material;

(iv) information reasonably sufficient to permit the service provider to contact the complaining party, (address, telephone number, and if available, email address);

(v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the owner, its agent or the law; and

(vi) a statement that the information in the notification is accurate, and under penalty of perjury or its functional equivalent in the relevant territory, the complaining party is authorized to act on behalf of the owner of the exclusive intellectual property right that is allegedly infringed.

### **III. TAKEDOWN**

The service provider upon receipt of an adequate takedown notice from a lawfully designated agent must respond expeditiously to remove, or disable access to, the allegedly infringing material or the subject of the infringing activity, which resides on the service provider's system or network. The term "expeditious" should not be defined in any law, regulation or code so as to standardise the period of time between receipt of a notice and the response.

The safe harbor referred to above would provide that a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

### **IV. Additional Related General Principles and Recommendations**

Access to Data

The GBDe Liability Issue Group concluded in 1999 that, “The principle of ‘immediate offender pays’ should guide liability in a general context. This means that the person/party who commits the illegal act in the digital environment is the immediate offender and therefore should be primarily held liable for it. In specific cases, however, liability could be shared by more than one offender or even go beyond the immediate offender.”

One of the biggest problems faced by rightholders today is that once infringing material is taken down or access to it is disabled, it often re-appears at another location on the Internet within hours. Ultimately, in order to stop this from recurring at the source, a rightholder must be in a position to pursue the party who is originating the infringing material (i.e., the “immediate offender”). In order to pursue the immediate offender, a complaining party must have access to quality contact data that enables the complaining party to identify and contact the immediate offender.

(i) WHOIS Contact Data: The GBDe recommends that there be global public access to the WHOIS registry and other similar registries containing domain name registrant contact details that are or may be established in the future, to the extent that such access is permitted by applicable law.<sup>4</sup> In addition to enabling the complaining party to identify and contact the immediate offender, such contact data is essential to the proper functioning of a voluntary system of notice and takedown because the WHOIS database also contains contact data on service providers which is necessary for the communication of takedown notices.

Such access is not only vital to online anti-piracy enforcement activities, it is also in the best interests of consumers and citizens. For instance, this contact data can be used by consumers to locate and lodge consumer complaints against child pornographers, hate groups and others, and to identify the source of unsolicited commercial communications.

Although the two policy objectives of providing privacy to data subjects and providing access in order to facilitate legitimate law enforcement and anti-piracy activities are often perceived as being in conflict, the GBDe believes that it is possible to reconcile these two objectives without compromising the interests of either. Data protection rules were not intended, and should not be, used to protect the anonymity of criminals and pirates.<sup>5</sup>

---

<sup>4</sup> The GBDe notes, for instance, that ICANN accreditation agreements already require domain name registrars to make available WHOIS information.

<sup>5</sup> As an example of this, the issue has been raised as to whether such access would be consistent with the principles contained in the EU’s 1995 Data Protection Directive (the “Directive”). Article 7 of the Directive provides for a number of mechanisms upon which a transparent domain name registrant contact data system could properly be based. For instance, Article 7(a) of the Directive allows processing of personal data for which “the data subject has unambiguously given his consent”. Under Article 7(a),

## (ii) Contact Data held by Service Providers

The GBDe recommends that countries develop procedures, such as the subpoena procedures contained in the DMCA, that allow copyright owners to expeditiously obtain a subpoena to gain access to the contact information of alleged infringers from service providers. Such procedures will take into consideration the privacy of data subjects while allowing copyright owners to expeditiously obtain contact information of those allegedly infringing their works.

### Accommodation and Non-Interference with Technological Measures

The GBDe Liability Issue Group concluded in 1999 that, “any framework should refrain from imposing on service providers a general requirement to monitor the information they transmit or store, and should refrain from imposing unreasonable burdens on the various stakeholders.” Both the DMCA and the E-Commerce Directive are broadly consistent with these principles. This relief from a general duty to monitor, however, should not be construed as a limitation on rightholders’ ability to carry out their own monitoring activities through the use of, among other things, technological measures.

The DMCA provides for certain general threshold conditions that must be met by service providers in order to be eligible for limitations on liability. One such additional general threshold condition requires service providers to accommodate and not interfere with widely agreed technological measures used by industry for the protection and identification of transmitted material. This general threshold condition ensures the ability of rightholders to in effect carry out their own monitoring activities.

Such technical measures include those used by rightholders to identify and/or protect their intellectual property rights, which have been developed pursuant to a broad consensus of rightholders and service providers in an open, fair, voluntary, multi-industry standards process, which are available to any person on reasonable and nondiscriminatory terms, and which do not impose substantial costs on service providers or substantial burdens on their systems or networks. Many GBDe members are currently involved in on-going efforts to agree to such measures in various fora throughout the world.

### Repeat Infringer Policy

The DMCA provides for certain general threshold conditions that must be met by service providers in order to be eligible for limitations on liability. One such additional general

---

domain name registrants can be advised, at the time of registration, that their application for a domain name constitutes consent to the making available of specific contact data contained in the application. In addition, however, there are several other grounds upon which a transparent domain name registrant contact data system can also be justified under the Directive, the detailed discussion of which is beyond the scope of this paper.

threshold condition requires service providers to adopt and reasonably implement a policy of terminating in appropriate circumstances subscribers who are repeat infringers. The DMCA also requires service providers to inform their subscribers of the existence of such a policy.

One of the biggest problems faced by rightholders is that once infringing material is taken down or access to it is blocked, it often re-appears at another location on the Internet within hours. To help to ameliorate this problem, service providers should be required to advise their subscribers that repeated unlawful activities will result in the termination of their accounts. This type of policy provides further incentives for cooperation amongst stakeholders to work together in fighting illegal activities in the digital environment.

(a) Liability for Wrongful Notice

The GBDe recommends that the model IPR-specific notice and takedown procedures set forth above be accompanied by a provision addressing liability for wrongful notice. The GBDe intends to continue discussions on this issue during its 2000-2001 work program in an effort to arrive at an agreed upon standard for such a provision.

## ANNEX 1

### 1999 CONCLUSIONS OF THE GBDE LIABILITY WORKING GROUP

The 1999 conclusions of the GBDe Liability Issue Group were as follows:

- (a) All stakeholders, including content providers, service providers acting as intermediaries and end-users have a common interest in fighting illegal activities in the digital environment and establishing a predictable, efficient legal and business framework to ensure the full development of an electronic marketplace.
- (b) Any legislation that deals with the issue of liability should carefully consider the effect such laws have on the interests of all stakeholders in the electronic environment, and needs to strike a careful balance between the legitimate business interests of the different stakeholders involved, including content providers, service providers and end-users.
- (c) Models to be followed in seeking such a balanced approach include the TABD Recommendations of November 1998, the United States Digital Millennium Copyright Act (“DMCA”) and the proposed European Union Directive on Certain Legal Aspects of Electronic Commerce (“E-Commerce Directive”).
- (d) The liability issue should be addressed, where feasible and appropriate, in a horizontal manner.
- (e) In order to promote electronic commerce, governments should eliminate impediments to contract-based arrangements that will reduce the risk of illegal online activities and facilitate their detection and elimination. Since these arrangements cannot be constructed without the maximum degree of contractual freedom for all parties concerned, the Issue Group on Liability believes that freedom of contract should rule the development of electronic commerce.
- (f) Eligibility for any specific limitations on liability of stakeholders should be determined in relation to specific and well-defined activities and functions. Intermediary activities and functions, i.e., storage of material at the direction of a user, system caching and acting as a mere conduit, must be defined in terms of compliance with a number of reasonable pre-conditions which are related to each such specific activity or function. If the conditions are not met, then the limitation on liability should not apply. This approach is consistent with those taken by both the U.S. and the EU in this area.
- (g) The principle of “immediate offender pays” should guide liability in a general context. This means that the person/party who commits the illegal act in the digital environment is the immediate offender and therefore should be primarily held liable

for it. In specific cases, however, liability could be shared by more than one offender or even go beyond the immediate offender.

- (h) When the notice and takedown procedure is used to remove allegedly unlawful material, the DMCA could serve as a good basis for the development of such a procedure. This means that certain formal requirements must be followed. Intermediaries should not be held liable for the removal or disabling of access to allegedly unlawful material done in accordance with this procedure.
- (i) Any legal framework, including a notice and takedown procedure, should provide a safe harbor provision exempting service providers from liability and/or damage claims resulting from taking down or blocking access to allegedly unlawful material.
- (j) Any framework that provides for limitations on liability for service providers should be restricted to damages and other monetary relief. Injunctive relief and other forms of equitable relief should be available subject to applicable laws governing such relief.
- (k) Eligibility for any limitations on liability should be subject to appropriate general threshold conditions. The DMCA could provide a basis for the establishment of such conditions, however, the nature of such conditions elsewhere is still subject to further discussion.
- (l) Any framework should refrain from imposing on service providers a general requirement to monitor the information they transmit or store, and should refrain from imposing unreasonable burdens on the various stakeholders.
- (m) Any framework should encourage the development of self-regulation and market solutions through widely adopted voluntary codes of conduct to promote responsible online behavior and recognition of the need for shared responsibilities among all parties.

## ANNEX 2

### 1999 CONCLUSIONS OF THE GBDE INTELLECTUAL PROPERTY ISSUE GROUP

The 1999 conclusions of the GBDe Intellectual Property Issue Group were as follows:

- (a) Governments should provide rightholders with effective and convenient means of pursuing copyright enforcement actions in each jurisdiction where infringement occurs.
- (b) Governments should encourage the improvement of judicial proceedings, remedies and workable liability rules for copyright infringement in all countries, in order to achieve effective enforcement and deter infringement.
- (c) Governments should promote a copyright awareness program among public, industrial and educational organizations to educate users on the importance of copyright protection and compliance with copyright laws, which together foster creative activities.
- (d) Governments should ratify and implement the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty promptly and faithfully. As part of treaty implementation, appropriate legal frameworks should be enacted for effective technological protection measures. Such legislation should also prohibit harmful circumvention related activities by regulating both conduct and devices, while providing appropriate exceptions, such as those set forth in the legislation recently enacted in the US, that would maintain the overall balance between rightholders and users.
- (e) The GBDe believes that effective technologies are most efficiently developed through private sector initiatives and any standards which are developed should reflect a broad based industry consensus.
- (f) While ensuring full and effective copyright enforcement, governments should avoid taking legislative measures that impede the innovation of technology.
- (g) The GBDe encourages adoption of the principles on service provider liability agreed among rightholders and service providers, such as those reflected in the recently enacted US legislation, in the case of any legislation dealing with the issue of intellectual property liability. These principles recognize the common stake of rightholders and service providers in ridding the electronic marketplace of infringing material.
- (h) The GBDe attaches great importance to the WTO Trade Related Aspects of Intellectual Property Rights Agreement (“TRIPs”). Adequate and effective intellectual property protection and its enforcement are the third pillar of the WTO, along with liberalized trade in goods and services.

- (i) All WTO members countries should implement and enforce TRIPs fully, faithfully and promptly. Countries seeking accession to the WTO should be encouraged to bring their enforcement regimes into compliance with WTO TRIPs standards.
- (j) The GBDe supports the recent WIPO recommendations to ICANN regarding domain names and encourages prompt ICANN implementation of these recommendations.
- (k) The GBDe looks to governments to bring new impetus to harmonizing intellectual property protection worldwide. Harmonization and implementation should be targeted not only on the online electronic environment, but also the illegitimate reproduction, distribution and importation of protected materials. In this regard, governments should ratify and fulfil their international obligations under all major intellectual property and related treaties, including the 1971 Paris text of the Berne Convention for the Protection of Literary and Artistic Works. Much more work on enforcement needs to be done to control the illegitimate production and distribution of such “optical media” as compact discs (CDs), CD-ROMs, video CDs (VCDs) and Digital Versatile Discs (DVDs).
- (l) The GBDe encourages governments to study and, if appropriate, to provide for the optimal level and means of protection for databases worldwide.