

The background features several overlapping, curved, light purple shapes that create a sense of movement and depth. These shapes are primarily located on the left and top-left sides of the slide, framing the central text.

FROM ISP LIABILITY TO ISP COOPERATION

**INTERNATIONAL DEVELOPMENTS FROM
US DMCA TO UK DIGITAL ECONOMY ACT**

Shira Perlmutter

Executive Vice President, Global Legal Policy, IFPI

BACKGROUND

- Challenges of copyright on the internet
- 1 ½ decades of adaptation
 - Successes and failures
 - Lessons learned
- No silver bullet or single answer
 - Winning hearts and minds
 - Reasons to prefer legal
 - Tempting offers
 - Risks/deterrence
- Reality: key role of ISPs
 - Technical control
 - Subscriber relationships

20TH CENTURY: ISP SAFE HARBOURS

- Backdrop of potential liability
 - Direct infringement
 - Secondary liability
- WIPO Treaties 1996 – update copyright for digital age
 - Wake-up call internationally
 - Opportunity
- DMCA negotiated framework (US 1998)
 - 4 major ISP functions
 - “mere conduit”
 - Hosting
 - Caching
 - Information location tools
 - No monetary damages for businesses acting responsibly
 - Conditions:
 - “red flag” knowledge standard
 - Notice and takedown procedure
 - No interference with rightholders’ technologies, usage rules
 - Policy on termination of repeat infringers
 - No monitoring

SAFE HARBOURS – CONT'D

- E-Commerce Directive (EU 2000)
 - 3 major functions – same as DMCA minus information location tools
 - Same concept of monetary damages v. injunctions
 - Conditions:
 - Same “red flag” knowledge standard
 - Notice and takedown without procedural details
 - No monitoring
- Similar approach in most major markets (China, Japan, Australia, NZ)
- Results:
 - Well-functioning notice and takedown systems
 - Some litigation over scope of safe harbours
 - Injunctions issued by courts, especially in EU

TODAY'S CHALLENGE: MORE EFFECTIVE COOPERATION

- New forms of infringement
 - Rise of P2P – now bulk of online infringement
 - Content not hosted by ISP
 - Ever evolving
- Available responses
 - More education (including re: security risks)
 - More appealing legal alternatives
 - Enforcing existing law
 - P2P services
 - P2P users
 - ISPs

TODAY'S CHALLENGE: MORE EFFECTIVE COOPERATION – CONT'D

- Impact
 - Greater legal clarity
 - Greatly increased public awareness
 - Digital percentage of market up – but not enough to compensate
 - Services shut down or licensed
 - Illegal uses continue and evolve
 - Problem: unfair competition from free/perception of low risk
- Solution: help from ISPs
 - Cooperation/partnership, not liability
 - Active role in making internet an environment where legal markets can flourish
 - Steps depending on nature of infringement (P2P v. other)
 - Voluntary where possible
 - Need level playing field – government involvement key

THE GRADUATED RESPONSE APPROACH

- Basic elements:
 - Rightholders participate in P2P networks, identify IP addresses making content available
 - Notify relevant ISP and provide evidence of infringement
 - ISP matches IP address to subscriber
 - ISP sends educational/warning notice to subscriber
 - After multiple notices, if subscriber refuses to stop, deterrent sanction
 - In most versions, possible sanctions include temporary suspension of account
- Developed over past 3 years out of extensive discussions
- Seen as preferable solution to alternatives (lawsuits or network-level technical controls)
- Goals
 - Migrate consumers to lawful services
 - Deterrence key - avoid need to apply sanctions
 - Studies of consumer reactions

GRADUATED RESPONSE – CONT'D

- Benefits
 - Rightholder
 - Effective
 - Efficient
 - Consumer
 - Better than being sued or prosecuted and subject to costs/damages/fines
 - No penalties for past behaviour if stop
 - Identity never disclosed
 - ISP
 - Simple and based on existing infrastructure
 - Have right to take action under existing contractual terms
 - Improves environment for possible music offerings
 - Preserves bandwidth
 - Public interest
 - Educational

GRADUATED RESPONSE – CONT'D

- Addressing concerns
 - Monitoring private communications – no one is doing this
 - Data protection – limited internal use of limited types of data
 - Access to internet – not a ban
 - Due process – important to build in safeguards
- Status
 - New laws incorporating versions of graduated response
 - HADOPI (France)
 - Digital Economy Act (UK)
 - S. Korea
 - Taiwan
 - New Zealand (in consultation process)
 - Chile
 - Litigation
 - Court orders (Belgium et al)
 - Settlements (Ireland)
 - Private agreements (US)
 - Ongoing discussions (EU/some Member States, Japan, Hong Kong)

CONCLUSION

- Finding proportionate and reasonable solutions is in everyone's interest
- Give consumers enough reasons to make the right choice without lawsuits
- Enable a diverse online marketplace to flourish