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## Intermediaries, aggregators, safe harbour and transfer of value

The European Commission's Digital Single Market strategy is an opportunity to address significant failings in the online market which are harming the UK's creative industries. It is essential its proposals to amend the copyright legislation include measures to re-establish rightsholders' ability to consent to the use of their works, and in turn create a level playing field between online content services; all of which derive value from the use of sound recordings and musical works but only some of which fairly remunerate those who created the content.

### Problem 1: Intermediaries

Article 14, "the hosting defence", of the E-Commerce Directive provides "intermediaries" with a limitation of copyright liability on the basis that they had no knowledge of copyright infringement. 15 years ago "the hosting defence" was intended to support investment in infrastructure and services that are essential to the operation of the digital market. Such defences in the E-Commerce Directive have been used as a safe harbour by some content services to avoid paying fair, or in some cases any, royalties for the use of content that drives their businesses.

Some content services provide access to "user generated content" uploaded by users of those services (which content, despite its description as user-generated, frequently includes copyright material – including sound recordings and musical works - that is actually owned or controlled by other rightsholders who have not given consent). Such services often seek to exploit the legal ambiguity regarding the scope of what it means to be a "mere host" as defined in the hosting defence, by claiming they are a mere host and therefore not liable for copyright infringement or obliged to remunerate rightsholders for their use of content. The services may be under-licensed, such as YouTube, in that the provider chooses to monetise for only a small percentage of the total works used, or they are unlicensed, such as SoundCloud, and provide no royalties at all.

This is a fundamental distortion in the online content market. Some online platforms are making copyright content available to the public without a licence from the relevant rightsholders, despite the fact they compete directly with licensed services for similar or equivalent revenues and users. Others use the protection of safe harbours and the inadequacies of the existing notice and takedown system to force rightsholders into

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accepting conditions that are far below the appropriate value of the content. This then distorts competition between digital content services.

Whilst the hosting defence has played an important role in securing the initial development of the online market and there is still a need for such a defence for genuine “passive” intermediaries, there is a need for a clarification to ensure all “active” content providers, irrespective of the source of the content, are competing fairly and remunerating rightsholders.

### The solution

In order to achieve a fair and level playing field for content online, the law must reflect the way in which the online market actually operates, as well as provide certainty to rightsholders and online platforms. This can be achieved by recognising that there are both “active” and “passive” hosts operating in the online market.

A “passive” host will primarily store, or provide the conduit for the exchange of, information, usually in a restricted manner. An “active” host allows users to search, create and promote specific user-uploaded works. It is this functionality which allows “active” hosts to compete directly with licensed service providers, like Apple Music and Spotify. Therefore, in order to secure a well-functioning online market, “active” hosts must be subject to the same legal liability for the copyright of the works they use.

This can be achieved as part of the Digital Single Market strategy by introducing minor amendments into the Information Society (InfoSoc) Directive; it does not require reopening of the E-Commerce Directive.

An “active” host can be defined as those services whose activities include: (1) the presentation of content, (2) suggestion and promotion of content to users, (3) the organisation of works via search, curation and aggregation, (4) economic benefit from access to content.

These “active” hosts must then be made liable in that (1) they cannot benefit from any of the protections in safe harbour, (2) are liable for infringement in relation to the unlicensed copyright content on their service and (3) liable in relation to the users’ of infringements.

### Problem 2: Aggregators

A growing number of websites are being developed based on aggregating multiple services providing access to content, often deriving new revenues from the access they provide. However, rightsholders meet obstacles licensing the use of their works by these services. The licensing difficulties have occurred as a result of the Court of Justice of the European Union (CJEU) developing, through a series of decisions, a requirement to apply a “new public” criterion to the “communication to the public” right. The “new public” criterion could be used to argue that there is only a communication to the public if the service provides access to a completely new audience.

Given rightsholders' reliance on the communication to the public right to receive royalties from the use of their works in the online context, the decisions by the CJEU on this topic have acted as a restriction on licensing and created loopholes.

The "new public" criterion creates ambiguity, and in many cases leads to unfair competition and a transfer of value when services can use music to generate financial return without any responsibility for ensuring rightsholders are financially rewarded for the use of their music.

### The solution

This problem can be addressed via small discreet changes to the InfoSoc Directive to ensure that such online aggregators are liable for the communication to the public of content. The right to license should apply irrespective of whether the same work or subject matter has been, or is being, communicated by (1) the same or different technological means, (2) by another information society service provider (to use the terminology from the InfoSoc Directive), or (3) to the same actual or potential members of the public.

### **Annex**

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the membership association for music writers and exists to support and protect the professional interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition – the voice of the featured artists.
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians

- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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