21st December 2015

European Commission

Public consultation on the regulatory environement for platforms, online internediaries, data and cloud computing and the collaborative economy[1]

About UK Music

UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. The members of UK Music are listed in an annex.

Specific Questions

Online plaforms

1. Social and economic role of online platforms

Do you agree with the definition of "Online platform" as provided below?

"Online platform" refers to an undertaking operating in two (or multi)-sided markets, which uses the Internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups. Certain platforms also qualify as Intermediary service providers.

[1] https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud

UK Music
4TH floor
49 Whitehall
London, SW1A 2BX
T. 020 3713 8454
M: 07720 496 555
E. info@ukmusic.org

www.ukmusic.org

Typical examples include general internet search engines (e.g. Google, Bing), specialised search tools (e.g. Google Shopping, Kelkoo, Twenga, Google Local, TripAdvisor, Yelp,), location-based business directories or some maps (e.g. Google or Bing Maps), news aggregators (e.g. Google News), online market places (e.g. Amazon, eBay, Allegro, Booking.com), audio-visual and music platforms (e.g. Deezer, Spotify, Netflix, Canal play, Apple TV), video sharing platforms (e.g. YouTube, Dailymotion), payment systems (e.g. PayPal, Apple Pay), social networks (e.g. Facebook, Linkedin, Twitter, Tuenti), app stores (e.g. Apple App Store, Google Play) or collaborative economy platforms (e.g. AirBnB, Uber, Taskrabbit, Bla-bla car). Internet access providers fall outside the scope of this definition.

No.

Though the definition may not be 'wrong' per se, it does not reflect the reality of the operation of online platforms and is therefore not a workable definition for regulatory or legislative purposes. It is not possible to categorise online platforms so simply as to say that they engage in a variety of activities. The outright exclusion of Internet access providers from the definition of online platforms does not reflect the fact that such services often offer services which qualify them as online platforms. They offer commercial services as part of a bundle of services. Additionally, the categorisation of YouTube as a mere video sharing network does not do justice to the manifold commercial activities of YouTube (such as AdSense).

We are equally concerned about the different and broad definitions of what constitutes online platforms throughout the European Union. Business requires clear terminology to operate in a digital market.

2. Tackling illegal content online and the liability of online intermediaries

Have you encountered situations suggesting that the liability regime introduced in Section IV of the E-commerce Directive (art. 12-15) has proven not fit for purpose or has negatively affected market level playing field?

YES.

Some online platforms unduly rely on Articles 12 – 15 to avoid negotiating a license.

Article 14, "the hosting defence", of the E-Commerce Directive (ECD) 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.

Defences in the ECD 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 copyright material, including commercially produced sound recordings and musical works, without the consent of the rightsholders. The activities of the user may be limited to merely uploading the copyright material without any creative contribution. Such services often seek to exploit the legal ambiguity regarding the scope of what it means to be a “mere host” as defined in Article 14. Claiming they are a ‘mere host’ allows these services to contest they are not liable for copyright infringement and by association not obliged to seek consent from, or remunerate, rightsholders for the use of their works. The inability of rightsholders to enforce their rights on these services has created a situation where services can simply choose which works to pay royalties against.

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

The hosting defence has played an important role in securing the initial development of the online market and there is still a policy rationale for such a defence for genuine “passive” intermediaries. However, it is essential the definition of ‘passive’ intermediaries is clarified to ensure “active” content providers, irrespective of the source of the content, are competing fairly and remunerating rightsholders.

Furthermore, the liability of information society service providers justifiably benefitting from Article 14 ECD needs to extend to copyright works which have been notified and taken down but subsequently re-uploaded. The likely immediate reupload of a copyright work after a takedown notice, but with a new URL, renders the notice and takedown process unproductive (despite the industrial level of notices sent by rightsholders). We explore this issue in more detail later in our response.

Do you think that the concept of a "mere technical, automatic and passive nature" of information transmission by information society service providers provided under recital 42 of the ECD is sufficiently clear to be interpreted and applied in a homogeneous way, having in mind the growing involvement in content

distribution by some online intermediaries, e.g.: video sharing websites?

No

Recital 42 clarifies that the defences provided for under the ECD only apply to 'information society services' of a mere technical, automatic and passive nature that consist of storage of information. These defences should only protect such services from liability for illegal activity of their users.

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 ECD.

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.

Mere conduit/caching/hosting describe the activities that are undertaken by a service provider. However, new business models and services have appeared since the adopting of the E-commerce Directive. For instance, some cloud service providers might also be covered under hosting services e.g. pure data storage. Other cloud-based services, as processing, might fall under a different category or not fit correctly into any of the existing ones. The same can apply to linking services and search engines, where there has been some diverging case-law at

national level. Do you think that further categories of intermediary services should be established, besides mere conduit/caching/hosting and/or should the existing categories be clarified?

We do not think that further categories should be established or the additional options implemented based on Article 21 of the ECD. However, a clarification of the services benefitting from the existing mere conduit/caching/hosting defences will address some of our concerns mentioned above, i.e. when information society service providers argue that they benefit from the protection of Article 12 – 14 ECD if their activities are clearly outside the parameters of these provisions as specified by Recital 42 ECD**.**

(i) On the "notice"

Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures, and in particular different requirements as regards the content of the notice?

Do you think that any of the following categories of illegal content requires a specific approach?

- **Illegal offer of goods and services (e.g. illegal arms, fake medicines, dangerous products, unauthorised gambling services etc.)**
- **Illegal promotion of goods and services**
- **Content facilitating phishing, pharming or hacking**
- **Infringements of intellectual property rights (e.g. copyright and related rights, trademarks)**
- **Infringement of consumer protection rules, such as fraudulent or misleading offers**
- **Infringement of safety and security requirements**
- **Racist and xenophobic speech**
- **Homophobic and other kinds of hate speech**
- **Child abuse content**
- **Terrorism-related content (e.g. content inciting the commitment of terrorist offences and training**
- **material)**
- **Defamation**
- **Other:**

It is outside our expertise to comment on these additional categories.

(ii) On the "action"

Should the content providers be given the opportunity to give their views to the hosting service provider on the alleged illegality of the content? (1500 characters)

Yes.

In the area of infringement of copyright, music content providers are already able to put forward arguments to the hosting service provider on the alleged illegality with the objective to get the content put back up after a successful notice by rightsholders.

Whatever put back mechanism is chosen by the hosting service provider it should not lead to a delay in the efficient and expeditious operation of the notice and takedown procedure. A delay of the takedown could lead to considerable damages to the right holder. In particular when a song which has been leaked before official release on an online platform and remains widely available for a considerable time despite a detailed notice and takedown request. During this time there is likely to be considerable damage.

If you consider that this should only apply for some kinds of illegal content, please indicate which one(s).

We do not have experience regarding other kinds of illegal content.

Should action taken by hosting service providers remain effective over time ("take down and stay down" principle)?

Yes.

If an internet intermediary duly benefits from the defence under Article 14 ECD it needs to take measures to prevent subsequent re-uploading once a notice and takedown has been initiated. The effectiveness of Notice and Takedown systems is reduced given their alleged limitation to the specific link. It is clear that even when rightholders engage in issuing notice and takedown on an industrial scale, material taken down invariably re-appears. It needs to be clarified that the notification of a work triggers actual knowledge regarding the work itself and not only the specific copy of the work uploaded via a specific URL. This reflects the wording of Article 14.

Equally, internet intermediaries cannot rely on Article 15 because notice and stay down is based on actual knowledge the information society service provider has already obtained. This does not impose a general obligation as per Article 15. They do not need to monitor as they already have the required knowledge. Technology is available to assist the process and is best applied at the level of the Internet Service Providers.

Some Service providers are unwilling to apply such technology arguing that whilst they currently qualify as mere conduit under Article 12 applying such technology they will be subject to the hosing provision in Article 14 and also have actual knowledge given the results of the technology. Hence they are disincentivised to apply such technologies. In our view the categorisation of online platforms as mere conduits/ caching or hosting service is unconnected to the technology they use.

(iii)On duties of care for online intermediaries

Recital 48 of the Ecommerce Directive establishes that "[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, 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". Moreover, Article 16 of the same Directive calls on Member States and the Commission to encourage the "drawing up of codes of conduct at Community level by trade, professional and consumer associations or organisations designed to contribute to the proper implementation of Articles 5 to 15". At the same time, however, Article 15 sets out a prohibition to impose "a general obligation to monitor".

Do you see a need to impose specific duties of care for certain categories of illegal content?

Yes

The duty of care under the system provided in Articles 12 – 15 ECD needs to be clarified so that online platforms have to apply measures to bring to an end (and to prevent) further infringements. Such an obligation does not conflict with Article 15 because it does not impose a general obligation to monitor networks. The online platform already has actual knowledge of the infringing material on their networks.

Please specify for which categories of content you would establish such an obligation.

For the music industry it is important that both copyright categories are covered by such an obligation, sound recordings and musical works.

Please specify for which categories of intermediary you would establish such an obligation

All online platforms listed in the definition above (and with the caveat that all aspects of their activities need to be taken into account).

Please specify what types of actions could be covered by such an obligation

A duty of care should include obligations to employ software to enable identification of copyright content. Solutions can be based on technology which is readily available such as the Content ID software programme.

We also suggest looking at a mechanism which will enable bona fide rightsholders to initiate direct notice and take down measures.

It would also useful if online platforms provide clear guidelines on copyright and more importantly on the policies they operate.

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 professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright 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

For more information please contact Tom Kiehl, Director of Government and Public Affairs, UK Music on tom.kiehl@ukmusic.org or 020 3713 8454.