



September 2020

Digital Services Act Package Consultation

I. Introduction

1. UK Music is the umbrella body representing the interests of the commercial music industry across all the nations of the United Kingdom (see annex for full list of members). We campaign and lobby for the collective interests of the commercial music industry on behalf of artists, musicians, songwriters and composers, record labels, music publishers, studio producers, managers, and music licensing organisations. We strive to promote the extraordinarily successful commercial music sector across Wales, England, Scotland and Northern Ireland and support policies that drive growth and promote music to society.
2. Music created by UK composers and performers is enjoyed globally and in particular within the European Union; two of the five key markets for UK music are members of the European Union (France and Germany). UK record companies and music publishers operate throughout the European Union often with a business establishment within the European Union. Throughout Europe there has always been extensive exchanges of culture and people between her nations; this will continue after the UK leaves the EU as music knows no boundaries; nor do digital services.
3. This review of the responsibilities of digital services (covering a very large category of services, from simple websites to online intermediaries such as online platforms or internet access providers) is welcome. The legal framework which limits the liability of digital services for copyright infringement has had a considerable impact on the music industry. Digital services have been able to limit the value of licenses obtained from rightholders in reference to such limitations, or even avoid obtaining a licence altogether. This has led to a transfer of value from the creative industry to the tech sector which is commonly called “the value gap”.

Additionally, we note that digital services often offer illegitimate products on their market places they host providing a shop window for counterfeit products, therefore financially benefitting from their own lax approach to enforcement. Specifically, they provide online markets for those reselling concert tickets for a considerable premium.

Not only do sales in these market places deprive musicians of income due to them, they also damage consumers who obtain tickets in good faith and are not admitted without further proof of purchase.

4. These liability limitations for digital services were devised in the late 1990s to promote the then nascent digital communications market. In this aim it was very successful; by 2020 digital services are not only dominant, their strength is increasing. This leaves a widening scope for anti-competitive practices. Abuse of this dominant market position has been noted in various decisions by competition authorities, for instance in [France](#) or [Europe](#). We surmise that competition authorities throughout the European Union will have the relevant data on digital services as gatekeepers. Digital services should be required to supervise access to their platforms to ensure a level playing field for trade partners.
5. The challenges have been widely acknowledged. In addition to the European Union establishing a Digital Services Act, the United States Copyright Office has carried out a comprehensive review of their system of limitations of liability for digital services (“safe harbors”), and concluded that the current approach under § 512 US Copyright Act (as interpreted by the Courts) led to an imbalance at the expense of rightholders. Furthermore, their report suggested specific legislative changes to balance the interests of all parts of the value chain. Similar national initiatives are being considered around the world, for instance in India and the United Kingdom. The latter is considering an horizontal instrument, the expected Online Harms legislation (noting that the scope of this legislation is not yet defined, in particular as to whether it will include economic harm resulting from copyright infringement).
6. At European Union level, the Directive on Copyright in the Digital Single Market (EU) 2019/ 790 provides a special rule for ‘online content-sharing service providers’ defined as providers of an information society service of which the main, or one of the main purposes, is to store and give public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes. We are surprised that the relevant parts of the questionnaire are limited to online platforms when it should address the situation of digital services.

Comment on specific questions

1. How to effectively keep users safer online? ...

2. Clarifying responsibilities for online platforms and other digital services

1 What responsibilities should be legally required from online platforms and under what conditions?

Should such measures be taken, in your view, by all online platforms, or only by specific ones (e.g. depending on their size, capability, extent of risks of exposure to illegal activities conducted by their users)? If you consider that some measures should only be taken by large online platforms, please identify which would these measures be.

- *Maintain an effective 'notice and action' system for reporting illegal goods or content.*
- *Maintain a system for assessing the risk of exposure to illegal goods or content.*
- *Have content moderation teams, appropriately trained and resourced.*
- *Systematically respond to requests from law enforcement authorities.*
- *Cooperate with national authorities and law enforcement, in accordance with clear procedures.*
- *Cooperate with trusted organizations with proven expertise who can report illegal activities for fast analysis ('trusted flaggers').*
- *Detect illegal content, goods or services.*
- *In particular where they intermediate sales of goods or services, inform their professional users about their obligations under EU law.*
- *Request professional users to identify themselves clearly ('know your customer' policy).*
- *Provide technical means allowing professional users to comply with their obligations (e.g. enable them to publish on the platform the pre-contractual information consumers need to receive in accordance with applicable consumer law).*
- *Inform consumers when they become aware of product recalls or sales of illegal goods.*
- *Cooperate with other online platforms for exchanging best practices, sharing information or tools to tackle illegal activities.*
- *Be transparent about their content policies, measures and their effects.*
- *Maintain an effective 'counter-notice' system for users whose goods or content is removed due to erroneous decisions,*

2 Please elaborate, if you wish to further explain your choices. 5000 character(s) maximum

- 7. All the measures listed above should be undertaken by all digital services including online platforms, based on the actual activities they undertake (e.g. content hosting, selling goods or services). It should not be limited to larger digital services only because the illegality is not dependent upon the size of the digital service (including online platforms). For the same reason the measures should not be limited to platforms at particular risk of exposure to illegal activities by their users.*

It will be difficult to establish whether a platform is at “particular” risk of exposure to illegal activities, or not.

3 What information would be, in your view, necessary and sufficient for users and third parties to send to an online platform in order to notify an illegal activity (sales of illegal goods, offering of services or sharing illegal content) conducted by a user of the service?

- *Precise location: e.g. URL*
- *Precise reason why the activity is considered illegal*
- *Description of the activity*
- *Identity of the person or organisation sending the notification. Please explain under what conditions such information is necessary:*
- *Other, please specify*

4 Please explain 3000 character(s) maximum

8. The key information with regards to copyright infringement, which is necessary and sufficient for online platforms, is the actual work which has been infringed. The illegal activity is the infringement of the work. The URL only assists the online platform/ digital service to locate the infringed work. The information in the first three bullets listed above seems appropriate in order to notify an illegal activity conducted by use of the service. However, we are concerned regarding the protection of the identity of the person sending the notification; in particular, where that person is doing so as an individual (composer or performer) as opposed to on behalf of a professional organisation (such as a trade association, a record companies or a music publishers). We do not think that such information is necessary to effectively identify and notify illegal activity. Identities in particular of individuals need to be protected from any potential abuse. As far as the evidence for illegal activity is concerned we suggest that, certain trusted parties should benefit from a simple way of providing such information (e.g. collective management organisations established in European Union member states such as GEMA in Germany or antipiracy organisations such as Stichting BREIN in the Netherlands).

5 How should the reappearance of illegal content, goods or services be addressed in your view? What approaches are effective and proportionate? 5000 character(s) maximum

9. Digital services should ensure the unavailability of specific notified works, in accordance with high industry standards of professional diligence; works for which rightholders have provided the relevant and necessary information to identify them. This reflects the current European Union copyright acquis (e.g. Directive Copyright in the Digital Single Market EU 2019/ 790). Once rightholders have identified and provided information about the infringing work, it is the responsibility of the digital service to address the reappearance of illegal content. This reflects the view of national courts. For example, the German Federal Court of Justice – Bundesgerichtshof (BGH) held as early as August 2013 in GEMA v Rapidshare that a file hosting service provider has a duty to scan and monitor the uploads to check whether the uploads contain links to infringing works which they were notified about. They have a “Marktbeobachtungspflicht” i.e. an obligation to monitor the market.

They have to check whether there are links to notified infringing works using web crawlers, as well as search engines.

The decision of the Court of Justice of the European Union in case 682/18 is expected later in 2020. Given that technological measures constantly improve, we recommend reference to a high industry standard of professional diligence and legislation. This will future proof the Digital Services Act and allow digital services to apply effective measures according to the technology available at the time. Content recognition applications are readily available catering for the needs of the various digital services, catering for different sizes and different activities.

6 Where automated tools are used for detection of illegal content, goods or services, what opportunities and risks does their use represent as regards different types of illegal activities and the specificities of the different types of tools? 3000 character(s) maximum

10. Rightholders such as record labels and music publishers use automated tools to detect infringing uses of works owned by composers, performers and rightholders on digital services. Individual performers and creators do not have access to automated tools in the vast majority of cases so any checks must be done manually and are far from efficient. Once notified of an infringement, digital services should apply their own automated tools to avoid the appearance of illegal content. The infringement of copyright in musical works and sound recordings constitutes a specific type of illegal activity, and digital services can avail themselves of readily available automated tools for detecting notified infringing works on their services.

7 How should the spread of illegal goods, services or content across multiple platforms and services be addressed? Are there specific provisions necessary for addressing risks brought by: 3000 character(s) maximum

- a. Digital services established outside of the Union?
- b. Sellers established outside of the Union, who reach EU consumers through online platforms?

11. In the absence of an international agreement on the responsibility of digital services we refer to the opportunities already provided within the European Union legal framework, Art 8 (3) Directive Copyright in the Information Society 2001/29 EC. Website blocking orders have been an invaluable tool for rightholders in the countries where they are available. As a first step we suggest that all European Union member states implement the mandatory Art 8 (3) Directive Copyright in the information Society 2001/29 EC. The next step should be to increase the scope of this Article to enable pan-European website blocking. At the same time we suggest that the European Union includes a provision on website blocking in its bi-or multilateral trade negotiations to ensure the widespread availability of this successful measure.

8 What would be appropriate and proportionate measures that digital services acting as online intermediaries, other than online platforms, should take – e.g. other types of hosting services, such as web hosts, or services deeper in the Internet stack, like cloud infrastructure services, content distribution services, DNS services, etc.? 5k characters max

12. As regards copyright infringement there is no justification to differentiate between digital services in general. However, we note the practical limitations for rightholders to identify digital services for instance operating in the “dark net”.

18 In your view, what information should online platforms make available in relation to their policy and measures taken with regards to content and goods offered by their users? Please elaborate, with regards to the identification of illegal content and goods, removal, blocking or demotion of content or goods offered, complaints mechanisms and reinstatement, the format and frequency of such information, and who can access the information. 5000 character(s) maximum

13. Transparency on the policy measures taken by digital services is paramount for rightholders as well as users affected by this policy. This provides clarity on the application of measures as well as a mechanism to supervise implementation, i.e. whether they are adequate and adhere to the obligations of digital services. We suggest that digital services provide clear information on the process from notification to removal, clearly outlining the specific steps required by rightholders as well as users and the measures by digital services. This information needs to be made available with individual copyright owners in mind as well as companies, i.e. it needs to be user-friendly and simple for an individual to follow.

We appreciate the importance of Article 5 of the E-Commerce Directive 2000/ 31 EC, which obliges service providers to supply the geographic address at which they are established.

20 In your view, what measures are necessary with regard to algorithmic recommender systems used by online platforms? 5000 character(s) maximum

14. Such algorithmic recommender systems should only refer to legal content; this presupposes the application of automated tools which are able to identify illegal works notified by rightholders.

23 What types of sanctions would be effective, dissuasive and proportionate for online platforms which systematically fail to comply with their obligations (See also the last module of the consultation)? 5000 character(s) maximum

15. For sanctions to be effective, dissuasive and proportionate, platforms which repeatedly and systematically fail to comply with the obligations should be generally subject to penalties in addition to civil damages for their illegal activity. For an effective deterrent we suggest copying the system for infringement of the General Data Protection Rules (GDPR). The fines imposed by the competent authorities under Articles 82 and 83 GDPR are flexible and proportionate to the size of the digital service, and they are in addition to the damages for the infringement of copyright. The GDPR further considers proportionality given that less serious failures to comply trigger a fine of up to €10 million, or 2% of the firm’s worldwide annual revenue from the preceding financial year; and more serious infringements a fine of up to €20 million, or 4% of the firm’s worldwide annual revenue from the preceding financial year, whichever amount is higher.

Copyright infringement as pure economic sanction falls in the first category, whilst promotion of terrorism or child pornography in the second. Different fines enable the competent authorities to react proportionately to the severity of the infringement of the obligations by digital services.

Meaningful economic sanctions for such infringements of their obligations are indispensable to convincing digital services to obtain licences corresponding to the value of the music. Otherwise they will take a commercial risk and avoid licenses depriving individual composers and performers as well as rightholders of an income from their talent and investment.

24 Are there other points you would like to raise? 3000 character(s) maximum

In particular larger international digital services also obtain a competitive advantage by being allowed to use tax avoidance schemes. We welcome moves by the European Union to close such schemes.

II. Reviewing the liability regime of digital services acting as intermediaries?

The liability of online intermediaries is a particularly important area of internet law in Europe and worldwide.

1 How important is the harmonised liability exemption for users' illegal activities or information for the development of your company?

2 The liability regime for online intermediaries is primarily established in the Ecommerce Directive, which distinguishes between different types of services: so called 'mere conduits', 'caching services', and 'hosting services'.

In your understanding, are these categories sufficiently clear and complete for characterising and regulating today's digital intermediary services? Please explain.

5000 character(s) maximum

16. No; these categories are based on the technological functions of the services in the late 1990s; they do not reflect the current activities of digital services. Such focus on the nature of the digital service is inappropriate; we suggest considering liability of digital services based on their actual activities, i.e. making music available to the public. This provides more clarity and reflects the reality of the services provided.

Most notably, clarification has been achieved regarding the responsibilities of online content-sharing service providers. The hosting exception should not apply to digital services (including online platforms) making available to the public sound recordings and musical works without permission. These services are not merely hosting infringing material but are actively making content uploaded by their users available to the public. This is the position in various member states and also in the most recent legislation at European Union level, Article 17 Directive Copyright in the Digital Single Market EU 2019/790. Digital services making available to the public music fall under Article 3 Directive Copyright in the Information Society 2001/29 EC (as well as reproducing music at server and user level, Article 2 thereof). Introducing a further different "clarification" would upset the whole value chain.

3. Are there elements that require further legal clarification? 5000 character(s) maximum

17. We welcome the clarification in Article 17 Directive Copyright in the Digital Single Market EU 2019/ 790 that online content-sharing service provider perform an act of communication to the public or an act of making available to the public. In addition to the legal arguments set out in various opinions, we note the perception of the services provided by users. From a user perspective it is the digital service which transmits the music (similar to a radio or TV broadcast); it is not the person uploading the music. Digital platforms offering user uploaded music (and hiding behind limitations of liability to reduce the amount they pay for music licensing or avoid payment altogether directly compete with legitimate music online services. For users they offer the same product (music) but for fully licensed online music services this means they do not compete on a level playing field, ultimately composers and performers receive less money for use of their copyright protected works.

4. Does the current legal framework dis-incentivize service providers to take proactive measures against illegal activities? If yes, please provide your view on how disincentives could be corrected. 5000 character(s) maximum

18. Limitations to liability often dis-incentivises digital services taking pro-active measures against the illegal activities. This is evidenced by ongoing legal cases at European and national level. We note in particular the different interpretation of the legal framework provided in the Directive Copyright in the information Society 2001/29 EC society and the e-Commerce Directive throughout the European Union.

This is not helped by the complicated and sometimes ambiguous European Union case law on communication to the public and limitation of liability. A clarification of the situation for all digital services is needed; directive copyright in the digital single market in recital 64 already provides such clarification for online content sharing service providers.

5 Do you think that the concept characterising intermediary service providers as playing a role of a 'mere technical, automatic and passive nature' in the transmission of information (recital 42 of the E-Commerce Directive) is sufficiently clear and still valid? Please explain.

5000 character(s) maximum

19. In view of the recent opinion by the Advocate General in the case [682/18](#) and the reinterpretation of 15 years of CJEU case law on communication to the public and limitations of liability it is apparent that the active role of intermediary services requires further clarification.

6 The E-commerce Directive also prohibits Member States from imposing on intermediary service providers general monitoring obligations or obligations to seek facts or circumstances of illegal activities conducted on their service by their users. In your view, is this approach, balancing risks to different rights and policy objectives, still appropriate today? Is there further clarity needed as to the parameters for 'general monitoring obligations'? Please explain. 5000 character(s) maximum

20. The main purpose of legislation should be to discourage conduct that facilitates copyright infringements. Article 15 of Directive 2000/31 EC states that digital services are not obliged to monitor in a general and abstract manner the information which they store and to actively seek illegal activity on the services. Once a digital service has been notified about the illegal activity (i.e. the infringement of the specific work) Article 15 becomes irrelevant. The information becomes specific and stops being general and abstract. In some CJEU decisions this was referred to as duty of care but in our view this is only semantics; once notified with specific information, the digital service cannot rely on the absence of a general obligation to monitor. As the Advocate General stated in his opinion in Case C 682/18: *“In short, a service provider is obliged diligently to process facts and circumstances brought to its knowledge, in particular by notifications, concerning specific illegal information. This should not be confused with an obligation actively to seek facts or circumstances in general.”*

7 Do you see any other points where an upgrade may be needed for the liability regime of digital services acting as intermediaries? 5000 character(s) maximum