



SELECT COMMITTEE ON THE EUROPEAN UNION
Internal Market Sub-Committee
CALL FOR EVIDENCE
Online Platforms and the EU Digital Single Market

The House of Lords EU Internal Market Sub-Committee, chaired by Lord Whitty, has launched an inquiry into the regulation of 'online platforms' in the EU. Provisionally defined by the European Commission as "software-based facilities offering two- or even multisided markets where providers and users of content, goods and services can meet", online platforms are ever more central to how businesses and consumers access information and engage in e-commerce.

Types of platform that the Commission identifies include:

- online marketplaces (Amazon, Ebay, Allegro, Booking.com)
- collaborative or 'sharing' economy platforms (Uber, Airbnb, Taskrabbit, Bla-bla car)
- communication platforms (Skype, Whatsapp)
- social networks (Facebook, LinkedIn, Twitter)
- search engines and specialised search tools (Google search, Tripadvisor, Twenga, Yelp)
- maps (Google maps, Bing maps)
- news aggregators (Google news)
- music platforms (Deezer, Spotify, Netflix, Canal Play, Apple TV)
- videosharing platforms (Youtube, Dailymotion)
- payment systems (PayPal, Apple Pay)
- app stores (Google Play, Apple app store).

While acknowledging the benefits that platforms bring, the European Commission's Digital Single Market Strategy expresses concern that "some platforms can control access to online markets and can exercise significant influence over how various players in the market are remunerated", and voices reservations about "the growing market power of some platforms". In response, the Commission is now reviewing whether "existing regulatory tools are sufficient to tackle the problem, or whether new tools need to be developed."

From the range of concerns that the Commission has identified, it has prioritised the following:

- transparency (eg in how search results are ranked, how personal data is used, and what rights consumers may have in the event of non-performance by another party)
- regulation of how platforms use the information/data they acquire
- relations between platforms and suppliers (eg asymmetries in bargaining power and the fairness of terms and conditions)
- constraints on individuals and businesses' ability to switch from one platform to another.

In order to arrive at an informed view on this issue, the House of Lords EU Internal Market

Sub-Committee will collect evidence from a wide range of stakeholders including consumers, businesses that use platforms to sell their goods and services, regulators, online platforms themselves, and non-digital competitors whose businesses may be disrupted by those platforms. The inquiry will ask if any problems associated with platforms can be resolved by regulation.

Written evidence is sought by 16 October 2015. Public hearings will be held from 12 October until 14 December. The Committee aims to publish its report in spring 2016. The report will receive responses from the Government and the European Commission, and will be debated in the House of Lords.

The Committee seeks evidence on the following questions from anyone with an interest in these issues. You need not address all these questions in your response, and respondents from a particular area or sector are invited to focus on the questions most relevant to them. Evidence submitted by consumers and businesses that use platforms can be anonymized upon request, as explained in Annex 1.

For detailed background on the Commission's views on platforms

.....

Introduction & Summary:

BAPLA (the British Association of Picture Libraries and Agencies) is the UK trade association for picture libraries and agencies representing photographers and image-makers. The photo licensing industry is worth several billion dollars globally and in the UK alone several hundred million pounds, with BAPLA members contributing a sizeable amount towards this.

Our members employ in the region of 2,500 people in the UK and generate revenue for, and manage the interests of over 120,000 creators and rights holders. The photographic sector is unique within the framework of the UK creative industry. Our members have adapted the needs of our B2B clients as well as to market changes as rapidly as they appear, continuously striving to work towards solutions for the growth in digital enterprises.

Call For Evidence – Online Platforms and the EU Digital Single Market

BAPLA is pleased to see the House of Lords EU Internal Market Sub-Committee, chaired by Lord Whitty, launch this enquiry. For the photography industry, the use of image-led content on search engines, social media and commercial websites is prolific and in most cases hard to track the full extent of unauthorised exploitation simply because rights holders and their representatives are unable to adequately address the issues directly.

This enquiry has the potential to be vital in gauging the level of impact on the creative sector as a whole, and in particular for photography. The review could also provide an invaluable opportunity to help foster much needed dialogue between the types of platforms, which in recent years have gained unprecedented advantages in developing dominant services, with content creators needing to reclaim control of their valuable IP and, in many cases, generate an income.

Internet Intermediaries

Key Points

- There are two main types of platforms that have the most impact on distorting competition for the professional photography industry, leading to smaller commercial websites infringing photographs - search engines and social media;
- Double edge sword for professional photographers & their representatives who have no choice but to market using leviathan platforms with hosting privileges;
- Imbalance of position for creator and representative between the need to be found (to make a living) and the encouragement to upload and share creative content;
- Transfer value - from rights holder to platform to publisher without any reciprocity for the creator;
- Billions of £ pounds made by platforms with no obligation to remunerate creators whether professional or non-professional;
- In terms of copyright infringement both search engines and social media sites preside over at arms length, so they barely take on any liability for the scale of infringement that occurs;
- Duped into "sub-license" agreements, which do not have a reciprocal financial benefit, only a perception of providing exposure and personal fulfilment;
- Photo libraries have a business model that provides a reciprocal remuneration structure, and is a good example of what Internet platforms should engage with;
- Platforms engaging in exploitative business models, and with their permission, third party tech platforms repurposing content, are able to offer online companies services to publish what's commonly known as user-generated content UGC (without knowing whether content is infringed);
- Two known large-scale models in operation, which do allow for remuneration, and of those, one polices infringements - You Tube for moving images, and Apple for music;
- Great fortunes are being made by these leviathan platforms on a shrinking economy instead of growing it by fair reciprocity and duty of care to creators.

In relation to photography, everyone is a creator from which two groups emerge - the professional (and their representative) who invest considerable time & money into producing high quality content, and the non-

professional (or general public), who have experienced a renaissance in the pleasure of taking photographs. Both groups use social media companies and search engines for very distinctive reasons:

<u>Professional</u>	<u>Non-Professional</u>
Business	Enjoyment
Marketing	Sharing moments
Selling/Licensing	Messaging
Discoverability	Trend

One of the most significant issues for both professional and non-professionals in relation to photography are the terms & conditions both parties unwittingly consent to without realising the extent of the implied license imposed when engaging with such platforms and as a subsequence the inherent value is transferred. We have reached a tipping point for the professional visual creator and their representative, where their energy is spent on protecting content rather than creating content.

The rise of platforms such as Pinterest, Tumblr, Snapchat, Instagram, and Facebook's acquisition of the latter shows how visual content is becoming increasingly dominant in all communication and advertising online. Images are the best way to optimise a text-based medium of social media communication¹.

With images being so important to attracting viewers, as evidenced by home pages of most websites and the importance of images to search engines, it seems perverse that those online publishers which do generally license images (e.g. websites of traditional media companies) are receiving a much lower share of total ad spend compared to popular social media platforms that don't license images.

Sharing and widespread use of images is good for society, it makes the world a more enjoyable place, but if the owners of images are to share in any of the value that their images contribute, then regulation is needed to address the following issues:

- hosting defence (aka copyright safe harbour) should be updated so that its only available to hosts acting in a purely passive manner, as originally intended;
- the right of "communication to the public" should be adjusted to reflect reality, so as to include the displaying of a copyright work by framing in a manner that is substitutive to the published work it is framing (distinct from other types of hyper-linking which are fine and to be encouraged); and
- competition law should be applied in a way that prevents monopolistic search engines from using third party content to compete against the owners of that third party content.

Questions

Section 1: Online platforms, consumers, suppliers

Defining online platforms

1. Do you agree with the Commission's definition of online platforms? What are the key common features of online platforms and how they operate? What are the main types of online platform are there significant differences between them?

We don't disagree but note that it is an extremely wide definition spanning many different sectors and that not all types of online platforms are harmful to the visual content licensing industry. Of the 11 types of online platforms listed, probably two are the most harmful to us: social networks and search engines.

Whilst the definition of platforms are broadly correct, they do not present the interplay or value gap that presides with these more dominant platforms. If we look at the economy of scale within the creative industry, and in particular the business of photography, all of it occurs online via the Internet, whether transferring or marketing photos as a digital product. What cannot be underestimated is the power of two specific types of platforms -

¹ <http://www.springleap.com/blog/social-media-trends-rise-content-creation/>

search engines and social media, both of which have seen exponential growth over the last 5-10 years and are now having a dramatic impact on the professional market. BAPLA has conducted research over the last year that supports this (see below). There is a significant tipping point in which the control and consent of the creator is irrelevant in the face of these enormous powerhouses.

2. How and to what extent do online platforms shape and control the online environment and the experience of those using them?

The graph below shows the comparative growth for social networking sites in the last three years generated from ad revenues.

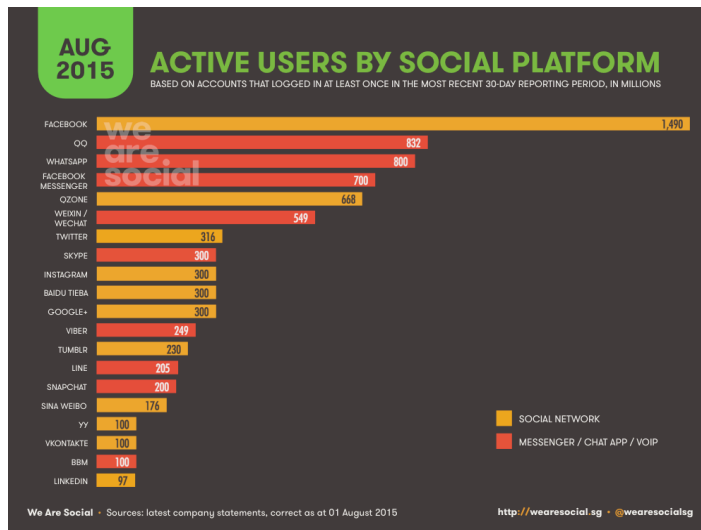
US Social Network Ad Revenues, by Venue, 2012-2015
millions and % change

	2012	2013	2014	2015
Facebook	\$2,182.3	\$3,168.7	\$3,947.0	\$4,778.4
—% change	25.8%	45.2%	24.6%	21.1%
Twitter	\$219.0	\$421.3	\$790.5	\$1,178.8
—% change	199.3%	92.4%	87.6%	49.1%
LinkedIn	\$164.0	\$233.0	\$327.0	\$450.2
—% change	54.7%	42.1%	40.3%	37.7%
Social games	\$189.2	\$222.9	\$273.9	\$311.2
—% change	39.7%	17.8%	22.9%	13.6%
Other	\$349.5	\$390.4	\$479.3	\$584.0
—% change	4.1%	11.7%	22.8%	21.9%
Total	\$3,103.9	\$4,436.3	\$5,817.6	\$7,302.5
—% change	30.1%	42.9%	31.1%	25.5%

Note: includes paid advertising appearing within social network sites, social network games and social network applications; excludes spending by marketers that goes toward developing or maintaining a social network presence; numbers may not add up to total due to rounding
Source: eMarketer, Dec 2013

166356 www.eMarketer.com

Successful online platforms are quickly able to dominate respective markets



The ownership of data regarding the use of online platforms has a self-reinforcing effect. When copying is effortless, there is almost no intrinsic scarcity and therefore the market value collapses. This is being evidenced by our members in the photographic industry².

Effects on consumers, suppliers (including SMEs), competitors and society

3. What benefits have online platforms brought consumers and businesses that rely on platforms to sell their goods and services, as well as the wider economy?

BAPLA members have always strived to be innovative, adopting digital content delivery and fashioning business models to suit the needs of a diverse range of clients. We regularly maintain good communications with clients,

²http://bapla.captureweb.co.uk/coo/user/gpimages/Web%20social%20media%20and%20app%20survey%20result%20s.pdf?dm_i=5VL,3J112,QW899,CNEIS,1

adapting services, delivery and pricing for both traditional and new forms of communication. Online platforms have generally made it easier for businesses and consumers to share and view images³. This brings short term benefits to such users but with the long term disadvantages of reducing the incentive for professional photographers and their representatives to invest in future creation/distribution (if they are not receiving a share of this benefit) and by encouraging downstream infringements (which can be an unexpected cost for those businesses).

From responses to the BAPLA survey conducted in July 2015, there was a lack of standards in supply for web use, that copyright infringement conducted online via websites and social media is common and that there was a need for more copyright protection. When members were asked whether their copyright has ever been infringed online, 94.4% answered yes and 5.6% answered no. Responses from members also highlighted the difficulty in pursuing private individuals who may infringe copyright by placing images on their private Social Media channels. As one picture library owner put it: "For specialist libraries the issue is about price and control of works, but also about monetizing the sharing of our images via social media."⁴

PicScout's, General Manager, Uri Lavi states, "While pictures remain the most powerful human language present in our lives, they also continue to be extremely overlooked, unaccredited and unappreciated in terms of honoring or remunerating their creators' efforts and creativity." In their analysis of the current status for commercial websites: An average of 78% of commercial sites that are found by PicScout and reported back to our customers, are identified as unauthorized uses (or unlawful use).⁵

4. What problems, if any, do online platforms cause for you or others, and how can these be addressed? If you wish to describe a particular experience, please do so here.

As mentioned above BAPLA members have been greatly affected by the two types of platforms, which use the hosting defence. Our fellow European trade body CEPIC have made numerous submissions about the growing dominance of such platforms

"...Over the last 10-15 years, inadequate protection of images in the digital space has shifted the value from those that create images to those that provide the platforms for viewing and sharing images. Whilst all of the costs of production and distribution remain with the creators, the benefits are increasingly realised by aggregators that merely copy or display third party images at no cost. If this imbalance in the value chain persists, there will be less investment into creating tomorrow's iconic images, as well as less innovation in bringing new images to market. There will ultimately be a less diverse and shallower pool of new images being made freely accessible for the enjoyment of all Internet users. Imagine a world where selfies and holiday snaps are the dominant content or where all professionally produced photography resides online only behind locked doors."⁶

Search engines are acting as a competing force to image suppliers – as that's where most people source their images from these days (even if largely through ignorance of the law). The search engine [Google] has turned itself into a provider of "free" content and fuels online piracy at its sole profit. Since Google denies sophisticated rights expression technologies, photographers and picture agencies cannot protect themselves against this increasing exploitation. Photographers and picture agencies are creators, owners and providers of visual content. Due to Google's market share of up to 95% in Internet searches in Europe, image providers depend on being found in Google's web search, so that their investment in time, technology and creativity may be rewarded.⁷

5. In addition to concerns for consumers and businesses, do online platforms raise wider social and political concerns?

³ http://ceplic.org/app/uploads/2014/11/CEPIC-White-Paper_Executive_Summary.pdf

⁴ http://bapla.captureweb.co.uk/coo/user/gpimages/Web%20social%20media%20and%20app%20survey%20results.pdf?dm_i=5VL,3J1I2,QW899,CNEIS,1

⁵ <http://bapla.captureweb.co.uk/coo/user/gpimages/Copyright%20infringement%20PicScout.pdf>

⁶ <http://ceplic.org/issues/ceplic-submits-eu-antitrust-complaint-against-google-images>

⁷ <http://ceplic.org/issues/ceplic-submits-eu-antitrust-complaint-against-google-images>

There is an inefficient allocation of resources due to absence of consent to use images by online platforms. The Pareto Principle, which refers to the unequal relationship between what is input (content we upload) and what is output (the platforms gain) is having a dramatic impact on the value chain, creating an unprecedented transfer value (see ads revenue graph above). The long-term effect of a less culturally diverse Internet is almost inevitable if online platforms are able to continue prospering without channelling some of wealth creation back to image owners. The reality of a creator or rights holder having to “sing for their supper” everyday, in other words living a ‘real-time’ economic life, isn’t sustainable for a successful UK creative industry. The Internet traffic captive within large online platforms, that frame images, also removes the need or incentive for users to original or paid-for sources of images. Hence the Google Anti-Trust case our European trade organisation CEPIC has submitted⁸.

Platforms as part of the Digital Single Market Strategy

6. Is the European Commission right to be concerned about online platforms? Will other initiatives in the Digital Single Market Strategy have a positive or negative impact on online platforms?

Yes, there is a right to be concerned. Portability is a non-issue for photography as photographs are easily distributable. However, one aspect in particular could have a negative impact on the photography industry. The widening of the copyright exceptions and the commercialisation of data mining could set off unintended consequences - with the increase in technology and the demand for images to illuminate publications image scrapping could be included in data mining; expanding exceptions for education or public remit purposes would most likely remove the valuable secondary income generated for rights holders.

Section 2: Competition, data, collaborative economy

Competition and dominance

7. Is there evidence that some online platforms have excessive market power? Do they abuse this power? If so, how does this happen and how does it affect you or others?

Yes, one of our members Getty Images has previously submitted evidence to its effect⁹, and as mentioned about our European trade organisation CEPIC has also submitted evidence.

8. Online platforms often provide free services to consumers, operate in two-or multisided markets, and can operate in many different markets and across geographic borders. Is European competition law able adequately to address abuse by online platforms? What changes, if any, are required?

In view of the ability of dominant search engines and, potentially other dominant online platforms, to influence not only their direct rivals but also all other markets, online and offline, the Commission needs to be adequately staffed to address complaints on a sustainable basis. Competition is in favour of the leviathan platforms and not to the individual photographer. Fines need to be sufficient in order to act as a deterrent.

Collection and use of data

9. What role do data play in the business model of online platforms? How are data gathered, stored and used by online platforms and what control and access do consumers have to data concerning them?

Data is key. It allows online platforms to profile their users and maximise advertising opportunities. Knowing who is looking at what type of pictures can be very valuable information. Simply by looking at the growth of users and accounts in the graph below is an indicator of how much user (both professional and non-professional) content is uploaded:

⁸ http://ceplic.org/issues/an-overview-of-the-commissions-case-against-google?dm_i=5VL,3HX7U,QW899,CJ2RK,1

⁹ http://press.gettyimages.com/getty-images-granted-interested-party-status-in-eus-investigation-into-anticompetitive-behavior-by-google/?dm_i=5VL,3HX7U,QW899,CJ2RL,1



10. Is consumer and government understanding and oversight of the collection and use of data by online platforms sufficient? If not, why not? Will the proposed General Data Protection Regulation adequately address these concerns? Are further changes required and what should they be?

BAPLA has yet to fully review the General Data Protection Regulation. However it is important to point out that personal and household activities, which involve social media networks, are inclusive in this transfer value and the prodigious income growth for both types of platforms.

11. Should online platforms have to explain the inferences of their data-driven algorithms, and should they be made accountable for them? If so, how?

Yes. It needs to be recognised that markets can be controlled by the ownership of data; transparency is also key. A social network or search engine will invariably create persistent wealth from content given freely and the use of software integrations, such as application programme interfaces (APIs), which provide alternative revenues for such platforms. API software technology has become more powerful, intelligent and discerning over the past few years, and with that images have become more searchable too. API's are progressively getting better at scanning photos and working out what's in them. Advanced algorithms capable of extracting images for analysis, gathering terabytes of data, are fuelling new business models, which are getting faster & smarter at image recognition and dissemination. Consent to use content and the level of exploitation gained from third party use with content, such as photographs, must be made abundantly clear.

The collaborative economy

12. Can you describe the challenges that the collaborative economy brings? What possible solutions, regulatory or otherwise, do you propose?

See answers to Question 15 on our proposals.

The current regulatory environment and possible interventions

13. How are online platforms regulated at present? What are the main barriers to their growth in the UK and EU, compared to other countries?

There are currently no apparent barriers on copyright for such platforms. The implied consent enables media companies to exploit content and work with third parties (either through advertising revenues or through software API's) without full disclosure to the user, for example Instagram has 29 different APIs, of which 8 use photographs¹⁰. If there are barriers they are likely to be availability of investment capital, cultural/language differences, competing/uncertain tax regimes, etc.

¹⁰ <https://instagram.com/developer/business/>

14. Should online platforms be more transparent about how they work? If so, how?

Unreservedly yes, the particular platforms we have highlighted should be required to highlight, and allow opt-outs from any set of terms and conditions provided by online platforms that grant themselves the right to use images uploaded to their platforms, under the sub-license agreements. See below for suggested solutions.

15. What regulatory changes, if any, do you suggest in relation to online platforms? Why are they required and how would they work in practice? What would be the risks and benefits of these changes? Would the changes apply equally to all online platforms, regardless of type or size?

We would like to see the following solutions:

- Duty of care and transparency for users, as with Ello¹¹
- Work with professional photography organisations, such as BAPLA and others, as with Microsoft and Pinterest¹²;
- Either revise "sublicense" terms issued when using platforms, or;
- Clearly stipulate the financial exploitation that "sublicensing" can generate from content;
- Clearly define where the law stands in relation to the "new public" (Svensson Case C-466/12);
- A review of legal policy in relation to the InfoSoc Directive and E-Commerce Directive;
- Ensure expertise in dealing with copyright infringement & protection in small claims court proceedings.

Any regulation would need to apply indiscriminately but it should only affect some sectors and only those players that currently take advantage of current loopholes.

16. Are these issues best dealt with at EU or member state level?

We would argue that it requires both levels, both as the Internet itself permeates across borders and the European Court of Justice has made significant rulings in relation to copyright over the last few years, it would be most valuable at EU level.

"We realised some time ago that we could not pursue the tsunami of global misuse." Arcaid Images

On behalf of BAPLA

Isabelle Doran
BAPLA Chairman
<http://www.bapla.org.uk>

¹¹ <https://ello.co/beta-public-profiles>

¹² <http://press.gettyimages.com/getty-images-and-microsoft-launch-partnership-to-develop-next-generation-image-rich-experiences/> ; <http://press.gettyimages.com/getty-images-partners-with-pinterest/>