

Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

Fields marked with * are mandatory.

Objectives and General Information

The views expressed in this public consultation document may not be interpreted as stating an official position of the European Commission. All definitions provided in this document are strictly for the purposes of this public consultation and are without prejudice to differing definitions the Commission may use under current or future EU law, including any revision of the definitions by the Commission concerning the same subject matters.

You are invited to read the privacy statement attached to this consultation for information on how your personal data and contribution will be dealt with.

This public consultation will close on 6 January 2016 (13 weeks from the day when all language versions have been made available).

The Commission invites all interested parties to express their views on the questions targeting relations between platform providers and holders of rights in digital content (Question starting with "[A1]"), taking account of the Commission Communication "Towards a modern, more European copyright framework" of 9 December 2015. Technical features of the questionnaire have been adapted accordingly.

Please complete this section of the public consultation before moving to other sections.

- Respondents living with disabilities can request the questionnaire in .docx format and send their replies in email to the following address:
CNECT-PLATFORMS-CONSULTATION@ec.europa.eu.
- If you are an association representing several other organisations and intend to gather the views of your members by circulating the questionnaire to them, please send us a request in email and we will send you the questionnaire in .docx format. However, we ask you to introduce the aggregated answers into EU Survey. In such cases we will not consider answers submitted in other channels than EU Survey.
- If you want to submit position papers or other information in addition to the information you share with the Commission in EU Survey, please send them to
CNECT-PLATFORMS-CONSULTATION@ec.europa.eu and make reference to the "Case Id" displayed after you have concluded the online questionnaire. This helps the Commission to properly identify your contribution.
- Given the volume of this consultation, you may wish to download a PDF version before responding to the survey online. The PDF version includes all possible questions. When you fill the survey in online, you will not see all of the questions; only those applicable to your chosen respondent category and to other choices made when you answer previous questions.

* Please indicate your role for the purpose of this consultation

- ☐ An individual citizen
- ☐ An association or trade organization representing consumers
- ☒ An association or trade organization representing businesses
- ☐ An association or trade organization representing civil society
- ☐ An online platform
- ☐ A business, including suppliers using an online platform to provide services
- ☐ A public authority
- ☐ A research institution or Think tank
- ☐ Other

* Please indicate your country of residence

United Kingdom

* Please provide your contact information (name, address and e-mail address)

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- * Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

Note: If you are not answering this questionnaire as an individual, please register in the Transparency Register. If your organisation/institution responds without being registered, the Commission will consider its input as that of an individual and will publish it as such.

- ☒ Yes
☐ No
☐ Non-applicable

- * Please indicate your organisation's registration number in the Transparency Register

If you are an economic operator, please enter the NACE code, which best describes the economic activity you conduct. [You can find here the NACE classification.](#)

Text of 3 to 5 characters will be accepted

The Statistical classification of economic activities in the European Community, abbreviated as NACE, is the classification of economic activities in the European Union (EU).

- * I object the publication of my personal data

- ☐ Yes
☒ No

Online platforms

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.

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.

 

*Please explain how you would change the definition

1000 character(s) maximum

The definitions provided are broad, however they do not cover the types of activities which would otherwise accurately and fairly describe the performance undertaken by platforms, including whether they are commercially active or merely neutral conduits or carriers, Defining a platforms activities seems a logical first step in reviewing and clarifying regulations in relation to modernisation and following the ethos of the Digital Single Market Strategy.

What do you consider to be the key advantages of using online platforms?

Online platforms...

- ☐ make information more accessible
- ☒ make communication and interaction easier
- ☐ increase choice of products and services
- ☐ create more transparent prices and the possibility to compare offers
- ☐ increase trust between peers by providing trust mechanisms (i.e. ratings, reviews, etc.)
- ☐ lower prices for products and services
- ☐ lower the cost of reaching customers for suppliers
- ☐ help with matching supply and demand
- ☒ create new markets or business opportunities
- ☐ help in complying with obligations in cross-border sales
- ☐ help to share resources and improve resource-allocation
- ☒ others:

*Please specify:

100 character(s) maximum

Ability for rightsholders to fairly develop economic markets, reinvest & communicate their services

Have you encountered, or are you aware of problems faced by **consumers** or **suppliers** when dealing with online platforms?

"Consumer" is any natural person using an online platform for purposes outside the person's trade, business, craft or profession.

"Supplier" is any trader or non-professional individual that uses online platforms to provide services to third parties both under their own brand (name) and under the platform's brand.

- ☒ Yes
- ☐ No
- ☐ I don't know

Please list the problems you encountered, or you are aware of, in the order of importance and provide additional explanation where possible.

3000 character(s) maximum

The types of platforms that have the most impact on distorting competition for the professional photography industry, leading to a commonplace dispensation for infringing photographs, are search engines & social media. Whilst many of our members utilise these platforms to market copyright content, it is a double edge sword for visual creators & their representatives who have little choice but to market using leviathan platforms with hosting privileges. There are several key factors:

Copyright Infringement - Our members have for a considerable time reported that they have experienced copyright infringement activities. In a BAPLA members study conducted in July 2015, 94.4% stated infringement cases, of which 57% stated they had attempted to pursue online infringements. The process for claiming copyright infringement is largely clunky & ineffective, with very few infringers fearing any repercussions. Whilst the principle is important, the practicalities are unsustainable with many users encouraged to share and upload third party copyright content. Some members now utilise image recognition services to chase online infringements, as the growth of infringements has become pandemic in our industry, the scale of which even these services only scratch the surface. Many visual platform users are actively encouraged to share or use visual content they like, rather than visual content they own the rights to, with platforms & users alike oblivious to the actual harm being caused to rights holders in the creative industry, whether it is sourcing images via the likes of Google or using visual social media platforms, e.g: <http://on.ft.com/1EXqsC8>

Sub-licensing - Most, if not all platforms, & in particular Social Media platforms, have opaque Terms & Conditions, which issue in perpetuity sub-licenses, and are actively “leveraging” content to provide paid-for third party services without any remuneration to content suppliers (such as professionals or general public).

Value contribution shift/transfer - This “leveraging” is having a specific impact on the creative industry. Our sector in particular is experiencing the rapidly increasing value gap hindering commercial growth & reinvestment.

In relation to photography, everyone is a creator from which two groups emerge - the professional & their representatives who invest considerable time & money into producing premium content, and the non-professional (general public), who have experienced a renaissance in the pleasure of taking photographs.

It must be stressed that there is an imbalance of position for the photo industry using platforms, between the need to be found (to generate income) & the encouragement to upload & share creative content. Photo libraries & agencies have local & international businesses models that provide reciprocal remuneration structures, but have also reached a tipping point in applying measures to aid enforcement which should go towards creating & reinvesting in new premium content.

How could these problems be best addressed?

- ☐ market dynamics
- ☒ regulatory measures
- ☐ self-regulatory measures
- ☐ a combination of the above

TRANSPARENCY OF ONLINE PLATFORMS

Do you think that online platforms should ensure, as regards their own activities and those of the **traders** that use them, more transparency in relation to:

a) information required by consumer law (e.g. the contact details of the supplier, the main characteristics of products, the total price including delivery charges, and consumers' rights, such as the right of withdrawal)?

"Trader" is any natural or legal person using an online platform for business or professional purposes. Traders are in particular subject to EU consumer law in their relations with consumers.

- ☒ Yes
- ☐ No
- ☐ I don't know

b) information in response to a search query by the user, in particular if the displayed results are sponsored or not?

- ☒ Yes
- ☐ No
- ☐ I don't know

c) information on who the actual supplier is, offering products or services on the platform

- ☒ Yes
- ☐ No
- ☐ I don't know

d) information to discourage misleading marketing by professional suppliers (traders), including fake reviews?

- ☐ Yes
- ☐ No
- ☒ I don't know

e) is there any additional information that, in your opinion, online platforms should be obliged to display?

500 character(s) maximum

For online platforms that display images, which can be copied, shared & reposted. These types of platforms should provide:

- Clear, simple and transparent license terms & conditions for content-providers
- Clear, simple and transparent uses of the works to third party users & permissions granted
- A warning or notification of the re-use of the works, in particular commercial use
- Unequivocally not remove embedded metadata & identify the source for users attempting to find rights holders

Have you experienced that information displayed by the platform (e.g. advertising) has been adapted to the interest or recognisable characteristics of the user?

- ☒ Yes
- ☐ No
- ☐ I don't know

Do you find the information provided by online platforms on their terms of use sufficient and easy-to-understand?

- ☐ Yes
- ☒ No

- * What type of additional information and in what format would you find useful? Please briefly explain your response and share any best practice you are aware of.

1500 character(s) maximum

As stated above, there needs to be greater responsibility for platforms to provide clear, open and transparent notifications for those signing up for services whether as content-providers, users or third parties, such as notification at registration, uploading content, and offering new services, especially in the case where the platform is expecting to derive some value, including economic, from uploaded content. Providing automated opt-out options for rights holders and incentives to remain would be of consideration.

Social media platforms use the acronym ARPU (average revenue per user) to gauge the value each user or content provider contributes, so the more attractive the platform the more people contribute to the overall wealth of the platform, with little economic return in exchange for the entertaining or communication experience.

There are very few best practice examples performed by platforms which offer a transparent setting for visual rights holders to display their works, without exploitation via third party services offered by platforms. One positive example is ello.co, who market their communication/network platform as a benefit corporation with a mandate never to sell advertising or personal data to third parties - <https://ello.co/wtf/about/what-is-ello/>. We would in addition however support regulatory remedies relating to data protection, consumer protection and competition law.

Do you find reputation systems (e.g. ratings, reviews, certifications, trustmarks) and other trust mechanisms operated by online platforms are generally reliable?

- ☐ Yes
- ☐ No
- ☒ I don't know

What are the main benefits and drawbacks of reputation systems and other trust mechanisms operated by online platforms? Please describe their main benefits and drawbacks.

1500 character(s) maximum

N/A

USE OF INFORMATION BY ONLINE PLATFORMS

In your view, do online platforms provide sufficient and accessible information with regard to:

a) the personal and non-personal data they collect?

- ☐ Yes
- ☐ No
- ☒ I don't know

b) what use is made of the personal and non-personal data collected, including trading of the data to other platforms and actors in the Internet economy?

- ☐ Yes
- ☐ No
- ☒ I don't know

c) adapting prices, for instance dynamic pricing and conditions in function of data gathered on the buyer (both consumer and trader)?

- ☐ Yes
- ☐ No
- ☒ I don't know

Please share your general comments or ideas regarding the use of information by online platforms

3000 character(s) maximum

Whilst our responses to the questions above are all "don't know", we are aware of the exploitative nature of collecting data, which lacks openness and transparency, leaving rights holders with a lack of trust for platforms in general. One member in particular, Getty Images illustrates strong concerns over Google's use of their dominance within the online ecosystem. Data is key online; it allows online platforms to profile their users and maximise advertising opportunities. Knowing who is looking at what type of pictures can be extremely valuable information in today's data-driven economy. With information such as this controlled by a few monopolistic heavyweight platforms leaves an unbalanced, and in the long term, culturally poorer economy. As highlighted by the micro platform ello.co, they emphasise the concerns felt by visual rights holders about the exploitation of uploaded content and the captive valuable data - "Ello is an alternative to mainstream networks that manipulate what we see and try to control what we think. Networks that sell our data to the highest bidder violate our trust, and we feel unsafe to share the things we love."

Referring to our comment above in relation to metadata stripping, it is clear that online platforms are highly selective in the use of the data - scraping and analysing data where it suits them, and on the other hand, stripping ownership and credit data where it does not.

RELATIONS BETWEEN PLATFORMS AND SUPPLIERS/TRADERS/APPLICATION DEVELOPERS OR HOLDERS OF RIGHTS IN DIGITAL CONTENT

How often do you experience the following business practices in your business relations with platforms?

The online platform ...

* A parity clause is a provision in the terms of use of an online platform or in an individual contract between the online platform and a supplier under which the price, availability and other conditions of a product or service offered by the supplier on the online platform have to maintain parity with the best offer of the supplier on other sales channels.

	Never	Sometimes	Often	Always
requests me to use exclusively its services	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
applies "parity clauses" *	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
applies non-transparent fees	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
applies fees without corresponding counter-performance	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
applies terms and conditions, which I find unbalanced and do not have the possibility to negotiate	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
unilaterally modifies the contractual terms without giving you proper notification or allowing you to terminate the contract	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
limits access to data or provides it in a non-usable format	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
puts significant constraints to presenting your offer	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
presents suppliers/services in a biased way	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
refuses access to its services unless specific restrictions are accepted	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
promotes its own services to the disadvantage of services provided by suppliers	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>

If you do experience them, what is their impact on your business activity (on a scale from 0 to 3).

Impact on my business:

The online platform ...

* A parity clause is a provision in the terms of use of an online platform or in an individual contract between the online platform and a supplier under which the price, availability and other conditions of a product or service offered by the supplier on the online platform have to maintain parity with the best offer of the supplier on other sales channels.

	0 – no impact	1 – minor impact	2 – considerable impact	3 – heavy impact
requests me to use exclusively its services	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>	<input type="radio"/>
applies "parity clauses" *	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
applies non-transparent fees	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
applies fees without corresponding counter-performance	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>	<input type="radio"/>
applies terms and conditions, which I find unbalanced and do not have the possibility to negotiate	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>
unilaterally modifies the contractual terms without giving you proper notification or allowing you to terminate the contract	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
limits access to data or provides it in a non-usable format	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
puts significant constraints to presenting your offer	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
presents suppliers/services in a biased way	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
refuses access to its services unless specific restrictions are accepted	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
promotes its own services to the disadvantage of services provided by suppliers	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

If you are aware of other contractual clauses or experience other potentially problematic practices, please mention them here

1000 character(s) maximum

As previously mentioned most, if not all, platforms that handle visual content, such as photography, have in perpetuity sub-license clauses (often including rights to license for commercial purposes), which operate significant revenue generation without remuneration to rights holders. The disparity between such platforms & owners of copyright-protected works is exponential.

★ Please briefly describe the situation

3000 character(s) maximum

The implied consent through sub-licensing 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 a number of APIs, of which several use images/photographs uploaded to their platform by content-providers without full and transparent disclosure - <https://partners.business.instagram.com/>.

[A1] Are you a holder of rights in digital content protected by copyright, which is used on an online platform?

- ☒ Yes
☐ No

As a holder of rights in digital content protected by copyright have you faced any of the following circumstances:

An online platform such as a video sharing website or an online content aggregator uses my protected works online without having asked for my authorisation.

- ☒ Yes
☐ No

An online platform such as a video sharing website or a content aggregator refuses to enter into or negotiate licensing agreements with me.

- ☒ Yes
☐ No

An online platform such as a video sharing website or a content aggregator is willing to enter into a licensing agreement on terms that I consider unfair.

- ☒ Yes
☐ No

An online platform uses my protected works but claims it is a hosting provider under Article 14 of the E-Commerce Directive in order to refuse to negotiate a licence or to do so under their own terms.

- ☒ Yes
- ☐ No

As you answered YES to some of the above questions, please explain your situation in more detail.

3000 character(s) maximum

In support of our members as rights holders and representatives of visual creators, it is important to stress the considerable challenge in entering into any dialogue with such platforms. There are several reasons for this:

Size of platforms; Hiding behind exemptions; Hosting defence/privileges; Duty of care; Presiding at arms length; and Lack of liability, all of which encourages market failure for the image industry as it prevents the opportunity for rights holders to reinvest in new content. We believe the hosting defence was never meant to cover online intermediaries that are not neutral and passive but now play a key role in distributing creative content in a commercial context. As the hosting defence only protects internet service providers from liability for passive infringement, there is no incentive to respond to issues highlighted so far, such as - infringements, in perpetuity sub-licensing, "leveraging" uploaded content for economic gain, or otherwise offer/provide solutions to rights holders.

There is an inefficient allocation of resources due to absence of fully disclosed consent to use images by online platforms. The Pareto Principle, can be applied to the unequal relationship between what is input (content we upload) and what is output (the platforms gain). The disparity between the cost of content production by content providers, and the benefit derived from the content by online platforms is having a dramatic impact on the value chain, creating an unprecedented transfer value. 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 submitted - http://cepic.org/issues/an-overview-of-the-commissions-case-against-google?dm_i=5VL,3HX7U,QW899,CJ2RK,1

Please refer to our sister trade organisation CEPIC for a list of companies and their campaign calling for a better protection of images online:

<http://cepic.org/issues/image-providers-call-for-a-better-protection-of-images-online>, along with their response to this question.

Is there a room for improvement in the relation between platforms and suppliers using the services of platforms?

- ☐ No, the present situation is satisfactory.
- ☐ Yes, through market dynamics.
- ☐ Yes, through self-regulatory measures (codes of conducts / promotion of best practices).
- ☐ Yes, through regulatory measures.
- ☒ Yes, through the combination of the above.

Are you aware of any dispute resolution mechanisms operated by online platforms, or independent third parties on the business-to-business level mediating between platforms and their suppliers?

- ☐ Yes
- ☒ No

CONSTRAINTS ON THE ABILITY OF CONSUMERS AND TRADERS TO MOVE FROM ONE PLATFORM TO ANOTHER

Do you see a need to strengthen the technical capacity of online platforms and address possible other constraints on switching freely and easily from one platform to another and move user data (e.g. emails, messages, search and order history, or customer reviews)?

- ☐ Yes
- ☐ No

Should there be a mandatory requirement allowing non-personal data to be easily extracted and moved between comparable online services?

- ☐ Yes
- ☐ No

Please share your general comments or ideas regarding the ability of consumers and traders to move from one platform to another

3000 character(s) maximum

N/A

ACCESS TO DATA

As a trader or a consumer using the services of online platforms did you experience any of the following problems related to the access of data?

a) unexpectedly changing conditions of accessing the services of the platforms

- ☐ Yes
- ☐ No

b) unexpectedly changing conditions of accessing the Application Programming Interface of the platform

- ☐ Yes
☐ No

c) unexpectedly changing conditions of accessing the data you shared with or stored on the platform

- ☐ Yes
☐ No

d) discriminatory treatment in accessing data on the platform

- ☐ Yes
☐ No

Would a rating scheme, issued by an independent agency on certain aspects of the platforms' activities, improve the situation?

- ☐ Yes
☐ No

Please share your general comments or ideas regarding access to data on online platforms

3000 character(s) maximum

N/A

Tackling illegal content online and the liability of online intermediaries

Please indicate your role in the context of this set of questions

Terms used for the purposes of this consultation:

"Illegal content"

Corresponds to the term "illegal activity or information" used in Article 14 of the E-commerce Directive. The directive does not further specify this term. It may be understood in a wide sense so as to include any infringement of applicable EU or national laws and regulations. This could for instance include defamation, terrorism related content, IPR infringements, child abuse content, consumer rights infringements, or incitement to hatred or violence on the basis of race, origin, religion, gender, sexual orientation, malware, illegal online gambling, selling illegal medicines, selling unsafe products.

"Hosting"

According to Article 14 of the E-commerce Directive, hosting is the "storage of (content) that has been provided by the user of an online service". It may for instance be storage of websites on servers. It may also include the services offered by online market places, referencing services and social networks.

"Notice"

Any communication to a hosting service provider that gives the latter knowledge of a particular item of illegal content that it transmits or stores and therefore creates an obligation for it to act expeditiously by removing the illegal content or disabling/blocking access to it.. Such an obligation only arises if the notice provides the internet hosting service provider with actual awareness or knowledge of illegal content.

"Notice provider"

Anyone (a natural or legal person) that informs a hosting service provider about illegal content on the internet. It may for instance be an individual citizen, a hotline or a holder of intellectual property rights. In certain cases it may also include public authorities.

"Provider of content"

In the context of a hosting service the content is initially provided by the user of that service. A provider of content is for instance someone who posts a comment on a social network site or uploads a video on a video sharing site.

- ☐ individual user
- ☐ content provider
- ☐ notice provider
- ☐ intermediary
- ☒ none of the above

* Please explain

As a trade organisation representing visual rights holders, we do not match any of the descriptions above, although our members would fall under both content and notice providers in some form.

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
- ☐ No

*Please describe the situation.

3000 character(s) maximum

As mentioned in an earlier response, our members as rights holders and representatives of visual creators, have experienced significant challenges dealing with the liability regime adopted by platforms stipulated in the E-commerce Directive (2000) art. 12-15.

We have reached a tipping point for the professional visual rights holder where energy is spent on protecting content rather than creating and reinvesting in new content.

The use & effectiveness of notice and action is daunting for many of our members, as a few phrased it in a small BAPLA social media survey undertaken in 2014: "In some cases yes and more often in the past as SM began to emerge, however it's a mammoth task to undertake and the spread of reposts is epidemic." and "We realised some time ago that we could not pursue the tsunami of global misuse."

As previously stated, the process for claiming copyright infringement is largely clunky and ineffective, with very few infringers fearing any repercussions. Take down notices have mostly become redundant, although some members still utilise this method and for the most part it is an option that should remain available. Whilst the principle is important, the practicalities are unsustainable with many users encouraged to share and upload third party copyright content.

The rise of visually-orientated platforms such as Tumblr, Snapchat, Pinterest, Instagram, Facebook, and so on, shows how visual content is becoming increasingly dominant in all communication and advertising online. Images are one of the best ways to optimise social media communication. With images being so important to attracting viewers, as evidenced by the home pages of most websites, and the importance of images to search engines, it seems perverse that our members customers, who for the most part, license images (e.g. websites of traditional media and publishing companies) are receiving a much lower share of total ad spend compared to popular social media platforms that "leverage" images.

If rights holders are to share in any of the value that their images contribute, then regulation is needed to address the misuse of the E-Commerce Directive hosting defence. There should be a liability for online intermediaries to foster genuine growth for owners of creative works, especially by those platforms that whilst utilising the hosting defence, perform commercial exploitative intervention, rather than undertake a duty of care to rights holders and provide fair remuneration. We support the adoption of a clear and transparent definition, which focuses on the activities of platforms as "internet access providers" and updating online regulations, which is now archaic and urgently needs reform.

Please refer to our sister trade organisation CEPIC, and BAPLA member Getty Images, for their responses to this question.

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?

- ☐ Yes
- ☒ No
- ☐ I don't know

Please explain your answer.

1500 character(s) maximum

Again as previously stated in earlier responses, we do not believe the concept of a "mere technical, automatic & passive nature" of information transmission is sufficiently clear to be interpreted and applied in a homogeneous way. We strongly believe it is repeatedly misused and interpreted to the extent that it supports the wholesale acts of infringement & encourages the desire for "free", which unfairly economically penalises creative rights holders, transferring the value of their content to such platforms. To assume that these platforms are merely passive is to ignore their rapid commercial growth at the expense of rights holders as content providers. There is a significant tipping point in which the control & consent of the creator is irrelevant in the face of these enormous powerhouses. Looking at the economies of scale within the creative industry, & in particular the business of photography, much of it occurs online, whether transferring or marketing photos as a digital product. What cannot be underestimated is the unequal power of today's platforms, in particular search engines & social media, that have seen exponential growth over the last 5-10 years & are now having a dramatic impact on the professional market. We would support the notion of distinguishing the concept of active hosting by including displaying activity of content developed to attract viewers to such work, and in addition clarify that the hosting defence is not available to commercial platforms.

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?

- ☒ Yes
- ☐ No

Please provide examples

1500 character(s) maximum

As with previous responses above, distinguishing and clarifying platforms and their activities in relation to the hosting liability exemption, including consideration for exclusion to avoid broad interpretations, can in many ways support and assist the incentive for those in the creative industries, in particular visual rights holders, to continue to develop new and innovative technological business models that support economic growth. We would also support a review on the definitions of "communication to the public" under the Information Society Directive (2001) and "making available" rights, as well as consideration for a new "linking" exception, which again it's misuse by unauthorised aggregators has plagued many of our members legitimately licensing to their customers.

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?

- ☒ Yes
☐ No

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:

Please explain what approach you would see fit for the relevant category.

1000 character(s) maximum

Identifying one specific infringement in our response does not denigrate the importance of the remaining categories. However, from the perspective of our members who trade in a valuable creative & cultural industry, providing a specific approach to the treatment of IPR infringements would have considerable and positive consequences, providing much needed opportunity to aid our members contribution to European economic growth and new technological developments. We would support a three-pronged approach: firm and rigorous regulations, alongside strengthening civil remedies, and consideration for new tax systems that transfer the burden on rights holders to protect and enforce their works.

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?

- ☒ Yes
☐ No

* Please explain your answer

1500 character(s) maximum

We strongly believe accountability should be taken by those platforms that benefit from illegal display of images at the point of receiving uploaded content and/or upon registration by introducing a better vetting service, and a penalising system that supports the reporting (including dialogue) of infringements by rights holders.

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

1500 character(s) maximum

As stated in our earlier response, the opportunity for supportive economic growth and investment in GVA for creative rights holders by implementing far more rigorous processes to deter IPR infringements can be realised effectively and quickly.

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

- ☒ Yes
☐ No

Please explain

We fully support the principle of "take down and stay down" as it should be seen as a right and a choice of mechanism for dealing with infringements. However it should not be the only remedy to tackle or encourage the eradication of online infringements, it should be combined with multi-tiered solutions, including policy review and a "Follow the Money" approach. Any additional financial incentive would also be welcomed.

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".

(For online intermediaries): Have you put in place voluntary or proactive measures to remove certain categories of illegal content from your system?

- ☐ Yes
☒ No

Could you outline the considerations that have prevented you from putting in place voluntary measures?

1500 character(s) maximum

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

- ☒ Yes
☐ No
☐ I don't know

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

1500 character(s) maximum

We would support an obligation to establish protection for all IPR content, and in particular copyright works, such as images, as we believe without new and additional support there will be little incentive for online platforms to undertake a duty of care whilst there remains an economic and legal disparity between platforms & owners of copyright-protected works.

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

1500 character(s) maximum

As previously stated in earlier comments, we believe the categories of "platform" intermediaries should focus on an activity basis rather than identity basis, which is susceptible to change.

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

1500 character(s) maximum

We would support the following types of actions:

- timely and transparent response to permissions notification and action;
- clearly stating licensing permissions, use (including commercial use by third parties) and opt-out options for all content providers at the point of upload;
- encouraging the identification of rights holders (which would include the retention of metadata);
- clearly stating the rights holders as content providers, particularly in the case whereby a rights holder has identified their works have been uploaded illegally;
- greater use of image-identification software to support owners of copyright-protected works;
- tax breaks for those platforms that are more compliant and offer incentives to combat infringements.

Do you see a need for more transparency on the intermediaries' content restriction policies and practices (including the number of notices received as well as their main content and the results of the actions taken following the notices)?

- ☒ Yes
☐ No

Should this obligation be limited to those hosting service providers, which receive a sizeable amount of notices per year (e.g. more than 1000)?

- ☒ Yes
☐ No

Do you think that online intermediaries should have a specific service to facilitate contact with national authorities for the fastest possible notice and removal of illegal contents that constitute a threat for e.g. public security or fight against terrorism?

- ☒ Yes
☐ No

Do you think a minimum size threshold would be appropriate if there was such an obligation?

- ☒ Yes
☐ No

Please share your general comments or ideas regarding the liability of online intermediaries and the topics addressed in this section of the questionnaire.

5000 character(s) maximum

BAPLA welcomes the initiative to review this important area on the liability of online intermediaries, namely platforms. For the picture 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 visual works such as 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 visual rights holders needing to reclaim control of their works and, in many cases, generate much needed income to continue to create and invest.

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, 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 images. However, this brings short term benefits to such users but with the long term disadvantages of both reducing the incentive for visual rights holders to invest in future creation and dissemination, and encouraging wholesale infringements (which are costly for rights holders to enforce).

From responses to the BAPLA survey on conducted in July 2015, copyright infringement conducted online via search engines, websites & social media is rife and that there is an urgent need for more copyright protection. Responses from members 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 stated: "For specialist libraries the issue is about price and control of works, but also about monetizing the sharing of our images via social media."

Whilst widespread use of images is good for society, making the online world a more stimulating place, if rights owners of visual works are to share in any of the economic value that images contribute, then regulation is needed to address the following three main issues:

- Hosting defence should be updated so that it is only available to hosts acting in a purely basic and passive manner, as originally intended, and not on an "active commercial basis" performed by many online platforms;
- Framing (in the context of a "framed visual hyperlink", most commonly found on Google Images for example), which invariably conflicts with the normal exploitation of images as it ultimately reduces the

incentive of a user to click-through to the original website, depriving the original publisher of the opportunity to monetise its publishing of the copyright work, obtain data on the user viewing the work and otherwise promote its services or to interact with the user. The definition of a “new public” (highlighted in the Svensson Case C-466/12, 2014) should be re-examined and clarified to distinguish it from other types of hyperlinking, such as text, that is clearly identifiable as “communication to the public”;

- Competition law should be applied in a way that prevents monopolistic search engines from “leveraging” third party content to compete against the copyright owners of original content. As stated in our previous responses to the survey questions, the commercial activity undertaken by platforms are inherently anti-competitive in their current form for visual rights holders, who either virtually disappear online or must undertake to join non-negotiable visual platform services that transfer the “value” contribution away from content providers. We would request a level playing field for creative commercial organisations, such as our members, to continue to operate at their local level and at a broader international level. A truly collaborative and balanced functioning economy should be based on a fair and balanced policy, one that both protects creative rights holders and enables them to benefit financially, in order to support the economic growth of the European economy.

Submission of questionnaire

End of public consultation

Background Documents

BG_Въведение (/eusurvey/files/17798068-07b6-4cfb-8c80-a8e6a4f75e29)

BG_Декларация за поверителност (/eusurvey/files/0b5a7e6a-5c26-47ca-b263-9ece4aa566ca)

CS_Prohlášení o ochraně osobních údajů (/eusurvey/files/a93fa8dd-757e-421e-81f9-e1c9bca745af)

CS_Úvod (/eusurvey/files/af54c429-c5bf-482f-8525-c156be285051)

DA_Databeskyttelseserklæring (/eusurvey/files/5dd2c272-17fa-47f4-b0c7-2c207a86235f)

DA_Introduktion (/eusurvey/files/05c0d888-2d35-4e19-a314-65e8092597d6)

DE_Datenschutzerklärung (/eusurvey/files/b5e037cf-0350-40c3-b803-04f6357f9603)

DE_Einleitung (/eusurvey/files/300a2e87-e030-422a-b678-33fe2c7520a6)

EL_Δήλωση περί απορρήτου (/eusurvey/files/b408fd27-c292-4fc0-9c2d-fd70c74062c4)

EL_Εισαγωγή (/eusurvey/files/0be38358-a600-4568-bfd0-fd9697b1810f)

EN_Background Information (/eusurvey/files/0873ffeb-56b2-40d7-bf56-5aadb176c3c)

EN_Privacy Statement (/eusurvey/files/8861750d-baa1-4113-a832-f8a5454501b5)

ES_Declaración de confidencialidad (/eusurvey/files/edd31f1e-fe9d-493a-af5e-7a7c793295a9)

ES_Introducción (/eusurvey/files/600be540-eef2-4bde-bd3a-436360015845)

ET_Privaatsusteave (/eusurvey/files/294d2e58-3a3d-4e32-905f-74e8b376c5e6)

ET_Sissejuhatus (/eusurvey/files/4bc0f8b9-febc-478a-b828-b1032dc0117f)

FI_Johdanto (/eusurvey/files/a971b6fb-94d1-442c-8ad7-41a8e973f2d5)

FI_Tietosuojaseloste (/eusurvey/files/28a1f27e-3a8e-41f3-ae27-201e29134555)

FR_Déclaration relative à la protection de la vie privée (/eusurvey/files/1341b7cb-38e5-4b81-b3bc-bd0d5893d298)

FR_Introduction (/eusurvey/files/308a1cf7-5e78-469c-996a-372b33a1992b)

HR_Izjava o zaštiti osobnih podataka (/eusurvey/files/618120e1-286a-45d4-bbbd-2493d71617fb)

HR_Uvod (/eusurvey/files/6bfc9d48-cd5c-4603-9c68-5c45989ce864)

HU_Adatvédelmi nyilatkozat (/eusurvey/files/76f442e6-3e2d-4af3-acce-5efe8f74932b)

HU_Bevezetés (/eusurvey/files/3ea8491d-429d-4c8f-be30-82db40fa59c5)

IT_Informativa sulla privacy (/eusurvey/files/e2eb5a94-9e5e-4391-a8e3-35f9e151310b)

IT_Introduzione (/eusurvey/files/aa3bf020-9060-43ac-b92b-2ab2b6e41ba8)

LT_Pareiškimas apie privatumo apsaugą (/eusurvey/files/ab30fabd-4c4e-42bc-85c5-5ee75f45805d)

LT_Įvadas (/eusurvey/files/d5a34e68-4710-488a-8aa1-d3b39765f624)

LV_Īevads (/eusurvey/files/3a9bd2b1-7828-4f0e-97f1-d87cf87b7af1)

LV_Konfidencialitātes paziņojums (/eusurvey/files/7156fdc0-b876-4f73-a670-d97c92e6f464)

MT_Dikjarazzjoni ta' Privatezza (/eusurvey/files/03139a3f-7b5f-42c0-9d2f-53837c6df306)

MT_Introduzzjoni (/eusurvey/files/ceb27908-207c-40cf-828a-6cf193731cdf)

NL_Inleiding (/eusurvey/files/ca756d80-8c02-43e1-9704-3148a13c8503)

NL_Privacyverklaring (/eusurvey/files/83d9394e-b179-442f-8a1b-41514ad072df)

PL_Oświadczenie o ochronie prywatności (/eusurvey/files/15612e0b-807d-4c6e-af1c-d65fe4ec9ddb)

PL_Wprowadzenie (/eusurvey/files/df9e1828-bbd0-4e4a-90bb-ec45a8bf46da)

PT_Declaração de privacidade (/eusurvey/files/50a6e820-91bc-4531-9a0f-47b3685753d7)

PT_Introdução (/eusurvey/files/003979c0-5277-41e9-8092-2de66d57ca00)

RO_Declarație de confidențialitate (/eusurvey/files/25c135c6-ce01-4081-a83e-53e86086797e)
RO_Introducere (/eusurvey/files/4334379b-e465-43a5-a944-8602090b0bf5)
SK_Vyhlásenie o ochrane osobných údajov (/eusurvey/files/7fab071c-85f9-47eb-aaa9-949f2239701d)
SK_Úvod (/eusurvey/files/e45df825-5e71-4172-b2ec-e07789cc3966)
SL_Izjava o varstvu osebnih podatkov (/eusurvey/files/498ec1f0-3405-4454-9aa6-40607efe118f)
SL_Uvod (/eusurvey/files/1b0b239a-630d-4d36-a92f-d4b758d41ddc)
SV_Inledning (/eusurvey/files/e9111c5b-4637-4ea1-b235-ece85ef8fe1a)
SV_Regler för skydd av personuppgifter (/eusurvey/files/0d8275b2-8344-4895-8c09-51d075671061)

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