MPA group response to the Consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

Questions

Do you agree with the definition of "Online platform" as provided below? (1000 characters for how to change the definition) 1000 characters

"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.

No.

A simple definition does not reflect the variety of services provided by individual online platforms, aggregators and Internet access providers:

- YouTube provides more services than a mere video sharing platform; in fact, its most prevalent service consists of providing access to commercially produced music.
- Internet access providers often actively provide content services as part of their bundled offer, and are consequentially within the scope of the definition of online platforms.

The categorisation as online platforms seems irrelevant under current law; e.g. regarding Articles 12 to 14 e-Commerce Directive; introducing new terms does not contribute to clarifying the legal situation of online platforms. We suggest clarifying the terminology applied to “online platforms” and the other terms used such as information society services, internet access providers, intermediaries etc.

In order to assess the legal situation of online platforms we suggest focussing on the relevant activities, i.e. whether they play an active or are mere passive role in the distribution of content, be it music, movies or TV series; also reflecting that online platforms engage in a multitude of activities.

There are general concerns about uncertainties in this definition of online platforms for instance when it refers to markets without further defining them.

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? (3000 characters)

YES

The supposed broad interpretation of Articles 12-15 of the e-Commerce Directive is currently benefitting online platforms to the detriment of rights holders such as music publishers and composers. This has enabled some (by no means all) online platforms to hide behind limitations of liability seeking to avoid engaging in commercial negotiations with our members. This has been clearly acknowledged in the Digital Single Market strategy published in May 2015: "The unclear legal situation can also make it hard for right holders to licence their content with the platforms or obliges them to accept licensing conditions that are below the potential value of the content."

The limitations of liability in Articles 12 to 15 e-Commerce Directive were introduced in 2000 to assist the nascent e-Commerce market i.e. to benefit service providers who only passively provide infrastructure to their customers. The nature of the activities of such service providers has changed in the subsequent years; given technological and commercial market developments the majority of such service providers today play a more active and controlling role in delivering digital services to their customers, e.g. by use of search functionality." We are not aware of any online platform only providing a "mere conduit" infrastructure service; service providers are mainly an integral component of the commercial arrangements between their customers.

Online platforms generally have benefitted greatly from the broad interpretation of Articles 12- 15 which led to a considerable transfer of value from creators to online platforms. Their business models are built on the wide availability of creative content. Nevertheless, it has become common practice of some services to claim that they do not require a licence for the use of content on their online platforms. Such transfer of value is based on the blatant abuse of the system and the general weakness of the copyright law and of the legal drafting of the provisions of the e-Commerce Directive. In view of the nature of the commercial offerings of online platforms they should not be able to unduly benefit from limitations of liability provided in the e-Commerce Directive.

Additionally, online platforms often claim that the content they distribute on their networks has been created by the customers (UGC) or constitutes a "parody" and thus does not require a licence in the first place. Clarification that most of such activities require the permission of the right holders would be useful so as to prevent them being used as a means to avoid licensing what are commercial activities.

A further situation in which the existing system proves not to be fit for purpose relates to notice and takedown activities of online platforms: in order to be efficient the infringing material taken down needs to stay down – which we elaborate in the questions on "action."

Special questions concern the liability of cloud storage providers; despite technological possibilities to assess the nature of the content stored, storage providers often claim to benefit from the limitations of liability as hosting services without actual knowledge.

This leads to the absurd situation that cloud storage providers have to argue lack of knowledge of customers' activities on their networks when it would be in the commercial interests to know about their customers 'activities e.g. to better target advertising campaigns and to provide usage data to rights holders. However, regarding actual knowledge normal rules apply (Notice and Take Down).

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? (1500 characters)

No

It is frustrating for our members and colleagues that some online platforms continue to argue in commercial negotiations that they benefit from limitations of liability to avoid paying a licensing fee altogether or offering only an unreasonably reduced licensing fee. The majority of online platforms play a more active role than simply providing a service of a "mere technical, automatic and passive nature." A clarification of the limited application of this concept would be useful, in particular in view of the manifold activities of online platforms such as video sharing websites.

We support the general principle behind the limitation of liability for online platforms i.e. where they have a genuinely passive role they should maintain their exemption from liability. It is entirely inappropriate that where online platforms play an active role they are allowed to claim to benefit from the limitations of liability. This contradicts both the spirit and wording of the European Copyright Acquis as interpreted by the Court of Justice of the European Union (e.g. Cases C-236/08 to C-238/08 - Google v Louis Vuitton referring to a lack of knowledge or control of the data to justify the application of the limitations of liability). Limitations of liability disincentivise digital services to use data which are essential to get revenues (what little money there is) back to the original publishers and composers. It should be technically feasible to identify the particular music which has been played given that online platforms already can target their advertisement based on the data they obtained from analysing the online behaviour of their customers.

Under Article 3 of the Information Society Directive online platforms actively communicate works to the public by making music available on their networks. In this context, a clarification of communication to the public would be welcome as envisaged under the Commission Communication "Towards a modern more European Copyright framework of 9th December 2015.

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? (1500 characters).

No
Whilst further categories are not appropriate we recommend considering the passive or active role of the online platform within the categories of mere conduit/ caching/ hosting to avoid that online platforms use the existing categories to avoid licensing. There is no need for further categories; they will only lead to further uncertainty on the situation in the already established market for musical works. Clarification of the existing categories according to the passive or active role would be useful.

The liability for providing mere linking services is primarily a question of the definition of communication to the public under the Information Society Directive; further clarification would be welcome and is expected (c.f. CJEU Case C 160/15 - Geenstijl Media; Commission Communication "Towards a modern more European Copyright framework). Once liability under Copyright law has been considered, normal rules apply and any limitation of liability will be assessed according to the nature of the activities, i.e. whether the service plays a passive or active role in the distribution of links.

In the United Kingdom, mere search engines do not benefit from the limitation of liability given that the UK Government decided not to implement the options provided in Article 21 e-Commerce Directive. This has been decided by the UK Government in 2005 and in our view reflects the practical activities of mere search engines. Search engines consequentially should be more proactive in the activities concerning illegitimate content, e.g. promoting legal services in their search results.

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

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

N/A

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

Yes

To ensure that the providers of uploads can respond to a takedown notice they should be given the option to answer to the alleged illegality of the content they uploaded. However, this should not lead to any undue delay in the actual taking down of infringing material.

The availability of illegitimate content on online platforms even for short periods often leads to considerable commercial damage for the rights holder, in particular during the time of the commercial release of the song (pre – or immediately post publication). As we elaborate in our response to the next question a notice should lead to a permanent stay down of illegitimate content

We are concerned that providers of uploads are described as content providers; this presupposes a more creative role of the provider of uploads than reflects the reality. This creates confusion similar to the definition of user generated content which in the main consists of user uploaded content without any creative input. This linguistic uncertainty is the reason for most misunderstandings in this area.

If you consider that this should only apply for some kinds of illegal content, please indicate which one(s).
Should action taken by hosting service providers remain effective over time ("take down and stay down" principle)? (no character limitation!)

Yes.

In order to be effective a notice should lead to a stay down of illegitimate content. It is current practice that online platforms once notified of musical works which were uploaded without license only take down the specific URL linking to the musical work. This is often followed by the same piece of music being re-uploaded with a different URL This is unsatisfactory and insufficient; actual knowledge under Article 14 refers to the specific musical work notified and is not limited to a specific URL.. Equally, ensuring that illegitimate material once taken down stays down does not contravene Article 15 e-Commerce Directive; online platforms already have actual knowledge of the illegitimate music and thus stay down does not constitute a general obligation actively to seek facts or circumstances indicating illegal activity.

Online platforms already apply successfully technologies to identify specific notified or listed content on their networks.

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".

Could you outline the considerations that have prevented you from putting in place voluntary measures? (1500 characters)

The MPA as owner of MCPS was involved in the EC sponsored 2002 RightsWatch project suggesting a NTD approach between right holders and intermediaries (Article 16 e-Commerce Directive). It failed because 2002 was too early to get an agreement between the parties in the then nascent market for digital music. But the discussions arising out of this project led to a better mutual understanding of their respective situation. In 2015, voluntary measures have been replaced by successful licensing discussions provided of course that the parties to these discussions are willing to engage in the first place. If business models are built upon the distribution of infringing material without negotiated licence there is not much value in putting in place voluntary measures.

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

Yes

Such a "duty of care" has been referred to under European case law in particular in cases where the online platform plays a more active role in the distribution of the illegitimate content (Case C 324/09 L'Oreal v eBay refers in a similar context to measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind."). Online platforms generally play an active role and benefit commercially from the distribution of illegitimate content.

Such a duty of care also follows directly once the online platform has actual knowledge under Article 14 e-Commerce Directive. It also falls outside the scope of Article 15 e-Commerce Directive which states that there is no general obligation for information society service provider to monitor their networks. Once they have actual knowledge the question of actively monitoring their networks is not relevant; the duty of care as discussed does not concern the monitoring of information which they transmit or store. Online platforms already know the facts or circumstances indicating illegal activity.

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

In the field of music the main categories covered by such an obligation are sound recordings and musical works including the lyrics as literary works and notations. While sound recordings refer to a specific recording of a musical work, musical works can be recorded in different forms. It should be clarified that any obligation for that duty should also relate to musical works. Technologies are already available and applied to identify not only specific sound recordings but also the underlying musical work. Additionally, most of our members are small or medium enterprises without the resources to operate within the parameters of Articles 12 to 14 e-Commerce Directive; in particular given that without such a straight forward duty of care for online platforms the notice and takedown system is inefficient and requires resources which they don't have.

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

The actions to be covered by such an obligation relate to the application of already existing technological solutions for “monitoring” network activities such as Content ID. Such monitoring technologies are already being applied by online platforms to filter other illegal content but also to enable more targeted advertisement.

Additionally we note that a duty of care relates to the duty of online platforms to ensure that illegitimate content once notified stays down and is not simply re-uploaded with a different URL.

It would be helpful if online platforms describe their actions publicly and transparently.