



Submission to the European Commission

Re: Case Id: f90e2161-0d7f-48b6-a339-f04f7d165178

Position paper of OpenMedia re: *Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy*

December 23, 2015

OpenMedia is a community-based organisation that safeguards the possibilities of the open Internet.

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Submission of OpenMedia

OpenMedia is a community-based organization that works to keep the Internet open, affordable, and surveillance free. We work toward informed and participatory digital policy by engaging hundreds of thousands of people in protecting our online rights. Since our founding in 2008, we have built a community of over 800,000 global Internet users, who have spoken out through our campaigns on Privacy, Access, and Free Expression online. In our crowdsourced *Our Digital Future* report on intellectual property and copyright law, we call for fair, flexible rules that ensure creators and innovators around the world can share and collaborate freely online. You can learn more at ConnectedFuture.org.

OpenMedia is a founding member of SaveTheLink.org – a network of leading civil society groups, businesses and organisations who believe that linking is the foundation of the Web. We oppose regulations that create legal uncertainty for anyone linking to content, or that otherwise penalise services that utilise hyperlinks. As the Commission prepares to draft new copyright legislation, OpenMedia urges you to safeguard the right to link in the future Copyright Directive.

Please note that the arguments expressed herein are representative only of OpenMedia. We do not speak for other members of the Save the Link network, and we expect these organisations will write their own positions under separate cover. OpenMedia presents the following data and arguments to assist the Commission in their decision-making:

A. OpenMedia urges the Commission to review the detailed submission From 10,599 individual users via SaveTheLink.org

First, OpenMedia would like to draw your attention to a total of 10,599 submissions, generated via SaveTheLink.org, as part of the above noted proceeding. As mentioned above, SaveTheLink.org is comprised of a network of organizations, and the online action platform administered by OpenMedia.

These comments were created by means of an online comment submission tool hosted on <https://SaveTheLink.org/YourVoice>, and have been submitted via database export December 23, 2015. OpenMedia has also submitted to the Commission two copies of all comments made – one with identifying information for the use of the Commission in verifying responses, and another which has been stripped of identifying information should the Commission choose to publish the comments submitted. We ask that should the Commission choose to make public these comments, that they do so respecting the privacy of Internet users who have submitted, and publish only the document with all identifying information removed. OpenMedia urges that each individual submission be given equal weight to other individual submissions received by the Commission for this proceeding, and reminds Commissioners that each individual user speaks only for themselves, not for OpenMedia or any other organization in the Save The Link network.

B. OpenMedia urges the Commission to reject ancillary copyright

Recently, copyright laws in some EU states have included a so-called 'link tax' enforced through ancillary copyright regulations. Under these regimes, aggregators and search engines—Google News, reddit, and EUFeeds, to name only a few—have to pay a fee for using snippets of copyrighted text appearing as a preview when linking to news articles.

In light of these existing regulations, and of statements made by Commissioner Oettinger, as [reported by Member of European Parliament and copyright rapporteur Julia Reda](#),¹ about expanding ancillary copyright to the entire European Union, OpenMedia considers with great concern questions about the nature of relationships between online platforms and rightsholders, in specific the statement: “An online platform such as a video sharing website or a content aggregator refuses to enter into or negotiate licensing agreements with me.” It appears that this prompt is designed to elicit responses encouraging the Commission to implement ancillary copyright, and is particularly concerning in that this prompt to reply is only provided if a respondent to the survey first indicates that they are a rightsholder, even though individuals responding to the survey will also have a keen interest in the potential for such a policy to be expanded.

In the past, the implementation of ancillary copyright laws have created unintended consequences. Take the case of Spain, where rules that forbade the waiving of fees caused [Google News to shut down operations](#),² a move which caused news agencies to experience significant reductions in Web traffic. This has been especially true for smaller outlets, which don't have the same name recognition of large national or international sites.

It is no surprise then, in evaluating the *Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*, the European Parliament has said in no uncertain terms that it does not want an EU-wide ancillary copyright regime, rejecting in the JURI committee vote an amendment calling for its expansion and rejecting a similar plenary amendment during the plenary vote. OpenMedia urges the Commission to listen to the voice of the Parliament and of the people it serves as you shape new copyright provisions for the future.

At its heart, ancillary copyright fundamentally misunderstands the relationship between aggregators and news outlets, seeing it as parasitic when in fact it is mutually beneficial to both parties. OpenMedia urges the Commission to reject any proposals for inclusion of these ancillary copyright charges, and in turn recommend member states that have already implemented national ancillary copyright regimes to abolish them.

From our extensive public outreach, OpenMedia has found Internet users feel similarly. While we are certain you plan to review each individual comment generated via the tool at SaveTheLink.org in your consultation, we wish to offer a few exemplary comments below:

Comment From William

"I object to a link tax - given that content is out on the web in the first place. It is acceptable for a copyright owner to monetise content using a paywall, but non-paywall content should not be taxed."

Comment From Igor

"...Writing and posting in the internet is like speaking with others. Asking this question is the same as asking: Should people pay money for quoting someone else? Would anyone like to be restricted in what he thinks or what he says? I don't think so."

Comment From Stephen

"...Snippets of content should be viewed as fair use -- not to mention free publicity."

Comment From Henk

"No link tax, 'old fashioned' firms are trying to protect their old fashioned business models and not recognizing new developments on the internet."

Comment From Leif

"...This will be detrimental for the free exchange of ideas. This will also hinder development, advancement and exchange of new (open-source) technology. Ultimately it will be negative for the economy."

Comment From Anthony

"...The World Wide Web is powerful and useful simply because it allows hyperlinks. In fact the hyperlinks are pretty-much the defining feature of the web. So any attempt to tax links (which is doomed to fail, anyway) is a direct tax on the web itself."

Comment From Diana

"...Smaller companies would go out of business, leaving bigger companies to find ways of avoiding it through corporate lawyers."

Please see Annex 1, appended below, for more information on ancillary copyright.

C. OpenMedia urges balanced intermediary liability

Internet users are also deeply concerned by proposals that would force or encourage intermediaries to assume greater responsibility for third party content, as reflected in the initial proposals in the Digital Single Market (DSM) communication.

The scope of intermediary liability for online platforms was originally defined in the Directive 2000/31/EC on electronic commerce. However, imposing an *ex ante* duty of care on intermediaries was [rejected as unrealistic, impractical and costly](#).³ We must also consider that Internet traffic has increased dramatically in the last 15 years. It would therefore be impossible for humans to monitor all content, which leaves us in the hands of automated technology to

regulate the Internet. Where these technologies exist, such as online filters, they have been shown to consistently overreach and often result in the blocking of legal content,⁴ and the censorship of protected speech online.

As it is the role of the courts to assess the legality of speech, OpenMedia has concerns with any proposal that would saddle intermediaries with additional responsibilities to filter content, especially when such a regime would put them in the position to judge the permissibility of expression online without judicial oversight. Where there is not transparent judicial oversight in place, the monitoring and removal of content may fall to individual intermediaries to implement with voluntary measures. In addition to obligations imposed by governments, these voluntary measures can result in arbitrary surveillance and censorship that is inconsistent across platforms and is neither understood nor easily challenged by a platform's users.⁵

As you carry out your upcoming review of the role of online intermediaries and platforms in this work, OpenMedia urges you to use the [Manila Principles on Intermediary Liability](#) as a guideline.⁶

Again, while we expect you to review each individual user submission generated on this issue via SaveTheLink.org in your consultation, we wish to offer a few exemplary comments below:

Comment From Anthony

"Platforms should not be required to monitor their users' internet activity, any more than pubs and cafes should be required to record and monitor their customers' conversations."

Comment From Graham

"Platforms should not have to act as "policemen". The process of the Law needs to be carried through before the "punishment" i.e. censorship is administered."

Comment From Effie

"Yes, I believe that rights-holders have been given too much say [over which content is taken down off the web]. On the contrary, regulations should be in favour of the public for ensuring freedom of expression and access to information and knowledge for everybody."

Comment From J.

"I do not believe platforms should be required to monitor Internet activity, or filter and remove content. This is creating a climate of suspicion and self-censorship which could lead to criminalizing everyday activities."

Comment From Gonçalo

“The alleged infringement should be proven maybe not in court but [content] shouldn't be simply erased without me knowing.”

Comment From James

“The overreach of copyright protections for rightsholders is malignant against average content users, and often skirting or breaking the law in its abuse of censorship-by-copyright...Infringement should have to be proven in court before censorship is enacted. If content is censored before it is ruled by an impartial and official party, the censorship is unfounded.”

Please see Annex 2, appended below, for more information on intermediary liability.

Conclusion

OpenMedia and its partners in the Save the Link network have been active in promoting a digital future where the right to link is safeguarded for all Internet users. In the summer of 2015, we urged MEPs to consider the implications of restricting the right to link online as they voted on European Parliament's resolution: *Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*.

It is crucial that any change to copyright legislation and digital policies that affect free expression online undergo a direct consultation with Internet users and citizens whom it will affect every day. This is why OpenMedia is encouraged by the Commission's efforts to engage in a robust discussion with public stakeholders in advance of crafting new legislation. Already our network has done extensive outreach to Internet users in Europe, and have directly engaged over 90,000 individuals in our campaign to preserve and extend the right to link. Throughout the process of the copyright evaluation report, OpenMedia encouraged these individuals to reach out to their elected officials, and clearly articulate their views about the essential nature of hyperlinks online.

Internet users everywhere are keenly interested in the outcome of this work. OpenMedia, therefore, submits that the Commission's review must consider and take into account [international human rights standards](#),⁷ and in particular those that relate to the right to freedom of expression as you create a Copyright Directive fit for the digital age.

Bearing in mind the critical interest that Internet users have in protecting the right to link and in ensuring that regulations crafted by governments do not threaten this right, over the past month, the Save the Link network has been facilitating responses by our community members – over 90,000 users from 108 countries – to the *Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy*.

Using the platform housed at SaveTheLink.org/YourVoice, over 10,500 unique responses have been submitted by individual users. These responses speak directly to questions raised in this

consultation that would have the greatest impact on the right of users to meaningfully link to content of their choosing online. We have provided a third Annex detailing the design of our consultation platform at SaveTheLink.org/YourVoice and the individual consultation questions to which our tool corresponds.

If you have any questions or concerns, please do not hesitate to contact me.

Best regards,

[original signed]

Meghan Sali, Digital Rights Specialist, OpenMedia

Annex 1: Ancillary Copyright and the Right to Link

Press publishers have been fighting to extend the reach of copyright online to their favor. This extension is referred to as ancillary copyright. We have seen such proposals take several forms: ranging from an extension to cover short snippets of text [excerpts from articles](#),⁸ to headlines, quotations, [hyperlinks](#)⁹ or even [single words](#).¹⁰ These proposals have been put forward in order to require search engines and news aggregators to pay a levy for their use when linking.

Such an arrangement fails to understand the crucial role that aggregation services and search engines play in driving public attention to the creative work of news agencies, publishers and other content creators. In this interaction, no party benefits at the expense of the other. Closer inspection reveals that the two are in balance with one another. Instead of resolving an injustice, such an exclusive right fails to provide economic benefits for either party. Furthermore, these rules have severe consequences for the Web as we know it, and for our human rights.

1. The Digital Single Market

Ancillary copyright of this type has already been implemented in EU states Spain and Germany. As such, there is already significant evidence of the harm it creates. A study commissioned by publishers in Spain found that the law “has done substantial damage to the Spanish news industry... will cost publishers €10 million, or about \$10.9 million, which would fall [disproportionately on smaller publishers](#).”¹¹

In this case, Google News decided not to pay the levy and closed down to pursue business elsewhere unimpeded. The result was that small press publishers who didn't have the name recognition of large national or international sites experienced a significant reduction in traffic. In Germany, publishers [overwhelmingly chose to waive the fee](#) rather than not being indexed by Google.¹²

Innovators have also suffered adverse effects of these laws. Javier Sardá, a small business owner from Spain who ran a niche news aggregator [reported that](#) “the moment the law was approved, we lost 3/4ths of the customers we had gained during the preceding few months.”¹³ Ancillary copyright prevents the discovery of any innovative alternatives, like Javier's, and instead reinforces the dominance of large, entrenched services. Rather than encouraging online journalism, evidence shows that in practice it fosters market concentration, leaving a few established publishers in control of the market and the digital economy. The same is true for the search and aggregation sector. The German implementation showed that only Google managed to handle the ancillary copyright unharmed, whereas smaller providers, [start-ups and innovators](#) suffered severely from the legal uncertainty, threats of lawsuits and claims for compensation.¹⁴

More recently, press publishers themselves have come out against the proposed Europe-wide implementation of ancillary copyright, arguing:

“As publishers, we know such proposals make it harder for us to be heard, to reach new readers and new audiences. They create new barriers between us and our readers, new barriers to entry for news publishers such as ourselves. It will be harder for us to be present, discovered and accessed by our readers online. It will be harder for our readers to engage with our stories online, to share links or our headlines with their friends. It will be harder for us to grow, develop new sources of information and innovate in our business.”¹⁵

Search engines and publishers complement one another: without search engines to drive traffic the publishers lose readers, and without publishers the search engines have no links. A link tax simply creates a lose-lose situation. The stated aim of the Digital Single Market Strategy is to create an open online marketplace that encourages business and where digital innovation will thrive. The Commission should treat with extreme caution anything that makes this less viable, and in light of this, OpenMedia recommends you reject any efforts to impose ancillary copyright provisions.

2. Freedom of information

Introducing ancillary copyright doesn't just have a financial impact on both publishers and aggregators, it also stops the free flow of information to citizens around the world.

Aggregators and search engines play a fundamental role in the structure of the Internet, acting as gateways to online information. By creating a bias towards the strongest players and publishers, it also creates a bias in our news towards the mainstream, narrowing the breadth of knowledge available to us all. When these laws close down search engines and publishers, they at best put up barriers to accessing information, and at worst make some knowledge impossible to find.

The international law on copyright, has only one mandatory limitation, laid out in the Berne Convention since 1886, and that is [making quotations is permitted without remuneration](#) (Article 10).¹⁶ This has been long established in international law due an understanding that there must be fair exceptions to copyright to allow people to access information. Links are what make the Internet work, and like citations and quotations did before, they allow people to move from one source to another and gain access to a larger world. Making links part of a copyright regime is deeply flawed.

Additionally, such laws have a censoring effect created through uncertainty. They introduce a number of practical issues as to whom the tax applies. Questions around what is a blogger, or an aggregator, or a publisher always arise. What is 'commercial'? The delineation between 'commercial use' and 'personal use' is very unclear when it comes to Internet law. For instance, Facebook is a commercial site which monetises its users actions and data, but it is the users who share the links. If the trend towards making links subject to copyright regulation continues,

will we see swathes of content lost in the inevitable overreach as websites err on the side of caution in implementing such a law, and remove links to avoid charges?

Recently, 83 MEPs from six political groups have come out against charging a fee for using snippets of text to point to content freely available online, and specifically the explicit reference in the Commission's December 9 communication *Towards a modern, more European copyright framework*, in which they claim the action plan for copyright is "directly and unequivocally pointing towards the first steps towards the introduction of an ancillary copyright."¹⁷

These representatives in Parliament also remind the Commission of the broad rejection of ancillary copyright in the *Implementation of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*.

In conclusion, OpenMedia shares the concerns of MEPs, civil society groups, press publishers, and Internet users that ancillary copyright creates a broader trend towards the degradation of the right to link.

Annex 2: Duty of Care, Intermediary Liability and the Right to Link

Most online communication today takes place via a platform, or online intermediary. These are services such as Facebook, SoundCloud, Twitter, blogging platforms, message boards, and more. They are any place where Internet users increasingly gather to share stories, news, art, culture, and creative endeavours.

As pressure builds on governments and decision-makers to craft rules that require these intermediaries to censor undesirable content, there is an extreme risk that the outcome of such policies could result in, at best, unintended disruption and the removal of legal content online, and at worst a heavy-handed censorship regime that threatens free expression, access to knowledge, and online innovation.

In the recently proposed Digital Single Market plan, the Commission proposed the idea of a ‘duty of care’ that would require intermediaries to proactively monitor, evaluate, and remove content posted by Internet users on their platform. Recognising the rapidly-changing nature of information services, OpenMedia appreciates the role of legislators in making our digital sphere a safe space where individuals can be free from abuse and harassment. However, we encourage the Commission to make use of existing laws which have been crafted with the delicate balance between free expression and legal speech online in mind, rather than creating a new liability regime.

Extensive work has been done on the issue of intermediary liability: by copyright experts, human rights advocates, digital rights advocates, academics and economists. This research—in tandem with examining real-world examples of intermediary overreach—exposes the potential pitfalls of an overzealous liability regime. They include:

- filtering and over-blocking of legal content as [evidenced in the UK](#);¹⁸
- the impracticality of monitoring [billions of posts per day](#), resulting in automated systems that remove legal speech and expression;¹⁹
- giving intermediaries the power to act as courts, making decisions on what is legal content;
- concerns about how intermediary liability proposals limit free expression as outlined in [article 19 of the ICCPR](#);²⁰

As much has been written on the topic of intermediary liability, OpenMedia encourages the Commission to make use of the excellent resources at its disposal, particularly: the [Manila Principles on Intermediary Liability](#).²¹ We would draw your attention specifically to the First Principle, stating that “intermediaries must never be made strictly liable for hosting unlawful third-party content, nor should they ever be required to monitor content proactively as part of an intermediary liability regime.”

Finally, OpenMedia would like to address the business and economic implications of additional liability on intermediaries that facilitate online communications. The stated aim of the Digital Single Market strategy is to enhance online innovation in Europe, and kickstart the digital economy, giving European-grown innovators the tools they need to start and scale a business in today's competitive market. The ability of the next Google or Facebook to emerge from the EU hinges on reasonable, evidence-based policy that allows intermediaries to thrive, without hamstringing their operations with costly and cumbersome policies that require them to monitor every communication across their platform.

If the Commission is truly committed to providing European innovators with all the necessary tools for success, a liability regime that restricts startups, and favours existing Internet monopolies with deep pockets is clearly not the way to create a level playing field, particularly when intermediaries in other regions, like North America, do not have to contend with intermediary liability rules that increase both their cost of operations and potential legal responsibility for content posted by users. In fact, policies of this kind would put EU startups at a disadvantage, and serve to deepen the digital innovation divide between Europe and the rest of the world.

Annex 3: Questions as they appear on SaveTheLink.org/YourVoice and corresponding Commission questions

Question 1:

Question as seen in the platforms consultation: Have you encountered, or are you aware of problems faced by consumers or suppliers when dealing with online platforms?

Corresponding Question on SaveTheLink.org/YourVoice: When using platforms like SoundCloud or Facebook, have you ever seen legal content unfairly removed, or been unable to access it in your region?

Question 2:

Question as seen in the platforms consultation: Are you a holder of rights in digital content protected by copyright which is used in an online platform?

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 authorization?
- An online platform such as a video sharing website or an online content aggregator refuses to enter into or negotiate licensing agreement with me
- An online platform such as a video sharing website or an online content aggregator is willing to enter into a licensing agreement on terms that I consider unfair
- 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 license or to do so under their own terms
- If yes, explain.

Corresponding Question on SaveTheLink.org/YourVoice: Do you think rightsholders (such as the film or music industries) have too much say in which content is taken down from the web? Do you understand why some content (e.g., pictures, videos, gifs) get taken off the Internet?

Question 3:

Question as seen in the platforms consultation: 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?

Corresponding Question on SaveTheLink.org/YourVoice: Do you believe platforms such as SoundCloud, Twitter, or YouTube should face regulations requiring them to monitor your Internet activity, or filter and remove content you produce and share? Or should alleged infringement have to be proven in a court of law before censorship occurs?

Question 4:

Question as seen in the platforms consultation: Are you a holder of rights in digital content protected by copyright which is used in an online platform?

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 authorization?
- An online platform such as a video sharing website or an online content aggregator refuses to enter into or negotiate licensing agreement with me
- An online platform such as a video sharing website or an online content aggregator is willing to enter into a licensing agreement on terms that I consider unfair
- 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 license or to do so under their own terms
- If yes, explain.

Corresponding Question on SaveTheLink.org/YourVoice: Should websites and users be forced to pay a link tax? Put simply: should websites have to pay money when using snippets of text to preview other content online?

Question 5:

Question as seen in the platforms consultation: 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?

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

Corresponding Question on SaveTheLink.org/YourVoice: Do you agree that sharing content owned by others (pictures, videos, and blogs) should NOT be governed by the same rules that we use to punish extremism, hate speech, and abuse online. Why or why not?

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[7], [20] The *International Covenant on Civil and Political Rights* Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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