



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

## VG Bild-Kunst contribution

### 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 30 December 2015 (12 weeks from the day when all language versions have been made available).

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](mailto: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](mailto: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.

#### 1.1 - 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

VG Bild-Kunst is the German CMO for visual works. It represents more than 54.000 fine art artist, photographers, illustrators and designer as well as authors of audiovisual works.

#### 1.2 - Please indicate your country of residence

- Austria
- Belgium
- Bulgaria
- Czech Republic
- Croatia
- Cyprus
- Germany
- Denmark
- Estonia
- Greece
- Spain
- Finland
- France
- Hungary
- Ireland
- Italy
- Lithuania
- Luxembourg
- Latvia
- Malta
- The Netherlands
- Poland
- Portugal
- Romania
- Slovakia
- Slovenia
- Sweden
- United Kingdom
- Non-EU country



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

VG Bild-Kunst, Weberstrasse 61, 53113 Bonn, Germany, Anke Schierholz, [schierholz@bildkunst.de](mailto:schierholz@bildkunst.de)

1.4 - 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

1.4a - Please indicate your organisation's registration number in the Transparency Register

038215812569-88

1.5 - 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).

1.6 - I object the publication of my personal data

Yes / No

## Online platforms

### SOCIAL AND ECONOMIC ROLE OF ONLINE PLATFORMS

2.1 - 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.

Yes / **No**

2.1a - Please explain how you would change the definition (1000 character(s) maximum)

The definition seems to be too broad and covers too many different business models which deserve differentiated answers. We refer to statements made by SAA, GESAC and EVA on the definition of platforms.

Our focus is to make sure that feasible solutions for the respect of authors' and creators' rights and their remuneration are found for the different models. Therefore we doubt that a one-fits-all solution is possible.

The question of liability cannot be properly addressed by looking only on technical aspects of the services but must take into account the underlying business models. The safe harbour provisions of the ECD are no longer suitable for all the different business models which have emerged in the last 10-15 years, as they allow to escape liability for content by claiming that the service is limited to the technical setup for users to upload content - while at the same time this content is commercialized, e.g. through advertising.

2.2 - 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:**

2.2a - Please specify (100 character(s) maximum):

In fair, diverse and competitive markets, platforms have the potential to do many of these.



2.3 - Have you encountered, or are you aware of problems faced by consumers<sup>1</sup> or suppliers<sup>2</sup> when dealing with online platforms?

Yes / No / I don't know

2.3a - 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)

Platforms offering third party (often user generated) content show little to no interest in rights clearance.

Google, e.g., met once with representatives of the Visual Collecting societies over an offer to licenses protected works in the course of the Google Art Project – and preferred to eliminate all protected material. The same reaction can be seen for Google Images: the easy access service is not available in countries where copyright concerns have been voiced or Google has been sued. These “services” rely full on unremunerated access to copyrighted material.

Equally troubling are the terms and conditions of social media (see e.g. Facebook, Instagram and others) which oblige users to grant a non-exclusive but otherwise unlimited license in all materiel posted to enable the platform to commercialize it. Yet, the responsibility for posted content is entirely shifted to the (mainly private) user – and the platform operators hide in the safe harbour provisions of the ECD....

2.3b - How could these problems be best addressed?

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

## TRANSPARENCY OF ONLINE PLATFORMS

2.4 - Do you think that online platforms should ensure, as regards their own activities and those of the traders<sup>3</sup> 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)?

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?

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<sup>1</sup> "Consumer" is any natural person using an online platform for purposes outside the person's trade, business, craft or profession.

<sup>2</sup> "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.

<sup>3</sup> "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

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)

2.5 - 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

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

Yes / No

2.7 - 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)

Where copyrighted material is used all available information about the author and the work should be given.

2.8 - 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

2.8a - Please explain how the transparency of reputation systems and other trust mechanisms could be improved? (1500 character(s) maximum)

2.8b – 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)



## USE OF INFORMATION BY ONLINE PLATFORMS

2.9 - 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

2.10 - Please explain your choice and share any best practices that you are aware of. (1500 character(s) maximum)

2.11 – Please share your general comments or ideas regarding the use of information by online platforms (3000 character(s) maximum)

We share the concerns voiced by SAA and EVA and are concerned by automated filtering and algorithmic editorialisation based on data collected from user-habits and its impact on the visibility and accessibility of European works. These recommendation mechanisms mean that not all cultural works are equally visible to all service users. Alternatives to very popular works risk being intentionally and then automatically filtered out. Guaranteeing the visibility of a wide range of diverse works might be challenged by the commercial-driven desire of services to highlight blockbusters, with subsequent automated filtering and commercial arrangements guaranteeing prominence. The market concentration of the audiovisual sector's analogue markets seem to be being reproduced and even amplified online.

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

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

**Yes** / No

3.5a - As a holder of rights in digital content protected by copyright have you faced any of the following circumstances:



i) 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

ii) 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

iii) 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

iv) 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

3.5a\*If you answered YES to some of the above questions, please explain your situation in more detail. (3000 character(s) maximum)

Platforms operating on a business model where content is uploaded by users or any third party must guarantee that rights are cleared.

For professionally produced content individual rights clearance shall be the norm.

For remixes and other private user generated content a mechanism is needed to clear rights on a mass scale. We suggest an analogy to the operator levy for private copying, payable by the platform operator under a mandatory collective legal license system. The situation is similar to the one when private copying was introduced: copyright infringement by private users is taking place on a broad scale – but cannot reasonably be controlled or prohibited unless private users are criminalized. Most right holders do not want to pursue infringements by strict legal action when their works are re-mixed.

A collective legal license should apply to small parts of works (no entire books, no entire films) or small works, and should cover only the making available of the re-mixes and UGC on the licensed platform. All subsequent uses are reserved.

In order to protect the moral rights right holders need the option to opt out. We are confident that opt out will be limited to severe infringements of moral rights like e.g. political propaganda or other not approved contextualisation.

The benefits are obvious: private users are safe and do not need to fear to infringe rights and run no danger to be criminalized. And equally important: authors´ rights are respected and remunerated. CMOs provide for the system of distribution to the right holders. See also:

<http://www.bildkunst.de/urheberrecht/verantwortlichkeit-von-plattformbetreibern.html>

3.7 - 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.

3.8 - 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

## Tackling illegal content online and the liability of online intermediaries

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.

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

- individual user
- content provider
- notice provider



- intermediary
- none of the above

6.1a - Please explain

6.2 - 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

6.2a - Please describe the situation. (3000 character(s) maximum)

The E-Commerce Directive liability regime was designed for pure technical and passive intermediaries such as hosting providers of email services. As such, it is outdated as it does not take into account online platforms that have developed afterwards. Unfortunately, some national courts have extended the hosting provider liability exemption to platforms such as video sharing platforms whereas they are not passive technical intermediaries. Services that monetize uploaded content and editorialise (whether in person or through an algorithm) it should be considered responsible for this activity. The abusive application of the liability exemption regime to these platforms has given them a competitive advantage and undermined the ability of legal services to develop in a fair market.

The only means right holders have at their disposal in the context of the application of the liability exemption regime is notice actions. These notice actions are particularly burdensome and costly for right holders and have proved insufficient to eradicate the presence of illegal content on sharing platforms and social media. A fundamental change of approach is necessary.

6.3 - 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

6.3a - Please explain your answer. (1500 character(s) maximum)

We are of the opinion that it is insufficient to only look at technical aspects – the technical development is too quick to give legal certainty to stakeholders. Rather we suggest to take a closer look at the business model under which a service is working: if the user is paying for technical services rendered other rules for liability may apply than for those models where the service is offered "for free" but where the content is commercialized, e.g. by posting advertising, or data given by the user are sold.

6.4 - 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**

6.4a - Please provide examples (1500 character(s) maximum)

It should be clarified that the existing liability exemptions are limited to the benefit of pure technical and passive intermediaries and there is no need to expand the list of derogations. Any non-passive pure technical intermediary, i.e. any online platform whose business makes use of protected content should bear full responsibility for its activities.

The question whether the act of communication to the public is made by the end-user or by the online platform is less relevant as the CJEU has clearly stated in the Airfield case that a single act of communication to the public can be attributed to more than one person if the role played by the intermediary is indispensable to make the work available to the public.

It is up to the copyright legal framework to clarify when an act of communication to the public takes place. However, the "Svenson" and "Best Water" decisions of the CJEU, holding that framing (and possibly other forms of hyperlinking) are not infringing copyright if the linked works are made available without technical protection are detrimental to licensing copyrighted works in the internet. For details see our newsletter of November 2015: <http://www.bildkunst.de/urheberrecht/die-hyperlink-problematik.html> and or newsletter of October 2015 on liability of platform operators <http://www.bildkunst.de/urheberrecht/verantwortlichkeit-von-plattformbetreibern.html>

On the "notice"

6.5 - 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

6.6 - 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:

6.6a - Please specify. (500 character(s) maximum)

Notice-and-action procedures are ill-adapted for mass copyright infringement services. Procedures are burdensome and costly as they have to be conducted for each service, work and occurrence with no long-term benefit as the infringing content can reappear almost immediately.

6.7 - Please explain what approach you would see fit for the relevant category. (1000 character(s) maximum)

We refer to the answers given by SAA, EVA and GESAC

On the "action"

6.8 - 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**

6.8a - Please explain your answer (1500 character(s) maximum)

6.8b - If you consider that this should only apply for some kinds of illegal content, please indicate which one(s) (1500 character(s) maximum)

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

**Yes** / No

6.9a - Please explain

For services which rightfully benefit from the liability exemptions, it should be clarified that the notice-and-action procedure for infringement of copyright protected works is a "notice and stay down" procedure. These services should have systems in place that prevent unlicensed works re-appearing on their service.

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".

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

Yes / No / I don't know

6.11a - Please specify for which categories of content you would establish such an obligation. (1500 character(s) maximum)

Copyrighted works

6.11b - Please specify for which categories of intermediary you would establish such an obligation (1500 character(s) maximum)

Technical intermediaries who benefit from liability exemptions should be subject to duty of care requirements (provided for in recital 48 of the E-Commerce Directive) for copyrighted works and neither promote nor profit from unlicensed content.

Any online platform whose business model takes advantage of protected works should not benefit from any liability exemption and should enter into a licence with right holders.

Further we refer to our suggestion for a collective legal license for re-mixes and other private user generated content (above answer to question 3a)

6.11c - Please specify what types of actions could be covered by such an obligation (1500 character(s) maximum)

The objective of duties of care is to detect and prevent certain types of illegal activities. As far as protected works are concerned, it should focus on detecting and preventing piracy. Codes of conduct discussed with payment and advertising intermediaries, such as in the context of "Follow the money" approach to enforcement, are certainly a very interesting option.

Further we refer to our suggestion for a collective legal license for re-mixes and other private user generated content (above answer to question 3a)

6.12 - 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

6.12a - 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

6.13 - 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

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



Yes / No

6.15 - 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)

Operating a services that generates revenue by attaching advertising to individual pieces of content confers a responsibility on the service provider to ensure that the content in question is properly licensed. These services can no longer benefit from liability exemptions designed for pure passive technical intermediaries. They have to enter into licence agreements with rightholders and share their revenues with the authors of the works that make their service attractive. Collective licensing is the best solution for these services.

The question of linking must be addressed as well. The results of the "Svenson" and "Best Water" decisions of the CJEU are that right holders became very careful to license the use the works in the internet without proper technical protection against framing and other forms of hyperlinking. This has consequences for cultural institutions (museums, archives and libraries), too, who are expected to make their collections available on-line: VG Bild-Kunst could not license German Digital Library for stand-alone images because technical protection cannot be provided.

Unless this rulings of the CJEU are corrected, it will be difficult to acquire rights for third party copyrighted content. Existing forms of communication in the internet like e.g. blogs and discussion are endangered and new business models cannot develop.