

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

## Objectives and General Information

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.
- 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
- X Other

IMRO is the national organisation that represents over 10,000 authors, songwriters composers and music publishers in Ireland

. It licenses the public performance and making available rights in musical works on their behalf to music users including online platforms. It has affiliate agreements with many similar organisations worldwide.

Please describe the type of online platforms that you represent, a brief description of the online platform and indicate its name and web address

---

Please briefly explain the nature of your activities, the main services you provide and your relation to the online platform(s) which you use to provide services

---

Are you a SME or micro enterprise?

- Yes
- No

Please specify

---

Please indicate your country of residence

X Ireland

---

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

**Name:** Victor Finn\_\_\_\_\_

**Address:** Irish Music Rights Organisation

Pembroke Row,

Baggot Street,

Dublin 2\_\_\_\_\_

E-mail:\_\_\_\_victor.finn@imro.ie\_\_\_\_\_

---

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.*

X No

---

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.](#)

*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

X No

Please provide a brief justification.

## Online platforms

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.

- Yes  
 No

Please explain how you would change the definition

*IMRO does not agree with such a broad definition of “online platforms” as the policy perspectives considered for such services would be blurred and misguided, when the same principles are applied to structurally different services.*

*IMRO will therefore focus its comments on certain types of service providers or content aggregation services that require specific policy measures as regards copyright law.*

*Self proclaimed online intermediaries or intermediary service providers rely on the current safe harbour regime of the E-Commerce Directive (ECD), although they provide the same or similar services as the pure “digital service providers” (DSPs) that are subject to Directive 2001/29/EC (InfoSoc Dir.).*

Online access to cultural content has seen a huge transformation in the last 5-10 years. The services, to which consumers most likely go to access and enjoy cultural content, do not always operate in the same manner as the so-called DSPs or OTT (over the top) operators. These services’ offers are characterised by a platform-based approach and they aim at keeping consumers/end users within their platforms by enabling them to access all cultural content, entertainment, as well as other information that might or might not be available elsewhere in a different format or a different manner. Their business model is based on the aggregated attractiveness of their offer (i) to create stronger consumer stickiness, (ii) to become the main reference point for consumers for whatever they are looking for and (iii) to keep users within the platform on a continuous basis. They do not create or invest in cultural content but aggregate or make available cultural content that is available on other websites or made available by the individual users of those services.

‘Platforms’ appear in different structures and technical typologies; for example where

- individual end-users upload content (UGC or professional promotion platforms, e.g; You Tube, Dailymotion, Soundcloud, MySpace),
- individual end-users post links to cultural content or post their own content to share with others in a social media environment (Facebook, Hyves, twitter, Musicyou, Snapchat, etc)
- operators of the services select, aggregate and facilitate access to existing content on other websites and/or platforms through hyperlinking and/or embedding (TuneIn, iHeartRadio, NL FM, 6 Seconds, UberRadios, OnLineTV Lite, etc.), some of which raising also moral rights issues (Bmusic, in Spain).
- operators develop software and dedicated search engines to find, index, list and access content (dedicated to certain type of cultural content such as books, images, videos, news and/or including cultural content as part of a general offer, e.g. Google, Yahoo, Bing, Qwant, etc.)
- recently there appeared application based services providing the technical facility to access cultural content available from other end-users’ devices through links that give direct access to cultural content (e.g. periscope, etc.).

Such self-proclaimed online intermediary services, even where they actively engage in dissemination of creative works, deny their involvement in making the creative works available to public and invoke the safe harbour privileges to avoid any liability to take consent of or to remunerate creators.

---

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

---

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

Yes

No

IMRO itself is not a right holder but IMRO members represent the rights of authors, composers, and other rightholders, whose works are displayed on the platforms of online intermediaries. Therefore IMRO will answer the below questions as a right holder.

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.

*There are a plethora of services that have refused the licensing requests of authors' societies and a few of the aggregation services, who had a licence before, terminated their agreements relying on the current legal framework. Consequently the members of the societies do not receive a cent from the use of their works by those services and platforms. When the right holders have managed to conclude agreements with such services and platforms, such agreements differ significantly from the normal licensing agreements in terms of remuneration level and structure, usage reporting and transparency. Therefore although there are some agreements in place, it is a situation of "under-licensing".*

- **arguing that they do not undertake any copyright relevant acts:** this is raised in most of the cases together with safe harbour claim, especially where the works are uploaded by end-users to video and audio platforms or where works are uploaded or linked by end-users to social media type of platforms
- **relying on the CJEU's Svensson and BestWater judgements** to argue that their services based on hyperlinking, framing and/or embedding are not directed at a "new public", although their platforms offer new autonomous services to public
- **claiming safe harbour defence:** These online services are able to claim non-liability, mostly based on safe harbour provisions of the E-Commerce Directive. Most services operating a video or audio platform now claim safe harbour status.
- **indicating that they do not commercialise their service** in general or in the country where they are approached by the author society, which is not a legal argument since profit making nature is not a requirement for establishing the existence of copyright relevant act
- **indicating that they do not have any legally relevant establishment (e.g. registered office or branch office) or legal representation in the country** where they are approached by the authors' society, although their services are available to the public in those countries: In fact this claim is very much connected to the previous claim above about not commercialising content in the country, since those services consider that they only supposed to get a licence when they commercially operate in a country and have their offices in that country, although neither of those are relevant for the exercise of exclusive rights of authors and composers.

As regards the agreements that right holders have managed to conclude, it is important to stress that such agreements cannot be compared to the licensing agreements that authors' societies normally have. The main problem is that they do not appropriately reflect the level of exploitation of members' works on the service. Firstly, right holders do not receive revenue for much of the uploaded content that includes their works, even though the service derives benefit from them. Secondly, where rightholders do receive a share of revenues, the rate per stream is much lower than any equivalent streaming service. A key cause of this 'under-licensing' has been such services' reliance on the hosting defence of the ECD.

The problems of low value are exacerbated by the fact that these licences are exceptionally complex, leading to a lack of transparency. For example, sometimes our members refer to the difficulty of knowing exactly how money relating to content is generated and receiving accurate reporting on such content. Not reflecting the economic value of the rights compared to the DSPs providing similar services creates further difficulties in combination with the legal qualification of framing and embedding by the current CJEU case law. As there is generally agreement only to remunerate rightsholders on the basis of the advertising revenues generated on the concerned platform, rightsholders have no possibility to participate in the value created on the embedding website and no possibility for pricing-in this value in the original licence. Having a licence today is not a guarantee for continuation of such licences tomorrow, since the legal basis of such contracts do not recognise active involvement of the service in making the creative works available to the public. For instance, GEMA used to have a licence but when the terms were re-negotiated YT claimed safe harbour. On a similar line, several societies have agreements with YT now, although they did not have before because YT was claiming safe harbour.

IMRO would like to note that this is not a problem limited to one service and/or the music sector only. The day-to-day experience of IMRO members with those services together with the market study of Roland Berger illustrates that creators and right holders have been paralysed in their ability to receive any or appropriate remuneration from an exponentially growing market. A process of a "re-intermediation" in terms of end-users' access to creators' works is being materialised, however the appropriate structures to ensure revenue streams to creators are not established in a legally certain way. Moreover, the current legal framework gives these services an unfair competitive advantage over legitimate distributors of copyright protected works that try to be a part of a sustainable digital economy. Therefore, the European Commission's intention of "clarifying the rules on the activities of intermediaries in relation to copyright-protected content" should clearly address that the services that actively take part in making the copyright protected works available through their deliberate acts on platform-based services cannot benefit from the safe harbour regime. The rights should apply irrespective of whether the same work or subject matter has been, or is being, communicated or made available, by the same or different technological means, by another information society service provider, to the same actual or potential members of the public.

---

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

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

IMRO itself does not provide notices but some of IMRO's members do. In any case IMRO members hold rights in works that are used by and accessed on the platforms of the self-proclaimed online intermediaries. Moreover although not all IMRO members provide notices, they hold rights (rights of authors and composers) in the protected works for which other rightholders or a joint entity of rightholders systematically send notices. Such notice and action regime, as the only legal procedure applying to online intermediaries, combined with its ineffectiveness, also has a huge impact on the possibility to effectively exercise the exclusive rights held by IMRO members.

---

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?

- X Yes
- No

Please describe the situation.

The three cases of exemption from liability established by the ECD (Art 12 to 14) were designed for technical 'services' provided by operators which remain neutral in relation to the transmitted or stored information. Therefore, they should apply to certain activities that the operators may perform and not to 'categories of service providers'.

Hosting in particular raise difficulties in this respect.<sup>1</sup> Art 14 mentions only the "storage" of information provided by a recipient of the service, without referring to the possibility of such information being "communicated to the public" by the hosting services provider. Therefore, only hosting in the strict sense of storage was contemplated by the ECD. The host is the provider that stores a website on its servers, whereas the site's contents are made available to the public by the person operating the site. Recitals 46 to 48, which are the only ones dealing with hosting, do not contain any details on the activity covered by the exemption but only explain the conditions for

---

<sup>1</sup> The study commissioned by GESAC to Agnes Lucas-Schloetter explains this issue in detail. The IMRO answer to this question also includes parts from that study.

application of the exemption. Thus, the key concept of knowledge of illegality of the stored information is not a factor for defining the activity of hosting but rather a test for the assessment of the provider's possible exemption from liability. Moreover, as per Recitals 17 and 18, the activity's profit-making nature neither affects the status of host, nor deprives the provider of the exemption from liability under Art 14.

In fact, at the time of the adoption of the ECD many of the services that now claim to be under Art 14 did not even exist. The intention was to address purely technical services of storage. For instance the proposal for the ECD referred to *"the provision of server space for a company's or an individual's web site"*<sup>2</sup> as an example of the services targeted by this provision. Considering that the ECD's objective was to strike *"a balance between the different interests at stake"*, it is difficult to argue that such a balance is still in place where a plethora of services that have become the main access route to copyright works (just because they operate user-uploaded content platforms or services to aggregate links to copyright content) claim to benefit from such non-liability regime.

The Court of Justice of the EU (CJEU) in the cases regarding Google's Adwords service and eBay's online auction service (in cases involving trademark law) extended the definitional criteria laid down under Recital 42 for mere conduit and caching activities to hosting providers, whose activity shall be of a *"mere technical, automatic and passive nature"* and who play no *"active role of such a kind as to give it knowledge of, or control over, the data stored"*.

A number of services claiming host status are not currently licensed (or considerably under licensed), despite their active involvement in making copyright works available, because of the national and EU copyright laws and/or the way they are applied by the judges in consideration of ECD provisions. There have been many attempts at national level to convince judges that the safe harbour regime should not be applied to service providers who are not purely technical service providers within the intended meaning of the ECD. These attempts have been unsuccessful in most cases. Where UGC platforms are concerned, after refusing to consider such operators as hosting service providers,<sup>3</sup> French courts decided to apply to them the safe harbour regime.<sup>4</sup> In Spain, the courts also handed down decisions enabling YouTube to benefit from such regime<sup>5</sup> while the Italian Court of cassation described Google Videos as a host.<sup>6</sup> The court of Appeal of Milan reversed a previous decision in the case Yahoo v. RTI, denying the differentiation between active and passive service provider; similarly Turin courts qualified YouTube and Dailymotion as host provider which could at most be subject to preventing re-upload of the removed illegal content<sup>7</sup>. In Germany, local courts gave contradicting judgments as regards YouTube<sup>8</sup> and appeal courts have found YT only liable as a host provider for taking down and filtering unlawful content where the unlawfulness (infringement) has been substantiated, but not for remuneration of rightsholders. In Poland, Polish Chamber of Books sued local UGC portal Chomikuj.pl (music, literature, video) to block certain content and to reimburse

---

<sup>2</sup> COM (1998) 586 final, 18.11.1998, p. 30.

<sup>3</sup> See, for example, Court of appeals of Paris, 7 June 2006, Tiscali v. Dargaud Lombard.

<sup>4</sup> See for instance C Cass, Civ. 1, 17 February 2011, Société Nord-Ouest v. Dailymotion; Civ. 1, 12 July 2012, Google v. Bac Films and Google v. Bac Films.

<sup>5</sup> See Juzgado de lo Mercantil de Madrid of 20 September 2010, Telecinco v. YouTube, confirmed by Audiencia Provincial de Madrid of 14 January 2014.

<sup>6</sup> See Corte di Cassazione, decision of 17 December 2013 – 3 February 2014.

<sup>7</sup> Court of Appeal of Milan n.29/2015 Yahoo! Vs. R.T.I. of 10 July 2014; Court of Turin in case Delta TV v Google/YouTube of 5 May 2014; Court of Turin in case Delta TV v Dailymotion of 3 June 2015.

<sup>8</sup> LG Hamburg Urteil, 03.09.2010 - 308 O 27/09 and LG Hamburg, Urteil 20.04.2012 – 310 O 461/10

rightholders, however courts rejected the case because of the safe harbour principle. As for search engines, the French courts have extended to them the safe harbour regime for hosts<sup>9</sup>.

Following those cases, most services operating a video or audio platform now claim safe harbour status, although they are clearly in competition with other fully licensed online music services and significantly impact emergence and development of new legitimate online services by distorting the market. A recent study from Roland Berger Consultants shows that the services such as YouTube (YT) and Soundcloud that claim hosting status have 183 million and 100 million monthly users respectively in Europe as compared to Spotify that has 25 million monthly users, while 66% of YT's and 100% of Soundclouds usage (and revenues) are directly related to access to music. Moreover, according to a 2013 Ipsos study, which asks consumers which music services they use, 84% answer YT, compared to 68% who uses iTunes, 62% Spotify and 28% Deezer.

Therefore, IMRO believes that categorical extension of Art 12-15 of ECD to the copyright relevant acts of new type of services that did not exist and that the ECD did not intend to cover at the time of its adoption is very problematic and needs to be clarified under the forthcoming review of InfoSoc Dir.

---

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.

*The dispute as to whether the ECD exempts service providers only for infringing acts under the InfoSoc Dir performed by their users, or also for those acts that may be directly imputed to them was not relevant at the time when the ECD was adopted: exempted providers were hardly ever direct perpetrators and the immunity granted to them concerned only the cases in which they could incur (indirect) liability for contributing to infringing acts committed by their users. However, as outlined above in answer to the previous question, the ECD's conditional non-liability regime based on the "mere technical, automatic and passive nature" of the role has been extended to new services, e.g. video sharing websites or more generally user-uploaded audio and video sharing platforms, as it is given as an example by the Commission in this question. Today, the problem of right holders vis-à-vis such platforms is twofold: i) whether latter's acts are covered by the rights defined under Art 2 and 3 of the InfoSoc Dir; and ii) whether such platforms can claim safe harbour non-liability regime for such acts, when the non-liability was, in fact, constructed to exempt the services from liability for infringement committed by third persons under certain circumstances.*

In order to see whether the acts undertaken by those user-uploaded content services are not of passive and mere technical nature but on the contrary actively engage in communication to the

---

<sup>9</sup> See e.g. C Cass, Civ. 1, 17 February 2011, Bloobox-net v. Martinez.

public and/or making available, the following points can be considered in light of the current EU law and the CJEU rulings:<sup>10</sup>

As regards the service provided by user-uploaded content platforms, the operators of such services argue that they do not undertake any copyright relevant acts but the individual users uploading content do. However the CJEU in *Svensson* ruling took a definition of act of communication based on “*provision of direct access to the work*”, without referring to operators’ active and/or conscious role. Moreover in several rulings the CJEU referred to the “*indispensable role*” played by the person to whom an act of communication can be attributed (such as a hotel, spa or pub owner, dentist practice or operator of a retransmission service). In the case of user-uploaded content platforms, on the one hand there are individual uploaders, who initiate the communication to public but relying on the assistance of the platform to make the works available to the public, and on the other hand, there are platforms that are created for the individual uploaders to upload, without which the works cannot be made available to the public (and accessed and enjoyed by the members of the public). In this respect the CJEU in the *Airfield* ruling clearly established that unless the role played by the operator is limited to “*mere provision of physical facilities*” (as provided under Rec 27 of the InfoSoc Dir), a single act of communication to the public can be attributed to more than one person, if the role played by an operator is indispensable to make the works available to the public (i.e. no access to such works without the platform) and provides a service for the end-users to access protected works. In this respect it could be useful to note that the UK courts looked at the legal status of user-uploaded content services in relation to copyright in a number of site-blocking cases in the UK. Site-blocking cases involve a determination of whether websites are infringing copyright. Although in these cases where BitTorrent indexing and link aggregating websites gave access to protected content and the court said that “*the communication to the public involves both the operators of websites, who provide a mechanism specifically designed to achieve this, and the users, who provide the actual recordings*”, those websites were not party to the case and therefore neither impacted by the decisions for their acts, nor did challenge this position:

- *Dramatico Entertainment v BSKyB* [2012]: users of the Pirate Bay held to infringe copyright by communication to the public; operators of the Pirate Bay infringe copyright by authorising users’ infringements.
- *EMI v BSKyB* [2013]: three P2P file-sharing sites – users held to infringe copyright by copying or communication to the public; operators of the sites liable for communication to the public, authorisation and joint tortfeasance.
- *Football Association Premier League v BSKyB* [2013]: FirstRow, a website hosting hyperlinks to streams, posted by users, held liable for communication to the public.
- *Paramount Home Entertainment International v BSKyB* [2013]: two sites hosting files or hyperlinks posted by users were held liable for communication to the public and authorisation. Users held liable for copying but judge uncertain whether users posting hyperlinks constituted communication to the public.
- *Paramount Home Entertainment International v BSKyB* [2014]: sites hosting hyperlinks to streams found liable for communication to the public.
- *Twentieth Century Fox v Sky UK* [2015]: UGC hyperlink sites and P2P BitTorrent sites held liable.

In this respect, both for the “*mere provision of physical facilities*” concept and to assess the role of such platforms (although characterisation of act of communications is independent from the

---

<sup>10</sup> Please note that a comprehensive legal analysis has been undertaken in this respect in the study prepared by Agnes Lucas-Shloetter for GESAC and IMRO’s answer to this question is also mainly based on that analysis.

classification of the services as an online intermediary service under ECD), the criteria used by the CJEU to assess the host status in *Google France v Louis Vuitton* ruling, i.e whether the platform has knowledge of or control over the data stored, could be looked at in parallel.

As regards “knowledge”, there seems to be no question on the fact that the operators of user-uploaded content services clearly know “*the consequences of their actions*” and their intention and knowledge of operating such a service, which even becomes the main route for consumers to access creative works, is apparent. In fact, in this respect, the CJEU requires neither volition nor intention, and deliberate intervention on the part of the provider to enable to make protected works available to the public is sufficient.

As regards “control” over the content, an ‘editorial’ role as defined under media law is not required, since an act of retransmission without a control on the content of the programmes of the broadcast or an involvement of a hotel owner in the individual radio-TV broadcasts offered through the radio-TV sets in guests’ rooms do not require such responsibility either, although they all are qualified as a communication to public. The other point regarding the control over the data might be considered as regards the verification of lawfulness (or copyright status) of the files uploaded by individual users. Although the difficulty of such a process due to extensive volume of data uploaded to those platforms every minute can be raised, the necessity and cost of identification tools cannot be asserted as an argument (or an excuse) against the existence of communication to the public, if such control is technically possible and if such an act is not covered by an exception. Obviously there is no such exception under copyright law. And, since required technical identification possibilities/tools exist and, since, in fact, the business models of such platforms rely on providing relevant advertising strategies, suggesting access to other relevant content, as well as enabling the users to find, list, combine and arrange specific content, lack of “control” should not be a valid argument for the operators of such autonomous services.

In light of the arguments listed above, the concept of one single communication to public involving two different parties can be used in the situation of user-uploaded content platforms as well. The communication cannot happen without the initiative of the uploader, however without the initiatives taken by the operator to make protected works available to the public as a service that provide necessary convenience for end-user to enjoy the protected works, such communication cannot reach to the public. Therefore, it should be considered that such user-uploaded content platforms take part in the communication to the public under the Art 3 of the InfoSoc Dir and they cannot invoke the concept of “*mere technical, automatic and passive nature*” of information transmission by information society service providers provided under recital 42 of the ECD.

---

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

IMRO believes that there is no need to create any new categories for exemption based on the technological typology of a service. The ECD in 2000 has provided a framework that is now abused by a number of services to avoid liability for the content distributed and disseminated through their platforms, especially as regards copyright. Such services have become copyright content distribution platforms, yet they claim ECD non-liability privilege because their technical structures are vaguely associated with the services, whose acts were intended to be covered by Art 12 to 14 of the ECD.

A vibrant and sustainable digital economy, in which ICT (information and communication technologies) and CCI (cultural and creative industries) can grow hand-in-hand, requires a new approach as regards copyright, where services are evaluated according to their function under the copyright law and not their technical structure under the ECD.

IMRO would therefore ask for a clarification within the InfoSoc Directive to define the scope of activities that are covered by copyright and also to indicate that when those act are undertaken, safe harbour exemptions cannot be invoked.

---

### 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 specify.

IMRO members' experience regarding notice and takedown (NTD) procedures as regards the works protected by copyright proves that these provisions are extremely inefficient and costly, as well as not delivering limited beneficial outcome.

Considering the cost of the system, and with human resource restrictions, some rightholders also use certain automated notice systems, however they create other types of major costs again without any satisfactory results. IMRO has for example engaged the services of a third party anti-piracy company to issue automated takedown notices to infringing websites at the request of IMRO members, however this has proven costly with the effectiveness of such a process debatable.

NTD procedures are predominantly used at pre-trial stage to prepare liability proceedings against intermediaries. The research effort involved is quite intense as highly specialised external IT service providers have to be engaged to search for and verify copyright infringing content. Furthermore, for proper documentation and lawful preservation of evidence, strict requirements have to be applied. Moreover, besides the mere initial development and operating costs these applications require constant updating.

This is because illegal and popular content spreads very rapidly across numerous different online platforms and services within a matter of minutes, even when rightholders issue notices to take down, and however large-scale that activity is. An enforcing rightholder must find as many copies of the work as possible and take action in relation to each of those in order to have any positive impact. Even then, it is highly unlikely to fully solve the problem of the work's availability online. In addition to this, once files have been removed, they can quickly re-appear: either being re-uploaded by the same internet user, or by a different user of the same online service, or alternatively by a user of an entirely different online service or platform. To illustrate the problem, over a 4-month period in 2013, *PRS for Music* reported to GESAC that they sent a total of 849 notices to a particular service, Rapidgator.net, in relation to just one single musical work.

In the cases where the services are used for mass copyright infringement or the service is deliberately designed to make protected works available to public and where they develop their own technology to help consumers to store, find, categorise, arrange and access protected works, it seems unreasonable to keep the burden of proof on the side of rights holders to constantly prove unlawfulness of the content and to exempt such services from liability for damages because the service operates in an automated manner, do not control each of the upload by the consumer and do not have actual knowledge of each of such uploads by consumer. In the end it is the service (the operator) who created and designed the referred automated system with its deliberate intention to create such an autonomous service for reproduction and communication to the public of protected works and in full knowledge of how its service is used by consumers. Please see also IMRO's answer to above questions, where the concepts of "knowledge" and "control" are analysed more in detail.

---

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

*IMRO believes that there should be two separate tracks of action at EU policy level for two distinct problems at stake.*

*The first problem is a substantial copyright law problem regarding the application of Art 2 and 3 of the InfoSoc Dir to certain self-proclaimed online intermediary services.*

*Second one is a general e-commerce and enforcement problem regarding efficient application of notice and action procedures through the intermediary of the services that are supposed to benefit from the conditional non-liability regime under Art 12-14 of the ECD.*

*Therefore IMRO strongly believes that dealing with the second problem only would not provide a solution for the first problem, however dealing with the first problem would certainly help solving part of the issues referred to in second problem.*

The first problem requires a legislative clarification under InfoSoc Dir for the acts of the services that actively take part in making protected works available to the public, but invoke safe harbour status in an abusive manner to avoid any liability, such as user uploaded content platforms and content aggregators. Please see IMRO's answers to above questions for more detail in this respect.

Second one is a general e-commerce and enforcement problem regarding efficient application of notice and action procedures through the intermediary of the services that are supposed to benefit from the conditional non-liability regime under Art 12-14 of the ECD. This would require solutions related to ECD and Enforcement Directive, such as "stay-down" obligations, and having additional obligations and responsibilities after a certain number of notices.

Therefore IMRO strongly believes that dealing with the second problem only would not provide a solution for the first problem, however dealing with the first problem would certainly help solving part of the issues referred to in second problem. When the services that are covered by the Art 2 and 3 of the InfoSoc Dir operate without consent and remuneration of creators, they would clearly be infringing rights of right holders. Thus, there would not be a reason to try to refer to useless, ineffective and continuous NTD procedures for a number of services that currently invoke Art 14 non-liability provision to avoid any liability.

### **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

Counter-notices should only be acceptable in a constrained timeframe as to avoid dilatory manoeuvres. Time is of the essence where Internet is concerned and delays are clearly not acceptable.

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)?

Yes

No

Please explain

Where services are rightfully benefiting from the Article ECD exemptions in general and Art 14 in particular, we believe that working practices would greatly benefit if the EU policy were to clarify the functioning of procedures. Such clarification (including for duties of care) should cover:

1. a duty of care on intermediaries, including obligations on services to provide information to their users about copyright and to employ appropriate and effective content-identification technology;
2. clarification that notice and takedown means "notice and stay down" and that service providers are required to remove not only an example URL but all instances of the specific infringement or illegal content once they are notified and/or become aware. IMRO believes that a take-down/stay down obligation can only relieve part of the burden which rights holders have to bear without putting any undue obligation on hosting providers as they have the necessary means to comply. As long as the content has been previously considered as infringing the rights holders' rights, there cannot be deemed to exist a prohibited general obligation to monitor within the meaning of the CJEU ruling on Scarlet case;
3. best practices for hosting service providers' procedures that deal with illegal content, including (a) that service providers' abuse policies and procedures should be easily found, clearly stated, apparent and generally consistent; (b) that online takedown tools for speedy removal are made available and easy to find and use; (c) that action in response to notices should be taken in a matter of hours, not days; (d) that communications be sent by service providers to notice providers, informing them when action has been taken; and (e) a system of accreditation for reputable notice providers, who would be given priority access to the service provider's platform in order to search for, identify and report illegal content, and for whom expedited action is taken in response to notices. Accreditation should be lost or suspended in cases where notice providers are found to have abused those privileges.

### **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

Please describe them.

Could you estimate the financial costs to your undertaking of putting in place and running this system?

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

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.

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

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

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.

## ON ACCESS TO OPEN DATA

Do you think more could be done to open up public sector data for re-use in addition to the recently revised EU legislation (Directive 2013/37/EU)?

*Open by default means: Establish an expectation that all government data be published and made openly re-usable by default, while recognising that there are legitimate reasons why some data cannot be released.*

- Introducing the principle of 'open by default'[1]  
 Licensing of 'Open Data': help persons/ organisations wishing to re-use public sector information (e.g., Standard European License)  
 Further expanding the scope of the Directive (e.g. to include public service broadcasters, public

undertakings);

- Improving interoperability (e.g., common data formats);
- Further limiting the possibility to charge for re-use of public sector information
- Remedies available to potential re-users against unfavourable decisions
- Other aspects?

Please specify

IMRO would like to note that access to public sector information directive has been revised in 2013 with a view to extending its scope. This legislative act focuses on the economic aspects of re-use of information.<sup>11</sup> As regards the public sector entities holding copyright protected works in their collections or archives, the 2013 revision indeed extended the scope of the directive so as to cover public libraries, museums and archives as far as their public domain collections are concerned. The purpose was to allow commercial services to engage in partnership with those entities to digitise their content and to make them commercially available. Obviously this directive does not address third party intellectual property and it is not a directive created for copyright protected works.

Use of copyright protected works is subject to their creators' and rightholders' authorisation, unless the usage falls under one of the exceptions and limitations provided by the InfoSoc Dir. Neither the InfoSoc Dir, nor the Directive 2013/37/EU provide such an exception and since the latter aims at providing access to public data for commercial re-use, it has no merit and justification to create an unauthorised and not remunerated commercial use of creators' works.

---

Do you think that there is a case for the opening up of data held by private entities to promote its re-use by public and/or private sector, while respecting the existing provisions on data protection?

- Yes
- No

Under what conditions?

- in case it is in the public interest
- for non-commercial purposes (e.g. research)
- other conditions

Please explain

---

<sup>11</sup> <http://ec.europa.eu/digital-agenda/en/european-legislation-reuse-public-sector-information>. Most significant examples for the subject matter of this directive are e.g. information on the roads, traffic, meteorology, etc. held by public sector to create new commercial services such as online maps or weather information.