

British Copyright Council response to the European Commission's Digital Services Act (8 September 2020)

1. The BCC is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues. We represent those who create, perform and manage rights across the creative industries. Our membership spans literary, dramatic, musical and artistic works, films, sound recordings and broadcasts. The purpose of the BCC is to provide a representative voice on copyright and related issues across our 29 members, who themselves represent hundreds of thousands of creators.¹

General comments

2. Based on the latest available information (dating back to 2015) the value of the creative and cultural industries within the European Union represented 6.8% of European GDP (approximately €860 billion) and 6.5% of European employment (approximately 14 million people). In the United Kingdom, the creative industries contributed £111.7 billion to the economy in 2018 – more than the automotive, aerospace, life sciences and oil and gas industries combined. This was up 7.4% on the previous year.² Obviously, current restrictions given the Coronavirus pandemic are having a considerable economic impact on the creative and cultural industries, in particular as far as they rely on live performances and events. This means that income from digital marketplaces and the responsibility of digital services within the creative value chain has become even more important.
3. However, there has been an uptake in the creation and consumption of online content during the Pandemic. The Creative Industries Policy and Evidence Centre's survey found that over the six weeks when social distancing measures were at their most stringent in the UK, the consumption of online content increased across music, film, TV, and e-publishing, as well as for 'non-traditional' digital activities such as watching filmed performances of theatre, concerts and dance shows and looking at art, paintings and photographs online.³ Under the current liability regime for digital services as defined in this consultation, which dates back to 2000, these services have enjoyed a significant increase in revenue from creative works, whilst artists,' writers' and performers' income, and that of their representatives, has fallen in real terms leaving them with little opportunity to earn a living from their talent and works.⁴ Despite this, the creative industries took immediate action to facilitate lawful access to their repertoires online during the pandemic, for example by offering broad access to works educational purposes.
4. This shift has expedited the dependency of creators and artists and their representatives on digital services (including platforms), meaning that it is now even more important to ensure

¹ The BCC's membership: Artist's Collecting Society; Association of Authors' Agents; Association of Illustrators; Association of Learned and Professional Society Publishers; Association of Photographers; Authors' Licensing & Collecting Society; BECTU; British Association of Picture Libraries & Agencies; British Equity Collecting Society; BPI; Chartered Institute of Journalists; DACS; Directors UK; ERA; ISM; Ivors Academy; Music Publishers Association; Musicians' Union; National Union of Journalists; PICSEL; Publishers' Association; PPL; Professional Publishers Association; PRS for Music; Publishers' Licensing Services; Royal Photographic Society; Society of Artists' Agents; Society of Authors; Writer's Guild of Great Britain.

² Government press release, *UK's Creative Industries contributes almost £13 million to the UK economy every hour* <https://www.gov.uk/government/news/uks-creative-industries-contributes-almost-13-million-to-the-uk-economy-every-hour>

³ Policy and Evidence Centre led by Nesta (2020) <https://pec.ac.uk/blog/cultural-consumption>

⁴ <https://www.alcs.co.uk/research>

that artists and performers are fairly rewarded for the online use of their talent. Given the dominant position of certain substantially sized digital services, it is hard for creators and artists to directly oversee how their content is used online and to maintain their associated revenue streams. Digital services are in a crucial position to ensure creators and artists benefit from online use of their works.

5. A negative consequence of this shift is an increase in the level of piracy across the music, film, publishing and photography sectors. Of particular concern is a reported increase in the activities of large-scale serial offenders. Small and medium sized members of the creative sector, not to mention individual creators, are rarely able face the costs of challenging persistent infringers in court.
6. Preventing copyright infringement and educating consumers and users about its effect should be core considerations in the future development of the digital marketplace. The position of digital services within the value chain puts them in an ideal position to take a more active role in effectively preventing unauthorised or harmful content from being transmitted on their services.
7. Digital services play a key role in both (I.) the digital value chain, remunerating creators and artists and (II.) the prevention of illegal activities on their platforms. They facilitate cross-border trading within and outside the EU and open entirely new business opportunities to a variety of European (including the United Kingdom) businesses and traders by facilitating their expansion and access to new markets.
 - I. Digital services should obtain licences from rightholders for the creative content they are using either directly as part of the services made available or indirectly (as content upload platforms). Such licences offering rights clearance at scale are readily available at business-to-business level without interfering with the interests of individual users. Licences granted at business-to-business level may remove any need for more intrusive measures. Unfortunately, in the past certain digital services have managed to avoid obtaining licences not only to the detriment of creators and artists whose works are used within the services, but also to those digital services that do the right thing and obtain a licence. Any European initiative needs to ensure a level playing field. In particular, larger digital services have been avoiding obtaining licences, instead relying on their interpretation of the limitations of their responsibilities and European legislation. Digital services which do not obtain licences need to face effective and persuasive sanctions to uphold the level playing field necessary for a legitimate marketplace. This will be addressed in the EU's Directive on Copyright in the Digital Single Market.
 - II. Digital services which provide the platform for exchange of content and services play a pivotal role in ensuing compliance with laws relating to copyright works and performances and addressing unlicensed posting or illegal use of works within their services. They are best placed within the digital ecology to deal with illegal material efficiently. Digital services which do not play their part in preventing piracy need to face effective and persuasive sanctions to uphold the level playing field necessary for a legitimate marketplace.
8. The BCC and its members look forward to working with digital services to facilitate licences as well as preventing piracy or other illegal uses. Closer cooperation and clearly defined responsibilities for digital services should be supervised by a competent authority. This

authority should have responsibility for a 'Notice and Stay Down' provision as this would incentivise digital services to obtain a licence, as well as to prevent piracy on the platforms.

9. The BCC welcomes proposals for the Digital Services Act as the first initiative at the international level to address the responsibilities of digital services against the backdrop of evolved business models, technologies and social realities over the last 20 years. Given the international nature of the provision of digital services, it is important that the initiative recognises and complements other activities to address rebalancing the interests of rightholders and digital services. This includes US action following the review of Section 512 United States Copyright Act on safe harbours for intermediaries and the expected Online Harms Bill in the United Kingdom.
10. We have only answered those questions where our members have relevant expertise.

Section 2: Clarifying responsibilities for online platforms and other digital services

Q1. What responsibilities should be legally required from online platforms and under what conditions?

11. Digital services should be required to comply with all of the responsibilities outlined in the questionnaire notwithstanding their respective size.

Q3. What information would be, in your view, necessary and sufficient for users and third parties to send to an online platform in order to notify an illegal activity (sales of illegal goods, offering of services or sharing illegal content) conducted by a user of the service?

12. Over the last 20 years, the operation of the limitations of liability in the e-Commerce Directive have established the extent of necessary and sufficient information in order to notify illegal activity. Therefore we do not recommend any changes to those provisions. The system works for digital services including platforms as well as rightholders. Rather than limiting the notification to URLs we suggest that the notification relates to actual works or other subject matter as the relevant subject matter of the illegal activity is the work and not the URL. Furthermore, online platforms and other digital services should have a responsibility to prevent future uploads of works or other subject matter when they have previously been notified about the unlicensed nature of their use.

Q5. How should the reappearance of illegal content, goods or services be addressed, in your view? What approaches are effective and proportionate?

13. As outlined in the recent Copyright Directive (EU) 2019/790, the onus is on rightholders to monitor the availability of infringing works. However, it is the responsibility of the digital service to prevent illegal content from appearing without permission. Digital services are best placed to monitor the services specifically for the availability of the notified works from rightholders. This does not constitute the imposition of a general monitoring obligation on digital services (c.f. Recital 66 Copyright Directive (EU) 2019/790).
14. Whilst the approach concerning online content-sharing service providers has not been tested in practice, because the relevant Directive has not been implemented yet (deadline: 7 June 2021), we cautiously suggest considering a similar approach for other digital services. Though this depends on the efficiency of their approach in practice, which can only be assessed in a couple of years' time. Cooperation between digital services and rightholders is key for the creation of a functioning digital economy and market where users have confidence to engage. This should also include close cooperation with third party service providers for example offering content recognition technology.

Q6. Where automated tools are used for detection of illegal content, goods or services, what opportunities and risks does their use represent as regards different types of illegal activities and the specificities of the different types of tools?

15. Widely available automatic tools used for the detection of infringing works constitute a significant part of the solution to create a legal digital environment. It will be key that all stakeholders, digital services and rightholders, work together to ensure that the application reflects different types of illegal activities and different types of tools. The European Commission should provide supervision for such dialogues; however, in order for these dialogues to be of practical value, ultimately, there needs to be a consequence if an approach cannot be mutually agreed. In the United Kingdom, legislation is expected on “online harms” that will set out responsibilities for digital service providers and will be supervised by a competent authority. We stress, however, that the interpretation of “online harms” and “illegal” content should encompass all forms of unlawful uses of content, and not merely, as it is sometimes suggested, violent or indecent content. Such interpretation would lead to piecemeal reform only, rather than a holistic approach to the creation of a safe digital environment.
16. Such oversight may provide a strong incentive for the development of codes of practice and the adoption of new initiatives to respond to new technological uses or potentially abusive business models.

Q7. How should the spread of illegal goods, services or content across multiple platforms and services be addressed? Are there specific provisions necessary for addressing risks brought by:

- a. Digital services established outside of the Union?
- b. Sellers established outside of the Union, who reach EU consumers through online platforms?

17. In the absence of an international agreement on the responsibilities of digital services (which could be discussed at WIPO in the future), perhaps the European Commission could propose such an initiative.
18. Website blocking orders constitute an effective approach based on Article 8 (3) Copyright Directive 2001/29/EC for copyright infringement or Article 11 Enforcement Directive 2004/48 /EC for infringement of other intellectual property rights. In addition, the national implementation in the United Kingdom of Section 97A CDPA has been successfully used by rightholders to block access to infringing websites originating outside the United Kingdom.

This mechanism, which has been recognised as a relevant option in the report of the United States Copyright Office on Section 512 as well as the Advocate General in his opinion in case 682/18, could however be improved (and then expressly implemented in all member states of the European Union) by addressing the two main issues:

- the process is expensive; and
- the website blocking is limited to the national territory in which the order has been obtained.

19. Infringement of visual content relies on certain image recognition tools (VRTs) or fingerprints, and in some cases combined with metadata, appearing on digital services. It is an efficient and authoritative way of identifying rightholders’ works, and can be applied to corroborate infringement cases, for example the UK’s IPEC Small Claims Track service.

Q8. What would be appropriate and proportionate measures that digital services acting as online intermediaries, other than online platforms, should take – e.g. other types of hosting services, such as web hosts, or services deeper in the Internet stack, like cloud infrastructure services, content distribution services, DNS services, etc.?

20. Given the horizontal approach of the Digital Services Act, appropriate and proportionate measures should apply to all digital services as defined in this questionnaire. However, we note in this context that online content-sharing service providers are subject to a special regime for copyright-protected works or other protected subject matter uploaded by its users. We note that if metadata were to be respected and preserved throughout the process of using/uploading content to these 'services' it would make monitoring and policing (by rightholders and digital services) much easier.

Q15. What would be effective measures service providers should take, in your view, for protecting the freedom of expression of their users? Please rate from 1 (not at all necessary) to 5 (very necessary)

- **High standards of transparency on their terms of service and removal decisions**
- **Diligence in assessing the content notified to them for removal or blocking**
- **Maintaining an effective complaint and redress mechanism**
- **Diligence in informing users whose content/goods/services was removed or blocked or whose accounts are threatened to be suspended**
- **High accuracy and diligent control mechanisms, including human oversight, when automated tools are deployed for detecting, removing or demoting content or suspending users' accounts**
- **Enabling third party insight – e.g. by academics – of main content moderation systems**

21. All of these measures seem very necessary.

Q16. Please explain.

22. The relationship between freedom of expression and the right to property has been widely discussed in Articles 11 and 17 (2) of the Charter of Fundamental Rights of the European Union. As far as the subsistence of copyright is concerned, the appropriate balance between the interests of rightholders and users of protected work has been addressed within copyright law. In particular by providing exceptions for specific uses and by limiting the term of protection. According to the Court of Justice of the European Union, the European Union Copyright Acquis conclusively establishes the balance between these two rights, e.g. Funke Medien Case C-469/17.

23. Similarly, at the level of the European Convention on Human Rights, the relationship between the fundamental rights of freedom of expression, and to protection of property has been extensively considered by the European Court of Human Rights. The Court affords member states a "particularly wide" margin of appreciation in setting remedies for copyright infringement (Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden Appl. nr. 40397/12). This is because the copyright system's internal architecture sufficiently balances rights and freedoms of creators and users. Moreover, in several cases, the European Court of Human Rights has established that even if copyright infringement could be regarded as interference with the right of freedom of expression under Article 10 of the European Convention on Human Rights, such interference is subject to formalities, conditions, restrictions or penalties which are prescribed by law such as copyright law. E.g. the criminal case Donald Ashby v France concerning reproduction and communication to the public of copyright protected material.

Q18. In your view, what information should online platforms make available in relation to their policy and measures taken with regards to content and goods offered by their users? Please elaborate, with regards to the identification of illegal content and goods, removal, blocking or demotion of content or goods offered, complaints mechanisms and reinstatement, the format and frequency of such information, and who can access the information.

24. Digital services should clearly state the policy and all the measures they apply concerning illegal content. They should also outline the required content of a notice for a stay down and a counter notice to assist users. They should describe the steps they will apply concerning illegal content. Notified content should stay down whilst the validity of a counter notice is assessed in order to avoid considerable potential damage to rightholders.

25. For visual content, many commercially available technological tools to detect infringement, rely on matching of the digital sequence of the source content with digital copies available online. The process would be more efficient, if rather than finding individual uses online, technology could query the indexed libraries of digital platforms and detect proprietary content via API solutions. Use rules for such content could be set at source, i.e. within the digital platform's index.

Q19. What type of information should be shared with users and/or competent authorities and other third parties such as trusted researchers with regard to the use of automated systems used by online platforms to detect, remove and/or block illegal content, goods, or user accounts?

26. Whilst we generally see no need for users to obtain information on often proprietary automated systems, we agree that third parties should be able to obtain sufficient information to assess the efficiency of the automated systems used.

Q20. In your view, what measures are necessary with regard to algorithmic recommender systems used by online platforms?

27. Algorithmic recommender systems used by online platforms should not recommend illegal material to its users. This was agreed within a voluntary code of practice between the UK record industry and internet search engines in 2017 and works well in practice.⁵

Q23. What types of sanctions would be effective, dissuasive and proportionate for online platforms which systematically fail to comply with their obligations (See also the last module of the consultation)?

28. Digital services which systematically fail to comply with their obligations should be subject to financial penalties proportionate to their size, probably as a percentage of their annual income (capped at a specific sum). This will ensure that the penalties are proportionate. We suggest looking into penalties available for infringement of competition or data protection law. Both seem effective and dissuasive.

II. Reviewing the liability regime of digital services acting as intermediaries

The liability regime for online intermediaries is primarily established in the Ecommerce Directive, which distinguishes between different types of services: so called 'mere conduits', 'caching services', and 'hosting services'.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/609478/code-of-practice-on-search-and-copyright.pdf

Q2. In your understanding, are these categories sufficiently clear and complete for characterising and regulating today's digital intermediary services? Please explain.

29. These categories are not appropriate anymore. They were introduced in 2000 based on the available technologies provided by services such as Netscape or AOL. This was years before Facebook and YouTube and other digital services that dominate the online marketplace in 2020. Most digital services provide a huge variety of services; these services cannot be categorised as 'mere conduits', 'caching services', and 'hosting services' (or even location tool services as suggested in Article 21 e-Commerce Directive 2000/ 31/EC). We suggest that the general responsibilities as defined in this consultation apply to all digital services subject to *leges speciales* if available.

Q3. Are there elements that require further legal clarification? 5000 character(s) maximum

30. Consequently, we think that with a comprehensive definition of digital services no further legal clarification should be required, subject to *leges speciales* as suggested above.

Q4. Does the current legal framework dis-incentivize service providers to take proactive measures against illegal activities? If yes, please provide your view on how disincentives could be corrected. 5000 character(s) maximum

31. Yes; the existing liability framework has dis-incentivised digital services to take proactive measures. As regards the creative industries, there is one simple proactive measure for digital services - LICENSING. Licensing the use of creative material on digital services removes the need for complicated measures such as notice and stay down. Legitimate digital music services already obtain the relevant licences. Licences from rightholders should also cover uploading users.

Q6. The E-commerce Directive also prohibits Member States from imposing on intermediary service providers general monitoring obligations or obligations to seek facts or circumstances of illegal activities conducted on their service by their users. In your view, is this approach, balancing risks to different rights and policy objectives, still appropriate today? Is there further clarity needed as to the parameters for 'general monitoring obligations'? Please explain. 5000 character(s) maximum

32. We understand the political objective to avoid a general monitoring obligation. This has also been stressed in the context of the discussions of the European Parliament reports expected in September 2020. Obligations amounting to ex-ante control of content are recognised as a concern for freedom of expression. However, once the availability of an infringing work on an online platform has been notified by the rightholder it is the responsibility of the digital service to prevent illegal content reappearing, as has been outlined for online content-sharing service providers in the recent Copyright Directive (EU) 2019/790. This does not constitute the imposition of a general monitoring obligation on digital services (c.f Recital 66 Copyright Directive (EU) 2019/790. (c.f. our answer to question I. 2. 5 above).

III. What issues derive from the gatekeeper power of digital platforms?

Q9. Are there specific issues and unfair practices you perceive on large online platform companies?

33. There have been specific instances where certain digital services have tried to avoid licensing by putting undue pressure on rightholders based on their position within the market.

- YouTube has engaged in a long and hostile exchange with the German collecting society for composers and publishers GEMA before finally agreeing a licence.⁶
- Google has been threatening to withhold market access if Spanish or German publishers continue to demand licences for the use of press snippets. In 2014, this led certain press publishers to agree to a free license for Google to communicate the content; access to the platform provided by Google was key for German press publishers even without remuneration.⁷
- Most recently, the French Competition A⁸ stated that Google may have abused its dominant position by imposing unfair trading conditions on publishers and news agencies. So far France is the only EU member state to have implemented Article 15 of the EU Copyright Directive. Although negotiations between press publishers and Google have started, discussions are not progressing, and press publishers are bringing the case back to the competition authority.⁹
- It is helpful that work is now taking place under joint effort by the German collecting society VG Media and the French association of newspapers publishers (Alliance de la Presse d'Information Générale) to set up a European collecting society in charge of negotiating with platforms for fair application of the press publishers' right.

IV. Other emerging issues and opportunities, including online advertising and smart contracts

Smart contracts

Q1. Is there sufficient legal clarity in the EU for the provision and use of “smart contracts” – e.g. with regard to validity, applicable law and jurisdiction?

34. In view of the importance of smart contracts, more clarity for the provision and use of smart contracts is required, in particular as regards the communication of the applicable legal framework. We recommend that the European Union provides clear guidance on the application of smart contracts, in particular in order to protect users.

**For further information contact Rebecca Deegan, Director of Policy and Public Affairs:
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⁶ <https://www.musicbusinessworldwide.com/youtube-strikes-deal-gema-host-music-videos-germany/>

⁷ http://www.vg-media.de/images/stories/pdfs/presse/2014/141022_pm_vgmedia_gratiseinwilligung-google.pdf

⁸ <https://www.autoritedelaconurrence.fr/fr/decision/relative-des-demandes-de-mesures-conservatoires-presentees-par-le-syndicat-des-editeurs-de>

⁹ Google acting in bad faith as press publishers refer back to the French Competition Authority (French version) https://www.nextinpact.com/article/43465/jugeant-google-mauvaise-foi-editeurs-presse-ressaisissent-autorite-concurrence?utm_source=divr.it&utm_medium=twitter&utm_campaign=social