

PRS for Music's response to the draft recommendation of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries

PRS for Music welcomes the opportunity to comment on the draft recommendation of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries. This consultation is extremely timely: the role of internet intermediaries in the exploitation of copyright protected works and their relationship with the creators and rightsholders is a critical element of the European Commission's Digital Single Market Strategy. Therefore any recommendations should take in to account the impact assessments¹ conducted by the European Commission and the provisions set out in the resulting proposal for a copyright directive², specifically its consideration of the liability of online platforms.

PRS for Music's recommendations

1. Copyright is a fundamental right

Rights and the protection of rights must be viewed through the lens of the relevant legislative framework in addition to the rights granted under the Convention. For creator/rightsholders, internet intermediaries and their users, the provisions of the InfoSoc Directive³ and the E-Commerce Directive⁴ are engaged, as regulated by the need to comply with the European Union Charter of Fundamental Rights⁵, and so must be taken into account.

There are a number of rights enshrined in the Charter of Fundamental Rights which are at stake in the online marketplace:

- Article 8- Protection of personal data
- Article 11- Freedom of expression and information
- Article 16 – Freedom to conduct a business
- Article 17- Right to property, Article 17(2) the right to intellectual property

None of these rights are absolute. They can be limited to the extent that any such limitations are "necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others"⁶.

¹ <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

² <https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market>

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>

⁵ Charter of Fundamental Rights of the European Union http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

⁶ Article 52(1) Charter of Fundamental Rights of the European Union

Similarly, Article 10, the right to freedom of expression under the Convention is not an absolute right but must be balanced with “the protection of the reputation or rights of others”, and Article 1 of Protocol 1 which enshrines the right to protection of property. The fundamental rights of internet users do not include a right to infringe copyright.

There is a natural tension between rights, however the importance of protecting intellectual property must not be understated or neglected; it should be prioritised in an increasingly digital world.

2. Professional creators/rightsholders must be treated and included as a specific category

The Committee’s draft recommendation makes many observations about the roles and responsibilities in respect of the intermediaries and the users but it fails to include the creators and rightsholders whose creative works have driven the exponential growth and development of the internet and who are the source of so much expression and information shared across the world via the internet.

The recommendation makes clear that the fundamental rights under consideration apply to “everyone”. Any consideration of the roles and responsibilities, obligations and duty of care owed by internet intermediaries must take into account and extend to, as a distinct group, professional creators whose fundamental rights, property rights and intellectual property rights are so obviously engaged. To merely include creators among users or third-parties fails to recognise their specific needs and rights and is reductive of their contribution to the success of the internet.

Internet intermediaries are dependent on professional creators for the majority of their most valuable content and therefore have a responsibility to facilitate the well-being and economic viability of the creative sector for their own business and users alike. Copyright is an intrinsic right that vests in the creator. For professional creators such as PRS for Music members, the licensing of their intellectual property is the only way they can earn money from the exploitation of their works. Therefore they must be included in any protections, engagements or dialogues and a fair balance struck between the interests of all of the relevant parties.

3. Striking a fair balance of rights and safeguarding the rights of creator/rightsholders

The evolution of the internet has wrought unprecedented change in the creative industries, giving birth to a digital marketplace which enables creators to create and share music in myriad new ways, while the consumer has never had such fast, cheap and easy access to more content than ever before. Creators and consumers alike have embraced these opportunities and consumption of creative works has skyrocketed.

However, these new opportunities have been accompanied by a steady erosion of creators’ rights. Not only have their revenues stagnated or shrunk but they have lost the ability to control the use of their works: online platforms rarely afford creators the right to withhold their consent for the exploitation of their intellectual property rights and little redress is afforded them.

As a result of this erosion, though revenues from online exploitation have increased, the increase is not nearly proportionate to the exponential explosion in consumption. In 2016 PRS for Music processed 4.3 trillion lines of data, up from 136 billion in 2013. Revenues from online in 2013 were £61.2million, and have only grown to £80.5million in 2016.

A major factor in this market stagnation is due to many online platforms wrongfully exploiting ambiguity in the current legislation to avoid taking a licence and fairly remunerating the creators upon whose works their business models have been built and now depend. This so-called 'transfer of value'⁷ is illustrative of the extent to which the rights of creators have been diminished online.

These platforms are services which predominantly host user-uploaded content and are dominant market players, building billion-dollar businesses by providing access to creators' works, while paying little or no royalties. Their misapplication of the 'hosting defence' of the E-Commerce Directive⁸ has a broad detrimental and chilling effect on innovation and thus consumer choice in the marketplace; the distorted market harms fully licensed online platforms and prevents new ones from entering the market, as they are forced to compete with free (ad-funded) services that do not have the same costs - royalty payments to creators. The net effect is a devaluation of creative works online and the facilitation of these user-upload platforms growing at the direct expense of creators.

Measures to improve legal certainty as to the liability of these platforms for the exploitation of copyright protected works⁹ will result in improved protection for creators and the right to enjoy their intellectual property rights, which will in turn help to secure a viable future for all aspects of the online content market. An online environment that respects and protects the rights of creators, enabling them to receive fair remuneration also benefits the end user/consumer. Such an environment supports and incentivises reinvestment and innovation, the outcome of which is improved consumer choice, both in terms of the content produced and available, and the choice of platforms on which they access and share content.

4. Content moderation and access to an effective remedy for creators/rightsholders

Internet intermediaries should be responsible for the facilitation and implementation of appropriate and effective management systems for the copyright protected content they are exploiting on their platforms, particularly as many of the platforms providing access to works are reaping huge commercial rewards. It should be noted that in the current market, creators of copyright protected content rarely have any ability to decline the consent for and therefore to actually prevent the use of their works online and very often

⁷ 'Transfer of value', or 'value gap', is a term which is used to describe the way in which the value of creative works (music, images, audio-visual) has transferred away from the creators of those works to the platforms which host and monetise them.

⁸ Article 13 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031> The hosting defence is also often commonly referred to as 'safe harbour' the term used for a similar provision in the United States' Digital Millennium Copyright Act (DMCA) 1998 as they both achieve similar outcomes.

⁹ Such as those proposed in Recitals 38 and 39 of the European Commission's proposed copyright directive, which clarify the liability of such services.

receive little to no compensation or remuneration for its exploitation¹⁰. It is impossible for individual creator/rightsholders to effectively monitor the use of their works online and the existing 'notice and takedown' measures are onerous, costly and impractical.

Automated content management systems are the only feasible means of managing the vast amount of content being uploaded, processed and consumed in order to fulfil this responsibility. They are a vital tool in preventing copyright infringement and therefore in protecting and respecting the rights of the creator. Copyright infringement remains a huge problem for the creative industries, causing a great deal of harm to professional creators by undermining the sustainability of their business.

The fulfilment of a responsibility to prevent copyright infringement and remunerate creators via automated content recognition technologies does not amount to a general monitoring obligation. Content recognition technologies are incredibly sophisticated, involving a highly targeted matching exercise in which a digital fingerprint is generated for the file which is uploaded by the user, this fingerprint is then matched against a database supplied by rightsholders. The system looks specifically for matches between this finger print and the metadata of copyright protected works. The scope of what is being filtered is therefore defined and limited. It does not monitor files against which there is no match and it does not monitor the personal data of the user. Such systems are concerned with content that has been identified by the rightsholder and of which the service has been notified of potential copyright infringement, not the identity of the person communicating it. Therefore there is no engagement with personal data or privacy.

Whether the implementation of any content recognition technologies amounts to a general monitoring obligations must be considered within the context of the legislative framework, in this case the E-Commerce Directive, specifically Article 15 and the Charter of Fundamental Rights.

Article 15 of the E-Commerce Directive, where the prohibition of a general obligation to monitor is enshrined, does not prioritise the rights of internet intermediaries' users over those of the creators. It is part of a group of measures intended to "strike a balance between the different interests at stake"¹¹, all of which must be applied in a manner that it compatible with the rights under the Charter. The Directive in no way suggests that the provisions therein preclude the development and implementation of such measures. When read in light of the related recitals, it is clearly reasonable that a "diligent economic operator" would adopt content recognition to meet the requirement to "detect and prevent" illegal activities, thereby protecting the rights of creators and supporting their own freedom to conduct a business¹². Indeed, many internet intermediaries have already implemented such technologies, whether they be proprietary or one of the range of innovative start-ups offering bespoke solutions in this field. Their deployment does not

¹⁰ This was recognised as a specific problem in need of resolution in the European Commission's Impact Assessment on the modernisation of EU copyright rules, pg 137, 5.2. Use of protected content by online services storing and giving access to user uploaded content <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

¹¹ Recital 41, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32000L0031>

¹² Article 16, Charter of Fundamental Rights of the European Union

interfere with the efficient functioning of the internet and has in no way prejudiced freedom of expression.

In the European Commission's Impact Assessment on the modernisation of EU copyright rules the effect on fundamental rights of an obligation for services which store and give access to large amounts of copyright protected content to implement content recognition technologies was weighed and was found not only to "strike the necessary balance between copyright and other fundamental rights"¹³ but to rebalance rights favourably for the creators/rightsholders. It also asserts that the deployment of such measures would have longer term benefits for creators/rightsholders, who would enjoy improved ability to control and monetise the use of their work, and for users, who would benefit from increased and safeguarded choice of content as the benefit to creators would also facilitate the investment in new works. Users would also reap the benefit of the associated procedural safeguards and dispute processes that would accompany the implementation of effective content recognition technologies. In addition to which, the existing notice and takedown provisions should be improved for the benefit of users and creator/rightsholders alike by clarifying that, for copyright infringing works, notice and takedown, should mean 'notice and staydown'. This would further improve the efficiency of the complaints and redress mechanisms allowing conflicts to be resolved more swiftly and with greater certainty.

From the perspective of a collective rights management organisation, content recognition technologies enable the production of accurate data which is imperative in meeting the transparency obligations which should apply to the relationship between creator/rightsholders and the platforms just as the recommendation suggests it ought between platform and users. The accurate data content recognition systems can provide about the use of works online is invaluable in facilitating the accurate and timely distribution of royalties to the members. As there are few obligations regarding the provision of data at present, the internet intermediaries often provide substandard data which increases the burden on rightholders.

5. Education and skills promotion

The promotion of "media and literacy skills" should encompass education about the rights of all stakeholders, such as copyright and intellectual property rights and the respect for those rights.

¹³ Pg 154, European Commission's Impact Assessment on the modernisation of EU copyright rules <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

About PRS for Music

PRS for Music is a collective management organisation representing over 125,000 songwriters, composers and publishers across the world. Through our global network with other societies, we license the rights of over 22 million works to organisations which play, perform or make available music.

As a membership organisation we ensure creators are paid whenever their music is played, performed or reproduced, championing the importance of copyright to protect and support the music industry. Our members depend on copyright and our ability to license it in order to sustain their businesses and create the works so essential to the success of the EU's creative industries.

Online revenues are a significant and growing part of our members' business, contributing 13% of our overall revenues in 2016 (£80.5million).