

CRA response to DSA consultation:

Background:

- The Creators' Rights Alliance (CRA) is a UK-based organisation that exists to promote, protect and further the interests of creators through advocacy and campaigning work. We speak on behalf of 17 member organisations and trade unions within the creative industries on issues affecting creative professionals – from authors, artists and illustrators to translators, musicians and journalists – on public policy issues as diverse as fairer contract terms and working conditions to copyright and intellectual property issues. (See appendix for our membership.)
- Many CRA member organisations are also members of the British Copyright Council (BCC), which is also responding to the European Commission's consultation on the Digital Services Act (DSA) and CRA members are supportive of the BCC's response, having had advance sight of it before submission.
- The creative industries constitute a disproportionately large part of the UK relative to many EU27 countries, accounting for £111.7 billion or 5.8% of UK Gross Value Added in 2018 (up 7.4% on 2017). The CRA is therefore responding to the Commission's consultation owing to the size of the UK's creative industries and the huge number of its members working both in the UK and across the EU single market. The outcome of the Commission's consultation may also have a bearing on the UK's eventual trading relationship with the EU27 and its conclusions will invariably be of concern to our members.
- The CRA is responding to the Digital Services Act (DSA) consultation because it has members who work in both the UK and EU marketplaces and therefore its outcome will be relevant to our members.
- The creative industries have been hit hard following the COVID-19 pandemic consistent with other domestic markets across the EU27. The pandemic has exposed the fragilities that exist within the creative sector, many of whose authors and performers work on short-term, freelance and self-employed contracts. One in three of the UK's 2 million workers in the creative industries is self-employed. CRA members have each conducted income surveys to better understand how the pandemic is impacting their memberships. Findings indicate that the majority are seriously concerned about their financial and professional futures following the pandemic and as we move into 2021 with the end of the Implementation Period.
- As a result of national and localised lockdowns, and the ensuing restrictions on indoor venues, many creative professionals in the live performance sector have been unable to carry out their work and have lost income. Creators such as journalists, photographers and technical operators have seen a freeze in commissions covering sporting and cultural events which have all been cancelled due to the lockdown. There are concerns over the long-term impact of the pandemic: we expect a

decrease in commissions even after the economy reopens due to a reduction in funds.

- In June 2020 the European Commission launched a [public consultation](#) on the Digital Services Act package. The Digital Services Act package proposes increased and harmonised regulation of online intermediaries and platforms, and the content they facilitate, as well as measures to ensure that large gatekeeper platforms do not distort the digital single market.
- The current regulatory framework for digital services dates back twenty years. It helped the growth of European digital services, but it does not give answers to many of today's pressing questions on the role and responsibility of online platforms, particularly the largest ones.
- Digital services play a key role both in the digital value chain, remunerating creators and artists, and in the prevention of piracy on their platforms. They facilitate cross-border trading within and outside the EU and open entirely new business opportunities to a variety of European businesses and traders (including those in the United Kingdom) by facilitating their access to new markets.
- The digital revolution has dramatically changed the creative landscape, generating opportunities for some and challenges for others. In the face of falling revenues, rampant online piracy and fake news, the dominance of tech giants like Amazon, Facebook, Google, Netflix and Spotify is the source of growing concern.
- Digital services should obtain licences from rightholders for the creative content they are using, either directly or indirectly as content upload platforms. Such licences are readily available at business-to-business level without interfering with the interests of individual users. Licences remove any need for further intrusive measures. Unfortunately, in the past certain digital services have managed to avoid obtaining licences not only to the detriment of creators and artists 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 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 of a legitimate marketplace.
- Digital services play a pivotal role in avoiding illegal (in the case of creative works unlicensed) works on 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 of a legitimate marketplace.
- 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.

We welcome the Digital Services Act as the first initiative at the international level to address the responsibilities of digital services. Though we expect further activities to rebalance the interests of rightholders and digital services, for instance following the review of Section 512 United States Copyright Act – safe harbours for intermediaries and the expected Online Harms Bill in the United Kingdom.

Consultation Questions:

Clarifying responsibilities for online platforms and other digital services

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

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

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

As outlined in the recent Copyright Directive (EU) 790/ 19, 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 reappearing. Digital services are best placed to monitor the services specifically for the availability of the notified works. This does not constitute the imposition of a general monitoring obligation on digital services (c.f. Recital 66 Copyright Directive (EU) 790/ 19).

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 those offering content-recognition technology.

3 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?

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” setting out responsibilities for digital service providers supervised by a competent authority, the Office of Communication ([Ofcom](#)). Notably, this Bill is not expected to cover economic harm including copyright infringement.

4 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?

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.

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 website blocking is limited to the national territory in which the order has been obtained.

5 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

The CRA believes that all of these measures are very necessary and would rate each as a 5.

Other. Please specify

- Ensure that those users can receive a fair share of income derived from publication of their expression via whatever means or platform.

6 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.

Digital services should clearly state the policy and all the measures they apply concerning illegal content. Digital services should outline the required content of a notice for take down and stay down and for a counter-notice. 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 damage to rightholders. However, we do not believe that more requirements for policy statements on websites that merely summarise the law will achieve very much.

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

The CRA notes that other organisations, such as the BCC, will be better suited to answer this question.

8 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)?

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). The repeated dissemination of unauthorised works, for example, should attract steadily-increasing civil penalties for “flagrant” breach of authors' rights. Criminal penalties under competition law will be appropriate in some circumstances and, as with the Data Protection legislation, maximum penalties should be tied to platforms' turnover.

Reviewing the liability regime of digital services acting as intermediaries?

1 How important is the harmonised liability exemption for users' illegal activities or information for the development of your company? Please rate from 1 star (not important) to 5 stars (very important)

On the contrary, it operates to prevent our members getting fair remuneration for the use of their work.

What issues derive from the gatekeeper power of digital platforms?

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

The business models of digital platforms often work against the long-term interests of creators and the quality and diversity of creative content. As these platforms accumulate data from consumers, they will invariably develop a greater understanding of what content is most in demand and divert customers' attentions to content that 'sells' rather than content that is creatively diverse.

These data-driven platforms prioritise consumption over variety of content, which will in time lead to their directly producing content, further impacting production companies, record labels and studios, and the creators who work for them.

Such online content platforms will be able to shape exactly what consumers want, leaving them with an even greater share of the marketplace. There is a question as to the impact of this on individual creators, many of who work (directly or indirectly) for studios, record labels and production companies etc.

Many creative professionals will be forced to work for the few online content platforms that dominate the industry, giving them less flexibility to pursue projects, less control over their copyright and greater reliance for remuneration from a few companies.

Decisions that have a substantial impact on the creative community will be taken by a handful of executives and shareholders at a handful of online platforms. The result stands to further exacerbate the power imbalance between the creator and the platform commissioning creative content, creating a form of collective monopsony (or 'oligopsony') with all the attendant competition concerns.

Specific examples:

- There have been specific instances where digital services such as online platforms 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.
- Google has been threatening to withhold market access if Spanish or German newspaper 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.
- Most recently, the French competition authority stated that Google may have abused its dominant position by imposing unfair trading conditions on publishers and news agencies.

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

Smart contracts

1 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?

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. However, any question regarding contracts and digital services need to be address the inherent power imbalance between workers (such as creators) and large digital platforms, who due to their dominance in the market are able to set whatever terms and conditions they see fit, regardless of how fair they are for the creator.

Appendix: Current Creators' Rights Alliance Membership (Full & Associate) in Alphabetical order:

1. Association of Artists' Agents
2. Association of British Science Writers

3. Association of Illustrators
4. Association of Photographers
5. Authors' Licensing and Collecting Society
6. British Association of Picture Libraries and Agencies
7. Chartered Institute of Journalists
8. Design and Artists Copyright Society
9. Directors UK
10. Equity
11. Incorporated Society of Musicians
12. Ivors Academy of Music
13. Musicians' Union
14. National Union of Journalists
15. Society of Artists' Agents
16. Society of Authors
17. Writers' Guild of Great Britain