

FIAD

Contribution From
The International Federation of Film Distributors' Associations (FIAD)
To the Consultation on the "*Digital Services Act package: deepening the
Internal Market and clarifying responsibilities for digital services*"
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I. Introduction

The International Federation of Film Distributors' Associations ([FIAD](#)) represents national organisations of film distribution companies. Film distributors are the intermediates between film producers and cinema exhibitors and cover the entire range of companies: small and medium-sized companies specialized in art house films, as well as larger companies focused on mainstream films. FIAD's members operate in 14 countries where they cover 90 to 100 percent of the theatrical market. Distributors bring millions of people to see films every year, be it in the theatres, home entertainment, online or tv.

The audiovisual sector is a cornerstone of the EU's socio-economic pillar and a priceless strand of the EU's cultural fabric. According to the European Audiovisual Observatory, the EU audiovisual sector was worth €112 billion in 2017 to the EU economy. Moreover, it is important to recall that 2019 was a record-breaking year for cinemas worldwide and that the cinema industry in Europe was on a growth trajectory, with an unprecedented 1.34 billion admissions across European territories in 2019.

Therefore, given FIAD's members significant role in the EU audiovisual sector, FIAD welcomes the opportunity to contribute to the discussion on a topic which our members consider to be crucial and is glad to contribute to this public consultation on the "Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services".

The E-Commerce Directive (ECD) has existed for 20 years and needs to be updated given the rapid transformation and growth of digital services. In 2020, there is a much wider diversity of digital services that play an active role than when the ECD was adopted in 2000. We are glad to see that the European Commission has recognised some of the problems and appreciate the Commission's efforts to improve the current legal framework that will be applicable to all digital developments over the next decade(s).

The launch of this consultation comes at a moment when the European AV sector is suffering grievously from large scale online copyright infringements which drastically reduces revenues for all actors within the EU audiovisual ecosystem. This reality forces FIAD's members to decrease their investments in both physical and online distribution as well as curtail investment in content creation. In turn, this jeopardises the circulation of European works, threatens cultural diversity and endangers jobs in the European AV sector. **Our unwavering ambition to turn the tide against the scourge of large-scale online piracy has guided FIAD's approach to the consultation.**

Furthermore, the closure of cinemas throughout the EU to hinder the spread of the COVID-19 virus has not only helped legal services grow, but exacerbated the online piracy challenge, as consumers have consumed greater amounts of illegal audiovisual content during lockdown. For example, Data released from MUSO, the global authority on digital piracy, reveals global piracy increased by over 33% when lockdown was in place.

Creating more legal alternatives to consume content is often raised as a tool to address the illegal use of copyrighted content. FIAD members are expanding their reach and investing in the online audiovisual content distribution business. **However, we believe this is just part of the solution and one which can only flourish if there is a digital environment which respects the rule of law and where piracy is not tolerated or easily accessible.** This is essential to encourage and facilitate legal offers of content to thrive online and to provide the incentive to create new, innovative digital content services. Intellectual property rights create viable business models for creators and those who invest in the creation of content. It is paramount that the Commission - through the DSA - promotes a sustainable European content production and distribution industry, allowing innovative services and products to create growth and jobs in Europe. Ensuring that intellectual property rights are properly enforced is vital, not least to guarantee growth and job creation in Europe.

The E-Commerce Directive

Given the rampant scale of piracy and its serious and scarring impact on the entire European AV chain, **the importance of the Digital Services Act to support copyright owners in the fight against online infringements cannot be overstated.**

Thus, FIAD believes that the DSA offers an opportunity to 1) amend and update the ECD to clarify that the exception from liability provided in Articles 12, 13 and 14 applies only to truly neutral intermediaries and 2) impose stronger liability for active online intermediaries when dealing with illegal content online - with the vision to reduce the proliferation of infringing content in the online sphere. This should be complemented with responsibility rules to mitigate the proliferation of illegal content, through an **enhanced and strengthened Know Your Business Customer requirement, building on provisions already set in Article 5 of the ECD and through a stay-down requirement** as introduced in Article 17 of the Directive on Copyright in the Digital Single Market¹ complementing the notice and take down regime. Clear obligations for the removal of illegal content to address commercial-scale online infringement must address all categories of online intermediaries, including

¹ [Article 17, DIRECTIVE \(EU\) 2019/790 on copyright and related rights in the Digital Single Market: European Commission, 17 April 2019](#)

sites, platforms, portals, infrastructure providers (the technical backbone on which all web services are built and delivered: hosting, access, domain registration, circumvention & anonymization), search, online advertisers and payment processors.

Unlike the ECD, we call for the DSA to cover all digital services which are not covered by specific legislation and cover companies such as the global platforms which are not established in the EU, but which provide their services to EU consumers. The proliferation of intermediaries established outside the EU will accelerate in view of the ongoing mutation of domain name resolution (ie the translation of domain names into IP addresses, with the increasing use of "DNS over http" or "DoH"). For an effective implementation of the applicable legislation in Europe, it is necessary to ensure the recognition and enforcement of court decisions vis-à-vis digital players whose headquarters are established outside the EU. Injunctions intended to block access to certain infringing sites (DNS blocking), the decisions of national courts taken in this context must be able to be enforceable against companies located outside the EU for the IP addresses of that national territory.

The DSA should not lead to the creation of a supranational regulation authority for platforms. Rather than creating a new agency at the EU level, existing authorities need clearer rules and well-defined competencies.

Ex ante regulatory framework

In order to improve the reach of films online, data is needed, and since platforms do not have any obligation to share data on the performance of the films, this valuable information is not accessible to the ones who are bringing these films to audiences all around Europe – the distributors. The transparency obligations provisions listed in Article 19 – 21 and respective Recitals 75-81 of the DSM Directive ²establish a right for the authors and performers to ask for data on the work's performance on a regular basis, at least once a year from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation all revenues generated and remuneration due. FIAD calls for similar rules under DSA **granting access to relevant data**, enabling also rightholders and distributors to assess the demand for films in order to better connect with their online audiences, innovate and measure how their content is received by consumers on platforms.

II. The E-Commerce Directive

Platforms liability

The role of 'intermediaries' is crucial in successful preventative measures against IPR infringement. Internet 'intermediaries' are 'the gatekeepers' of the internet and are indispensable to achieve the goal of preventing IPR infringement. **FIAD strongly believes the DSA should enhance and update the liability provisions as set out in the ECD to reduce online copyright infringements.**

² [Article 19 – 21 and respective Recitals 75-81 of DIRECTIVE \(EU\) 2019/790 on copyright and related rights in the Digital Single Market: European Commission, 17 April 2019](#)

We would like to emphasise that FIAD does not favour a policy where individual users are sued for infringements of copyright content. However, enhanced legal tools are needed against organised criminal activities and infringements on a commercial scale. New forms of infringement, including those committed by or through online file-sharing services, have arisen which are as destructive to the value of copyright content as other intentionally infringing operations. **The concept of ‘what is illegal offline should also be illegal online’ must be at the forefront of the DSA.**

We believe the distinction between active and passive online intermediaries is still valid. However, FIAD would like to see greater clarification of the exception from liability which online intermediaries currently benefit from, pursuant to Article 14 of E-commerce Directive 2000/31/EC. The growing importance of the role of online intermediaries in accessing works, in particular audiovisual, requires clearer rules for online intermediaries in order to provide a better legal certainty for these companies, strengthened safeguards for users and a more effective tackling of illegal content, which is essential to the sustainability and development of our cultural industries and literary and artistic creative works in Europe.

Only passive providers may benefit from the ECD’s liability exceptions, while providers exceeding the threshold of a certain activity fall out of the scope of the liability exception. The ECD is explicit in Recital 42 that these exceptions from liability cover only cases where the activity of the information society service provider is limited to activity, which is of a mere technical, automatic and passive nature. This has been clarified through CJEU case law. Some providers have migrated from a passive role to active gatekeepers of content: they curate content to maximise engagement of their users for their own profit. For example, this is achieved by optimising presentation of the illegal content or promoting it and, as such, because of the sheer scale and impact on society of the content they distribute, the providers should be recognised as active and thus be subject to strengthened obligations for the removal of illegal content. Existing safe harbour provisions and the ban on imposing general monitoring obligations should only continue to apply while maintaining that in certain cases, national authorities should be able to prescribe specific and targeted monitoring obligations.

It is reasonable and appropriate to expect such ‘intermediaries’ - as lawful businesses - to act and stop the abuse of their services for illegal purposes. Their responsibility should also be clear in relation to the liability exception put in place by the ECD. The term ‘intermediary’ is highly ambiguous and in practice often misleading. That is why the definition of an ‘intermediary’ which is eligible for a liability exemption requires clarity to distinguish them from irresponsible actors. The DSA should build on existing case law³ and focus on whether the provider has “actual knowledge”, “editorial functions”, and a certain “degree of control”, and thus better reflects the technical reality of today’s services.

The liability and responsibility for illegal content must differ based on the activities, functionality and impact of the platform. Any new criteria or definition introduced by the DSA must not lead to a weakening of the liability of providers. Therefore, **FIAD is opposed to the introduction of a ‘Good**

³ (Reference for a preliminary ruling — Intellectual and industrial property — Directive 2001/29/EC — Harmonisation of certain aspects of copyright and related rights — Article 3(1) — Communication to the public — Definition — Online sharing platform — Sharing of protected files, without the consent of the rightholder): [CJEU, 14 June 2017](#)

Samaritan Clause'⁴ - Under this proposal, the limited liability regime would be significantly extended to cover active intermediaries. We have seen that voluntary action is not effective in reducing the proliferation of illegal content and it has enabled third-party content platforms to turn a blind eye to illegal activity. Given the scale and scope of illegal content and fraudulent activity throughout the online sphere and the pressing need to tackle the issue, now is the time to strengthen responsibilities not weaken them.

It would be preferable if the new legislation describes the types of activities that will disqualify this service from being able to invoke one of the liability exemptions under the ECD. This will prevent services that are NOT mere technical, automatic and passive from taking advantage of the broad scope of the current definition.

A service which facilitates copyright infringement whilst generating revenues should not qualify for the liability privileges set forth in Articles 12-14 of the ECD. This principle is clear from both decisions by the Court of Justice of the European Union and most national case law. It would be helpful to clarify that such sites are not only subject to injunction orders requiring them to filter out infringing content, but that they may also be subject to criminal and/or civil liability.

1. Removal of illegal content

Mere notice and takedown procedures are insufficient to address infringements that are taking place on a massive scale. A major issue on all content sharing platforms is the repeated reappearance of content already taken down.

In the experience of distributors and Content Protection Organisations (CPOs), the notification and redress mechanisms are burdensome and time-consuming. Currently they do not prevent content that was taken down from being uploaded again, and they require rightholders to file a lawsuit to address false counter claims by uploaders.

Distributors need effective take down & stay down practices to protect their investments and the audiovisual markets, for a culturally diverse and thriving European ecosystem.

Article 17 of the newly adopted [Directive on Copyright in the Digital Single Market⁵](#) aims to fix the “value-gap” by strongly incentivising licensing and the use and development of technologies to detect unauthorised content if a licence has not been concluded. Therefore, Article 17 imposes an obligation on online content-sharing service providers (OCSSPs) to make their best efforts to avoid the availability on their platforms of unauthorised content based on the relevant and necessary information” provided by the rightholders and make best efforts to prevent their future uploads. In order for these measures to be effective, it introduces the direct liability principle, meaning that content-service sharing providers (CSSPs) can be prosecuted in cases they do not successfully take measures to prevent unauthorised content, with exceptions only for specific situations.

⁴ [Communication 555/2017 of 28/09/17 on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms: European Commission, 28 September 2017](#)

⁵ [Article 17, DIRECTIVE \(EU\) 2019/790 on copyright and related rights in the Digital Single Market:](#)

Therefore, FIAD recommends the introduction of a stay-down requirement as introduced in Article 17 of the Directive on Copyright in the Digital Single Market and ensure that all online platforms not only act expeditiously to remove illegal content that has been notified to them, but make best efforts to prevent future uploads of similar or equivalent content.

In order to achieve this goal, as a first step, content recognition tools should be part of the solution. In its Communication of 28 September 2017⁶, the Commission “strongly encourages the further use and development of automatic technologies to prevent the re-appearance of illegal content online”. Whilst opponents of this approach may argue that automatic technologies may remove legal content, it must be recognised that the number of erroneous removals of content is insignificant compared with the volume of infringement.⁷

As a second step, greater transparency is required of the online platforms as to how their algorithms are applied to remove illegal content. Information on technological performance and the way in which tools are set up is not publicly available. While we understand that algorithms can be protected as trade secrets, we believe a reasonable balance should be found by keeping some technical details confidential while allowing an independent regulator to assess the performance of the content recognition tools. At the moment, rightholders have no choice but to rely on the assessment made by online platforms which cannot be considered neutral actors within the eco-system.

Moreover, FIAD is calling for more transparency on the measures taken by online platforms to remove illegal content such as the number of complaints against removal decision, number of reinstated contents, time of processing etc.

We would also like to recall that the European film distribution industry is mostly made up of small and medium sized enterprises, therefore the notification and identification requirements must not be too burdensome. The distributors are often the first to be informed of the illegal online availability of their titles. They use tech vendors to detect infringement and forward the links to content protection organizations (CPO) for takedown as SME distributors usually lack the know-how and resources for dedicated action against infringement. Large companies with many titles may have more resources for regular attention to copyright infringements, but they resort to CPOs just as much as smaller distributors in order to be able to focus on their core business.

2. Know Your Business Customer

We believe it is reasonable and appropriate to expect ‘intermediaries’ - as lawful businesses - to stop unlawful actors exploiting their services for illegal purposes. The new DSA must include legislation that ensures intermediaries take active measures to ensure their services are not exploited for illegal purposes.

⁶ [COM \(2017\) 555 - Tackling Illegal Content Online Towards an enhanced responsibility of online platforms](#)

⁷ Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward, Mission Report, French Ministry of Culture, 28 November 2019

We advocate for strengthening the liability on active platforms and complementing this liability regime with enhanced responsibility rules for passive players (intermediary services and infrastructure providers) to mitigate the proliferation of illegal content, through an updated Know Your Business Customer (KYBC) requirement.

Information obligations already exist in the ECD (Article 5) however criminal groups easily circumvent the legislation by providing false and misleading information. Europol has confirmed that lacking the information about the true identity of criminals engaging in commercial scale copyright infringement curtails law enforcement and copyright owners in the fight against online piracy.

Therefore, the DSA must build upon Article 5 of the ECD with the ambition of preventing online intermediaries from engaging in business with criminal groups.

One means to achieve this is to **modify the KYBC principle into a verify your business customer principle**. Online intermediaries must make due diligence checks on all prospective business partners / clients. These checks can be made by requesting validated documents, corporate registrations or proof of identity, a common business practice in the physical world.

Whilst law abiding entities can provide such documents, illegal actors would not be able to do so.

As such, when the requested documentation is fake or not forthcoming, the service provider must be obliged to terminate the service or not provide it in the first place. To ensure the effectiveness of this bolstered KYBC legislation, Member States should impose financial penalties for non-compliance.

Moreover, the KYBC principle also has a foundation in the EU directive on the enforcement of intellectual property rights and a recent ruling was given at the CJEU which should influence the direction and scope of the DSA.

On 9th July, the CJEU ruled⁸ that rights holders cannot force online platforms to hand over the email address, IP address or telephone number of copyright infringers. This ruling comes after Constantin Film took YouTube and Google to court in Germany because the tech giant would not provide the email address, telephone number and IP addresses of users who uploaded films (owned by Constantin) illegally onto YouTube.

The German Federal Court went to the CJEU and asked whether Article 8 of the EU directive on the enforcement of intellectual property rights covers email addresses, telephone numbers and IP addresses. Article 8 grants rights holders a “right of information” on copyright infringers including name and address. The upcoming Digital Services Act is an opportunity to address this imbalance based on an outdated state of affairs. In this sense, the passive intermediaries who provide business services, such as the cloud, proxy and storage services used to host e-commerce websites or illegal streaming sites, should have to verify the identity of their business customers. This will make it possible for law enforcement and private sector entities to determine who is providing fraudulent online services to European consumers.

⁸ C-264/19 - Constantin Film Verleih
<http://curia.europa.eu/juris/liste.jsf?num=C-264/19>

3. WHOIS database

The WHOIS database helps identify malicious domains on the internet and aids intellectual property rights enforcement cybersecurity, and law enforcement. **In order to prevent significant infringing or other illegal behaviour on the internet, FIAD is calling to consider the proportional balance of interests in permitting the e-mail address of domain name registrants to remain publicly accessible in the WHOIS directory to enable more transparency of the WHOIS domain registrant directory in the interest of consumers and legitimate businesses.** We call for an effective and timely access to registration data to entities with legitimate purposes enforcing their intellectual property rights.

There is an urgency to this as in May 2018, Internet Corporation for Assigned Names and Numbers adopted a temporary policy to comply with the GDPR. This policy gave the relevant registrar the power to decide whether to accept or reject access requests. Crucially, it required that the registry allow access to entities that have a legitimate purpose for such access.

However, in reality the majority of access requests are rejected, even when they comply with the ICANN's policy requirements. Such a scenario has led to a lack of accountability and enables the exploitation of domain names for illegal purposes. The GDPR was never intended to cut off access to data for legitimate purposes; the unintended consequences it has had on the availability of WHOIS data deserve careful scrutiny.

III. Ex ante Regulatory Framework - Data transparency

The Digital Services Act should set data transparency obligations for platforms. In the platform economy, data is the indispensable fuel for the functioning and improvement of services. Thus, the competitiveness of distributors in digital markets depends on their ability to access relevant data, enabling them to assess the success of a film in order to better connect with their online audiences, innovate and measure how their content is received by consumers on VOD platforms.

Currently, there are no benchmarks or measures of success against which the audiovisual industry can judge the performance of films in the online market. Streaming platforms are often unwilling to provide gathered data to distributors and rights holders. Such data would be key for promotion and would help the distributor better plan future investments in partnership with content creators. Without access to data, the audiovisual industry is making investments without knowledge as to whether the content will be a success. A basis for comparison is needed to help producers, distributors, policymakers and funders to make evidence-based choices.

There should be transparency amongst other things, on how many subscribers they have and how many views a specific movie gets, similar to TV ratings. It is only with a 'level playing field' that rights holders can take decisions fairly and consistently, and that the marketplace can be reported accurately and comprehensively. Similar transparency obligations provisions have been provided in Article 19 – 21 and respective Recitals 75-81 of the DSM Directive⁹ which establish a right for the authors and performers to ask for data on the work's performance on a regular basis, at least once a year from

⁹ Article 19 – 21 and respective Recitals 75-81 of the DSM Directive
<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>

those to whom they have licensed or transferred their rights, notably as regards modes of exploitation all revenues generated and remuneration due.

In order to improve the reach of films online, distributors need data, and since platforms do not have any obligation to share data on the performance of the films, this valuable information is not accessible to the ones who are financing, producing and bringing these films to audiences throughout Europe. FIAD calls for similar rules provided in Article 19 of the DSM Directive granting access to data to allow by consequence right holders, especially distributors, to use these figures and data to better innovate in marketing their films and connect with the audiences, and obviously measure what is the reality of the consumption on these platforms.