

# A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries

## I. Background information

1. Please indicate your role for the purpose of this consultation: -multiple choices reply-(compulsory)	Business federation
2. Please indicate your place of residence or establishment: -single choice reply-(compulsory)	Belgium
3. Please provide your contact information (name, address and e-mail address): -open reply-(compulsory)	SAA - Society of Audiovisual Authors Rue du Prince Royal 87 B - 1050 Brussels info@saa-authors.eu
4. Is your organisation registered in the Interest Representative Register? -single choice reply-(compulsory)	Yes
5. What is /are the category /ies of illegal content of greatest relevance to you in the context of N&A procedures? -multiple choices reply-(compulsory)	Infringements of copyright and related rights

## II Notice and Action procedures in Europe

Action against illegal content is often ineffective -single choice reply-(compulsory)	I agree
Action against illegal content is often too slow -single choice reply-(compulsory)	I agree
Hosting service providers often take action against <i>legal</i> content -single choice reply-(compulsory)	I disagree
There is too much legal fragmentation and uncertainty for hosting service providers and notice providers -single choice reply-(compulsory)	I agree
The exact scope of 'hosting' is sufficiently clear -single choice reply-(compulsory)	I disagree
The terms "actual knowledge" and "awareness" are sufficiently clear -single choice reply-(compulsory)	I disagree
The term "expeditiously" is sufficiently clear -single choice reply-(compulsory)	I disagree
The public consultation on e-commerce of 2010	Other

has demonstrated that most stakeholders consider hosting *of websites* to be hosting, but that there is less unanimity on other services that could be hosting. The CJEU has stated that hosting may in principle be the services of online market places, referencing services and social networks.

8. In your opinion, what activities should be considered as 'hosting'? -multiple choices reply-  
(compulsory)

*Please specify* -open reply-(optional)

Hosting services cannot be understood restrictively as just hosting providers of websites. It should refer to the hosting of any data by a neutral and passive service, as clarified by the CJUE. Services that are actively managed (the operator is involved in the content and has knowledge of infringements) such as content aggregators should not be able to benefit from the hosting safe harbour. However, it is difficult to designate particular categories of services. It depends on the circumstances.

### III. Notifying illegal content to hosting service providers

It is easy to find pages or tools to notify illegal content -single choice reply-(compulsory) | I disagree

It is easy to use pages or tools to notify illegal content -single choice reply-(compulsory) | I disagree

10. Should all hosting service providers have a procedure in place which allows them to be easily notified of illegal content that they may be hosting? -single choice reply-(compulsory) | Yes

Some hosting service providers have voluntarily put in place mechanisms to receive notifications of illegal content. Some of these providers have complained that their mechanisms are not always used and that concerns about content are not notified in a manner that would be easy to process (e.g. by fax, without sufficient information to assess the alleged illegal character of content etc.). Providers also claim that this creates delays in taking action against illegal content, because the hosting service provider would for instance have to contact the notice provider to ask for additional information.

No

11. If a hosting service provider has a procedure for notifying illegal content (such as a web form

designed for that purpose) that is easy to find and easy to use, should illegal content exclusively be notified by means of that procedure? -single choice reply-(compulsory)	
Please explain -open reply-(optional)	If there is an easy to use electronic form or automated procedure, it should in principle be used. However, some services use them with the aim of making the process cumbersome, so other electronic means such as emails should be still possible, including for sending notices for several pieces of illegal content at once. Harmonisation of the notification procedure and of the information to be provided would facilitate the whole process.
A notice should be submitted by electronic means -single choice reply-(compulsory)	Yes.
A notice should contain contact details of the sender -single choice reply-(compulsory)	Yes.
A notice should make it easy to identify the alleged illegal content (for instance by providing a URL) -single choice reply-(compulsory)	Yes.
A notice should contain a detailed description of the alleged illegal nature of the content -single choice reply-(compulsory)	Yes.
A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act -single choice reply-(compulsory)	No
Can you please specify why you do not agree with the statement: "A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act" -open reply-(optional)	An obligation to first contact the content provider would only lead to delays (due to the anonymity of most uploaders) and is not reasonable since the hosting service has actual knowledge of the infringement and should therefore remove it as soon as possible.
Both civil rights organisations and hosting service providers have complained about a significant proportion of unjustified or even abusive notices. Some stakeholders have proposed more effective sanctions and remedies for this purpose.  13. Should there be rules to avoid unjustified notifications? -single choice reply-(compulsory)	Yes
Please explain -open reply-(optional)	Unjustified notification can be prevented by requiring notice providers to give their contact details and by publishing statistics on notices. Statistics would certainly show the important role of professional defence bodies acting on behalf of rightholders.
14. How can unjustified notifications be best prevented? -multiple choices reply-(compulsory)	By requiring notice providers to give their contact details - By publishing (statistics on) notices

## IV. Action against illegal content by hosting service providers

<p>15. Should hosting service providers provide feedback to notice providers about the status of their notice? -single choice reply-(<b>compulsory</b>)</p>	<p>Yes</p>
<p><i>Multiple choice</i> -multiple choices reply-(<b>compulsory</b>)</p>	<p>The hosting service provider should send a confirmation of receipt. - The hosting service provider should inform the notice provider of any action that is taken. - Other</p>
<p>Please specify -open reply-(<b>optional</b>)</p>	<p>It is critically important that hosting providers report on action taken. This is essential for rightholders to measure the effects of notice sending. In persistent cases, they should also report on additional action taken such as repeat infringer policy and the use of content recognition technologies.</p>
<p>16. Should hosting service providers consult the providers of alleged illegal content? -single choice reply-(<b>compulsory</b>)</p>	<p>No</p>
<p>Please specify -open reply-(<b>optional</b>)</p>	<p>An obligation to first contact the illegal content provider would only delay the process. Hosting providers should first remove the illegal content and then inform and warn the content provider that the content has been removed (including their repeat infringer policy).</p>
<p>According to the E-commerce Directive, the hosting provider should act "to remove or to disable access to the information"</p> <ul style="list-style-type: none"> <li>- One may interpret "removing" as permanently taking down or deleting content.</li> <li>- "Disabling access" can be understood as any technique that ensures that a user does not have access to the content. Some hosting service providers for instance use geo-software to impede access exclusively to users with an IP address from a country where the content is question is considered illegal. Similarly, some hosting service providers firstly impede access to all users without permanently deleting it. This can for instance allow law enforcement authorities to further analyse the alleged illegal content in the context of criminal investigations. If deleting would not any longer hinder the investigation, the hosting service provider may still remove the content.</li> </ul>	<p>Other</p>
<p>17. Assuming that certain content is illegal, how should a hosting service provider act? -single choice reply-(<b>compulsory</b>)</p>	

<p>Please specify -open reply-(optional)</p>	<p>The illegal content should be removed, not just the link pointing at it. The take down of the content should include the concept of permanent take down, i.e. take down and stay down. The hosting provider should take reasonable measures to prevent the re-upload and renewed accessibility of the same content.</p>
<p>Several providers may host the same content on a particular website. For instance, a particular 'wall post' on the site of a social network may be hosted by the social network and by the hosting service provider that leases server capacity to the social network. It may be that this hosting service provider that leases server capacity is in a position to act against the alleged illegal content, but not without acting against other (legal) content.</p> <p>18. When the same item of illegal content is hosted by several providers, which hosting service provider should act against it? -single choice reply-(compulsory)</p>	<p>The hosting service provider that is aware of the illegal content and is technically in a position to remove exclusively the notified illegal content</p>
<p>As soon as the illegal nature of certain content has been confirmed, the E-commerce Directive requires the hosting service provider to act "<i>expeditiously</i>" if the provider is to be exempted from liability. However, the Directive does not further specify the concept of "expeditiously". Some stakeholders consider that a pre-defined timeframe for action should be established, whereas others consider that the required speed of action depends on the circumstances of the specific case. In a specific case it may be difficult to assess the legality of content (for instance in a case of defamation) or it may be easy to do so (for instance in a manifest case of child abuse content). This may have an impact on the speed of action. Similarly, what is expeditious for a specific category of content may not be sufficiently expeditious for another. For instance, the taking down of content within 6 hours will generally be considered very fast, but may not be sufficiently fast for the live-streaming of sports events (that are not any longer relevant once a match is finished).</p> <p>19. Once a hosting service provider becomes aware of illegal content, how fast should it act? -single choice reply-(compulsory)</p>	<p>Other</p>
<p>Please specify -open reply-(optional)</p>	<p>The hosting provider should remove the illegal content immediately. This can be done by automated takedown systems and this should be encouraged at least for</p>

	<p>notifications coming from professional defence bodies of rightholders. More generally, it should be as fast as possible within a maximum 24 hours period.</p>
<p>In individual cases, law enforcement authorities may ask hosting service providers not to act expeditiously on certain illegal content that are the subject of criminal investigations. Acting expeditiously could alert law infringers of the existence of a criminal investigation and would impede analysing the traffic on a particular site.</p> <p>20. Should hosting service providers act expeditiously on illegal content, even when there is a request from law enforcement authorities not to do so? -single choice reply- (compulsory)</p>	<p>No</p>
<p>Please explain: -open reply-(optional)</p>	
<p>Civil rights organisations complain that hosting service providers sometimes take down or disable access to <i>legal</i> content. They claim that some hosting service providers automatically act on notices without assessing the validity of the notices. In this context, the CJEU has held that blocking of legal content could potentially undermine the freedom of expression and information.</p> <p>21. How can unjustified action against legal content be best addressed/prevented? -multiple choices reply-(compulsory)</p>	<p>By requiring detailed notices - By providing easy and accessible appeal procedures - By publishing (statistics on) notices - Other</p>
<p>Please specify -open reply-(optional)</p>	<p>Harmonisation of the notification procedure and of the information to be provided could also facilitate the all process as already mentioned above.</p>
<p>Some hosting service providers are hesitant to take pro-active measures to prevent illegal content. They claim that taking such measures could be interpreted by courts as automatically leading to "actual knowledge" or "awareness" of all the content that they host. This would accordingly lead to a loss of the liability exemption they enjoy under the respective national implementation of the E-commerce Directive. In at least one national ruling, a court has interpreted actual knowledge in this sense. At the same time, the CJEU has held that awareness can result from own initiative investigations (Judgment of the Court of Justice of the European Union of 12 July 2011 in case C-324/09 (L'Oréal – eBay), points 121-122).</p>	<p>Yes</p>

22. In your opinion, should hosting service providers be protected against liability that could result from taking pro-active measures? -single choice reply-(compulsory)	
Please explain -open reply-(optional)	Hosting providers do not lose protection by taking pro-active measures that end or prevent infringements. On the contrary, they will face liability if they do not act against illegal content.

## VI. The role of the EU in notice-and-action procedures

23. Should the EU play a role in contributing to the functioning of N&A procedures? -single choice reply-(compulsory)	Yes
Please specify: -multiple choices reply-(compulsory)	By encouraging self-regulation - By providing non-binding guidelines - By providing some binding minimum rules - Other
<i>Please specify</i> -open reply-(optional)	Guidelines and minimum binding rules are necessary for a better functioning of the N&A procedures: it should harmonize the notification procedure (and the information to be provided) as well as the impact of this procedure, i.e. the action to be taken by the hosting provider (immediate take down or as fast as possible within 24 hours and stay down of the illegal content, not just of the links to it).
<p>Article 14 of the E-commerce Directive does not specify the illegal content to which it relates. Consequently, this article can be understood to apply horizontally to any kind of illegal content. In response to the public consultation on e-commerce of 2010, stakeholders indicated that they did not wish to make modifications in this regard.</p> <p>24. Do you consider that different categories of illegal content require different policy approaches as regards notice-and-action procedures? -single choice reply-(compulsory)</p>	No

## VII. Additional comments

25. Do you wish to upload a document with additional comments? -single choice reply-(optional)	No
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