Society of Audiovisual Authors

SAA feedback regarding the Digital Services Act proposal

30 March 2021

About the SAA

The Society of Audiovisual Authors (SAA) is the umbrella association of European collective management organisations representing audiovisual authors. Its 33 members in 25 countries manage rights for over 160,000 film, television and multimedia European screenwriters and directors. The SAA's main objectives are: 1) to support and strengthen the economic and moral rights of audiovisual authors; 2) to secure fair and proportional remuneration for audiovisual authors for every use of their works; 3) to develop, promote and advance the collective management of rights by member organisations.

Introduction

Ever since their emergence in the years 2000, online services have grown at an unexpected speed into tentacular businesses capable of shaping the information and media environment and dictating the way content -any content- is provided and shared. They have also contributed to the transformation of the digital sphere and have turned it into public spaces which they hold control over. Therefore, in order to ensure a safe and fair digital environment, it is paramount that such powerful players be regulated and submitted to a specific liability regime. In the audiovisual sector for instance, the exploitation of works by digital services has considerably increased to the detriment of traditional players like cinemas, broadcasters and DVDs publishers, whose fragility has been amplified by the current Covid-19 crisis. The transition of viewers' habits to digital platforms has indeed benefited online services while depriving the audiovisual industry and audiovisual authors from revenues. Additionally, the spread of illegal copyrighted content over the internet has been mainly facilitated by online platforms, who contested for the most part their active role in providing a hosting space for infringements.

In these circumstances, the SAA and its members welcome the adoption of the Digital Services Act proposal ("the Proposal") and the intention of the Commission to address the role, the liability and the due diligence obligations of online services. However, although the SAA and its members support some aspects of the Proposal as explained hereafter, others remain to be clarified in order to ensure that what is illegal offline is illegal online and that any progress achieved under the Copyright Directive 2019/790 is not jeopardized by a lack of consistency.

Comments and suggestions

ILLEGAL CONTENT

Infringing hyperlinks

The notion of "illegal content" needs to be further specified as the scope of the definition is currently unclear. For instance, the Proposal provides that "illegal content" should cover information relating to illegal content, products, services and actions. However, the definition fails to indicate if such notion also covers hyperlinks referring users to infringing content provided on a given platform, while

it should be clearly indicated that such hyperlinks do constitute storage and dissemination of illegal content.

Circumvention of private copy compensation

It is also unclear in the current definition of "illegal content" whether devices which are used to circumvent the law are covered. More specifically, while the reproduction of works without the authorisation of rightsholders is prohibited by EU Copyright law, Member States may under Article 5.2(b) of the Copyright in the Information Society Directive (EC/2001/29), introduce an exception to this reproduction right. This exception allows reproduction of works provided that it is carried out for personal and non-commercial uses by private individuals and that rightsholders receive fair compensation from manufacturers or sellers of electronic devices and recording media. However, over the years online marketplaces have provided manufacturers and sellers of electronic devices and recording media a space to circumvent this obligation.

The role of marketplaces in tackling this problem is therefore essential. In this respect, we welcome the "Know Your Business Customer" obligation laid down in Article 22 of the Proposal as it requires online platforms operating as marketplaces to obtain accurate and reliable information on the identity of traders and thereby ensures the traceability of the latter. We also support the obligation for marketplaces to request traders to correct the information when it appears to be inaccurate or incomplete, and the obligation to suspend their services when traders fail to comply with the request to correct the information.

However, in order for these measures to effectively prevent the circumvention of the private copy compensation, Article 22 should also explicitly request that online marketplaces refrain from providing their services to traders who do not comply with the private copy compensation. In the absence of compliance with this obligation, online marketplaces should be held liable for the sale of electronic devices and recording media that circumvents the private copy compensation.

DEFINITION OF ONLINE PLATFORMS

The definition of online platform provided in Article 2(h) raises concerns as it excludes hosting service providers from the definition of "online platforms" when the storage and dissemination of content constitutes a minor and purely ancillary feature of another service and it cannot be used without that other service for objective and technical reasons. Although the Regulation does indicate that such a feature should not be integrated as a means to circumvent the objective of the Regulation, it may be very complicated to demonstrate that a platform intentionally seeks to achieve such a circumvention. Likewise, the example of the comments section in an online newspaper provided by Recital 13 of the Regulation to illustrate what type of service could qualify as an ancillary and minor feature only increases our concerns. Recital 13 indeed indicates that the comments section of a newspaper would be an ancillary feature if it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. Yet, in practice online intermediaries may precisely use that ancillary activity for mass infringements of rights.

INTERPLAY WITH EXISTING COPYRIGHT LEGISLATIONS

We welcome the approach of consistency with the Union Law of copyright laid down in Article 1(5)(c) on. However, while Recital 11 also confirms that "*(…) this Regulation is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected*", such wording only encompasses the complementarity of the Proposal with EU copyright legal instruments, and fails to underline the *lex specialis derogat legi generali* principle. According to this principle, not only should the Proposal (*lex generalis*) be consistent with specialised copyright legislation (*lex specialis*), but the latter should prevail over the former. Likewise, it should

specifically set forth that national laws transposing EU copyright law should also be considered lex specialis prevailing over the Proposal.

LIABILITY EXEMPTIONS

An inadequate duplication of the e-Commerce Directive

The SAA and its members deplore that the liability exemption has been merely integrated into the Proposal, while the role of internet service providers (ISPs) and more specifically, of online platforms, has considerably changed over the past two decades. First, the vast majority of online platforms as we know them today did not exist at the time of the adoption of the e-Commerce Directive and therefore escaped the scrutiny of the EU legislator back then. Second, with their tremendous expansion and their ability to shape the digital environment, online platforms have proved to be active when operating their services. It therefore no longer possible to consider that they carry out mere technical service. Consequently, and accordingly with the CJEU caselaw (i.e., C-324/09 *L'Oreal v eBay*), they should not benefit from the liability exemption regime initially established in the e-Commerce Directive.

Yet, while Recital 18 of the Proposal highlights that the liability exemption should not apply if an online platform does not limit itself "*to providing the services neutrally, by a merely technical and automatic processing of the information provided by the recipient of the service, the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information*", the Proposal does not specifically indicate that only a passive role guarantees the application of the exemption regime. The notion of "passivity" is indeed expressively mentioned in Recital 42 of the e-Commerce and should also be stressed in the Proposal in order to ensure that online platforms must demonstrate that they have been passive when they invoke the liability exemption.

The risk of the"Good Samaritan"-like principle

Article 6 establishes a principle similar to the so-called "Good Samaritan" clause laid down in Section 230 of the US Communication Decency Act, which guarantees that internet service providers are not held liable when they take initiatives to tackle online illegal content. Article 6 is more limited in scope because it states that ISPs "*(…) shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or other activities (…)"* aimed at tackling illegal content, while Section 230 also protects from liability ISPs who did not act against illegal content whether or not they had knowledge of it.

However, the Good Samaritan-like principle laid down in Article 6 appears contradictory with Article 5 which specifically indicates that an ISP who has actual knowledge of an infringement may not benefit from the liability exemption. The implementation of voluntary measures indeed necessarily allows ISPs to gain knowledge of an infringement. Article 6 could therefore prevent copyright owners from enforcing their rights and claiming damages.

Finally, the Commission should clarify what situations Article 6 covers when referring to ISPs who "*solely* (…) *carry out voluntary own-initiative investigations or other activities*". More specifically, it should be clearly indicated what "solely" entails under Article 6.

INSUFFICIENT NOTICE-AND-ACTION MEASURES

The SAA and its members deplore the absence of notice-and-stay down measures, as the Proposal was the last chance to establish such mechanisms. Furthermore, Article 14 establishes an obligation to indicate the exact URL address, while the description of the content subject for the notification or the removal should be sufficient. Lastly, hosting services should be obliged to remove the illegal content without undue delay.

TRANSPARENCY

The SAA and its members welcome the establishment of transparency reporting. Making public authorities aware about digital economy and platforms is necessary for its further sustainable development. The current transparency and information requirements set out in the e-Commerce Directive on information society service providers and their business customers, and the minimum information requirements on commercial communications, should also be substantially strengthened.

When SAA members engage in contractual negotiations or already have a contractual relationship with online platforms, they need to have a minimum of information from their counterpart to effectively ensure authors fair remuneration. It means that they need to have accurate financial information on the value of the works on the platform to calculate a rate, in particular when audiovisual works are exploited within bundle offers, as well as information on the exploitation of authors' works (e.g. audience or other performance indicators such as downloads).

TRUSTED FLAGGERS

The establishment of trusted flaggers is an important proposition although SAA members, as collective management organisations, would not necessarily undertake such a role. They are indeed already actively involved in enforcement activities and being trusted flaggers could generate additional costs.

KNOW YOUR BUSINESS CUSTOMER

The SAA and its members welcome and support the proposition for a Know-Your-Business-Customer obligation set forth in Article 22, which is crucial to identify infringers and ensure that illegal content is more easily identified. Such a mechanisms could for instance help identify manufacturers and sellers who circumvent the private copy compensation when selling electronic devices and recording media via online marketplaces.

However, while the Know-Your-Business-Customer obligation is a crucial means to identify traders, we deplore that it is limited to marketplaces. It should instead be extended to all types of online platforms as the identification of providers of content of any sort is key in tackling illegal content and repeat infringements in the digital environment.

GOVERNANCE AND ENFORCEMENT

The creation of independent and impartial Digital Service Coordinators in charge of the enforcement of the Proposal is necessary and for this reason, the SAA and its members support this proposition, as well as the cooperation between the Commission, Digital Service Coordinators and the European Board for Digital Services.

DESIGNATION OF A LEGAL REPRESENTATIVE IN THE EU

The SAA and its members welcome the designation of a legal representative based in the EU. It is indeed extremely difficult to engage in discussions with online platforms as there is usually no identified representative that CMOs and rightsholders can address their requests to.