

MEMORANDUM OF UNDERSTANDING

ON ONLINE ADVERTISING AND INTELLECTUAL PROPERTY RIGHTS

Final draft – revised 07/06/18

PREAMBLE

Internet websites and mobile applications that provide access to content, goods or services infringing intellectual property rights ('IPR') on a commercial scale use the sale of advertising space as one of their revenue sources.

The presence of advertising for household brands, and presence of well-known payment services on websites and mobile applications that infringe IPR can confuse consumers. It can lead consumers to believe mistakenly that the site or application they are accessing provides access to legal content, goods or services. More generally, IPR infringement harms companies through: damage to brand equity; erosion of consumer confidence; lost revenue; heightened enforcement costs and diminished incentive to innovate. It also harms consumers who access content that infringes IPR, or who purchase counterfeit goods of lower quality, or who purchase goods that pose health or safety risks. Finally, it harms governments, which lose tax revenue. Overall, IPR infringement reduces economic growth, damages competitiveness and hinders job creation.

To strengthen the protection of IPR and reduce the harm caused by its infringement, the signatories agree on this Memorandum of Understanding (MoU). The MoU signatories represent parties involved in placing, buying, selling and/or facilitating advertising. They also represent other parties with an interest in fighting IPR infringement. These signatories include advertisers, advertising agencies, trading desks, advertising platforms, advertising networks, advertising exchanges for publishers, sales houses, publishers and IPR owners. They also include representatives or associations of the above groups.

The signatories aim to minimise the placement of advertising on websites and mobile applications that infringe copyright or that disseminate counterfeit goods¹, on a commercial scale. They aim to do this while preserving and protecting legitimate uses of IPR and recognising other fundamental rights, in particular freedom of expression and information and freedom to conduct a business. They also aim to do this without impeding the freedom of commercial communication and competition at all levels of trade, including the purchasing and selling of advertising.

This MoU endeavours to operate in a manner that supports and complements initiatives against IPR infringement in the Member States, and that complies with EU and/or national law, including competition law.

¹ For the purposes of this MoU counterfeit goods should be understood as goods which are the subject of an act infringing a trade mark in the country where they are found and bear without authorisation a sign which is identical to the trade mark validly registered in respect of the same type of goods, or which cannot be distinguished in its essential aspects from such a trade mark, as well as any packaging, label, sticker, brochure, operating instructions, warranty document or other similar item, even if presented separately, which is the subject of an act infringing a trade mark, which includes a sign, name or term which is identical to a validly registered trade mark, or which cannot be distinguished in its essential aspects from such a trade mark, and which can be used for the same type of goods as that for which the trade mark has been registered.

The MoU is agreed in good faith between the signatories, building on a fair and honest representation of their intentions. The signatories recognise that trade associations that have signed the MoU are not entering into obligations on behalf of their members. However, these associations commit to make their members fully aware of the MoU, and encourage them to join it or respect its principles, as appropriate.

The application of the MoU is limited for each signatory to services provided in the States that are Contracting Parties to the European Economic Area. It is not legally binding and it does not create any contractual or pre-contractual obligations under law. Nothing in the MoU may be construed as creating any liability, rights, waiver of any rights or obligations for any parties, or as releasing any parties from their legal obligations. The MoU must not be construed in any way as replacing or interpreting the existing legal framework. The MoU may not be used as, or form part of, evidence in any legal proceedings.

Signatories, including signatory associations, commit to undertake the actions provided for by the MoU in a manner that ensures full compliance with EU and national competition law. Signatories support the ‘follow the money’ approach to IPR infringements, seeking to deprive commercial scale IPR infringers of the revenue flows that make their activities profitable.

I. PURPOSE

1. The purpose of the MoU is to minimise the placement of advertising on websites and mobile applications:
 - which have no substantial legitimate uses,
 - where information is available that such websites or mobile applications have been found by judicial, administrative or other enforcement authorities to infringe copyright or to disseminate counterfeit goods, on a commercial scale², and
 - where technically possible,thus minimising the revenue that such websites or mobile applications gain from online advertising. The information on decisions issued by relevant authorities includes, but is not limited to, information provided by rightholders.
2. The signatories should, based on their own individual policies and assessment criteria, limit the placement of advertising on other websites and/or mobile applications, which have no substantial legitimate uses, and for which the advertisers have reasonably available evidence that these websites and applications are infringing copyright or disseminating counterfeit goods, on a commercial scale.
3. The MoU is without prejudice to other initiatives aiming at minimising the placement of advertising on websites infringing IPR.

² The concept of ‘commercial scale’ should be interpreted in line with the guidance provided in Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee — Guidance on certain aspects of Directive 2004/48/EC (COM(2017) 708, p. 8-9).

II. COMMITMENTS

II.A. INDIVIDUAL SIGNATORIES

4. Signatories directly responsible for the placement of advertising (**‘Advertisers’**) commit to undertake reasonable measures to minimise the placement of their advertising on websites or mobile applications described in Paragraph 1. They also commit to take reasonable steps to ensure that, when they become aware that their advertising is appearing on such websites and/or mobile applications, the advertising will be removed.
5. Advertisers should also, based on their own individual policies and assessment criteria, limit the placement of their advertising on websites and mobile applications described in Paragraph 2. Such reasonable evidence may include evidence provided by rightholders that their IPR are being infringed on a commercial scale.
6. Advertisers commit to adopt an IPR policy and make it publicly available. Such policies should include, but need not be limited to, general information on the measures, tools and safeguards they use in order to minimise the placement of their advertising on websites and mobile applications referred to in Section I, without prejudice to protection of confidential information. Advertisers may choose any reasonable measure(s) to implement their IPR policy.
7. Signatories directly involved in buying, selling or brokering the sale or purchase of advertising space (**‘Advertising Intermediaries’**) undertake to allow, in their contractual agreements, advertisers or other media buyers to use and/or require the use of tools and safeguards with the aim that the advertising placed through or with support of the Advertising Intermediaries’ services is not placed on websites and mobile applications described in Paragraph 1. For example, such tools could include tools for content verification, advertising delivery and advertising reporting. Advertising Intermediaries also commit to take reasonable steps to ensure that, when they become aware that advertising placed through their services is appearing on such websites and/or mobile applications, this advertising will be removed.
8. Advertising Intermediaries may also individually allow Advertisers to use and/or require the use of tools and safeguards with the aim that the advertising placed through — or with the support of — the Advertising Intermediaries’ services is not placed on websites or mobile applications that have been identified by Advertisers in their advertising placement policies (as described in Paragraph 6), or with the aim that the advertising is removed from such websites when detected.
9. Advertising Intermediaries commit to adopt an IPR policy and make it publicly available. This policy should include, but need not be limited to, general information on the measures, tools and safeguards they use to fulfil their commitments under the MoU (Paragraphs 7 and 8), without prejudice to protection of confidential information. Advertising Intermediaries may choose any reasonable measure(s) to implement their IPR policy.

II.B. ASSOCIATIONS

10. Signatory associations undertake to use their best efforts to encourage their members not to:
 - offer for sale, recommend, or buy advertising space on websites or mobile applications described in Paragraph 1,
 - allow their services to be used either to place, or in connection with the placement of, advertising in such advertising space,in compliance with the principles of the MoU and subject to applicable laws.

11. Signatory associations undertake to encourage their members, where appropriate, to sign the MoU individually.

II.C. OTHER

12. Advertisers and Advertising Intermediaries must ensure that, in relations with their contracting parties, for the services that fall within the scope of the MoU, they act in a manner that upholds the spirit of their commitments under the MoU.
13. In exercising their commitments under the MoU the signatories must not enter into any discussion, activity or conduct that violates, on their part or on the part of their members, any applicable competition law. By way of example, signatories must not discuss, communicate or exchange any commercially sensitive information. This includes non-public information on: prices; marketing and advertising strategy; costs and revenues; trading terms and conditions with third parties (including purchasing strategy); terms of supply; trade programmes or distribution strategy. This applies not only to discussions in formal meetings but also to informal discussions before, during and after meetings.
14. For the purposes of the MoU, signatories must not share or discuss with other market players, or with each other, lists or catalogues that may include and/or exclude websites, URLs or applications used on mobile devices that are deemed either appropriate or inappropriate by parties. The signatories must also not engage in any type of collective action which could have the object or effect of disadvantaging other market players for reasons other than their engagement in respect of IPR infringements.

III. MEASUREMENT OF MOU EFFECTIVENESS

15. As set out below in Sub-sections III.A and III.B, the signatories agree to measure the effectiveness of the MoU by reporting on their efforts to apply their commitments and by monitoring the impact of the MoU on the online advertising market.

III.A. MONITORING THE SIGNATORIES' EFFORTS UNDER THE MOU

16. Advertisers and Advertising Intermediaries commit to inform other signatories, and the European Commission, on an annual basis, on:
 - a) the concrete means they have in place to comply with the commitments set out in Section II of the MoU, and
 - b) the estimated effectiveness of such means.
17. Associations commit to actively seek feedback on issues covered by the MoU from their members and to inform the other signatories, on an annual basis, of this feedback.

III.B. MONITORING THE MOU'S IMPACT ON THE MARKET

18. Signatories commit to collect and discuss information analysing the online advertising market, such as documents and reports prepared by public or private bodies, including academia, which is relevant to the work under the MoU.

IV. ASSESSMENT PERIOD

19. The signature of the MoU will be followed by an assessment period of 12 months, during which the signatories will meet quarterly to analyse its progress, implementation and functioning.

20. The signatories will meet at the end of the assessment period to evaluate the effectiveness of the MoU under four headings: strengthening IPR protection; reducing the harm caused by IPR infringement; upholding fundamental rights and ensuring fair competition. They will discuss the continuation of the MoU and, if appropriate, discuss and propose follow-up actions. These follow-up actions may include changes to how the signatories' efforts under the MoU and the MoU's impact on the market are monitored. They may also include extending the MoU to cover applications other than those used on mobile devices. The results of this evaluation will be summarised in a report, which will include conclusions on the signatories' efforts under the MoU (Sub-section III.A) and the MoU's impact on the online advertising market (Sub-section III.B).
21. After the assessment period, the signatories will meet biannually to review the MoU and to take further steps if necessary. They may meet more frequently should they deem it necessary to discuss the functioning of the MoU. Reports may be drawn up to take stock of the MoU's functioning and effectiveness. These reports would also include conclusions on the signatories' efforts under the MoU (Sub-section III.A) as well as the MoU's impact on the market (Sub-section III.B).
22. The signatories agree to cooperate with the European Commission in assessing and reporting on the functioning of the MoU. This cooperation will include:
 - a. making available relevant information upon request;
 - b. informing the Commission of the signature or withdrawal of any signatories;
 - c. responding to the Commission's questions and consultations;
 - d. discussing the above-mentioned assessment and reports in meetings of the signatories; and
 - e. inviting the Commission to all such meetings.

All signatories should be consulted on any report evaluating the functioning and the effectiveness of the MoU.

V. EXISTING SCHEMES

23. Subject to the limits provided for in the MoU, the signatories agree to share, for information purposes, details of schemes elsewhere in the world, including memoranda of understanding, declarations of intent, best practice or other relevant initiatives. The signatories are not obliged to comply with any such schemes, but may consider them in determining appropriate measures, tools and safeguards set out in Section II.

VI. SIGNATORIES

24. The MoU only applies to its signatories. Additional signatories may sign the MoU at any point after the assessment period. Candidate signatories must present their activities to the existing signatories and indicate how they intend to comply with the MoU commitments.
25. A signatory may withdraw from the MoU at any time, by notifying the other signatories. Such a withdrawal will not have the effect of terminating the MoU between the other signatories.

26. Each signatory may at any time inform the other signatories that it believes a signatory is not complying with the principles of the MoU, and of the grounds for this belief. The signatories may decide to consider the matter in a plenary meeting. Having heard the signatory concerned, and after concluding on objective grounds that this signatory is not willing to respect the principles established by the MoU, the signatories may invite such a signatory to withdraw from the MoU. The signatories will inform the European Commission of this decision.
27. The signatories may indicate on their websites or in commercial or other communications that they have signed the MoU. They can take all reasonable measures to make their business contacts aware of the existence of the MoU.

VII. ENTRY INTO FORCE

28. The MoU will become effective and will enter into force one month from its signature.
29. Any changes to the MoU must be agreed by all signatories.
30. The MoU has an indefinite duration, subject to the signatories' continued agreement.

Signed in Brussels, on 25 June 2018