

POSITION PAPER

Recognising individual IP right holders as trusted flaggers under the DSA

1. Rights holders: the most trusted of flaggers

Article 22 of the Digital Services Act sets out the trusted flaggers system, ensuring that those most trusted to identify illegal content online can flag that content to the online intermediary so that it can be dealt with as appropriately and rapidly as possible. In the case of goods that infringe intellectual property rights, such as counterfeits, or those that are non-compliant with EU laws, including consumer protection or product standards, the party most able to recognise this illegal content is the IP right holder.

The Member States are responsible for designing their trusted flagger systems. Unfortunately, some are under the misguided impression that these systems may be overwhelmed if individual right holders are granted trusted flagger status, thus only trade associations or other organisations should be so recognised. In reality, denying individual right holders this status would render Article 22 unworkable for content that is, in fact and in law, illegal: IP-infringing content and goods that do not comply with EU laws.

Mandating the use of a third party such an association through which notices must be filtered may be appropriate for certain user-generated content which may be subject to interpretation or nuance, such as disinformation or alleged harassment, but it is not for content that can be addressed automatically. Verification of an IP right holder is straightforward: it can prove its identity and provide evidence of its rights (for example by uploading a trade mark certificate) via a standardised form, with little, if any, human review needed of its notices thereafter.

Not only do IP owners themselves clearly meet the conditions for being granted trusted flagger status, they alone know all of their rights and can authenticate their products: associations have neither the expertise to do so nor the capacity to deal with the significant amount of notices issued every day. To deny this status to right holders would conflict with the stated aims of Article 22 and be a retrograde, impractical and costly step, reversing the current practice where their notices are prioritised under the voluntary notifier systems employed by many platforms. Such an outcome would actively damage the EU's consumers and markets.

2. Trusted flaggers systems in practice

The intentions behind any trusted notifier system are practicality and speed. If illegal goods or other content are available, the person most able to detect them should be able to flag them to the person that can remove that availability.

The co-legislator clearly intended that the DSA would cover illegal goods. Recital 12 specifies that illegal content includes *“the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, [and] the non-authorized use of copyright protected material”*. Recital 80 cites *“the sale of products or services prohibited by Union or national law, including dangerous or counterfeit products”* as an illegal activity. As further confirmed in the Commission’s FAQs, the trusted flaggers system is partly intended to *“protect people from unsafe or counterfeit goods... A new system of trusted flaggers will also be available, for example, for brand owners fighting counterfeit goods, and for faster and easier flagging and removal of counterfeit goods.”* Commissioner Breton himself has stressed that the DSA *is not just about hate speech, disinformation and cyberbullying. It is also there to ensure removal of illegal or unsafe products sold in the EU via e-commerce platforms* (emphasis added).

During discussions leading to the adoption of the DSA we were frequently told that IP had acted as inspiration for this system, as (many) platforms already operate (proprietary) trusted notifier systems for right holders. Platforms, just like law enforcement officers, cannot be expected to know every brand and IP right prior to being notified: the only party that does is the relevant right holder. Absent generalised proactive monitoring, or controls, of all content offered to the public the only practical solution is for the right holder to act as the expert. Platforms regularly praise their cooperation with right holders in their transparency reports.

We make this direct comparison to law enforcement as for decades right holders have performed this expert role for Customs Authorities. Under Regulation 608/2013, as well as its predecessors and multiple similar systems throughout the world, right holders can record details of their IP rights and products with customs. Should customs detain suspicious shipments, they contact the relevant right holder which then verifies if the goods are infringing, allowing for prompt appropriate enforcement action. Over time, customs’ knowledge base has increased and they can identify more infringements, but they recognise that only the right holder is the expert in its own products.

Similarly, during field operations and litigation, law enforcement authorities and courts usually rely on right holders' knowledge and expertise about their products to decide on appropriate action.

The existing notice and action systems, as well as online brand protection programmes and IP portals, work on the same principle. While platforms' algorithms are reportedly enhanced by every new infringement identified, either proactively or by notification, they cannot be expected to recognise every product or piece of content offered. In practice they can, however, easily verify right holders and then rely on them to act as expert notifiers and authenticators of the product/content if necessary. The roll out of such trusted notifier systems saves resources on both sides, avoiding the need for repeat verification, and time, minimising the danger to consumers as listings can be removed expeditiously. Right holders' notices have also, we are told, fed the algorithms used for automated content moderation, the favoured approach of all VLOPs as evidenced in the recently published transparency reports.

3. The Digital Services Act

Recital 61 specifies that, "*Action against illegal content can be taken more quickly and reliably where providers of online platforms take the necessary measures to ensure that notices submitted by trusted flaggers, **acting within their designated area of expertise**, through the notice and action mechanisms required by this Regulation are **treated with priority***". Article 22 sets out the conditions a potential trusted flagger must demonstrate, including "***particular expertise and competence for the purposes of detecting, identifying and notifying illegal content***" and that "*it carries out its activities for the purposes of submitting notices **diligently, accurately and objectively***".

As noted above, no one has more expertise about content protected by IP than the IP right holder, and their decades of demonstrated competence and diligence is evidenced by their relationships with law enforcement as well as with many platforms themselves. The eligibility requirements are clear and apply equally to companies of all sizes: they alone are the experts in their own goods.

It was this recognition that the right holder is the expert that, during the preparation of the DSA, led to the deletion of the requirement that trusted flaggers must "*represent collective interests*". While this may be appropriate for, e.g., "*illegal racist and xenophobic expressions*", for counterfeit and other IP-infringing products it is simply unworkable:

- No association, no matter its size, is expert in all of the brands and all of the associated IP rights - be they trade marks, design rights, copyright or even patents - of all of its members. This would be impossible in practice due to constantly changing IP rights portfolios and IP right holders' particular challenges and strategies.
- Large companies, with sometimes hundreds of brands and associated IPRs, invest considerable resources to protect their brands and consumers and have dedicated online enforcement teams who specialise in detecting and notifying listings and advertisements for IP-infringing content to dozens of online intermediaries.
- Many companies also employ expert commercial service providers with specialised and ever-evolving IT solutions to do so.
- Smaller companies with few brands, or even just one, may submit notices directly. Denying them the possibility to be recognised as the expert in their own goods or content but forcing them to pay for a third-party gatekeeper will, by default, exclude them from any benefit the system is supposed to provide as they just do not have the budget.
- To mandate the imposition of an extra step, so that notices would have to be submitted from any right holder of any size to (for example) an association, would have no practical benefit:
 - The association cannot conduct triage or act as a filter; if the right holder says the item is counterfeit, the association cannot confirm or deny this. All it could do is act as a collection centre, to receive and then forward the notice to the platform.
 - If the platform had queries, again the association could not respond, but could only act as a collection and re-sending service: query to the brand, response back to the association and then back to the platform.
 - The number of notices submitted would not change.
 - Instead, it would result in delays and bottlenecks, running contra to the very purpose of the trusted flagger system to enable faster action against illegal content, to limit its harmful effects on IP right holders, on consumers and on society.
- Article 22(2) states that trusted flagger status shall be awarded by the DSC *"of the Member State in which the applicant is established"*.
 - If we take that to mean a national association must be the applicant, does that mean that every notice relating to every brand legally sold in that Member State should be submitted not directly, but via this association? As that would run into (at a minimum) tens of thousands of brands, how many staff should that association then employ, to act

as no more than digital delivery couriers? What happens to right holders who are not members of that association, or who cannot afford its fees? Or to those who are domiciled in non-EU countries? What about countries which do not have such a national association?

- If we take it to mean an international association based in that Member State, do we extrapolate the above to all brands of all of their members, regardless of where they are based?
- The training alone required to enable national and/or international associations to identify and report IP-infringing content would be so onerous that it could not realistically be achieved.
- Even the simple receipt and re-sending of notices would necessitate dedicated staff, IT infrastructure, premises and associated resources – all unnecessary and far beyond the capacity of any existing branded goods or anti-counterfeiting association.
- Added to these logistical impossibilities, and vast costs for no practical benefits, such a system would also raise major confidentiality concerns. While many right holders value the work of their industry associations, those same right holders will not support a system where the detailed expertise that is needed to monitor and enforce their IP rights needs to be shared with an industry association that holds similar information of its competitors.

None of this would add any value, either to the brand or the platform. All it would do is render Article 22 unworkable for IP-infringing and non-compliant goods, as clearly there could be no “priority” given to notices that take far longer, and cost far more, to be submitted. It would represent a clear step backwards from the current situation where many large platforms already operate voluntary trusted flagger mechanisms, employed by a vast number of brands. It would also add even more to the enforcement burden of genuine companies trying to protect their consumers and the EU market, for no benefit.

4. Concerns expressed by Member States

Right holders do not submit notices for action to a platform unless the content they see offered is illegal. They would only submit multiple notices if there were multiple offerings of illegal content on that platform.

Imposing an additional layer in the process would not reduce the number of notices. It would add bottlenecks at both association and platform level: one would need to collate spreadsheets, the other would need to separate the data out again to be able to feed the appropriate automated content moderation algorithm. It would simply add cost and delay, and render the purported goal of “faster and easier flagging and removal of counterfeit goods” a fallacy.

We also understand that some Member States believe that individual companies cannot be “objective”. There is no objectivity at play with a product that is counterfeit or non-compliant with EU laws: it is illegal. Granting trusted flagger status to associations or online brand protection service providers would not solve the “objectivity” criterion either, as it could be argued that they are not completely independent from IP right holders.

Recital 61 specifies that “*the overall number of trusted flaggers awarded in accordance with this Regulation should be limited*” so as to “*avoid diminishing the added value of such mechanism*”. Again, we appreciate this may be appropriate for user-generated content where some form of accreditation for trusted flaggers may be needed. As noted above, however, the verification process for IP right holders should be via a simple, standardised form. It would need little, if any, human review. To deny individual right holders this status would not so much diminish as eradicate any “added value” for them. It would be a step backwards from the current trusted notifier systems employed by many platforms, as direct relationships with brands would be compromised, the speed with which their notices are processed would be reduced and illegal content would remain present online for longer, actively damaging consumers and the EU’s creators, innovators, environment and markets.

5. The need for guidelines

We appreciate that the national rules have not yet been adopted, but we know that there is ongoing discussion between the Member States about this matter. As such we have called upon the Commission to issue guidelines in the near term, to avoid extremely damaging proposals from being formalised.

The [AIM Anti-Counterfeiting Committee](#), December 2023

For further information please contact marie.pattullo@aim.be