

## WHY THE EU NEEDS TO ADDRESS THE INVESTMENT GAP

EU citizens today are able to access content via multiple means and platforms. This level of access is unprecedented and helps facilitate a rich and dynamic cultural environment. However, technology is a means but not the principal reason for this abundance of choice and access. The key to this vibrant ecosystem is the EU's creative and cultural industry, and as concerns television, a unique audiovisual model that sustains a virtuous cycle of reinvestment in European works, in turn sustaining economic and job growth, media pluralism and cultural diversity. These are not just words but hard [facts](#)<sup>i</sup>. EU's cultural and creative industry represents:

- 6.8% share of the EU's GDP (€915 billion)
- 7.1 % of EU jobs
- ~15 million direct and indirect highly skilled, locally rooted (immune to offshoring) and well-educated workforce

Commercial broadcasters have and will continue to embrace the widest possible distribution and access of their content so far as it supports ongoing investment in content creation. Greater legal certainty will allow for more services, more content and more access. Broadcasters have a strong incentive to ensure their content is distributed and accessed in as many markets as possible. This allows for growth and reinvestment in high quality EU content. The IP and regulatory framework must ensure a return on investment (RoI) for risks taken without this RoI being captured by intermediaries that invest little or next to nothing in the creative process. With this in mind, it is in the strategic economic, social and cultural interest of the EU to bolster its creative ecosystems by enacting policies that sustain ongoing investment.

### CORE ISSUE

**Certain practices of User Uploaded Content (UUC) platforms are problematic** as they move from the role of passive hosting service providers to active involvement in the presentation, arrangement, usage and distribution of the content they store. These activities enable UUC Platforms to drive strong advertising revenue<sup>ii</sup>, frequently on the back of content that has been illegally uploaded. This main revenue stream is increasingly a result of the active role rather than the result of passive hosting. Depending on who they speak to, UUC platforms may take different postures. On the one hand, they promote their targeted advertising to brand owners. On the other hand, when right holders attempt to enforce the IPR in the content that the platforms are indirectly selling to advertisers, the same platforms claim to be purely storage providers, hiding behind the "safe harbour" provisions set out in Article 14 of the E-commerce Directive (ECD).

**Legal clarification is required.** UUC platforms have an incentive to maximise the scale of their content offer (whether legally or illegally uploaded) and for that content to remain up for as long as possible to maximise scale and attractiveness to advertisers. This is a form of semi-protected appropriation of the commercial return of those who are taking the investment risk on content production, the result of which leads to:

- lower levels of investment in content origination;
- lower employment in creative industries;
- less tax revenue;
- less cultural diversity (for example as seen with the overall decline of the press media across the EU).

Given the increasing use of UUC platforms to access content, there is a real need to ensure IPRs are respected in order to ensure a future for creativity, cultural diversity and media pluralism. Considering contradictory decisions taken by national courts<sup>iii</sup>, a clarification is needed on whether or not certain platforms should be permitted to avail themselves of the limitations on liability provided for under the ECD. A clarification would also lead to an increase in the number of legal (online content) services available to end-users. UUC platforms act as a break on investment as they have no costs tied to the acquisition and/or licensing of content.

## EUROPEAN COMMISSION'S (EC) PROPOSED REMEDY & ACT POSITION

**Proposals.** In Article 13 of the Proposal for a Directive on copyright in the Digital Single Market released on 14 September 2016 ("the Proposal"), the EC sets out new rules.

These rules require online services providing access to large amounts of content uploaded by users to:

- a) put in place appropriate measures (e.g. content recognition technologies);
- b) co-operate with right holders to ensure the functioning of agreements concluded with right holders, or prevent the uploading of works which have been identified by right holders.

The Proposal also clarifies (Recital 38) that such services are liable under copyright law, unless they are eligible for the liability exemption provided in Article 14 of the ECD. As regards Article 14, the EC states that it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

**Act Position.** ACT supports the EC's objective to allow right holders to better control the use of their content and to negotiate on a fairer basis with players that have become important content distributors. While the CJEU has provided some guidance<sup>iv</sup>, interpretation and application problems remain and the Proposal will help achieve clear distinctions. We therefore believe the EC's proposal is a step in the right direction, although the scope is very narrow (limited to UUC platforms) and the EC could have been more ambitious in finding ways to address digital piracy. As such, ACT welcomes the EC's decision to:

- strike the right balance between protecting truly passive hosting providers and respecting legitimate interests of right holders via the language set out in Recital 38 of the Proposal;
- create a "duty of care" obligation<sup>v</sup> on UUC platforms to cooperate with right holders in Article 13 of the Proposal.

## WHO WE ARE & WHY WE CARE

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. We entertain and inform hundreds of millions of EU citizens each week, delivering substantial value to EU citizens, for instance ensuring plurality in news provision as well as drama and sports to EU audiences. Europe's commercial TV's path to digitalization started 15 years ago, and we are now distributing TV according to our customers' preferences, whether that is digital terrestrial, digital satellite, cable or via stand-alone or multichannel networks online. We operate diverse digital business models that deliver unparalleled customer choice, varying from free-to-air advertising models to subscription on demand. The ACT member companies finance, produce, promote and distribute content and services benefiting Europeans across all platforms. At ACT we believe that a healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.

**For more information on the ACT position please contact Emilie Anthonis – [ea@acte.be](mailto:ea@acte.be)**

## Commercial Television: central to the lives of Europe's citizens as the motor of media plurality & cultural diversity

- Our TV channels reach over 200 million European households in 28 EU member states and beyond
- Our online TV services are available in over 150 million European homes connected to the internet and are central to Europe's broadband story
- Our member companies deliver content to a range of devices and platforms in response to consumer demand, going from television to total vision



<sup>i</sup> Intellectual property rights intensive industries and economic performance in the EU, European Observatory on Infringements of Intellectual Property Rights, October 2016.

<sup>ii</sup> Youtube for example is [estimated](#) to be worth more than \$70 billion, and its revenues are reported to have reached \$9 billion in 2015.

<sup>iii</sup> See for example in IT Court of Appeal of Milan n.29/2015 Yahoo! vs. R.T.I. of 10 July 2014 deciding in favour of the application of Article 14 ECD, while for example the GEMA vs Youtube case in Hamburg; the Decision by the Court of Rome in case RTI vs TMFT/Break Media of 27 April 2016 and the Decision by the Court of Rome of 15 July 2016 in case RTI/Megavideo decided that the UUC platform went beyond Article 14 ECD.

<sup>iv</sup> See for example CJEU judgment of 12 July 2011, in *L'Oréal and Others* (C-324/09)

<sup>v</sup> Such an approach is also supported by the recent CJEU GS Media decision (C-160/15) of 8 September. In its judgement, the CJEU ruled that hyperlinks to protected works (which are freely available on another website without the consent of the copyright holder) constitutes a 'communication to the public' when those links are provided with the pursuit of financial gain, in which case knowledge of the illegal nature of the publication must be presumed.