

## ACT FEEDBACK ON ROADMAP ON IP ACTION PLAN

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### A. Context, Problem Definition and Subsidiarity Check

Commercial broadcasters welcome the proposed roadmap on the IP Action Plan. We support the intention of the EC to further strengthen the existing IPR framework, and copyright specifically. Copyright is the DNA of business activities conducted by our members. Yet television remains one of the sectors most impacted by copyright infringements, prejudicing the sustainability of the creative ecosystem and with it cultural diversity. Piracy and unauthorised distribution of TV feed and content lead to a considerable loss of revenue and impact the commercial broadcasters' ability to invest in the next season of creative, journalistic and sporting programmes. ACT calls for a robust IP Action Plan that is linked, as set out in the Roadmap, to an industrial strategy and to Europe's fundamental values of media pluralism and cultural diversity.

We agree with the EC that a balanced and correctly enforced IP framework can build up resilience and further boost Europe's competitiveness. Balance requires addressing counterfeiting and online piracy with equal attention. The context should include the ongoing damage of online piracy and the objectives should "step up the fight against" piracy and not just counterfeiting. Ensuring a strong liability framework has a direct effect on financing and distributing our content, as well as on the attractiveness of our offers and services, throughout the EU.

This is crucial as part of the sector's ability to recover post-Covid. The IP Action Plan should secure a strong liability regime that ensures creation is properly protected and valued and that exclusive rights and contractual freedom are upheld. More importantly that the drivers of this value creation are fortified with practical and impactful enforcement tools.

### B. What does the initiative aim to achieve and how

**Upgrading the system of IP protection.** Impactful European legislative initiatives have been approved in the past five years. The EC needs to take stock of these, notably steering the transposition of the Copyright Directive, where we expect the Commission to aptly reflect the agreement between the Member States in its considerations on guidance (notably on notions of best efforts, diligence and exceptions). Rights holders are particularly weary that an IP Action Plan would be fundamentally flawed should platforms benefit from a Good Samaritan status that would fundamentally alter the IP landscape and further imbalance the playing field<sup>1</sup>.

Regarding Artificial Intelligence, it is important that any new or existing national or European liability rules are upheld so as to ensure prior authorisation/proper compensation of rightholders and reflect existing IP rules. ACT opposes the re-evaluation of existing IPR protections in the light of AI applications. AI applications are a means and not an end in themselves<sup>2</sup>.

### **Fighting IP theft**

We believe there is scope for a far wider and ambitious set of measures to fight IP theft. We consider the implementation of the copyright directive and the DSA as an opportunity to rectify the regulatory and value gaps in the digital space and fix the fact that online piracy costs the European creative industries billions every year.. This evaporation of investment into Europe's cultural and media landscape needs to be addressed with practical tools, such as: implementation of the Know Your Business Customer protocol mandating online platforms to check the identity of businesses operating on their services and of users wishing to monetise their content,

<sup>1</sup> ACT Feedback to DSA roadmap/ inception impact assessment, 29 June 2020 (Annex I)

<sup>2</sup> ACT Response to EC public consultation on Artificial Intelligence, 14 June 2020 (Annex II)

clarify access to the WHOIS database which is essential to combat illegal/harmful content online, possibility of issuing dynamic injunctions (catalogue or repertoire-wide), immediate takedown upon the notice of receipt of a trusted flagger such as broadcasters, proper enforcement of stay down obligations for illegal content, transparency of platforms' repeat infringer policies, ensure that rightholders have a useful right of information against copyright infringers under Art 8 IPRED, clarification of the legal regime applicable to creators of hyperlinks who actively contribute to the dissemination of illegal streams, etc. Online platforms in general are not playing by the same rules as their competitors. Ensuring their responsibility and accountability is an important step towards a vibrant audiovisual system that rewards investment in content creation. To this end, the active/passive distinction should be strongly upheld in the upcoming DSA package. We regret that the definition of hosting service provider in the Glossary of the DSA Public Consultation blurs these notions: while hosting service providers are defined as covered by the liability exemption in Article 14 of Directive 2000/31/EC, some of the services provided as example are clearly active players<sup>3</sup>. In addition, ACT calls for greater transparency regarding AI tools dedicated to anti-piracy. More specifically, content recognition tools deployed by online platforms to detect illegally uploaded copyright content should be made transparent toward an independent authority (at national or European level) and regularly audited to make sure they do not include pro-piracy bias and that they cover the full spectrum of uploaded content with the same conditions. The European Commission should also support the development of open and interoperable content recognition technologies. Regrettably the Commission's Memorandum of Understanding on the Follow-The-Money approach, aimed at disrupting the revenue flow for commercial-scale IP infringing activities through voluntary agreements between the online advertising community and rightholders, was substantially watered down towards the end of negotiations due to competition issues brought up by the EC Legal Service. This undermined the very purpose of the agreement by limiting application to a few adjudicated sites found by judicial or administrative authorities to infringe copyright.

### Promoting global fair play

ACT recommends a consistent approach in all legislative interventions, extending beyond voluntary schemes, to create a fair-trading environment and reinforce the internal market for digital services. ACT notes that achieving global fair play between content creators and gatekeeping platforms will not be possible unless the EU strengthens its IP framework. This includes an upgrade of liability rules paired with more effective regulatory oversight and judicial redress mechanisms and enforcement tools.

We also call for a measure tackling illegal offers from non-EU countries. Infringements of IPRs taking place outside the EU indeed constitutes a major source of concern, in addition to those that impact us within the EU. EC's efforts to address this problem through bilateral and international trade initiatives, notably at the WIPO, are to be supported strongly. We would urge the EC and Member States to continue to work at the global level for such an improved protection in order to grant a safer environment to those stakeholders who ensure the financing of high quality creative content.

As we see an increase of illegal IPTV activities<sup>4</sup>, significantly boosted by the Covid-19 crisis, we finally call on the EC to continue to work for the urgent improvement of the broadcasters' neighbouring right through finalising

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<sup>3</sup> Definition of hosting service provider in the DSA Consultation Glossary: "**Hosting service provider** means a provider of information society services consisting of the storage of information provided by the recipient of the service at her request, within the meaning of Article 14 of Directive 2000/31/EC, irrespective of its place of establishment, which directs its activities to consumers residing in the Union. Examples include social media platforms, video streaming services, video, image and audio sharing services, file sharing and other cloud services, websites where users can make comments or post reviews."

<sup>4</sup> [Illegal IPTV in the European Union](#), EUIPO - European Union Intellectual Property Office, November 2019. This report estimates EUR 941.7 million of unlawful revenue was generated by copyright infringing IPTV providers in the EU in 2018 and that these services were used by 13.7 million people in the EU (3.6 % of the EU-28 population).

the Broadcasters' Treaty that protects our activity in the digital environment and the reality of simulcasting, podcasting, catch up, on demand services or content aggregation and any other technological evolution eligible for protection.