

RESPONSE TO THE CALL FOR EVIDENCE ON PIRACY OF LIVE CONTENT

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CONTEXT

The Association of Commercial Television and Video on Demand Services in Europe (ACT) has long advocated for European legislation specifically addressed at addressing the stringent issue of piracy of live content.

Given the magnitude of the phenomenon and the complexity of the internet eco-system, a targeted piece of legislation is the only effective way to counter this problem. Globally, in 2020, a study showed that there were more than 357 million daily visits to audiovisual piracy sites, with Europe disproportionately accounting for 45.72% of traffic¹. The magnitude of the illegal IPTV offers is also well documented by both public² and private³ entities. Besides recent studies demonstrating economic damage, the past years the potential harms to consumers of pirated offers are also vastly documented⁴.

This problematic reality has not prevented our members, who allocate vast amounts of resources to fighting piracy, from observing that many hosting services and other intermediaries exploit any ambiguities in the law to avoid acting. The existing legislation at European level provides a theoretical basis for the protection of copyright protected content online but its adequacy to tackle actual infringements of live broadcasts is undermined by two issues: 1) the lack of obligation on the time within which hosting providers must act on notices received; 2) inconsistent application of live and dynamic blocking of illegal streams across the EU. It is difficult to believe that non-binding rules have the strength to change the behaviors of such operators.

The Recommendation should thus closely look at existing legal and technical hurdles that impede EU wide harmonization and effective remedies against piracy of live content.

¹ [Online Piracy in Numbers - Facts and Statistics \[Infographic\] \(go-globe.com\)](https://go-globe.com)

² "The illegal IPTV phenomenon is a rising trend in the global market[.....]the number of users involved in unauthorised IPTV streaming is estimated to be 13.7 million persons, corresponding to 3.6 % of the total EU-28 population in 2018.; Providers of copyright-infringing IPTV subscriptions are estimated to have generated EUR 941.7 million of annual unlawful revenue in 2018.; A single user on average spent EUR 5.74 per month in 2018 to access unauthorised IPTV online in the EU.", EUIPO "[Illegal IPTV in the European Union](#)", point 6. Conclusions and perspectives, page 84

³ "Estimates show that in 2021 nearly 17.1 million individuals (4.5% of the EU27+UK population) were using illicit IPTV services; The share is even higher among young Europeans – 11.8% of people aged 16-24 opted to access unauthorised IPTV. This represents nearly 5.9 million young individuals engaging in the use of unlawful IPTV in Europe This Report estimates EUR 1.06 billion of unlawful revenue was generated by copyright infringing IPTV providers in Europe in 2021", AAPA - [Illicit IPTV in Europe](#) by Dr Antanina Garanasvili, Economist, Gobelin House SLU, December 2022, page 9.

⁴ "90% of illegal websites are classified as risky, inter alia banking trojans, crypto scams, mature content" [The Hidden Threats Lurking on illegal streaming sites](#), Webroot; "[Study on Malware and audiovisual piracy highlights significant risks to European consumers](#)", AAPA, 19 September 2022; "5.9m people in Germany watched illegal live TV signals in 2022. This resulted in losses of €1.8bn, and foregone taxes and social security contributions of €390m", [Television Piracy Study 2022/2023](#)

IN DETAIL

According to the Call for Evidence released on the 13 of January, the Commission is structuring its reflection on the Recommendation to tackle piracy of live content on three pillars: 1) existing provisions in the Digital Services Act ('DSA') ("notice and action"), 2) encouraging all Member States to explore the use of dynamic injunctions for live content⁵, specifically in the context of Copyright in the Information Society Directive and IPRED⁶ and 3) facilitating the exchange of best practices amongst Member States.

Against this background, we would like to bring several elements to your attention, which we ask you to consider in all activities related to piracy of live content and the upcoming Recommendation:

1. The recently adopted DSA does not go far enough in helping the ACT members to protect their rights:

- The "notice and action" mechanism foreseen in Article 16 of the recently adopted Regulation, which is applicable exclusively to hosting services, has the potential to become a useful instrument. However, as explained above, without a specific time limit associated with take – down notices, which reflects the speed of compliance required for live events, that provision risks being an ineffective remedy. Today, the only requirement enshrined in law concerning the timing in which hosting providers shall take action on a notice is the E-Commerce Directive which states that the provider must act "expeditiously". The term expeditiously is left to interpretation and vastly differs not only between Member States, but also between hosting services. The DSA makes no changes in this respect to the 20-year-old law, despite certain national jurisprudence requiring hosts to act within 30 minutes⁷.
- Recital 51 of the DSA is also very problematic as it allows hosting providers who claim to not have the operational or technical capacity to act, to simply notify the notice sender, without any subsequent action required on their part. This creates yet another loophole allowing for more uncertainties for live content. Because the economic value of live content is exhausted at the end of the live broadcast, immediate action is required. For the planned Recommendation to produce any meaningful results, these loopholes should be addressed urgently. It is very important to note that hosting providers greatly benefit from allowing illegal live stream content on their services. Without rules, there is no incentive for them to act in a timely manner, if at all.

⁵ 1 *Dynamic (or "forward-looking") blocking injunctions are intended to cover repeated infringements of copyright and/or related rights* Dynamic (or "forward-looking") blocking injunctions are intended to cover repeated infringements of copyright and/or related rights [...] The dynamic aspect of this legal mechanism allows the prevention of repeated and future infringements of the same protected content, by extending the scope of a particular injunction to cover similar websites, including other domain names, Internet Protocol (IP) addresses or URLs, without the need to initiate new legal proceedings to obtain a new injunction. Mapping report on national remedies against online piracy of sports content, European Audiovisual Observatory, Strasbourg, 2021, p. 74.

⁶ [Directive 2001/29/EC](#) of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society & [Directive 2004/48/EC](#) of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights

⁷ 2 Dutch District Court in 2018 in *FAPL v Ecatel 3 Counterfeit and Piracy Watch List*- Commission Staff Working Document- Point 5.6, pages 31-37

- The “trusted flagger” mechanism foreseen in Article 22 of the DSA only applies to online platforms. Given the way in which the piracy ecosystem is organized today, the scope of this mechanism is too narrow. The DSA does not foresee a sufficiently granular scope of action for notices emanating from trusted flaggers. The only requirement for online platforms is to treat such notices “with priority”. This will not be enough to ensure that online platforms act immediately, as the specificity of live content requires. Without this, trusted flagger mechanisms become meaningless.
- We regret that, due to its horizontal nature and the manner in which negotiations were carried, the DSA does not thoroughly consider various other actors which play a strategic role in the online piracy ecosystem:
 - Providers of dedicated server services/leasing servers facilitate piracy by knowingly providing hosting solutions to illegal streaming sites.
 - Providers of “reverse proxy” services are an essential link⁸ in the web woven by pirate sites to organize their anonymity.
 - Piracy as a Service (PaaS) platforms constitute off-the-shelf services that make it easy for would-be pirates to create, operate, and monetise a fully functioning pirate service. PaaS providers lower the barriers to entry into commercial piracy. For IPTV specifically, forms of PaaS include, by way of example: (i) dashboards that allow an illegal IPTV operator to oversee the infrastructure of their service; (ii) hosting providers that do not respond to copyright infringement notices; and (iii) media players to which individual IPTV operators can add their own logo.

The same horizontal nature defined the lack of the DSA in robust policies in tackling repeat infringement. In addition the Know Your Business Customer principle (KYBC), although present in the DSA, is limited to marketplaces. This is not sufficient to tackle any online activities related to piracy, and even less so related to piracy of live content.

2. Encouraging all Member States to make use of dynamic injunctions:

- One of, if not, the most effective tool in protection of rights is article 8(3) of the Information Society Directive requiring Member States to ensure that rights holders can apply for an injunction against intermediaries whose services are used to infringe copyright. The statutory test set out in this article is not complicated or controversial, but the discretionary element afforded to Member States and their courts has led to vastly divergent regimes of relief. Indeed, while ACT members can make use of dynamic injunctions to enforce their rights in certain territories which allow them to do so, it is important to underline that, due to the specificity of live content and the patchwork of protection which exists in the EU 27, dynamic injunctions are either not available or are not a practical and effective remedy. This is especially the case because lawsuits are usually time consuming (and costly), which again contradicts the immediacy required to fight against piracy of live content. For these reasons, the most effective way to combat piracy of live content is to combine notices and actions with dynamic injunctions as they are complementary tools. The Recommendation must ensure that dynamic injunctions are available in circumstances where intermediaries are best placed to bringing infringing activity to an end, as a stepping stone towards live

⁸ “71% of websites which Corsearch notified to Google for search engine demotion used Cloudflare’s Content Delivery Network (CDN) services[...]A quarter (23.5%) of all websites flagged for offering counterfeited goods used Cloudflare” White Paper Corsearch Calls for Cloudflare To Do More To Protect Consumers & IP Owners

injunctions, without procedural barriers or limitations (for example subsidiarity requirements, costs or evidential rules) which make them an impractical tool.

- As stated above, applying live injunctions across the EU is not possible due to the diverse implementation by Member States of the EU Copyright acquis. In fact, at present, live blocking injunctions can only apply in the Member State where they are issued. To ensure they can be effectively enforced throughout the EU, a legal instrument is needed. This can be done through an instrument defining a uniform minimum set of fair rules leaving the possibility for Member States to go further, in order to avoid penalizing those that already have powerful tools. However, we still believe that the European Commission could seek to replicate across the union this effective and carefully used⁹ tool by promoting best practices and shared guidance that could set an example also at international level, while calling for reviews in countries where the article is not leading to effective injunctions because of local jurisprudence – Germany being a prime example. It would incentivize courts to adopt an approach which allows for such blocking where the likelihood of impeding access to legitimate content is low by putting in place the appropriate safeguards. Jurisdictions where live-server-blocking is in place have seen a considerable reduction in piracy traffic at peak hours with no suggestion of abuse, no negative impact on fundamental rights and no meaningful reports of over-blocking.

3. Facilitating the exchange of best practices between Member States:

- Whilst we recognize the value of this workstream, we also foresee its limitations given the variety of approaches chosen by Member States to address piracy of live content at national level.
- While certain Member States have well-functioning systems, we fear that without a legislative intervention at EU level, such exchanges of best practices will prove inefficient.
- For this work stream to produce real-life results, it is important that the EUIPO facilitates an exchange between competent authorities in Member States and representatives of the sectors involved. It is crucial that the two types of practitioners understand each other's approaches, problems and limitations. This is even more crucial given that ACT members generally operate on multiple territories, therefore their experience concerning the lack of harmonization and lack of adequate legal tools at EU level is prominent and should be brought to the attention of representatives from all 27 EU Member States authorities.

4. Introducing a review clause in the Recommendation

- Such a review clause is vital to the Recommendation. We would however raise several questions related to its practicality:
 - It is important that the criteria the European Commission is considering when assessing the effects of the Recommendation be listed in an Annex accompanying the Recommendation. As mentioned above, because those who facilitate piracy have no incentive to respond to soft measures, only a clear set of Key Performance Indicators (KPI) will encourage online intermediaries to act. These criteria should not just look at the impact of the various elements of the Recommendation, but

⁹ "In most SMS, dynamic injunctions address the risk of over- and under-blocking (e.g. in Denmark, France, Germany, Ireland, Italy, the Netherlands, Sweden and the UK)", [Study on dynamic blocking injunctions in the European Union](#), EUIPO – p.30

also the potential benefits of taking the legislative approaches we have identified above. Throughout the years, our sector has built considerable expertise in monitoring piracy trends which we hope to share with legislators during the process. Examples of KPIs could include quarterly data from rights owners on the volume of notices sent and acted upon, data from hosting providers on timing of removal, data from Member States on promoting the use of article 8(3) at national level...etc. Reviewing such data on a quarterly basis would allow the EU Commission to assess whether progress is being made against the two key issues: timely notice and action and live/dynamic injunctions).

- Which entity will monitor the efficiency of the Recommendation? Again, the best stakeholders to assess this efficiency, in our view, are and will remain the industries that have the rights for live events, such as those represented in the Live Content Coalition¹⁰.
- As a last point, given the underlying time sensitivity of the matter, the speed at which technologies evolve and change at the moment, we are reflecting on how long we can expect the Recommendation and the DSA to produce results. ACT members would recommend that the practical implications of the Recommendation be assessed together with the industry as soon as possible and, in any event, no later than 12 months after publication. Without a specific deadline set in stone by which the objectives set out in the Recommendation must be achieved, none of the players in scope will be incentivised to act.

¹⁰ [Live Content Coalition](#)