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COMPETITIVENESS OF EUROPEAN MEDIA CONTENT INDUSTRY AND IMPACT OF DIGITAL SINGLE MARKET

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EXECUTIVE SUMMARY

The European Commission has been working to adapt the current legislative framework in the media content domain aimed at creating a Digital Single Market. The goal is ambitious, due to the complexity of the files under discussion. One of the purposes of the Commission is to meet consumers' needs in terms of broader access to online content and removal of barriers to free circulation of content. However, the proposals presented so far have raised some doubts about their being future-proof and innovative friendly.

The introduction of neighbouring rights for press publishers

- Content aggregation has positive effects in terms of publisher visibility and revenues, as well as of user choice and pluralism. In Germany and Spain, the introduction of a remuneration right in favour of press publishers for the aggregation of news produced a marked decrease in traffic on news publisher websites.
- Granting rights to increasing numbers of actors may lead to the risk of reducing the economic value of each right essentially covering the same economic use.
- In some countries press publishers and online service providers have signed agreements to promote digital media development. This seems to be the right approach to achieve a more competitive marketplace and ensure the survival of quality journalism.

The new liability regime for online intermediaries

- The proposed new rules would threaten the liability regime for hosting coming from the E-commerce Directive, and would give rise to confusion and interpretation problems.
- This provision could provide an incentive for hosts of user generated content to enter into preventive agreements with right holders to minimize the liability risk.
- Filtering measures would become excessive, therefore becoming incompatible with the freedom to conduct business and the freedom of expression and information.

Fair remuneration for authors

- Obligations for transparency and knowledge of data regarding authors and performers' remuneration from the party with whom they entered into a contract for the exploitation of the rights is important for the development of new business models, innovation, economic growth, jobs and the creation of a Digital Single Market.

The tutelage of legal content and the follow- the-money approach

- The Commission has been working on a European framework to "follow-the-money" to cut financial flows to businesses which make money out of piracy.

This approach has been effective in some European countries, as the UK.

- On the consumer side, awareness and education is considered the best means to stop or substantially reduce the spread of illegal video streams.

Travelling with content: the portability regulation

- In the Commission's view, the new rules will benefit: consumers, online content distribution platforms (by simplifying the process of clearing licences for other territories) and right holders, that will be able to rely on strong safeguarding measures.
- For businesses, there might be issues to address in content licence agreements, but there is also a vast array of other considerations such as customer sales terms, technical and caring issues and commercial models that will need addressing.
- Some stakeholders are in favour of industry-led solutions and soft law tools introducing more flexibility in the acquisition of rights.

The online retransmission of TV programmes and the safeguarding of territoriality

- Commercial broadcasters and right holders state that the scope extension would *de facto* lead to pan-European licences and restrict service providers' ability to license rights on a territorial basis, with negative consequences for the production and distribution value chain. The proposed regulation entails the risk of forum shopping by service providers and a more complicated enforcement by right holders.
- Most PSBs welcome the proposed regulation because it would enable them to expand their services to other Member States and reduce administrative burdens and costs associated with the clearance of rights.
- Consumers Associations generally support the Commission's proposal - consumers will be the main beneficiaries of this approach and Europe's cultural diversity will be strengthened.

The AVMS Directive and the role of online platforms

- The Commission's proposal foresees a limited extension of its scope to video-sharing platforms, which will have to protect minors against harmful content and consumers against incitement to hatred.
- In the view of the Commission, the extension to video sharing platforms (VSP) of part of the legal framework relating to traditional audiovisual media might contribute to level the playing field among providers, but some stakeholders consider that as a whole it could enter into conflict with the liability regime modelled by the E-Commerce Directive.
- Implementation of the new regime would be encouraged via co-regulation, which seems to be appropriate for coping with the challenges of a fast-evolving sector as shown by the recently published Code of Conduct on hate speech as well as other models established by the ICT and news media-industry.
- The latest amendments proposed by the European Parliament set out the minimum harmonisation

system for the regulation of VSPs, which could lead to a fragmentation of up to 27 different codes of conduct or regulations to be implemented.

On-demand services and support for European art works

- The rules on the promotion of European works for TV broadcasting services have contributed to the development of a European audiovisual industry and ensured consumers access to European works.
- According to several online content providers, the imposition of quotas on European content would distort the market and create a "perverse incentive" for operators to buy cheap titles, while rules concerning prominence would interfere with a VOD company's "personalised" approach providing their services.
- The possibility for Member States to require a contribution for the production of European content from VOD service providers established in other Member States creates an exception to the principle of country of origin for VOD providers, and could lead to regulatory fragmentation and more complex administrative burdens undermining the very idea of a Digital Single Market.
- The industry considers that forum shopping practices could be avoided providing more harmonization at Member State level.

Commercial communications and media companies

- The hourly limit for advertising is replaced by an overall limit of 20% of broadcasting time between 06 and 00, to be respected in two separate time frames. Broadcasters oppose the establishment of such time frames, while they are supporting more flexibility, i.e. a daily limit. They consider that a shift to a 20% daily limit could generate between a 2% and 15% increase of revenues.
- The printed press and other content distribution platforms fear that such a daily limit runs the risk of triggering a shift in advertising resources from the print media to television.
- To strengthen establishing a level playing field, video-sharing platforms shall comply with some qualitative requirements concerning audio-visual commercial communications that are marketed, sold and arranged by those video-sharing platform providers. The VSPs are encouraged to provide for policies and schemes to develop "media literacy skills".
- Several MSs have highlighted that no impact assessment has been carried out to evaluate the legal, administrative and market impact of the inclusion of VSPs in the scope of the AVMS directive.

INTRODUCTION

It's been nearly two years since, in May 2015, the Commission adopted the Digital Single Market (DSM) Strategy identifying digital content as one of the main drivers of growth in the digital economy.

It highlighted the need for action leading to a wider online access to content for users, including audio-visuals, music, books and other types of content, and the need for a market and regulatory environment that would continue to foster its creativity, sustainable financing, and cultural diversity.

Through both legislative and non-legislative measures, the Commission proposed what it viewed as an ambitious and future-proof agenda to help European copyright industries flourish in the single market and European authors reach new audiences, while making European works widely accessible to European citizens.

Can an early evaluation of the responses of this attempt be made?

I-Com, in the following, will attempt to analyse the strengths and weaknesses of the reforms underway and will try to establish a common thread running through the most important measures. Are the Commission's targets closer to achieving or are they moving further away – also in the light of Brexit?

The paper is divided into two main sections, keeping in mind the most important provisions concerning online audiovisual content providers:

1. A well-functioning market for copyright: analysis of the Copyright Directive
2. Wider access to content across EU: analysis of the regulation on certain online broadcasting transmissions, of the Portability Regulation and of the AVMS Directive Proposal.

PART 1

THE EVOLUTION OF THE EUROPEAN AUDIO-VISUAL CONTENT MARKET

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Creative industries in Europe make a substantial contribution to the EU economy, generating more than €550 billion in added value to GDP (4.4% of total GDP), and 8.3 million full-time jobs, that is, 3.8% of Europe's workforce. Creative industries also account for roughly 4.2% of EU exports, being one of the few IPR-intensive sectors with a trade surplus[1]. However, some of Europe's cultural and creative industries are facing particular competitive, entrepreneurial and financial challenges.

On the supply side, incumbent players such as broadcasting companies and telecom operators are challenged by new entrants from the tech world in the European audio-visual sector and by new forms of Internet entertainment, thus resulting in increased competition for revenues, subscribers and viewers. In a field in which technological innovation is crucial, and therefore requiring investment in research and development in order to be able to compete, we are now witnessing a huge upheaval in the traditional audio-visual value chain and established market structures.

On the demand side, audiences are now being offered an enormous range of entertainment options (films, television shows, social media, video games, e-sports, etc.) and various devices and screens for accessing and viewing the audio-visual content. All these factors are resulting in an audience fragmentation across services and screens, increasing the difficulties for traditional analogue players to reach audiences.

Linear Audio-visual Media Services, Non-Linear (i.e., On-Demand) Audio-visual Media Services, Video Sharing Platform/Hosting Providers, E-commerce Intermediaries operate in a new wider competitive landscape providing their services with different business models - SVOD services, VOD transactional services and advertising funded online audio-visual services.

The acknowledgment of the importance of digital technologies and applications has led the European Commission to set as a priority the creation of a Digital Single Market.

In the Digital Single Market pursued by the Commission, consumers will be able to access to services and content via electronic devices within Europe, without national restrictions and businesses will be able to offer their goods and services within a harmonized regulatory framework, allowing them to be more competitive globally (a level playing field).

Therefore, the Commission is calling for greater coordination at European level and is working on legislation with common rules that allow all citizens to fully benefit from the great opportunities offered by a truly connected digital single market.

1 Status of online platforms in the EU as regards copyright and the need for legislation, Open letter of the Intergroup Cultural & Creative Industries of the European Parliament to Jean-Claude Juncker President of the European Commission and to Andrus Ansip, Vice-President of the European Commission, and to Günther Oettinger, Commissioner, 20 June 2016.

PART 2

A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

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In recent years, the Internet has become a key distribution channel for accessing and distributing copyright-protected content. Online services now represent a major source of revenue for creators of works and other protected content and are expected to continue to grow in importance. For instance, the global music industry association IFPI recently reported its strongest year-on-year growth in 20 years, with digital revenue accounting for more than 50% of total sales revenue for the first time[2]. However, despite this picture of growth, some right holders have raised concerns whether there is equitable sharing of value from digital services for the use of their content online. On the other side, intermediaries and aggregators call for freedom of expression, support for the new business models and a legal framework that does not hinder digital innovation. From a user perspective, new technologies make it possible to expand access to vast quantities of knowledge and content. The Internet has facilitated an unprecedented shift for citizens, from being passive consumers of "broadcast" culture to active creators and participants. Individual users are increasingly involved in content and knowledge creation. The European copyright framework should reflect this new interaction which encourages creativity, cultural diversity, self-expression and innovation. Linked to this, but also affecting offline forms of exploitation, is the question of the fair remuneration of authors and performers and of the difference in bargaining power when licensing or transferring their rights. Authors, i.e. writers, literary translators, composers, songwriters, journalists, screenwriters, complain that this circumstance affects their remuneration and fair share in the exploitation of their works. In most instances, authors' contracts lack provisions allowing them to renegotiate their terms. Therefore, they call for clear contracts, in written form, which transparently set out the exact scope of the rights granted / assigned / licensed and are promptly and transparently negotiated. They encourage the European Commission to further harmonise transparent and fair remuneration schemes for authors throughout the EU[3].

2 IFPI, Global Music Report 2017

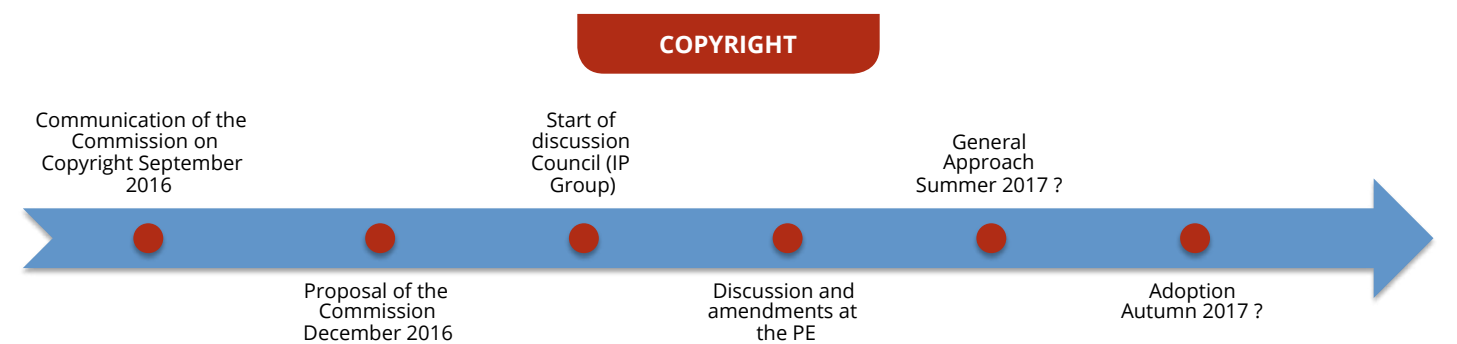
3 See, for example, the "*Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators*" by the Authors' Group, an umbrella organisation of ECSA, EFJ, EWC, FERA and FSE composeralliance.org/wp-content/uploads/2015/07/CC_declaration.pdf, or the Fair terms for creators campaign coordinated by the Creators Rights Alliance http://www.fairtermsforcreators.org/

2.1 THE MODERNISATION OF COPYRIGHT LAW FOR INNOVATION AND SIMPLIFICATION: RESPONSIBILITY OF INTERMEDIARIES, SAFEGUARDING AND REMUNERATION OF ROYALTIES

Digital technologies have transformed the ways creative content is produced, distributed and accessed. Today 49% of EU internet users access music or audio-visual content online, 40% aged 15-24 years watch TV online at least once a week. In 2015, digital became the primary revenue stream for recorded music[4]. However, essential parts of the EU copyright framework date back to 2001 and there is no full agreement among experts and stakeholders on the fact that this framework has been fully adapted to the digital landscape. With the proposed and controversial Single Market, the European Commission hopes to: facilitate the licensing of European audio-visual works and the digitisation and availability of out-of-commerce works; adapt key exceptions to the digital and cross-border environments, focusing on digital and online use for educational purposes, text and data mining to boost research and innovation, and preservation of works in cultural heritage institution collections such as museums and cinematheques; achieve a well-functioning marketplace for copyright, focusing on issues related to value-sharing in the online market place. The Commission's objective is to adapt EU copyright rules in a context where digital technologies are rapidly changing the way works and other protected subject matter are created, produced, distributed and exploited, but some stakeholders fear that the proposed rules are far from being future-proof and innovation-friendly, resulting in more protection to the incumbents.

Legislative schedule – Copyright Directive

Source: I-Com



4 IFPI, Global Music Report 2016

2.1.1 The introduction of neighbouring rights for press publishers under EU law

- Publishers argue that in the digital world the online publishing sector runs the risk of being taken over by content aggregators that would profit from using content in a variety of ways, preventing publishers from receiving a market compensation for their productive activities.
- However, tools do exist preventing content to be indexed and the option of voluntary agreement also exists.
- Content aggregation has positive effects in terms of publisher visibility and revenues. "referral traffic" was worth an estimated €746 million to news publishers in the UK, Germany, France and Spain in 2014. In Germany and Spain, the introduction of a remuneration right in favour of press publishers for the aggregation of news produced a marked decrease of traffic in news publisher websites.
- Different approaches to the protection of publishers at national level have resulted in fragmentation in the single market.
- Granting rights to increasing numbers of actors may lead to the risk of reducing the economic value of each right essentially covering the same economic use.
- In some countries press publishers and online service providers have signed agreements to promote digital developments of media. This poses the question whether a more competitive marketplace can be achieved by means of an additional layer of protection or developing new business models in the digital environment to ensure the survival of quality journalism.

The Commission proposes to introduce a new related right for publishers (art. 11 of the Proposal) for digital uses of their publication, similar to the right that already exists under EU law for film producers, record producers and other players in the creative industries such as broadcasters. In addition, the proposal provides that, upon transferring or licensing of authors' rights, publishers are entitled to claim a share of the revenue stream stemming from compensated exceptions or limitations (art. 12).

According to the Commission, "the new right recognises the important role press publishers play in investing in and creating quality journalistic content, which is essential for citizens' access to knowledge in our democratic societies"[5].

Neighbouring rights as investment reward

Neighbouring rights are similar to copyright but do not reward an author original creation. Instead, they reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (e.g.by a producer) which may also include participation in the creative process[6]. Current EU copyright law grants neighbouring rights to performers, film producers,

5 European Commission Press Release IP/16/3010, State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate, 14 September 2016

6 Impact Assessment on the modernisation of EU copyright rules 14 Sept. 2016, Part 1, p. 6

record producers and broadcasting organisations. Publishers are not among the neighbouring right holders at European level.

Several countries expressed perplexity regarding the introduction of these new rights[7].

A first observation regarding the justification for such protection should be made. Neighbouring rights are commonly justified as a reward for investment in the production and distribution of creative works. It might be argued that, today, modern digital editing and graphical design tools allow for a faster, easier and cheaper publishing process compared to the past. The present proposal does not take this into account. Making trivial information available on a "news website" would attract the same protection as the publication of an article resulting from months of investigative journalism.

If the new neighbouring right is seen as a means of protecting investment rather than journalistic originality, any snippet taken from a press publication would fall under the proposed exclusive right – regardless of whether the snippet is original or not[8]. However, if the proposal intends to cover snippets, it should clarify what constitutes a snippet, and how much text that would involve. Also it should make clear whether the neighboring rights proposal intend to capture hyperlinking.

As the European Commission clearly seeks to "place press publishers in a comparable situation to the one of other related right holders under EU law, such as film and phonogram producers", the interpretation of the new neighbouring right for press publishers would be aligned with the existing interpretation in the field of sound recordings. In this case, the neighbouring right covers even smallest fragments of a sound recording. As a consequence, in the case of neighbouring rights for press publishers only individual words or the smallest text excerpts would not fall within its scope. Such a situation would pose a serious threat to the free flow of information.

Any economic input into the value chain of creative activities does not necessarily merit the granting of a property right. Also, a grant of a neighbouring right to one economic actor cannot be a reason for granting such a right to another. Moreover, the Proposal does not follow any meaningful logic of investment reward, since it proposes to grant rights to any publication, even those that do not involve any substantial investment.

Neighbouring rights as a remedy for a market failure?

For the European Commission, the purpose of the proposed neigh-

7 The Italian delegation to the Council Copyright working group, on the 17 May 2017 meeting, pointed out that publishers already enjoy copyright protection, following agreements with authors. According to the Italian delegation, the introduction of such a right at European level would fill the existing gap between press publishers and film and music producers.

8 In the field of the neighbouring right of phonogram producers, it is already recognized that the neighbouring right covers even the smallest fragments of a sound recording. In *Infopaq*, the Court of Justice held that even a short sequence of 11 words may enjoy copyright protection if it reflects a sufficient level of creative choice leading to an "own intellectual creation". Press publishers, thus, have far-reaching controls over the use of content snippets under the current legislation CJEU, 16 July 2009, case C-5/08, Infopaq, para. 48. In 2013, Germany amended its Law on Authors' and Neighbouring Rights by introducing a section that provides exclusive neighbouring rights to press publishers. This right covers making available for commercial purposes any publications and their fragments, with the consequence that only individual words or the smallest text excerpts do not fall within its scope. See below.

bouring right for press publishers is to establish a level-playing field for both press publishers and news aggregators. Publishers claim that this would be a tool for tackling the alleged non-functioning market place and the loss of revenue that they suffer from in the digital market due to business models adopted by service providers such as content aggregators[9].

In particular, publishers argue that new ways of consuming content on many digital platforms facilitate free-riding and, mainly in the digital world, the online publishing sector runs the risk of being taken over by third parties (e.g. content aggregators) that would profit from using content in a variety of ways, preventing publishers from receiving a market compensation for their productive activities. According to a study cited in the Impact Assessment, 47% of consumers mostly browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page[10]. This, according to publishers, is eroding the advertising revenues from newspaper webpages, even though people who just read the snippets would not necessarily read the newspapers' page otherwise. It must be noted that not all publishers are supportive of a neighbouring right. The Spanish newspaper El Paìs penned an op-ed criticizing the proposal[11] and others have been similarly vocal. Small publications also oppose the measure, as they heavily rely on online services to be discovered[12].

Some publishers' claim that a market failure exists seems unfounded. In fact, protocols already allow publishers to ensure their content is not indexed or introduced into the social media. As well, there is the option of contractual agreements including remuneration on a voluntary basis. Furthermore, aggregation of content has positive effects in terms of visibility of publishers, small and large. Online services direct considerable traffic to the websites of news publishers, who then enjoy economic advantages by selling advertisements and subscriptions. Another study cited by the European Commission covering France, Germany, the United Kingdom and Spain shows that 66% of visits to newspaper websites involves referral traffic, i.e. traffic channelled by other online services, the total value of which has been estimated to be €746 million in the 4 MSs considered[13].

Digital services not only drive revenues for publishers,

9 The problem does not affect publishers other than press publishers to the same extent, due to the different nature of their products and business models. Book publishers generally do not make their content freely accessible online in the same way press as publishers do. As a consequence, at the moment, online services such as news aggregators and the social media rarely play a role as distributors of book content. The online distribution of e-books generally follows a more traditional linear model, based on copyright licences between publishers and online distributors (with or without the intermediary intervention), in many cases large multimedia online service providers. Scientific publishers generate revenues either through subscription licences with universities and similar establishments or, when they make their content available online under the open access model, charging authors for the publication. Because of the specific nature of scientific publications, advertising revenues as well as traffic generated by online service providers rarely plays a role in this market. See Impact Assessment, p.158.

10 In 2016, the social media (22 %), news aggregators (14 %) and search engines (21 %) were the main means to read news online for 57 % of users in the EU Eurobarometer Flash 437 - Use of news aggregators, online social media or search engines to access the news online.

11 Concordia digital. Medios de comunicación y empresas tecnológicas deben progresar juntos http://elpais.com/elpais/2017/03/23/opinion/1490295040_130405.html

12 http://www.aeepp.com/pdf/151204_Statement_on_Digital_Single_Market_FINAL.pdf

13 Deloitte 2016.

but they also create value for consumers, expanding the market for news and driving media pluralism. News aggregators raise consumers' awareness of news and of other news outlets, they provide snippets, giving consumers a more effective way of consuming and choosing to read news articles - hence increasing total media consumption[14]. Readers using news aggregators consume more news overall and consult more diverse news sources[15].

Neighbouring rights in practice

Based on the above, it seems there is no market failure in the digital world that would justify the introduction of a neighbouring right for publishers. Some evidence can be drawn from the German and Spanish experiences, where the introduction of a remuneration right in favour of press publishers for the aggregation of news produced a dramatic decrease in traffic to news publisher websites. Both countries have recently adopted national measures (generally referred to as 'ancillary rights') to grant publishers specific protection as regards the use of their content online.

The German law grants an exclusive but waivable right specifically covering making press products available to the public, and has been implemented by the main press publishers under collective management schemes[16]. The Spanish law establishes an obligation for online service providers to pay compensation to publishers (which cannot be waived) for uses of their content online[17].

Indeed, the introduction of the German Act has divided the German news publishing industry. Several major news outlets publicly refrained from exercising their right and clearly allowed online aggregators to index their content. A second group of publishers represented by VG Media decided to enforce the right for its members. When Google announced its intention to de-index snippets – as the company was and still is strongly opposed to ancillary copyright – VG Media complained to the German Federal Competition Authority (Bundeskartellamt). Recently the Bundeskartellamt rejected VG Media's claims, arguing that: "if an online service does not want to acquire a license for the display of snippets and hence only displays search results in a more limited, shorter version, it can do so. There is nothing under antitrust law that would

14 Calzada, Gil, 2016 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553

15 http://europeandigitalmediaassociation.org/pdfs/latest_news/EDiMA%20DE%20Policy%20Brief%20on%20Publisher%20Rights.pdf

16 The Leistungsschutzrecht für Presseverleger statute in Europe was enacted in Germany in August 201. The law, specifically aimed at granting revenues to publishers for news aggregation, attributes an exclusive right to press publishers. According to Section 87f "*[t]he producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts [...]*".

17 The "snippet levy provision" was enacted late in 2014 and went into effect on 1 January 2015. Section 32.2 provides that "*[t]he making available to the public by providers of digital services of content aggregation of non-significant fragments of content, available in periodical publications or in periodically updated websites and which have an in-formative purpose, of creation of public opinion or of entertainment, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be non-waivable and will be effective through the collective management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization*".

prevent companies from doing so, even if they are found to be doing so".

In the meantime, due to legal uncertainty, a number of innovative and promising European companies were faced with the decision to significantly limit or even shut down their service as a precautionary measure. To mention but a few - the blog aggregator rivva; the news search engine nasuma.de; NewsClub.de; commentarist.de; DeuSu.de; the non-commercial news review page Links.Historische; the news provider for historians res media, the news agency Radio Utopia; the search engine Unbubble.eu[18].

In Spain, Google withdrew from the market for Spanish news aggregation, closing down its news.google.es website in December 2014. Much like in Germany, domestic online service providers closed down their operations (e.g. Planeta Ludico, NiagaRank, InfoAliment, Astro Fìsica and Multifriki). Others like Menéame continued their activities, but had to close down shortly after. A study commissioned by the Spanish Association of Publishers of Periodical Publications[19] concluded that "on the more distant horizon, the negative impact will be more significant, discouraging the development of innovative content and platforms in the ecosystem of online news consumption in Spain".

In its Impact Assessment, the European Commission admits that so far none of these two recent 'ancillary rights' solutions at national level have proven effective to address publishers' problems, mainly as they have not resulted in increased revenues for publishers from the major online service providers. Moreover, different approaches to the protection of publishers at national level have resulted in fragmentation in the single market[20].

Despite clear negative experience in Germany and Spain, in response to the public consultation on the Proposal of Directive, some press publishers still argued that a new neighbouring right would help them. A minority of press publishers, mainly from Spain, took a different stand. They referred to the Spanish and German "ancillary rights" laws and expressed concern that the introduction of a neighbouring right at EU level would make it more difficult for service providers to direct audiences to newspaper and magazine websites and as a consequence would reduce traffic and advertising revenues for publishers. These respondents were doubtful that a neighbouring right would improve licensing and enforcement. They considered that legislative intervention at EU level could have a negative impact on the cooperation between online service providers and publishers and ultimately affect smaller publishers negatively[21].

The pie rule

As well, granting rights to increasing numbers of actors leads to the risk of reducing the economic value of

18 Ancillary Copyright for Publishers Taking Stock in Germany, Bitkom, 2015.
19 Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual, Nera, 2015.
20 Impact Assessment on the modernisation of EU copyright rules 14 Sept. 2016, Part 1, p. 160.
21 Synopsis reports and contributions to the public consultation on the role of publishers in the copyright value chain, available at http://ec.europa.eu/information_society/newsroom/image/document/2016-37/synopsis_report_-_publishers_-_final_17048.pdf

each right covering essentially the same economic use. The contribution of a producer of a phonogram or the producer of an audio-visual recording is very different from a publisher, even a news publisher. Through employment contracts or contracts with freelance journalists, press publishers already acquire the authors' copyright. So the proposal actually establishes a double layering of rights (notably the right of reproduction and the making available to the public for digital uses) for the same creation.

This overlap with existing authors' rights makes it uncertain whether additional revenues would be available since the grant of an additional layer of rights does not, by itself, increase the value of cultural goods. In this regard, the Impact Assessment comes to the following conclusion: "The introduction of a related right covering digital uses of press publications is not expected to generate higher licence fees for online service providers which already conclude licences covering specifically the use of digital news content"[22]. By contrast, the granting of neighbouring rights to publishers which, in substance, are similar to author copyright, may lead to discussions concerning the need for a transfer or licence. As press publishers would have their own rights in accordance with the proposal made by the Commission, individual authors contributing to a press publication may feel that there is no longer any need and justification for a transfer or licence. They may also feel that the value of their own copyright is reduced because of the additional right of publishers.

In fact, in the public consultation, journalists and photographers, while sharing the publishers' concerns that the publishing industry should be strengthened in their bargaining position with online service providers, expressed their worry that a neighbouring right for publishers could have an impact on their own authors' right, weakening their bargaining position with publishers and making it more difficult to exploit their rights independently[23]. While the Impact Assessment states that the introduction of neighbouring rights for publishers will be without prejudice to the rights of authors, it fails to explain how this is going to impact the authors' revenues. If the pie does not grow bigger, the authors' share will become smaller as additional rights come into play.

Can the market be the remedy?

Finally, in some countries (Belgium, Italy, France) tensions between press publishers and online service providers have been addressed by signing agreements (see the programmes financed by Google in France and Italy to promote digital developments of media). This raises the question whether a more competitive marketplace can be achieved by means of additional layers of protection or instead by developing new business models in the digital environment to ensure the survival of quality journalism[24].

- In France, Google signed an agreement with the

22 European Commission, Commission Staff Working Document, Executive Summary of the Impact Assessment on the modernisation of EU copyright rules, 14 September 2016, SWD (2016) 302 final, p. 4.

23 See *Syndicat National des Journalistes*, "Droits d'auteur: une directive européenne à surveiller" October 2016 https://goo.gl/NOoQli

24 This argument was put forward by El Paìs in its editorial: "Past experience and the present reality show that a way forward based on cooperation between the media and technology companies is required, rather than through confrontation"

association of news press publishers (AIPG) in 2013. The agreement created a €60 million fund – *Fonds Google – AIPG pour l'innovation numérique de la presse*, which provided French publishers with grants for partial funding for innovative development projects in news publishing from 2013 to 2015.

- In Italy, an agreement was reached in mid-2016 between Google and the Italian Federation of Newspaper Publishers (FIEG). It established *inter alia* an investment of 12 million euros in the publishing sector over a period of three years[25].
- An EU-wide fund of 150 million euros – the Digital News Initiative (DNI) – was launched by Google in 2016 for a three-year period to support projects in the news sector[26].
- Other EU online service providers have reached agreements and/or are presently working on new arrangements with publishers.
- In January 2017 Facebook launched its Journalism Project with three main objectives: work with journalists to build storytelling tools and monetization options; train journalists to help them make the best use of Facebook as a tool; and partner with third parties to promote news literacy on and off the social network. The company also plans to complete a global "listening tour" to promote regular communication with the publishing industry[27].

2.1.2 The responsibility/liability of intermediaries

- The European Commission's goal is to address the so-called "value gap" between the benefits platforms derive from hosting user uploaded content and the money paid to right holders of that content. The online services industry has repeatedly rebutted the value gap argument.
- The proposed new rules would threaten the liability regime for hosting and would give rise to confusion and interpretation problems.
- Even though this provision does not impose an obligation to enter into agreements with right holders, the change of the interpretation of the traditional liability regime for hosting could provide an incentive for hosts of user generated content to enter into such agreements to minimize the liability risk.
- Filtering measures may result in less content being available. Hence, broad filtering obligations might be incompatible with the freedom to conduct business and the freedom of expression and information.

The second point at stake concerns the role of certain online "information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users"[28].

25 See FIEG press release http://www.fieg.it/upload/salastampa/COMUNICATO%20STAMPA%20FIEG%20-%20GOOGLE%2007%2006%202016.pdf
26 For more information about the fund, see https://www.digitalnewsinitiative.com
27 https://media.fb.com/2017/01/11/facebook-journalism -project/

The European Commission, via the Copyright Directive, aims at strengthening the position of right holders to negotiate and be remunerated for the online exploitation of their content on video-sharing platforms. Such platforms would have an obligation to automatically detect songs or audio-visual works which right holders have identified and agreed with the platforms either to authorise or remove (Art. 13 of the Proposal)[29]. The ultimate goal is to address the so-called "value gap" between the benefits platforms derive from hosting user uploaded content and the money paid to right holders of that content[30].

The online services industry has repeatedly rebutted the value gap argument: indeed, digital services have been driving consumer welfare as well as increased revenue for the creative sector. The music industry, for example, in 2016 reported 112 million users of paid streaming subscriptions, allowing streaming revenue growth of 60.4%. Digital income of the recording industry now accounts for 50% of global revenues[31].

Three fundamental problems have been seen to arise from the European Commission's approach to the value gap: a possible incompatibility with EU Law (and especially the E-commerce Directive) and the jurisprudence; insufficient/inappropriate consumer safeguards and the potential violation of the EU

28 For a service to be covered by the obligations set out in Article 13, the following cumulative criteria need to be fulfilled: (i) the service needs to be an 'information society service' (as specified by the E-commerce Directive) which stores and gives access to protected content; (ii) the content needs to be uploaded by the users of the service without the involvement of right holders; and (iii) the service needs to host large amounts of user uploaded protected content. To those stakeholders raising concerns about legal uncertainty regarding the scope of services covered by the obligations of Article 13, the Commission has explained that the proposal does not target services such as Wikipedia where the content uploaded is either the authors' own or authorised, nor marketplaces where the protected content is generally not a large amount when compared to the overall content available. A search engine should also not be included, as its activity does involve storing content uploaded by its users. The Commission has also indicated that the notion of large amounts is a relative term which may change depending on a service but it should be understood in light of the measure's objective and understood as a combination of different elements, such as (i) the total number of files of copyright-protected content uploaded by users, which needs to be significant, and (ii) the need of the protected content uploaded by the users to constitute a significant part in the overall amount of content available on a website.

29 Art. 13: 1. Information society service providers that store and provide the public with access to large amounts of works or other subject-matter uploaded by their users, shall, in cooperation with right holders, take measures to ensure the functioning of agreements concluded with right holders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by right holders through cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide right holders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter. 2. Member States shall ensure that the service providers referred to in paragraph 1 establish complaint and redress mechanisms that are available to users in the case of disputes over the application of the measures referred to in paragraph 1. 3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and right holders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

30 In the recent joint French-Italian declaration signed on 3 May 2017, the two governments welcomed the European Commission's proposals, that are a first step towards an appropriate accountability of online platforms, in cooperation with the right holders. They also consider that the proposals should clarify the status of these activities concerning copyright and, on the other hand, clarify the right of communication to the public. They deem it appropriate to return to an original conception of this right, such as ensuring the necessary legal certainty. A similar declaration was signed between the French and Spanish governments in Màlaga, on 20 February 2017.

31 IFPI Global Music Report 2017, http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2017

Charter of Fundamental Rights (especially with regards to freedom of speech).

Liability or responsibility

Up to now, EU legislation in the field of e-commerce has shielded platforms from liability for copyright infringement by offering a so-called "safe harbour" for hosting.

The E-Commerce Directive 2000/31/EC had two main goals. Firstly, to support the economic growth of digital services relying on user-generated content by providing them with legal certainty, and secondly, to legislate for a rapid, reliable and proportionate enforcement of copyright and other rights.

Specifically referred to video-sharing platforms (VSP), the liability regime makes a host of content uploaded by users liable only upon obtaining knowledge of the content and its illegality deriving from a valid notice and action. As a result, while rightsholders can identify and report infringements to online providers, intermediaries oversee takedown of the notified content as notified by rights owners[32]. Different online services have developed their own system to verify and eventually take down content.

Some right holders have demanded "notice and stay down" injunctions. "Stay down" refers to an obligation for intermediaries to ensure that once a particular file has been removed, it will never reappear on their systems. In other words, after an intermediary has received a notice that certain content is not legal, it should take this material down and ensure that the same content does not reappear.

Stay down would require intermediaries to seek out and remove repeat copies of a file for an indefinite period. Any type of stay down system would need to operate by checking newly uploaded files against a database of previously identified infringing or illegal content. A stay down system would remove, or prohibit the uploading of any content that matched a file in the database. Stay down requires a content scanning or filtering system. Decisions would be taken on the basis of database matches and computer algorithms rather than human understanding of the law. Stay down raises concerns over the possibility for error, notably for false positives and the taking down of legal content.

Requests for stay down as a copyright enforcement measure have been rejected by national courts in France, Germany, and Italy. In 2012, the French Supreme Court, ruling in the case of Google vs BacFilms, stated that there is no obligation for a hosting provider to ensure that content that has been notified and removed is not re-posted[33]. Such an obligation would impose a general obligation to monitor, and would thus be

32 For example, through Content ID, YouTube blocks or monetizes content that has been claimed by a copyright owner according to their instructions. YouTube's Content ID, which has taken 9 years and $60 million to develop – including recent advancements in machine learning – currently handles 98% of copyright management on YouTube. Since its launch, Content ID has paid out over $2 billion to right holders. https://blog.google/topics/public-policy/continuing-to-create-value-while/

33 Christelle Coslin and Christine Gateau [Hogan Lovells] No 'Stay Down' Obligation for Hosting Providers in France, on Society for Computers and the Law website, http://www.scl.org/site.aspx?i=ed32661

incompatible with the E-Commerce Directive. The Milan Court of Appeal, ruling on RTI v Yahoo![34], followed the ECJ's rationale, saying that Yahoo! could not be liable for searching out generic content[35], and that a filtering or a stay down obligation would be too burdensome.

Despite these precedents, the copyright proposal puts in question the safe harbour for hosting in the E-commerce Directive, and gives rise to confusion and interpretation problems.

The proposal challenges the existing system already in Recital 38.

Recital 38: Where information society service providers store and provide the public with access to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with right holders, unless they are eligible for the liability exemption as per Article 14 of Directive 2000/31/EC of the European Parliament and Council.

The text is confusing. It states that direct liability does not apply in the case where a provider is covered by a safe harbour, while immediately stressing its limited applicability. The proposal says that to assess neutrality, it is necessary to verify whether the host plays an active role, including that it optimizes or promotes user generated content.

Consequently, hosts and other service providers who are not passive [do not just provide technical infrastructure], are *automatically* ('thereby') communicating work to the public and, thus, must license the content.

In the Impact Assessment, the Commission says that the proposed obligations would be without prejudice to liability regimes applicable to copyright infringements and the application of Article 14 ECD. In particular, the obligation to put in place content identification technologies would not remove the safe harbour provided that the conditions of Article 14 are fulfilled - the notice and takedown regime will continue to apply for hosting service providers covered by Article 14[36].

However, the text proposed in the Recital 38 Copyright Directive could be understood in the sense that the safe harbour for hosting already becomes unavailable when a platform provider structures user-generated content in a certain way. For instance, by providing content categories or columns, or when the provider refers to uploaded content in advertising. This, in turn, would mean that many hosting platforms could no longer rely on the immunity from liability which currently follows from the application of the traditional safe harbour.

Recital 38 does not clarify the scope and effect of Article 13. Instead, it creates further legal uncertainty, as it goes against settled CJEU case law[37] relating to Articles 14 and 15 of the E-commerce Directive and

34 Milan Court of Appeal, Reti Televisive Italiane S.p.A. (RTI) v. Yahoo! Italia Srl. (Yahoo!) *et al*, 7 January 2015.

35 The Court held that Yahoo! Italia was not required to act on the basis of a general listing of illegal content to be removed, without specifying the URLs of the files to be removed. The burden of accurately identifying such content, given the public nature of the portal they were located, fell on the R.T.I.

36 Impact Assessment on the modernisation of EU copyright rules 14 Sept. 2016, Part 1, p. 147.

Article 3 of the Infosoc Directive[38].

Broad filtering obligations

The E-commerce Directive also establishes a prohibition on general monitoring obligations. This is a means to achieve at least two central objectives: the encouragement of innovation, which is essential for the flourishing of the Digital Single Market and the protection of fundamental rights on the Internet.

This provision is based on the assumption that platforms hosting user-generated content should enter into contractual agreements with copyright holders seeking to prevent the possibility of infringing user-generated content. Even though the proposed directive does not set any formal obligation to conclude such agreements, the quite radical change in the interpretation of the traditional liability regime for hosting could motivate hosts of user generated content to enter into agreements with right holders to minimize the liability risk.

Ultimately, the proposed new legislation would lead to a *de facto* obligation to apply content recognition technology in cooperation with copyright holders.

According to web players, the general obligation to establish tools for automatic detection of illegal content will generate a great disparity between platforms. The few companies that are currently able to develop effective tools for detecting illegal content are larger, established ones, while smaller companies and new entrants will have to face higher barriers to market entry.

Paradoxically, this measure risks hindering the emergence of European players by disproportionately increasing the cost of market access or the unpredictable financial risks. Exceptions to the prohibition of general monitoring obligations should always be narrowly construed, always pursue a legitimate aim, always be based on a clear and foreseeable legal ground, as well as always be proportionate. As it stands, Article 13 of the proposed copyright Directive contradicts Article 15 of the E-commerce Directive[39].

37 See, for example, the Judgement in Google France v Luis Vuitton, C-236/08. The Court ruled that although Google controls the order of advertising display (according to, *inter alia*, the remuneration paid by the advertisers), this was not enough to decide whether Google is liable over client data it stores on its servers. It was only after consideration of "*the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keyword*" that Google could have been deemed to be an active service provider.

38 A recent judgement of the Rome Appeal Court has condemned the American video sharing platform Break.com for the spread of illegally loaded content on its portal from Mediaset. The rule clearly states that the liability exemption of hosting providers (Directive 2000/31/EC) applies only to providers offering a mere conduit service for user generated content, and the organization of such content, especially in the case of commercials, rules out the neutrality of those entities regarding the data and information stored. The Court pointed out the presence of an advanced operating system aiming at the best functioning of the platform and the existence of an editorial team in charge of the selection of the uploaded videos, in order to exploit them commercially – through advertising.

39 Opposite views regarding Article 13 have been expressed by some stakeholders. The Italian delegation in the Council Copyright working group, while in favour of article 13, has expressed the need to introduce Recital 38 into the Directive text, rendering it normative effective. It has added that the relation with the Ecommerce Directive is not clear, and no consequences are outlined for online providers infringing Article 13. Similarly, the relationship between article 13 and the "notice and take down" procedure is not clear, and the introduction of a specific legal measure has been suggested. Finally, the cooperation between ISPs and right owners is too general and should be more detailed. Some broadcasters, while pointing out that the scope of Art. 13 is limited to platform user generated content, suggest to clarify the relationship between copyright and liability exemption as provided by art. 14 of the ECD. They propose a new paragraph stating that an information society service provider which does not act in accordance with the requirements of Article 13(1) of the Directive shall not benefit from the immunity provided by Article 14(1) of Directive 2000/31/EC.

Art. 13 and the risks for freedom

Filtering measures may result in less content being available. Mash-ups and remixes of protected works might no longer appear on platforms if automated filtering technology is incapable of drawing a line between infringing copying and permitted parodies and quotations. Filtering technologies might also not be able to distinguish between protected works and public domain material, commercially exploited content and content offered under a Creative Commons license. Hence, broad filtering obligations may be incompatible with the freedom to conduct business and the freedom of expression and information.

2.1.3 Fair remuneration for authors

- The draft Directive obliges publishers and producers to be transparent and inform authors or performers about profits resulting from their works. It also puts in place a mechanism to help authors and performers to obtain a fair share when negotiating remuneration with producers and publishers.
- Obligations for transparency and knowledge of data regarding authors and performers' remuneration from the party with whom they entered into a contract for the exploitation of the rights is important for the development of new business models, innovation, economic growth, jobs and the creation of a Digital Single Market.

The draft Directive obliges publishers and producers to be transparent and inform authors or performers about profits resulting from their works. It also establishes a mechanism to help authors and performers to obtain a fair share when negotiating remuneration with producers and publishers[40].

In this way, the Commission aims to achieve a higher level of trust among all players in the digital value chain. Rewarding creators and creation is the point of copyright. But authors and performers claim to be affected by a weak bargaining position when assigning their rights to publishers, producers and broadcasters.

These proposals reaffirm the authors rights system in Europe which is based on fair remuneration, and similar provisions already exist in European Union Member States[41]. The fair remuneration of creators supports the whole value chain as it ensures creativity and also the safeguarding and promotion of European.

If the money goes to intermediaries instead, copyright is failing to achieve its purpose. It is not easy to find a solution, considering that there are many different types of authors[42] in different types of cultural industries.

The introduction of a transparency obligation as in Article 14 is paramount. Creators are often paid a one-off fee for their work and they receive little information about how their work has performed or its audience, according to the European Commission, reporting

40 Art. 14-16 of the Proposal of Directive. The contract adjustment mechanism set in art. 15 Article 15 is balanced by subparagraphs 2 and 3 which introduce a necessary safeguard to ensure this does not create an unnecessary burden for small players in the audio-visual sector and does not apply when authors do not contribute significantly to the overall work or performance.

41 This is the case, for example, with France and the Netherlands.

42 In the following paragraphs, unless differently specified, we are talking equally about authors and performers as right owners.

authors complaints[43].

Transparency is affected by the increasing complexity of new modes of online distribution, the variety of intermediaries and the difficulties for the individual creator to measure the actual online exploitation. This is mainly due to the evolution of consumption patterns in some sectors, for instance, from ownership to access/streaming modes of consumption[44].

In this framework, authors are not always in control of their own work. They often give away some of their rights to a company, such as a book publisher or a record company. These companies offer authors better chances to reach a wider audience, compared to trying to distribute their works alone. However, this is not always profitable for the authors. The latter complain that any contract that involves the transfer of rights in exchange for a one-off payment (a 'buy-out' contract), by definition, prevents an adequate or fair remuneration as the payment does not relate to the use, and even less to the success, of their work or performance. They criticise the duration of the contract, which often coincides with the term of the copyright protection without the possibility of the author or performer being able to renegotiate or terminate the contract. Such contracts are often accompanied by non-disclosure agreements. Another matter that is frequently raised is the poor quality or lack of accounts and reporting by publishers and producers regarding the use of the rights transferred by the author or the performer.

As well, it seems that intermediaries, such as publishers and record companies or author rights and collecting societies, tend to dominate the negotiations. The Federation of Screenwriters in Europe found in a survey of its members that the median income of screenwriters was € 22,000 per year[45], while in the UK median earnings of professional authors fall below the minimum wage[46]. More control and balance for authors would seem to be called for.

Most publishers/producers/broadcasters are of the opinion that authors and performers are appropriately remunerated thanks to existing laws and practice in all sectors of the creative industries. They consider that this area should be regulated by the market and the most important issue is to ensure that there is contractual freedom, freedom of negotiation and the right for an author to choose his/her representative.

43 European Commission, Impact Assessment on the modernisation of EU copyright rules, SWD (2016) 301 final.

44 The Commission explained that the proposal concentrates on the relationship between individual creators and their contractual partners. Against this background, some delegations asked whether such obligations shall be limited to the first contractual partner or extended to other parties involved down the value chain. Some delegations underlined the possible risk that the first contractual partner may not exploit the work himself. In this case, the first contractual partner would not be in a position to report relevant information to the creators, especially in some sectors where contractual arrangements such as commissioning, project companies or special-purpose vehicles – SPVs are relatively common. Similar concerns were also raised with regard to possible circumvention of the transparency obligation (e.g. the creation of shell companies to circumvent the obligation).

45 European Screenwriters' Income in 2012. An Overview, November 2013, available at http://www.scenaristes.org/pdfs/fseleafletremunerationweb.pdf

46 Median earnings of professional authors fall below the minimum wage, The Guardian, 20 April 2015, available at https://www.theguardian.com/books/2015/apr/20/earnings-authors-below-minimum-wage

Moreover, they ask the Commission to clarify the scope of the provision. It should be made clear that this applies to the subjects to whom works creators usually license their rights, that is, the producers of audio-visual content, but not the players in the subsequent levels of the value chain, such as pay TV providers and online service providers.

Transparency and knowledge of data regarding author remuneration is essential for the development of new business models, innovation, economic growth, jobs and the creation of a Digital Single Market, and could help authors to recover part of the value gap which cannot be attributable to piracy. This data is not personal data but big data which is crucial for the entire ecosystem including the audiovisual, advertising and e-commerce markets.

The introduction of a mandatory reporting obligation detailing the revenues generated and remuneration due will create more transparency and would help authors and performers to rectify unfair contractual agreements. These new provisions will constitute, together with a dispute resolution mechanism, an essential first step to create more sustainable conditions for Europe's creators, who underpin Europe's cultural and creative industries.

2.2 THE TUTELAGE OF LEGAL CONTENT AND THE PIRACY BATTLE. FOLLOW-THE-MONEY AND THE REINFORCEMENT OF MEDIA EDUCATION

- The audio-visual content industry is affected by the online infringement of intellectual property that places in jeopardy the capacity for creative businesses to continue to invest.
- The Commission has been working on a European framework to "follow-the-money" and cut the financial flows to businesses which make money out of piracy.
- The initiative involves a voluntary agreement among stakeholders, aimed at dissuading the placement of advertising on commercial scale IP infringing websites and apps. This approach has been effective in some European countries, as the UK.
- On the consumer side, awareness and education is considered the best means to stop or substantially reduce the spread of illegal video streams.

Media and entertainment businesses make up a large part of the creative sector that contributes to the global economy every year, providing millions of highly skilled jobs and vital investment to support sports, the arts, and culture. Piracy is a problem for the audiovisual industry and the economy as a whole, as it places in jeopardy the capacity for creative businesses to continue to invest.

Estimates of the rates of internet piracy vary, but according to the media industry around 30% of Internet

users around the world access illegal content regularly[47]. The impact of such behaviour threatens billions of investment and millions of jobs. It affects the whole entertainment supply chain[48].

Internet piracy is a global problem, while the legal measures available to protect intellectual property have a local nature. Therefore, there is a need a coordinated and strategic approach to systematically tackle the internet piracy challenges.

There is agreement on the fact that wider availability of content would help to fight piracy, given that 22% of Europeans believe that illegal downloads are acceptable if there is no legal alternative available in their country. Consequently, the Commission wants to ensure that copyright is properly enforced across the EU as part of its comprehensive approach to improving the enforcement of all types of intellectual property rights. Moreover, it has been working on a European framework to "follow-the-money" and stem the financial flows to businesses which make money out of piracy. This involves all relevant partners (right holders, advertising and payment service providers, consumer associations, etc.).

A recent study on online piracy in Spain[49] confirms the importance of cutting the economic incentives to sites hosting pirate content. In 2016, more than 67% of websites from which illegal contents were accessed were financed by advertising. It is quite remarkable that more than one third of publicity of pirate sites (37.6%) belongs to consumer products of renowned brands of food, fashion, insurance, telephony, etc., which confirms the urgent need for a greater collaboration between the industry and the advertisers to improve the ecosystem of online advertising.

The Commission follow-the-money initiative involves a voluntary agreement among stakeholders[50], aimed at dissuading the placement of advertising on commercial scale IP infringing websites and apps (e.g. on mobiles, tablets, or set-up boxes), thereby preventing the funding of IP infringement through advertising revenue.

Follow-the-money best practices: the UK case

This approach has been effective in the UK through the use of the City of London Police Infringing Website List[51], used by the industry within the Joint Industry Committee for Web Standards (the industry body that defines and facilitates good practice and standards for digital ad trading), via the Digital Trading Standards Group's self-regulatory framework to improve brand safety online.

The trial of this strategy resulted in an immediate reduction of 12% in the advertising revenue flowing to the list of infringing websites being managed by the City of London Police.

47 Letter of CEOs of the media and entertainment industry to the G7 Culture Ministers, 29 March 2017

48 The impact of piracy on the legitimate market is a vibrant area of debate. Economic estimates of the phenomenon are not coherent, and not every piracy act substitutes for a legitimate transaction.

49 Gfk, Observatorio de la piratería 2016.

50 European Commission, The follow-the-money approach to IPR enforcement, 21 October 2016, http://ec.europa.eu/DocsRoom/documents/19462/attachments/1/translations/en/renditions/native

51 https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx

The Police's Intellectual Property Crime Unit PIPCU launched Operation Creative[52] and the Infringing Website List (IWL) in 2013 to tackle the funding of illegal streaming websites that adversely impact on the UK's creative industries.

In March, the Unit declared that in the past twelve months there had been a 64% decrease in advertising from the UK's top ad spending companies on copyright infringing websites.

This means more revenue to the UK's creative industries on which hundreds of thousands of people rely for employment. The appearance of adverts from established brands on illegal websites lends sites a look of legitimacy. Therefore, a decrease in advertising from reputable brands will help consumers realise these sites are neither official nor legal.

The London Police have been working with brands, media agencies and ad networks to seek to ensure that advertising revenue is not directed to the websites.

In July 2014, the Police began replacing legitimate brand advertisements on the targeted websites with official police force pop-up banners that inform visitors that the site is under investigation for copyright infringement.

In February, the UK Intellectual Property Office (IPO) helped broker an agreement which will see search engines and the creative industries work together to stop consumers being led to copyright infringing websites. Representatives from the creative industries, leading UK search engines, and the IPO developed a Voluntary Code of Practice dedicated to the removal of links to infringing content from the first page of search results. The Code agreed on 9 February 2017 will come into force immediately, and sets targets for reducing the visibility of infringing content in search results by 1 June 2017.

Follow-the-money best practices: the US case

In December 2016, the Office of the U.S. Intellectual Property Enforcement Coordinator introduced a Joint Strategic Plan on Intellectual Property Enforcement (FY 2017-2019). The justification lies in the recognition of new and unforeseen means of IP right infringement. The government acknowledges that 'IP-intensive industries represent a major, integral, and growing part of the U.S. economy' and, like the EU it has set as its agenda the enhancement of safe and secure cross-border access and trade of intellectual goods.

The U.S. Strategic Plan is mostly concerned with illicit trade and infringing activities, and it effectively tackles all means and channels through which 'piracy' takes place. Measures for better online protection of IP rights are proposed in Section 2 with two main objectives. The first is to strengthen the position of the parties

52 As part of Operation Creative, right holders in the creative industries identify and report copyright infringing websites to PIPCU, providing a detailed package of evidence indicating how the site is involved in illegal copyright infringement. Officers from PIPCU then evaluate the websites and verify whether they are infringing copyright. At the first instance of a website being confirmed as providing copyright infringing content, the site owner is contacted by officers at PIPCU and offered the opportunity to work with the police, correct their behaviour and begin to operate legitimately. If a website fails to comply and work with the police, then a variety of other tactical options may be used including; contacting the domain registrar to seek suspension of the site, advert replacement and disrupting advertising revenue through the use of an Infringing Website List (IWL).

involved in online purchasing and advertising activities by establishing a follow-the-money principle. The second seeks to increase the ability of consumers to locate content and products through lawful means. One of the proposed measures has recognised that search engines are the first in line for preventing illicit trade, since most activities began with a search query. The same proposal notes that 'search engines have played an increasing role in curbing access to websites used to promote illicit activity'. It is also recommended that down-ranking algorithms which are able to affect the rankings of websites used for trade in counterfeit goods, including their removal from autocomplete predictions, should be used more, since they can clearly point out to the consumer the 'legitimate sources of content'.

Google already complies with this request. Every day it removes around 900k of search results, and its algorithm recognises websites that have been repeatedly reported and cancelled so as to reduce their visibility.

In Italy, the advertising industry (IAB Italy) and the content industry (FPM and FAPAv) have entered into a memorandum of understanding to support the fight against online piracy, by acting to prevent advertising on illegal web platforms. The agreement lays the foundation for a self-regulatory mechanism that aims to block advertising on pirate sites in the same way as Operation Creative in the UK.

On a global scale, important web players have committed to a follow-the-money strategy. A main component of YouTube's anti-piracy strategy is now available on Facebook. Creators on the latter can now choose to monetize unauthorized re-uploads of their videos, thus enabling a new revenue stream.

Through Facebook's Rights Manager[53], which was launched last year, right holders can find, claim, and manage copies of their videos that are uploaded without permission. Upon claiming a video, Rights Manager users had two options - request that the infringing clip be taken down, or allow it to stay up in order to benefit from the added reach it could generate.

Now, according to a blog post[54], a new option is available. Creators can activate Facebook's new mid-roll ads on any claimed video, thus allowing them to generate additional revenue from the material they own. This option is already available through YouTube's Content ID[55] service, and creators on that site often choose to monetize infringing uploads rather than take them down.

On the consumer side, awareness and education is considered the best means to stop or substantially reduce the spread of illegal video streams. A recent survey by Irdeto[56], indicates that more than 50% of respondents from across the world accessed pirated online video content. But nearly half of the global

53 https://rightsmanager.fb.com/
54 https://media.fb.com/2017/04/27/improvements-to-rights-manager/
55 https://support.google.com/youtube/answer/2797370?hl=en
56 https://irdeto.com/news/nearly-half-of-consumers-around-the-globe-are-willing-to-stop-or-watch-less-pirated-video-content.html

respondents indicate that they would stop or watch less illegally accessed content if they were more aware of the damage it causes the media industry.

This willingness by nearly half of consumers to change their viewing habits is proof of the huge impact that education could have on reducing the number of people who pirate video content.

However, educating consumers about damages associated with revenue loss may not be enough. A survey carried out by the consultancy firm Gfk, commissioned by Spain's Coalition of Content Creators[57] revealed the main justifications for illegal downloading. 47% of the surveyed people said, "I'm already paying for my Internet connection" and another 47% said, "If the original content weren't so expensive, I would pay for it." Other justifications included: "I'm not harming anyone," (36%) and "There are no legal consequences for people pirating, so it doesn't matter." (20%).

What also strongly emerges from previous research is that, while consumers theoretically identify piracy as morally and ethically wrong, when it comes to practice, and therefore to actually accessing content online, they continue to prefer the illegal (free) alternative. This phenomenon, in relation to online piracy, was verified in a Report by the European Office for Harmonization in the Internal Market[58]. The study shows that 96% of Europeans believe that Intellectual Property (IP) is important since it sustains innovation and creativity and rewards inventors, creators and artists for their work. Furthermore, 86% of the interviewees agree that protecting IP contributes to the improvement of the product and service quality, while 69% believe that it contributes to the creation of work and economic welfare. The paradox though is that, when asked about online downloads, 22% of the interviewees believed that downloading videos and songs from the Internet is acceptable if there are no legal alternatives, 42% believed it is acceptable for personal use, with peaks of 57% among young people between the ages of 15-24. As well, 55% of Europeans believe that the quality of illegally downloaded content is similar to the legal versions, and even of better quality for a third of the young consumers. There clearly is a gap between what consumers believe and how they act in terms of online content piracy that must be addressed.

An education initiative focusing on the impact of piracy on the creation of producing content, coupled with knowledge on how piracy is often linked to criminal organizations and that pirated content could include malware aimed at stealing the consumer's personal information, could lead to very positive results.

In the music domain, different education programs have already been developed worldwide. In the United Kingdom in 2010, for example, various figures of the music industry (including artists, retailers, songwriters,

57 Gfk, Observatorio de la piraterìa, 2016

58 European Office for Harmonization in the Internal Market (2013), "European citizens and Intellectual Property: perception, awareness and behaviour", *Report*, https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/IPContributionStudy/25-11-2013/european_public_opinion_study_web.pdf

labels and managers) launched Music Matters in order to remind listeners of the significance and value of music and to help music fans differentiate legal music services from illegal ones. The program was so successful that it was replicated in the United States (with partnerships between the Recording Industry Association of America - RIAA - and the Music Business Association – Music Biz), Ireland, Australia and New Zealand. The French education campaign, Tout pour la Musique, informs consumers on the jobs and roles in the music sector, and lists legitimate downloading and streaming sites available in France. On an international level, information campaigns such as Pro-music, supported by all music industry actors, provide guidance and information about how to safely and legally enjoy content on the Internet while Childnet, another initiative, helps make the Internet a much safer for children.

PART 3

WIDER ACCESS TO CONTENT ACROSS THE EU

3 WIDER ACCESS TO CONTENT ACROSS THE EU

The media landscape is undergoing a transformation, marked by a steady increase in convergence of media services, with a visible move towards bringing together traditional broadcasting and the Internet. Audio-visual media content already reaches non-TV screens and Internet content is now arriving on the traditional TV screen. The proliferation of connected devices and the wide availability of faster broadband connections are affecting existing business models and consumer habits and creating new challenges and opportunities for the creative industries.

This phenomenon empowers European citizens with seamless and interactive experiences, allowing them to access a broad variety of content while being agnostic as to the device or geographic locations from which they interact. In order to create a Digital Single Market, the Commission proposes measures to:

a) create favourable conditions for cross-border distribution of television and radio programmes online

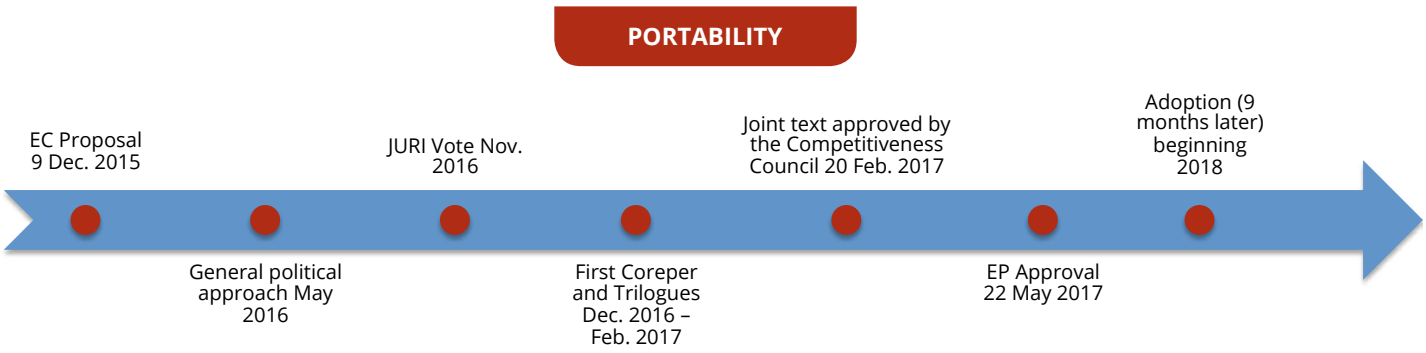
b) increase the availability of European audio-visual works on Video on demand VoD platforms (quota and prominence).

3.1 TRAVELLING WITH SUBSCRIPTION TO ONLINE CONTENT: THE IMPACT OF THE PORTABILITY REGULATION ON PROVIDERS AND USERS: STRENGTHS AND WEAKNESSES; TEMPORARY CROSS-BORDER ACCESS TO DIGITAL CONTENTS AND THE RESULTING CONTRACTUAL IMPLICATIONS

- Providers of online content distribution platforms will be required to give their subscribers access to their service when they are temporarily present in other Member States. The Regulation applies to subscription and transactional services, but providers offering online content for free will be able to opt for this regime
- In the Commission's view, the new rules will benefit: consumers, online platforms (by simplifying the process of clearing licences for other territories) and right holders, that will be able to rely on strong safeguarding measures.
- At the moment, for businesses there might be issues to address in content licence agreements, but there is also a vast array of other considerations such as customer sales terms, technical and caring issues and commercial models that will need addressing.
- Some stakeholders are not against cross-border portability of online content services but are in favour of industry-led solutions and soft law tools introducing more flexibility in the acquisition of rights.

Legislative schedule – Portability regulation

Source: I-Com



The Regulation aims to remove barriers to cross-border portability so that users can access the content that they pay for (or in some cases receive for free) in their home Member State, when they are temporarily present in other Member States. This seems to be a logical consequence driven by the emergence of IP technology, new devices and changes in customer habits.

The rapid take up of online content distribution platforms and increasing use of portable devices, including across borders, means that Europeans today expect to use online content services from wherever they are in the Union. One of the key objectives of the Commission's Digital Single Market strategy is to allow for wider online access to works by users across the EU.

In a recent survey, 33% of respondents (a figure rising to 65% in the 15-24 age bracket) who do not currently have a paying subscription for accessing content said that if they were to take up such a subscription they would find it important to be able access it while travelling or staying temporarily in another Member State[59].

The Regulation applies to subscription and transactional services, but providers of online content services[60] which are provided free of charge will be able to choose whether they want to benefit from these new rules.

The Regulation will therefore impact licensors/creators of content (such as studios) and licensees of content (such as a channel/rights management companies).

59 Flash Eurobarometer 411, August 2015, p. 93.

60 Online content service means a service that a provider is lawfully providing to a subscriber in his/ her Member State of residence on agreed terms, online and on a portable basis and which is: (i) an audio-visual media service as defined in point (a) of Article 1 of Directive 2010/13/EU, or (ii) a service where the main feature is the provision of access to and use of works, other protected subject matter or transmissions of broadcasting organisations, whether in a linear or an on-demand manner.

In the Commission's view, the new rules will benefit:

- Consumers who reside in the EU: new rules will enable them to continue using online content services – to watch films or sporting events, listen to music, download e-books or play games – when visiting other EU countries.
- Online platforms: they will be able to provide cross-border portability to consumers without having to acquire licences for other territories.
- Right holders: they will be able to rely on strong safeguards which protect their rights against abuses.

To summarise the views of the affected stakeholders concerning the proposal, consumers are generally in favour of improving cross-border access to online content, including the cross-border portability of online services; the content industry, representatives of right holders and service providers are not against cross-border portability of online content services but are usually in favour of industry-led solutions and soft law instruments as opposed to legal obligations in this area. In fact, for businesses there might be issues to address in content licence agreements, but there is also a vast array of other considerations such as customer sales terms, technical and caring issues and commercial models that will need addressing.

The Regulation, on the one hand, introduces a sort of new consumer right, which, on the other hand, imposes a specific business model for operators, and therefore could lead to a general increase in costs, which would be finally passed on to clients (even if only a minority of clients are interested in international mobility). Moreover, some governments, such as those of France, Italy and Spain, are committed to defending the copyright territoriality principle and rejecting those initiatives seeking to extend COO and questioning contractual freedom.

Similarly, producers and right holders reaffirm the absolute need for territorial copyright exclusivity, as a foundation of the industry, since it allows for the financing of contents, and then their exploitation, securing return on investment for financiers. It can be seen that, according to the same survey on cross-border access to online content published by the EU, a majority (82%) of respondents were able to find the audiovisual content they were looking for. 75% of the respondents have never tried to access content in paid subscription services. Among the 25% who tried, it worked perfectly well for 30%. The unhappy viewers are 70% of the 25%, that is 17.5% of respondents. Furthermore, only 8% of Internet users have tried to access content through online services outside their Home State, of these only 5%, or a total of only 0.4% for audio-visual content. The number of people that are concerned by this measure seems to be low.

However, the right holders are aware that the way people watch audio-visual content may change in the near future, and they are ready to anticipate these changes. However, they are asking for more legal certainty for different issues: habitual residence, temporary presence, authentication. Most importantly, portability must be implemented in full respect for the territoriality of rights which is the foundation of

financing and distribution in Europe. They claim that granting portability on content is neither a limitation from nor an exemption to the exercise of author's rights. Therefore, portability granted to the user should be subject to a contract between the parties, and a suitable transition period should be granted to adjust the existing contracts. Content owners claim there is a clear divide between portability and cross-border access.

Indeed, some stakeholders claim that cross border circulation of digital content could be allowed by introducing more flexibility in the acquisition of rights, which could lead to higher and better offers of cross-border services considered profitable by economic operators.

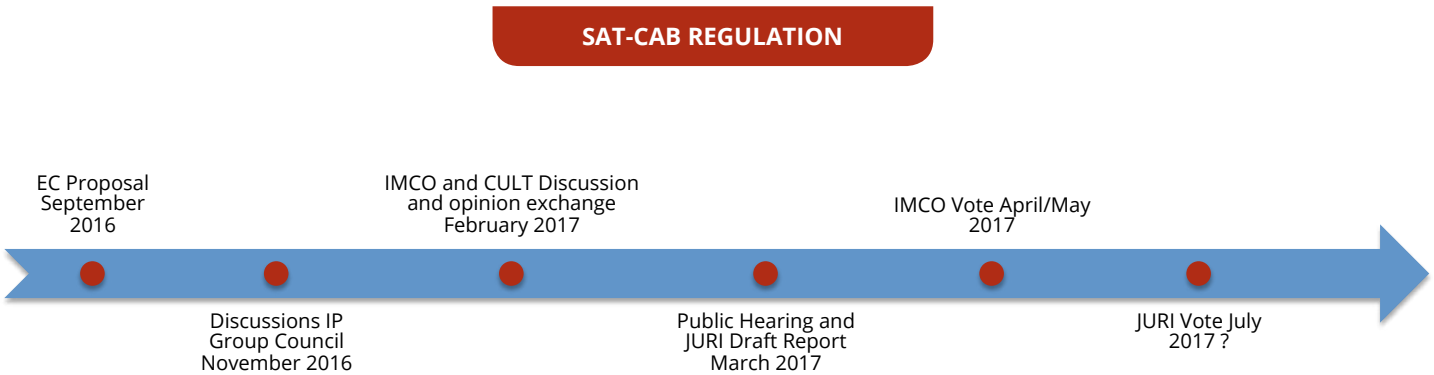
3.2 THE CROSS-BORDER SPREAD OF ONLINE AUDIO-VISUAL SERVICES AND THE SAFEGUARDING OF THE PRINCIPLE OF TERRITORIALITY; THE EXTENSION OF THE COUNTRY OF ORIGIN PRINCIPLE FOR THE RETRANSMISSION OF SUBORDINATED SERVICES AND IMPACT EVALUATION; SIMULCASTING CATCH-UP TV AND CLOSED NETWORKS

- The proposed regulation introduces the application of the country of origin to some online transmissions of broadcasting organisations, and the collective management of rights to retransmissions by means equivalent to cable, aiming at facilitating access to more television and radio programmes online from other EU countries.
- For operators offering packages of channels it will be easier to acquire the necessary authorisations: instead of having to negotiate individually with every right holder, they will be able to get the licences from collective management organisations representing right holders.
- Commercial broadcasters and right holders state that the scope extension would de facto lead to pan-European licences and restrict the service providers' ability to license rights on a territorial basis. Negative consequences are expected for the value chain of the production and the distribution of creative content. The proposed regulation entails the risk of forum shopping by service providers and more complicated enforcement by right holders.
- Most PSBs welcome the proposed regulation because it would enable them to expand their services to other Member States and reduce administrative burdens and costs associated with the clearance of rights. Moreover, it includes a recital on contractual freedom which protects territoriality for third party content.
- Consumers Associations generally support the Commission's proposal: consumers will be the main beneficiaries of this approach and Europe's cultural diversity will be strengthened.

The existing Satellite and Cable Directive 93/83/EEC facilitates cross-border satellite broadcasting and retransmission by cable of TV and radio programmes from other Member States. Thanks to the Satellite and Cable Directive, a large number of TV channels are

Legislation schedule – Online retransmission Regulation

Source: I-Com



available in Member States other than the Member State of origin, thus spreading European cultural diversity. One of the 16 initiatives of the Digital Single Market strategy is to review the Satellite and Cable Directive in order to assess if its scope needs to be enlarged to cover broadcaster online transmissions and whether further measures are needed to improve cross-border access to broadcaster services in Europe.

Building on this experience, the proposed regulation aims at facilitating access to more television and radio programmes online from other EU countries. In particular, it introduces the application of the country of origin to some online transmissions of broadcasting organisations, and the collective management of rights to retransmissions by means equivalent to cable.

The proposed rules in retransmission should make it easier for operators who offer packages of channels (such as Proximus TV in Belgium, Movistar+ in Spain, Deutsche Telekom's IPTV Entertain in Germany), to attain the necessary authorisations. Instead of having to negotiate individually with every right holder in order to offer such packages of channels originating in other EU Member States, they will be able to acquire the licences from collective management organisations representing right holders. This will also increase the choice of content for their customers.

According to Commission Vice-president Andrus Ansip: "Our proposal will make it significantly easier for broadcasters to offer online programmes across borders, but also incentivize the broadcasters to use this possibility". The goal of the regulation is "to double the content available to consumers so that everyone across

Europe can get the most out of our rich cultural diversity within the Digital Single Market."[61]

However, reactions to the proposal are quite different. The public service broadcasters and the consumer associations support the initiative, while other stakeholders have taken a strong position against it.

The main arguments against the proposed regulation state that the scope extension would de facto lead to pan-European licences and would restrict the service providers' ability to license rights on a territorial basis. Negative consequences are expected for the value chain of the production (e.g. financing of AV works) and the distribution of creative content (notably for AV works, as producers would no longer be able to rely on pre-sales of distribution rights with territorial exclusivity). The proposed regulation entails the risk of forum shopping by service providers and more complicated enforcement by right holders. To mitigate the impact of the regulation, a proposal has been made to limit the country of origin principle to content which is "100% financed" by the broadcaster or to limit it by genre i.e. only applying to news and current affairs.

Most PSBs welcome the proposed regulation because it would enable them to expand their services to other Member States and reduce administrative burdens and costs associated with the clearance of rights. They hold that the regulation would provide for additional revenues for right holders by ensuring a wider dissemination of TV and radio programmes and, therefore, of their works and other protected subject matter. Moreover, it includes a recital on contractual freedom which protects territoriality for third party content (mainly feature films and TV series)[62].

They refer to Recital 11 of the proposed regulation: "Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law".

Consumer Associations generally support the Commission's proposal as consumers will be the main beneficiaries of this approach. According to the Bureau Européen des Unions de Consommateurs, BEUC, currently, consumers in the Member States don't have the same chance of access to legal offers, in terms of availability, affordability and quality.

BEUC mentions some reports in order to support its position: a survey conducted among users in 40 countries, including the EU Member States, revealed that only 29% of consumers are satisfied with the quality and level of detail of the deals available on their TV guide[63].

61 State of the Union 2016: Commission proposes modern EU copyright rules for European culture to flourish and circulate, European Commission Press Release IP-16_3010.

62 EBU Reply to the EC consultation on the review of the EU Satellite and Cable Directive, available at https://www.ebu.ch/publications/ebu-reply-to-the-ec-consultation

63 http://www.ericsson.com/res/docs/2015/consumerlab/ericsson-consumerlab-tv-media-2015-presentation.pdf

Over 11,000 Danish consumers signed a collective complaint initiated by the Danish Consumer Council regarding the quality of pay-TV services. At least three out of four Danish consumers are paying for channels they do not watch. This is often because basic pay-TV packages are designed to push the consumer to pay more for premium services such as sports and films[64].

A survey from the German association vzbv also shows that 70% of German consumers would like to subscribe to foreign offers for sports, films and TV series[65].

In Italy, Altroconsumo expressed concern regarding the exclusive deals between Netflix and Sky, that limit the availability of series like *House of Cards* in Sky catalogue for Italian subscribers.

According to Consumer Associations allowing users to compare cross border offers of online service providers would widen their choice and help them decide from which country and service provider to buy contents, according to their own preferences. This is an important opportunity for those consumers living in countries with common linguistic or cultural traditions, as well as those permanently living in a county other than their own, wishing to access the content available in their home country, or for those who want to discover other European productions.

Furthermore, Europe's cultural diversity will be strengthened as consumers will be able to discover other European cultures with just a click. The European market is already dominated by Hollywood productions and one of the structural weaknesses of the European film industry is the lack of ability to reach a broader audience beyond national borders. Thus, addressing copyright rules to facilitate the clearance of rights will be an important step to bring European works closer to consumers across the EU[66].

Content producers mention some European TV productions that have earned significant revenues generated by sales in the different territories and that would be otherwise heavily affected by the proposed rules.

The Young Pope is an original series by Sky/HBO/Canal+, produced by Wildside (IT) and co-produced by Haut et Court (FR) and MediaPro (ES), directed by Academy Award-winning director, Paolo Sorrentino. Starting with Wildside's ongoing commitment to investing in the development of the highest quality original productions featuring world class talent both in front of and behind the camera, the first broadcaster on board was Sky Italia which committed at an early stage with an important financial contribution, both as a licensed broadcaster for the Italian territory and as co-producer of the series. The affiliated broadcasters Sky UK and Sky DE also soon joined, through extensive licensing deals covering all rights in their Sky territories (UK, Ireland, Germany, Austria). The independent production company Haut et Court entered as the French co-

64 http://taenk.dk/tema/hvorfor-f-skal-vi-betale-for-noget-vi-ikke-ser
65 http://www.vzbv.de/sites/default/files/digital_content_without_borders_factsheet_vzbv.pdf
66 European Commission's 2014 Communication "European film in the digital era", p 3.

producing counterpart, bringing in also the important partner Canal+. Wildside, Sky and Canal+ were joined on the project by HBO, producer of some of the most popular television shows of the 21st century, including *Sex and the City*, *The Sopranos*, *Game of Thrones* and *True Detective*. In conclusion, one last co-producer joined, the Spanish media-company MediaPro, licensing the rights in Portugal and Spain.

The EU argues the new measures would mean consumers can access programming when right holders do not strike a commercial deal, but this was cast aside as "an empty promise" by broadcasters and entertainment industry insiders. Earlier in May 2017, 411 trade organizations, companies and European film-TV executives signed an open joint letter calling upon the European Commission and Parliament to reject the Commission's plans for opening up Europe to pan-continental online broadcaster services.

On December 17, the Bundesrat, Germany's upper house, questioned whether the country of origin proposal took right holders interests sufficiently into account. On 20 February of this year, following a France-Spain summit, the corresponding governments issued a joint declaration "opposing the extension of the country of origin principle to certain broadcaster online services", rejecting those initiatives seeking to extend COO and questioning contractual freedom. In May, France and Italy signed a similar declaration committed to safeguarding the principle of copyright territoriality, as it is the key for the financing and spread of culture – notably in the cinema and audio-visual domains[67].

3.3 THE AVMS DIRECTIVE

Due to the different nature of the services, up to now, broadcast TV and internet services have been subject to different regulatory frameworks. However, viewers, and particularly minors, are now moving from traditional TV to the online world. The Directive therefore introduces flexibility when restrictions only applicable to TV are no longer justified[68].

A softer, or more flexible regulation would be needed to re-establish the attractiveness and competitiveness of the European Union and its creative industry.

At the same time, it should seek to ensure that consumers will be sufficiently protected in the on-demand and Internet world, by extending some new rules to online players.

It is highly important for the European regulatory framework which governs the industry in the coming years to include "future-proof" measures capable of strengthening the competitiveness of European firms and increasing cultural diversity and the transnational

67 Déclaration conjointe du Gouvernement de la République française Et du Gouvernement de la République d'Italie, Paris, 3 May 2017.
68 Commission staff working document accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review on the implementation of the Digital Single Market Strategy, SWD (2017) 155 final 10.05.2017.

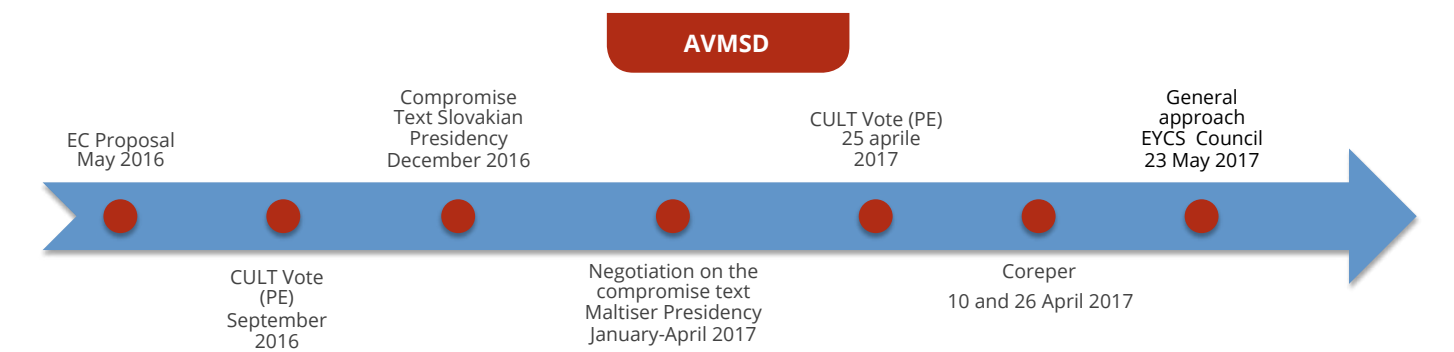
circulation of works, while ensuring a satisfactory level of consumer protection, especially for minors.

On May 23rd, the Council reached a general approach on the proposal for a revised of the Audiovisual Media Services Directive, and gave assignment to start negotiations with the European Parliament. The compromise text proposed by the Maltese Presidency was agreed on the basis of the following elements[69]:

- the scope of the directive has been extended to include "social media" services, where the provision of audiovisual content forms an essential part of such services;
- jurisdiction rules are streamlined and cooperation procedures have been strengthened to deal with problems relating to cross-border services, for instance those arising from providers established in one country but targeting an audience in another. Furthermore, a 2 month deadline has to be respected by national regulators if they receive a request from another Member State;
- the promotion of European works will also apply to on-demand service providers through a requirement for a minimum 30% quota of European works in their catalogues and the possibility for members states to require a financial contribution from media service providers, including those established in another member state, with exemptions for start-ups and small enterprises.

Legislative schedule – AVMS Directive

Source: I-Com



69 Adapting to technological changes, preserving European competitiveness and fundamental values in audiovisual services, Consilium Press Release 295/17, 23 May 2017 http://www.consilium.europa.eu/en/press/press-releases/2017/05/23-audiovisual-services/

3.3.1 The role of online platforms: the responsibility to safeguard minors and users and the role of the self- and co-regulation tools

- The Commission proposal foresees a limited extension of the scope of the Directive to video-sharing platforms which tag and organise video content and to services that "livestream" content. Such a measure might contribute to level the playing field among providers.
- Video sharing platforms will have to protect minors against harmful content and to protect all citizens from incitement to hatred and against the provocation to commit terroristic offences. The draft Directive suggests a list of appropriate measures to protect users, which most video-sharing platform operators already implement.
- The extension to UGC platforms of the legal framework relating to traditional audiovisual media as a whole could trigger critical issues and, to a certain degree, enter into conflict with the legal regime modelled by the E-Commerce Directive.
- Since the Commission did not propose extending the whole set of AVMSD obligations to VSPs, implementation of the new regime would be encouraged via co-regulation.
- Self- and/or co-regulation seem appropriate to cope with the challenges of a fast-evolving sector as shown by the recently published Code of Conduct on hate speech as well as other models established by the ICT and news media-industry.
- The latest amendments proposed by the European Parliament set out the minimum harmonisation system for the regulation of VSPs, which could lead to a fragmentation of up to 27 different codes of conduct or regulations to be implemented.

The Commission's proposal foresees a limited extension of its scope to video-sharing platforms which tag and organise the content. In the view of the Commission, the extension to video sharing platforms (VSP) of part of the legal framework relating to traditional audiovisual media might contribute to level the playing field among providers. A recent amended proposal of the Directive, voted by the Committee on Culture and Education of the European Parliament on 25 April 2017, has introduced significant changes to the rules applicable to the video sharing platforms, by broadening the types of services that would qualify as video sharing platforms, including social media and live-streaming services[70].

Undoubtedly, the workability of the definition, and notably its boundaries, will result in a wide debate. Indeed, the Commission considers that a substantial share of the content stored on VSPs is not under the editorial responsibility of the VSP provider but, at the same time, it acknowledges that the intervention of these providers is not merely the result of automatic means or algorithms.

70 The definition of VSP has been changed by removing the requirement to store a "large amount" of content, while services that "livestream" content and services with a significant proportion devoted to the provision of audio-visual content have been added. According to the Council, these changes respond to the concerns of many delegations to ensure that the same content found on different types of services is subject to the same rules, and that the services used particularly by the younger generation should be covered.

The degree of activeness (or rather non-passiveness), however, does not appear a useful criterion to include intermediaries within the scope of application of the AVMS Directive. Even where VSP providers are not purely "passive," that does not amount to editorial responsibility.

In light of the above, it seems a viable option to extend the scope of application of certain provisions established by the AVMS Directive to Internet service providers running UGC platforms, provided that the application of the said provisions is compatible with the nature of the operators which do not exercise any editorial responsibility.

The role of video-sharing platforms

Video sharing platforms will have to protect minors against content which may impair their physical, mental or moral development and to protect all citizens from incitement to hatred[71], based on new EU-specific terms in the revised AVMSD. The proposal explicitly points out that these measures are without prejudice to Articles 14 and 15 of Directive 2000/31/EC, thus excluding a duty to monitor, which is not permissible under the ECD.

The article suggests a list of appropriate measures to protect (children and users): inclusion in the terms and conditions of the requirements not to incite to violence or hatred and terrorist offences, as well the requirement not to provide content which could harm the development of children; mechanisms for users of video-sharing platforms to report or flag content; age verification systems; systems allowing users to rate the content; parental control systems; systems explaining to users the effect of reporting and flagging.

Video-sharing platform operators already implement these measure at present.

The list has been updated by adding a requirement for VSPs to provide for effective media literacy measures and tools and raising user awareness of these measures and tools.

It's important that the actions listed by the Commission are not broadly meant to include a general obligation to monitor.

According to the Commission, the system would be compatible with the liability exemption for hosting service providers set out in Article 14 of the E-commerce Directive ECD. Providers can only qualify as hosting service providers within the meaning of the ECD where they have neither knowledge of nor control over the information in question. However, in the opinion of the Commission, these obligations set out in the AVMSD relate to the responsibilities of the provider in the organisational sphere and do not entail liability for any illegal information stored on the platforms as such. It sounds as if that mere organisation would not require monitoring. However, for a video-sharing platform, the 'organisational sphere' means cataloguing, indexing, and search algorithms. It's important that the AVMSD clarify that these activities, falling under the organisational sphere and concerning economic freedom, do not bring into question the liability exemption regime.

71 Art. 28a of the Directive Proposal. In the Compromise Text voted on in April 2017, a protection obligation against "the public provocation to commit a terrorist offence" has been added.

Co-regulation

Implementation of the new regime would be encouraged via co-regulation with the technical support of ERGA[72] in order to facilitate exchange of best practices. The proposed rules provide basic requirements and partners who share responsibility contribute to fulfilling objectives.

So far, the "graduated regulatory approach" has been effective in reflecting the difference between linear and non-linear services in terms of user choice and control. However, although differences between linear and non-linear services are still present, the audio-visual market is becoming increasingly convergent, so an analysis should be carried out with the aim of assessing the current validity of the stricter provisions[73].

The approach of graduated regulation targets and tools and the degree of choice, organization and means of control by the providers correspond to the strengthening of co- and self-regulation mechanisms. Moreover, self- and/or co-regulation seem to be an appropriate means to cope with the challenges of a fast-evolving sector and to harness expertise and ensure the commitment of stakeholders.

By closely involving both regulatory authorities and stakeholders, co-regulation can offer flexibility, prompt adaptability to change, legal certainty and efficient enforcement, potentially creating stronger support for regulation.

A stronger encouragement of co-regulation could be achieved by allowing individual Member States to adapt systems appropriate for their circumstances. Thus, a revised Directive or alternative guidelines on a EU-level should not enter too much into detail on the criteria of co-regulation. It could be considered to further enhance the sharing of best practices between regulators, for instance on models and criteria in the field of effective co-regulation.

To make this possible, ERGA advocates a common development fund enabling both the industry to foster the evolution and distribution of technical tools and the state sector to take responsibility for constant research and development efforts needed in this field[74].

It remains to be seen, how the obligations for video-sharing-services with regard to the protection of minors and the handling of harmful content (e.g. terrorist propaganda, inhuman or glorifying violence videos) will be designed and how strictly they will be interpreted.

The text voted on 25 April by the CULT Commission of

72 The European Regulators Group for Audiovisual Media Services brings together heads or high level representatives of national independent regulatory bodies in the field of audiovisual services, to advise the Commission on the implementation of the EU's Audiovisual Media Services Directive (AVMSD). The Group was established was established in response to a perceived need for greater senior level cooperation in European audiovisual policy developments. On 3 February 2014, the European Commission adopted a Decision on establishing the ERGA and setting the objectives for the Group: (i) to advise and assist the Commission in its work, to ensure a consistent implementation of the AVMSD as well as in any other matters related to audiovisual media services within the Commission's competence; (II) to facilitate cooperation between the regulatory bodies in the EU, as provided for in the directive regulating audiovisual media services; and (iii) to allow for an exchange of experience and good practices.

73 Telecom Italia position on AVMSD.

74 Madeleine de Cock Buning, ERGA: *The platform is the message*, 10 May 2016.

the European Parliament replaced the maximum level of harmonisation for the regulation of VSP services proposed by the Commission in Article 28a with the minimum harmonisation system which is generally used in the AVMS Directive. Minimum harmonisation could lead to a greater fragmentation within the EU, as Member States could adopt stricter rules than those adopted at the European level, and up to 27 different codes of conduct or regulations on minor protection or on safeguards against violent content would have to be implemented.

Even though self- or co-regulatory initiatives may lead to a certain degree of uncertainty for users – they are decided by corporate procedures instead of by public bodies or judges -, the recently published Code of Conduct on hate speech jointly developed by leading international IT companies together with the Commission, as well as other models established by the ICT and new media-industry, seems to be the right approach. When it comes to obligations regarding harmful content, it should be ensured that the principle of "notice and take down" provided for in the E-Commerce Directive remains untouched.

It's worth noting that many initiatives in this field have been launched these past few years. Video-on-demand providers, for example, have already implemented measures to ensure that minors cannot watch harmful content - through age ratings, a mandatory login before accessing any content and the setup of different user profiles for the same family[75]. Furthermore, video-sharing platforms have community guidelines, ways for users to easily flag inappropriate comments/contents and the help of active user communities policing the platforms, and settings and controls to restrict minors' exposure to mature content.

A Code of Conduct on Illegal Hate Speech has been drawn up with the four big content platform providers – Google, Facebook, Twitter, and Microsoft – under the auspices of the EU Security Agenda (but as a separate initiative). The companies have agreed to review and, if deemed appropriate, take down hate speech notified to them by authorities, NGOs, or others within 24 hours.

The recent launch of the Alliance to Better Protect Children Online is also a new sign of a dynamic on-going co-regulation process and the commitment of the digital industry to making it work. Finally, it is also important not to be too prescriptive in terms of methods and/or tools to protect children online, leaving enough room for future (and potentially more efficient) technological developments in this field.

75 For example, YouTube provide users with a range of resources to address safety concerns and children protection, such as Privacy Guidelines, tips, flagging, blocking and reporting tools, complaint forms, a restricted browsing mode, comment moderation https://support.google.com/youtube/answer/2802272. Facebook has recently announced plans to hire 3000 people over the next year to monitor reports of inappropriate material, after a string of violent attacks were broadcast live on the social network.

3.3.2 On-demand services: support for promoting European art works and the financing of audio-visual contents fostering quality, creativity and innovation; the rating system for non-linear services, prominence, financial contributions and dispensation to the country of origin principle

- Under the draft directive, Member States should require on-demand service providers to secure a share of European works in their catalogue and give prominence to those works.
- In the view of the Commission, the extension to video sharing platforms (VSP) of part of the legal framework relating to traditional audiovisual media might contribute to level the playing field among providers.
- So far, quotas have been proven to be ineffective and inappropriate in promoting the creation, distribution and market appeal of European works: European works featured in linear and non-linear services are mostly national works; consumption of European content has not increased in line with availability.
- According to several online content providers, the imposition of quotas on European content would distort the market and create a "perverse incentive" for operators to buy cheap titles, while rules concerning prominence would interfere with a VOD company's "personalised" approach providing their services.
- The proposed Directive allows a Member State to require a contribution for the production of European content from VOD service providers established in other Member States, thus creating an exception to the principle of country of origin for video-on-demand providers.
- This can lead to regulatory fragmentation and more complex administrative burdens which undermine the very idea of a Digital Single Market.
- According to the Commission, allowing flexibility for Member States to impose financial contributions is a justified and balanced means to limit forum shopping practices, while the industry considers that the same goal could be attained providing more harmonization at Member State level.

Under the current AVMSD, TV broadcasters must, where practicable, reserve a majority proportion of their transmission time to European works and at least 10% of their transmission time or of their programming budget to European works created by independent producers. An adequate proportion of this quota has to be reserved to "recent" independent works. The proposed directive maintains the status quo for broadcasters. The rules on the promotion of European works for TV broadcasting services have contributed to the development of a European audiovisual industry and ensured consumers access to European works.

The latest results show that the average share of European works broadcast in the EU was 64.1% both in 2011 and 2012, with a very minor increase compared to 2009 (63.8%), thus meeting the directive's target requiring that broadcasters reserve a majority proportion of their transmission time to such works. Similarly, the share of European independent works

was well above the 10% target, with an EU-average proportion of 33.1% in 2011 and 34.1% in 2012. When compared to the previous reporting period, the overall level remained stable (34.1% in both 2009 and 2012)[76].

As for on demand audio-visual media service providers, Directive 2010/13/UE requires that they promote, where practicable and by appropriate means, the production of and access to European works. Currently only 19 Member States have imposed obligations and they have done so in varied ways, i.e. through financial contributions or share and/or prominence in their catalogues[77].

On average in the EU, the share of EU films in 75 big EU VoD catalogues was 27% in 2015 and 30% in 16 big SVoD catalogues. However, there are great disparities among the catalogues of pan-European on-demand service providers (from almost 0% to 70%) and among Member States (from an average of less than 10% to an average of almost 60%)[78].

As regards prominence, such quantitative thresholds in the Member States do not exist. Recently, the European Audio-visual Observatory tried to identify the promotional space for each of the services of a sample of on-demand service providers in DE, FR, UK. According to this study, "*European films were allocated between 21% (in the UK) and 33% (in France) of promotional spots".*

As for financial contributions, 9 Member States have included such obligations for on-demand services and they vary from 1% to 12%.

According to the European Commission, the low level of requirements imposed by some Member States has created gaps in the supply and promotion of European content on those services, even though, given the size of the on-demand market, this impact is still not very high.

The results of the 2015 public consultation on the amendment of the AVMSD showed a perceived lack of fair treatment between TV broadcasting and on-demand services: 61% of the contributors who expressed an opinion believe that the current rules are not fair.

Under the draft directive, Member States should require on-demand service providers to secure a share of European works in their catalogue[79] and give prominence to those works. In addition, on-demand service providers would be required to report to the Commission on their compliance with these obligations.

Some delegations (CZ, DE, DK, FI, NL, LU, SE and UK) do not believe that the quota is the right tool to promote European works in the catalogues of on-demand services.

76 EC, Ex-post REFIT evaluation of the Audiovisual Media Services Directive 2010/13/EU, 25 May 2016, ec.europa.eu/newsroom/dae/document.cfm?doc_id=15962.

77 Impact Assessment accompanying the document proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU.

78 On-demand Audiovisual Markets in the European Union (2014 and 2015 developments).

79 The exact percentage for quota is not a settled figure and there are divergent proposals between EU bodies. The Commission's Proposal required a 20% share, the CULT Commission asked for a 30% share. Some countries, like France, would set a 50% share of European works in VOD catalogues. On May 23rd the Council he Council reached a general approach on the proposal, setting a requirement for a minimum 30% quota of European works in VOD catalogues.

Up to now, these obligations have been proven to be inappropriate in promoting the creation, distribution and market appeal of European works.

The European works featured in linear and non-linear services, as reported also in the Green Paper of the European Commission[80], are mostly national works, produced and shown in the same Member State. Non-domestic European works only make up 8.1% of broadcasting hours in the EU and the proportion of independent works has been steadily decreasing in recent years[81].

Despite the legal protection provided by the Directive, which allowed for an increase in European transmission hours in linear services and a high presence of European works in non-linear services, viewing hours of European works have decreased[82]. Consumption of European content has not increased in line with availability.

Consumer demand drives EU content production, not quotas

Based on the above considerations, it must be concluded that the viewing of European works is not driven by the massive presence in the libraries (or transmission hours) but increasingly based on the quality of European works and the possibility to easily access this content. Regarding this, the study on the implementation of the provisions of the Audiovisual Media Services states that the "appetite for European works is due to the local taste of national mass audiences and we have not found any correlations between the modes of regulatory implementation and the levels of European works. This suggests that the proportion of European content, that is specifically national content on major channels, is sustained by the fact that people want to view it, not by the fact that there are rules that say it should be there".

Some responses to the public consultation on the AVMSD suggested that such policy objectives may be achieved more effectively by emphasising the promotion rather than the protection of European works. This could be achieved by creating mechanisms allowing for a broader online distribution of these works, such as subjecting the financing mechanisms for European works to a wider non-linear distribution, or by using prominence tools.

80 Green Paper on "*Preparing for a Fully Converged Audio-visual World: Growth, Creation and Values*", European Commission, 2013. The paper reports that: "*Members States are broadly fulfilling the current legal requirements set by the articles above, their efforts are concentrating on domestic productions*".

81 It should be noted, however, that European production has increased over the years. The European Audio-visual Observatory noted that in 2014, the market share for European films in cinemas reached a record high of 33.6% (highest recorded since 1996), whilst EU production levels have been steadily increasing over the past decades. This trend continued in 2015, as the estimated number of European feature film productions increased from 1,593 to 1,643 films. This represents yet another record high and breaks down into an estimated 1,127 feature fiction films and 516 feature documentaries. About 24% of European feature films were produced as co-productions http://www.obs.coe.int/en/-/pr-cannes-2015-film-market-trends-2014 and http://www.obs.coe.int/en/-/cannes-2016-cinema-market-trends

82 *Study on the implementation of the provisions of Audio-visual Media Services Directive concerning the promotion of European works in audio-visual media services*" Final Report, 13.12.2011, Attentional Ltd, pages 140, 208; The study reports, "*European works had increased their proportion of qualifying hours – 66.3% up from 62.4% in 2007- but viewer hours declined. In other words, while the correlation remains strong, the strength of the preference for European works has declined.*

A 2014 study of the European Commission show that it is difficult to find a relation between the presence of films in a catalogue and their consumption. At the same time, consumption trends seem to follow the promotional efforts made by the VOD provider. This would mean that a share in the catalogue of European works would be useless without any prominence actions[83].

According to Netflix – and to several companies operating in the field of Information Technology, Telecommunications and New Media - rules requiring a minimum of European content would distort the market and create a "perverse incentive" for operators to buy cheap titles. Rigid numerical quotas risk suffocating the market for on-demand audio-visual media services. An obligation to carry content to meet a numerical quota may cause new players to struggle to achieve a sustainable business model[84].

It should be noted that there's no consensus on rules concerning prominence and according to Netflix these are incompatible with the way subscribers watch content via subscription on-demand services. When watching content via a VOD service, they already control their own viewing experience and the titles surfaced to them are highly personalised. Regulatory measures that would interfere with a VOD company's "personalised" approach providing their services would undermine the ability of a service to approach its subscribers with content tailored to their needs and interests. Users nowadays have the choice of various navigation and search and recommendation systems for audio-visual works from Europe, which are often also provided and marketed independent of platforms or operators or as meta systems. This brings about significantly increased chances for a better noticeability of these productions. A legal obligation going beyond this showing these works separately is therefore neither necessary nor helpful. It is an important intervention regarding both user autonomy and operator freedom.

The draft directive introduces some novelties in the regime of financing European works. For example, a Member State would be allowed to require a contribution (e.g. levies and/or direct investment in content) for the production of European content from video on-demand service providers established in other Member States if:

- they target consumers in its territory
- the contribution applies only to the revenues generated in that Member State
- these revenues are not already subject to an equivalent contribution in the Member States of establishment.

The new rules make an exception to the principle of country of origin for video-on-demand providers.

In short, video-on-demand services available across the EU might have to contribute to up to 28 different national cultural funds, creating a widespread fragmentation within

83 Promotion of European works in practice, European Commission, July 2014, p.4.

84 Netflix response to the European Commission public consultation on the amendment of the AVMSD Directive; Bitkom response to the European Commission public consultation on the amendment of the AVMSD Directive.

the Single Market, numerous unintended consequences and implementation challenges. This is all without meeting the Commission's declared goal of establishing a "level playing field" between video-on-demand providers and broadcasters. Furthermore, the Council is also considering extending the scope of these cross-border levies to "all audio-visual media services", i.e. allowing multiple regulation of video-on-demand providers and broadcasters.

The proposal specifies that financial obligations paid in other Member States should be taken into account. However, this does not exclude parallel financial obligations in several Member States. This could lead to a significant burden for video-on-demand-service operators where an operator is active with tailored offers in several Member States.

As well, the imposition of financial contributions extraterritorially may have a negative impact on the provision of cross-border on-demand services in some territories where some providers – most probably smaller ones – may not be able to recoup the financial contributions and the related administrative costs. There could also be a risk of regulatory fragmentation and more complex administrative burdens which could undermine the very idea of Digital Single Market.

However, according to the Commission, allowing flexibility for Member States to impose financial contributions is considered justified and balanced in order to limit forum shopping practices without undermining the COO principle and the objectives of the DSM.

Where COO is used to circumvent national rules, then enhanced cooperation between Member States should be supported, but only where such measures are not a means to achieve a protectionist agenda.

By establishing the COO principle, the AVMSD permitted the removal of regulatory barriers which prevented or made it difficult for EU based operators to provide their services in other Member States. The rules included in the AVMSD constitute the grounds on which, once the services in question meet the requirements established by a Member State, they can freely circulate without restrictions across the European Union. If, then, at the basis of such free circulation lies a harmonized framework, there is no reason to extend the application of the country of origin principle to operators established in third states which are nevertheless targeting EU audiences by providing their service to European residents. The point then, could be in providing more harmonization at Member State level rather than extending the geographical scope of the principle.

3.3.3 The flexibility applied to the Commercial Communication rules: impacts on media companies and users.

- The proposal allows (in certain circumstances) product placement (it remains forbidden in children's programmes) and strengthen provisions to protect minors from inappropriate commercial communications for foods high in fat, salt/sodium, and sugars by, where necessary, encouraging codes of conduct at EU level.

- The hourly limit for advertising is replaced by an overall limit of 20% of broadcasting time between 6.00 and 00.00. In order to protect the "prime-time" slot, two separate time frames have been established, 20% television advertising allowed for each one. Broadcasters oppose the establishment of such time frames, while they are supporting more flexibility, i.e. a daily limit. They consider that a shift to a 20% daily limit could generate between a 2% and 15% increase of revenues.
- The printed press and other content distribution platforms fear that the abrogation of the time limit, replaced by a daily limit runs the risk of triggering a shift in advertising resources from the print media to television.
- To comply with the aim of reinforcing a level playing field, video-sharing platforms shall comply with some qualitative requirements concerning audio-visual commercial communications that are marketed, sold and arranged by those video-sharing platform providers. The VSPs are encouraged to provide for policies and schemes to develop "media literacy skills".
- Several MSs have highlighted that no impact assessment has been carried out to evaluate the legal, administrative and market impact of the inclusion of VSPs in the scope of the AVMS directive.

According to the European Commission, the market for TV broadcasting has evolved and there is a need for more flexibility concerning audio-visual commercial communications, above all for quantitative rules for linear audio-visual media services, product placement and sponsorship. The emergence of new services, including no advertising, has led to a greater choice for viewers, who can easily switch to alternative offers.

From a static point of view, the TV broadcasting market is still the strongest audio-visual market. In 2013, the linear television revenues in the EU 28 amounted to €83.6 billion. In comparison, the total consumer revenues of VoD and SVoD services were €2.5 billion, i.e. 3% of TV broadcaster revenues[85].

However, from a dynamic perspective, the domination of TV broadcasting is less obvious. Their growth rate has decreased from an average annual rate of 2.8% from 2009 to 2013, to only 0.3% in 2013. In the meantime, the total on-demand consumer revenues in the 28 Member States increased by 272%, a compound annual growth rate of 28%. According to the industry, by 2020, projections suggest that more than 20% of European households will have a specific paid account with a SVoD provider. As a result of this, the projected turnover of all VoD services in Europe should increase by 15% annually to 2020, reaching €6 billion[86].

The inflexibility of the rules on product placement and sponsorship has prevented these advertising formats from reaching their full potential in terms of revenues.

85 Study on data and information on the costs and benefits of the Audio-visual Media Service Directive (AVMSD) ec.europa.eu/newsroom/dae/document.cfm?action=display&doc_id=14350.

86 Impact Assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU.

Some regulators and Member States confirmed that the rules create legal uncertainty for stakeholders, discouraging them to invest in product placement. As a benchmark, in the US, where there is no actual regulation on product placement, this format represents almost 5% of the TV ad spent market. In the UK, it represents a share of only 0.1%[87].

The European Commission states that if the status quo were maintained, TV broadcasting would continue to be at an unfair competitive disadvantage to video on-demand services. The differences in regulation would harm competition and promotion of European works and, as well, rules on commercial communications would remain unsuitable for market evolution[88].

Consequently, the proposal to relax the stricter provisions on commercial communications imposed on linear broadcasting seems suitable in the broader context of favouring the level playing field.

Against this backdrop, the proposal allows (in certain circumstances) product placement and introduces more flexibility as regards the quantitative rules.

The proposed rules strengthen provisions to protect minors from inappropriate audio-visual commercial communications of foods high in fat, salt/sodium, sugars by, where necessary, encouraging codes of conduct at EU level.

Tobacco advertising remains forbidden in all types of media. For alcohol advertising, the Commission also wants to encourage further development of self- or co-regulation, at EU level if necessary, to effectively limit the exposure of minors to such ads. Member States can apply stricter rules and can, for example, ban alcohol advertisements or adopt other measures.

The overall limit of 20% of broadcasting time is maintained between 6.00 and 00.00, but instead of the current 12 minutes per hour, broadcasters can choose more freely when to show ads throughout the day. The Compromise text adopted by the European Parliament in April, in order to protect the "prime-time", establishes two separate time frames and allows 20% television advertising for each one. Member States will be free to choose their "prime-time" frame but it should not exceed 4 consecutive hours.

The transmission of TV films, cinematographic works and news programmes can be interrupted only once every 30 minutes, as under current rules. This applies also to children's programmes.

Broadcasters and on-demand providers will also have greater flexibility to use product placement and sponsorship, while keeping viewers informed at the beginning and/or end of a programme. Product placement will however remain forbidden in children's programmes.

These different measures are expected to have a positive economic impact for media services providers – mainly TV broadcasters – and increase their capacity to invest in audio-visual content.

Broadcasters oppose the establishment of two separate

87 ACT Position Paper on the revision of AVMSD.
88 Impact Assessment, op. cit. p. 14.

time frames, while they are supporting more flexibility, i.e. a daily limit. In their view, a simplified set to most broadcasters, a simplified set of rules on product placement could result in an increase of approximately 10% to 15% of product placement revenues[89], or a 4% increase in total advertising revenues in the EU (i.e. a potentially additional revenue of €1.2 million)[90]. Allowing more flexibility in sponsorship rules would allow broadcasters to generate from 15% to 50% in additional sponsorship revenues. This could result in more than a €441 million increase in total TV advertising spent in the EU (i.e. around 1.5% of current total TV advertising market value). In any case, it must be noted that it is difficult to foresee whether advertisers would increase their advertising budgets or spend their existing budget differently. As regards the 20% limitation, a shift to a daily limit could generate between a 2% and 15% increase in revenues.

The printed press, but also some governments fear that the abrogation of the time limit, replaced by a daily limit, runs the risk of triggering a shift in advertising resources from the print media to television. Press publishers claim that any proposal which would result in shifting more advertising resources to those who already hold the biggest advertising market share is an unprecedented breach of the principle of media pluralism.

According to the European Commission, where possible savings for service providers is concerned, it would be limited[91]. Advertising scheduling is a core component of broadcast programming and the quantitative rules imposed by the AVMSD are only a small part of a large number of parameters taken into account in TV scheduling strategies aiming at optimising audience and revenues. The costs associated with broadcast programming, including IT costs, are 'business as usual', i.e. costs endured even in the absence of the AVMSD.

To comply with the aim of reinforcing a level playing field, video-sharing platforms must comply with some qualitative requirements concerning audio-visual commercial communications that are marketed, sold and arranged by those video-sharing platform providers[92].

Advertising shall not include harmful and discriminatory content, nor content which is prejudicial to health, safety or environmental protection. Provisions set a ban on cigarettes, electronic cigarettes and tobacco products and limits on alcoholic beverage communications which must not be targeted minors or encourage immoderate consumption. A ban is also set on prescription only medicinal products or treatments. Finally, advertisements must not cause any physical ('moral' deleted) detriment to minors.

89 EGTA's report on the costs and benefits of compliance with the Audio-visual Media Services Directive.
90 Impact Assessment accompanying the document, Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU.
91 Explanatory Memorandum to COM (2016)287 - Amendment of Directive 2010/13/EU on the coordination of certain legal provisions in Member States concerning the provision of audio-visual media services.
92 The Council proposal only requires compliance with Article 9 requirements, while the CULT proposal asks for compliance with Article 9 and 10.

Provisions include specific measures to duly inform users and recipients when contents contain such advertisements, sponsored content or product placement.

Finally, the VSPs are encouraged to provide for policies and schemes to develop "media literacy skills".

Among Member States there is no full consensus on this extension of the Directive's material scope. Several MSs have specifically highlighted that no impact assessment has been carried out to evaluate the legal, administrative and market impact of such an extension. A number of these delegations already consider the inclusion of VSPs in the scope of the AVMS directive, as proposed by the Commission, to be problematic.

Some on-demand service providers consider that, up to now, the "graduated regulatory approach" has been effective in reflecting the difference between linear and non-linear services in terms of user choice and control. They highlight, however, that although differences between linear and non-linear services are still present, the audio-visual market is increasingly becoming convergent, therefore an analysis should be carried out to assess the current validity of the stricter provisions. Finally, regarding the distinction between services provided by different agents, they support the European Commission's decision to investigate if there is room for the deregulation of audio-visual services, particularly in the area of commercial services, so as to achieve a level playing field. For similar responsibilities, similar obligations should apply.

CONCLUSIONS

Through the proposed rules, the European Commission seeks to establish a level playing field in the copyright and audio-visual media content domains. But some measures have raised perplexities.

One of the most critical issues is probably that of reviewing the liability regime for online intermediaries, which is in contradiction with the E-commerce Directive. While it is true that the Internet landscape has undergone great changes since its adoption in 2001, the proposals seem to underestimate the positive effects that Internet, platforms and digitization have had on creativity. In the proposals, the dissemination of copyright protected content over the Internet is to be based on licensing agreements, subject to the right holder's control. This rather traditionalist perspective overlooks the sharing economy/culture that drives much of the content production and dissemination on the Internet today. Any forward-looking policy at EU level should reflect not only the economic needs and interests of traditional players, but should also be designed in light of a broader and more inclusive ambition to foster cultural production, access to culture and knowledge and technological progress. By contrast, this sectoral approach to the liability exemption regime is likely to create confusion.

Also, turning online intermediaries into cops could result in negative effects, other than the desired ones, reducing the likelihood of content circulation and limiting the freedom of expression and information, as well as distorting competition in the emerging European information market.

These proposals are of course the beginning of a process and there is a need for greater clarity regarding the exact intention behind certain definitions and a stronger evidence base as to why certain changes are needed.

On the other hand, the follow-the-money approach suggested by the Commission seems to be more promising and effective. This model, based on voluntary agreements aimed at eliminating economic incentives to infringements of online IP rights, has already proven to be valid in the countries where it has already been adopted.

Other proposed measures, such as the extension of the country-of-origin principle, in the Commission's intentions should strengthen the single digital market, but are challenged by those who fear an opposite effect resulting in greater fragmentation and the risk of forum shopping.

The purpose of the Commission is to establish a future-proof regulatory framework, but in imposing too strict or unclear rules, implementation may become difficult and the reform may result in hindering innovation.

When changed market conditions do not justify costlier rules for some players, the introduction of flexibility is beneficial. Now that the audio-visual market is increasingly converging and the Commission considers a degree of deregulation acceptable, the imposition of stricter rules for other subjects would be paradoxical. Therefore, co- and self-regulation should be welcomed. Institutions and web players should develop a stronger cooperation, in order to work out solutions and achieve

goals which otherwise, for different reasons, could be difficult to be enforced by law.

Finally, a higher degree of market transparency should be pursued as a condition for the development of new business models, innovation, growth and employment, being the basis for the creation of a Digital Single Market.

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