



Association of Commercial
Television in Europe

COMMERCIAL BROADCASTERS PERSPECTIVES ON THE VALUE GAP

BVA-ABA Lunch-causerie

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SECTION I

Value Gap

Comparing the current EP & Council Approaches

Original Commission proposal

- **Recital 38**

“Where information society service providers **store and provide access** to the public 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 rightholders, **unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC** of the European Parliament and of the Council.

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.”

Council vs EP: Definition of an online content sharing service provider (Art. 2(5))

EP Text

- *Whose **main or one of the main purposes** is to **store and give the public direct access** to a **significant** amount of works or other subject-matter*
- *Which the service **organises**, including amongst others displaying, tagging, sequencing the uploaded works*
- *non-for profit online encyclopaedia and educational or scientific repositories, where the content is uploaded by the rightholder, cloud services, online marketplaces are out of the scope*

Council Text

- *whose **main or one of the main purposes** is to **store and give the public access** to a **significant** amount of copyright protected works or other protected subject-matter*
- *non-for profit online encyclopaedia and educational or scientific material are out of the scope*

Council vs EP: Clarification of the communication to the public (Article 13)

EP Text

- *Online content sharing service providers perform a CTTP and shall conclude fair and appropriate licensing agreements*
- *If the rightholder refuses to grant a license, the provider shall still take appropriate and proportionate technical measures*
- *Passive service providers shall also take such measures*

Council Text

- *Without prejudice to Art. 3 of the Infosoc Directive*
- *Online content sharing service providers are « **capable** » of performing an act of CTTP when they give the public access to works*
- *When they do, they **shall not be eligible for the limited liability regime** of Art. 14 E-Commerce*

- *They shall be « deemed » to perform a CTTP:*
 - *When upon notification, the provider does not take effective **measures** to prevent the availability of illegal content*
 - *when upon notification, the provider does not act expeditiously to remove or disable access, and does not take steps to prevent future availability*

Council vs EP: What should the licences cover?

EP Text

Art. 13(-1)

*The licences should cover « the liability for works uploaded by users of their services **in line with terms and conditions set out set out in the licensing agreement**, provided that these users do not act for **commercial purposes** or are not the rightholder or his representative »*

Council Text

Art. 13(7)

*« these agreements shall cover the liability of the users of the online content sharing services when they are not acting in a **professional capacity** »*

SECTION II

Value Gap

Solutions & Challenges for commercial broadcasters

What is the position of the ACT on the VG (1/3)

Solutions

- Increases legal certainty
- Future proof, technologically neutral definition that caters for streaming services or other types of services that do not need to store content in order to communicate to the public
- In principle, CTPP right does not require a preliminary act of reproduction

CTTP applies to service providers storing and/or providing access to protected content

Challenges

- International law needs to be complied with
- To exclude specific services (streaming, cyberlockers) or the limitation only to profit making platforms is not legally admissible
- Mitigation for SMEs can easily take place through e.g. simplified licensing solutions

What is the position of the ACT on the VG (1/3)

Solutions

- Clarifies safe harbour by ensuring verification of service providers active role i.e. optimisation, presentation, promotion of uploaded works
- “irrespective of the means used therefor” needed to cover platforms’ algorithms that optimise presentation of works and/or their promotion
- Confirms existing CJEU case law, *Pirate Bay Case*

Keeping the EC’s clarification of E-Commerce Directive (R. 38)

Challenges

- Measures are limited to a temporary act of surveillance on specific copyright content that has been identified by right holders
- Such measures are already being used in practice and they are varied in nature to fit the capacities of different service providers

What is the position of the ACT on the VG (1/3)

Solutions

- Several recognition technologies exist and are affordable/scalable for small business (e.g. Audible Magic)
- Content recognition costs will decrease as market expands
- Technology often ineffective without any underlying legal obligation
- Platforms' information requests addressed to right holders should be proportionate and justified

Keeping the EC's reference to content recognition technologies (Art. 13)

Challenges

- The condition of knowledge is only required in the case of passive platforms (cf. E-Commerce Directive)
- An active platform optimising, promoting content, and performing a CTTP, cannot benefit from the liability limitation regime

CENTRAL TO THE LIVES OF EUROPE'S CITIZENS

- Our TV channels reach over 200 million European households in 28 EU member states and beyond

200 million
households reached

- Our online TV services are available in over 150 million European homes connected to the internet and are central to Europe's broadband story

150 million
EU homes connected

- Our member companies deliver content to a range of devices and platforms in response to consumer demand

