

**CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE
A REFLECTION DOCUMENT OF DG INFSO AND DG MARKT**

COMMENTS BY MEDIASET S.P.A.

JANUARY 2010

Mediaset's commitment to multi-platform delivery

Mediaset is seriously committed to making available and to facilitating access to its programming on a multiplatform basis, while enhancing its terrestrial offer with ad-hoc applications, specifically tailored for the online world. As of 13th January 2010, a new online video section (www.video.mediaset.it) will be ushered through its portal. The main features of this new offer provide users with:

- the latest complete episode of favourite programmes (talent and reality shows, soap operas, full version of news and current affairs programmes, as well as sports programmes) for catch-up vision in full screen version. All programmes will be made available for one week until the following prime-time episode is aired;
- top-notch software technology (Smooth Streaming by Microsoft) which guarantees fluid delivery of selected content and overcomes irritating waiting time and streaming interruptions due to internet connectivity variations, enabling perfect quality viewing;
- a semantic search engine that analyses and interprets the titles of available videos;
- ad hoc formatted videos to be shared with other users across the leading social networking platforms such as Facebook, Twitter, Microsoft and others.

Mediaset constantly proves its willingness to offer the best quality content choice in full compliance with legal obligations both for rights clearance and for other quantitative and qualitative measures aimed at protecting all viewers and especially minors. Broadcasters such as Mediaset develop their offers within strict contractual and legislative constraints, while honouring the value of the investments made in audiovisual production. Under the best auspices, all stakeholders in the European digital Single Market will continue to abide by the same principles, thus developing truly pro-competitive services to cater for the best possible consumer options.

In thanking the Commission for the opportunity to participate to this most welcome consultation, Mediaset's comments on the Commission's Reflection Document are limited to three main areas of concern:

1. Commercial users' access
2. Consumer access
3. Protection of right-holders.

The ACT submission, fully endorsed by Mediaset, provides a detailed focus on the specificities of the commercial broadcasters' position.

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Introduction

Before addressing the specific issues proposed by the Commission's timely Reflection document, it seems appropriate to consider that the ongoing digital revolution presents challenges and opportunities which recall the industrial revolution and the introduction of the printing press. The fundamental questions stated in the preamble to the Statute of Anne in 1710¹ do not differ from the legitimate strife for survival and growth that every author and right-owner is nowadays confronted with. The introduction of new technologies facilitating and improving the distribution of copyrighted materials cannot do away with the very principles established for the protection of intellectual property in most Member States at the beginning of the past century. After the launch of public service broadcasting services in the 1950s and further to the proliferation of commercial broadcasting outlets in the mid-seventies and eighties, audio-visual production, distribution, rights acquisition and licensing agreements have been carried out in compliance with the fundamental national regulatory provisions on intellectual property protection that are still at the basis of every copyright harmonization directive in the Internal Market. Mediaset endorses the Commission's ambitious vision for a digital agenda to foster growth of the knowledge economy in the EU; however, digitization of copyrighted works and their legitimate distribution should be promoted in a secure legal environment, whereby every stakeholder in the value chain will not be deprived of an adequate return on intellectual and financial investments. As acknowledged in the Commission's Reflection Document, thousands of professionals who contribute to production and distribution of IP protected works are all beneficiaries of human and investment capital from the creative industries.

¹ *Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families...*(**British Statute of Anne**, 1710).

1. Commercial users' access

1.1 As already stated on the occasion of the public consultation relevant to the “Green Paper on Copyright in the Knowledge Economy” (November 2008), Mediaset firmly believes that the basic legal principles enforced in the off-line world continue to be valid and have to be at the basis of any business model in the European Digital Single Market. Copyright infringements, as well as crimes such as theft, libel, defamation and pedophilia should be prosecuted in a platform-agnostic legal framework.

1.2 In the specific sector of audio-visual content distribution, a rich and varied linear offer will continue to cater for wide audiences and will be complemented by a proliferation of non-linear services: technology will soon be seamless and viewers will not care whether the delivery occurs through online, cable, terrestrial or satellite distribution. In fact, over-the-top-Tv (OTTV) allows a perfectly hybrid combination of linear and non-linear content.

1.3 Any business model which hinges on the delivery of audio-visual copyrighted materials and aims at profit-making – from advertising-funded catch-up services to pay premium cinema releases – depends upon the legitimate rights-holder’s prior consent. As rightly pointed out by both Commissioner Reding and Commissioner McCreevy, copyright protection is intrinsic and essential to the creation of sound and viable business activities that in turn support and finance original quality productions.²

1.4 Digital technologies facilitate and improve the viewing experience, not only in terms of quality but also of availability, timing and, indeed, pricing. Multiplatform competition thus enables consumers to choose among wider, better and cost-effective audiovisual content offers. Internet distribution mechanisms may improve efficiency through price competition and greater supplier choice. Applications for online search and sale of airline tickets are a straight-forward example of the benefits of competition and co-operation among on line and off-line operators: no matter how good a deal we may find, there is no such thing as a free plane ride, unless the carrier or the agent decides to do so for promotional purposes. In other words, online distribution of goods and services – whether tangible or intangible - complements and competes with off-line distribution: if we buy a book, a film or a plane ticket online, the meaningful part of the transaction is still the book, the film or the plane ticket.

² Baaria - official Italian entry best foreign language film Academy Awards 2010 - directed by Giuseppe Tornatore and produced by Medusa (fully owned by Mediaset S.p.A.,) is a recent example of European quality production severely harmed by illegal distribution. According to a lawsuit, currently pending at the *Tribunale Civile (sezione proprietà industriale)* in Rome and filed by the anti-piracy federation Fapav and the Italian collecting society SIAE, in October 2009 Baaria was illegally downloaded 600.000 times.

2. Consumer access

2.1 The Commission dwells on consumers' frustration over the impossibility to access content readily available from websites administered in other Member States and suggests that commercial practices and, in some instances, legislation, impede what technology enables. Users, regulators and industry alike should come to terms with the fact that online distribution is just another window in the release and lawful exploitation of audio-visual works.

2.2 There is no trade-off between demand, what consumer want, and supply, the right-holders' legitimate drive to recoup their costs and possibly maximize their revenues. Quality audio-visual content production is, to a large extent, capital-intensive and every stakeholder expects a legitimate return to break even on the investments made and to reward the risks borne in the creative and implementation process.

2.3 Commercial operators' access and viewers' access are both a function of price elasticity which determines contractual negotiations in the market for audiovisual content distribution that is, for the time being, and will continue to be strongly dependent upon the capacity to scout, invest in, develop and promote successful productions.

3. Protection of right-holders

3.1 Assuming that contractual negotiations will continue to prove their viability in delivering content where and when the users want it, given the fact that a mandatory media chronology is no longer applicable, the current legal framework is flexible enough to allow multi-territorial and multiplatform licensing, provided there is a market for it and that it is financially advisable to do so. Technology, market practice and legal instruments can indeed work in favor of innovation: talent shows can be launched online (as it seems to be the case for the latest show by the creator of "American Idol"), films can be distributed on iTunes: the market is booming with new and competing offers, provided that the legitimate right-holders agree to do so.

3.2 The Reflection Paper suggests the use of the exhaustion principle as a valid interpretative instrument to overcome national fragmentation in online content distribution. According to the Court of Justice³, the exhaustion principle⁴ applies only to goods which are inserted in, and inseparable from, a physical support. Consequently, it is not applicable in the case of intangible goods, such as content online, which can be duplicated an infinite number of times. The reasons why citizens living in a given Member State are prevented from accessing audio-visual content

³ Judgment 62/79 Coditel SA and Others v Ciné-Vog Films,

⁴ Introduced by the European Court of Justice the Judgment of 8 June 1971. Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co.

made available in another Member State are due neither to legal barriers nor to the broadcasters' reluctance. One should also bear in mind the specificities of the European market, characterized by an exceptional degree of cultural and linguistic fragmentation, which in most cases prevents content outlets – and most specifically providers of non English-speaking services - from covering the extra costs involved when broadcasting or distributing content beyond national boundaries. In order to overcome this obstacle, in other instances defined as “cultural diversity”, Mediaset has developed new and economically sustainable solutions addressing the expectation of expatriated Italian and niche non-domestic markets. *Mediaset Italia* is a linear channel conceived with a view to exporting the best Mediaset programming aired nation-wide on Mediaset mainstream channels: <http://www.mediasetdistribution.com/international/home/>.

3.3 It is advisable that the Commission's policy orientation will converge over the need to enforce existing provisions before introducing exemptions and new, ad hoc provisions. In Mediaset's experience - either in fighting theft of our signals unlawfully redistributed by cable services in other Member States or in advocating protection of the shows for which Mediaset paid the original content owners for exclusive territorial exploitation on air (analogue and DTT) and on line (e.g.: *Grande Fratello* - Italian version of *Big Brother* - exclusive rights licensed for € 17.200.000) - the best contribution to promoting European production in the 27 Member States would be enforcing a thorough safeguard of the investments made by all the players which hold a legitimate stake in the value chain of content creation and distribution.

3.4 The judgment delivered on 15 December 2009 by the *Tribunale di Roma* further to the complaint lodged by R.T.I. (Mediaset's fully owned broadcasting concern) against YouTube is an important first step in stating the need to accurately consider, on a case by case basis, the scope and responsibilities inherent to internet hosting activities.⁵ The regulatory framework enforced to date leaves no doubt about what is lawful and what is not in terms of legitimate online distribution of audio-visual content: the mere fact of enabling the user to upload content is not exactly equivalent to organizing such content in a catalogue, with ad-hoc search engines to retrieve it, exercising control and selection over it, whilst inserting relevant advertising messages. According to the Rome Court's decision, YouTube is not a mere host and does exercise editorial control; thereby, it is to be held accountable for the audiovisual files that are being made available online.

⁵ http://www.mediaset.it/corporate/salastampa/2009/comunicatostampa_5307_en.shtml

3.5 Several legal actions at national level, such the decision by the Italian *Corte di Cassazione* on the Pirate Bay case last December⁶, confirm the jurisprudence undertaken so far, on a case by case basis, by the Italian Courts and currently debated at EU level on the application and interpretation of the e-commerce and data protection directives⁷. The Italian judges have assessed the scope of the intermediaries' activities and acknowledged a causal link between such activities and the fraudulent use of the illegally uploaded contents. Upon these premises, the European Commission could perhaps set up a special task force to follow-up on national jurisprudence, to clarify the application of existing provisions and to discuss ex-ante schemes that would in the future facilitate the proliferation of audiovisual services in the European Digital Single Market, guarantee timely enforcement of due protection to legitimate holders of copyright and neighbouring rights and, by the same token, grant consumers a safe, versatile and lawful digital environment.

Mediaset S.p.A., January 2010

⁶ Decision 49437, 23 December 2009 , cf.:

<http://www.ilsole24ore.com/art/SoleOnLine4/Norme%20e%20Tributi/2009/12/cassazione-sentenza-diritto-autore.shtml?uuid=e9a9b64e-f000-11de-b4be-a6cf520e4afe&DocRulesView=Libero#>

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') and Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.