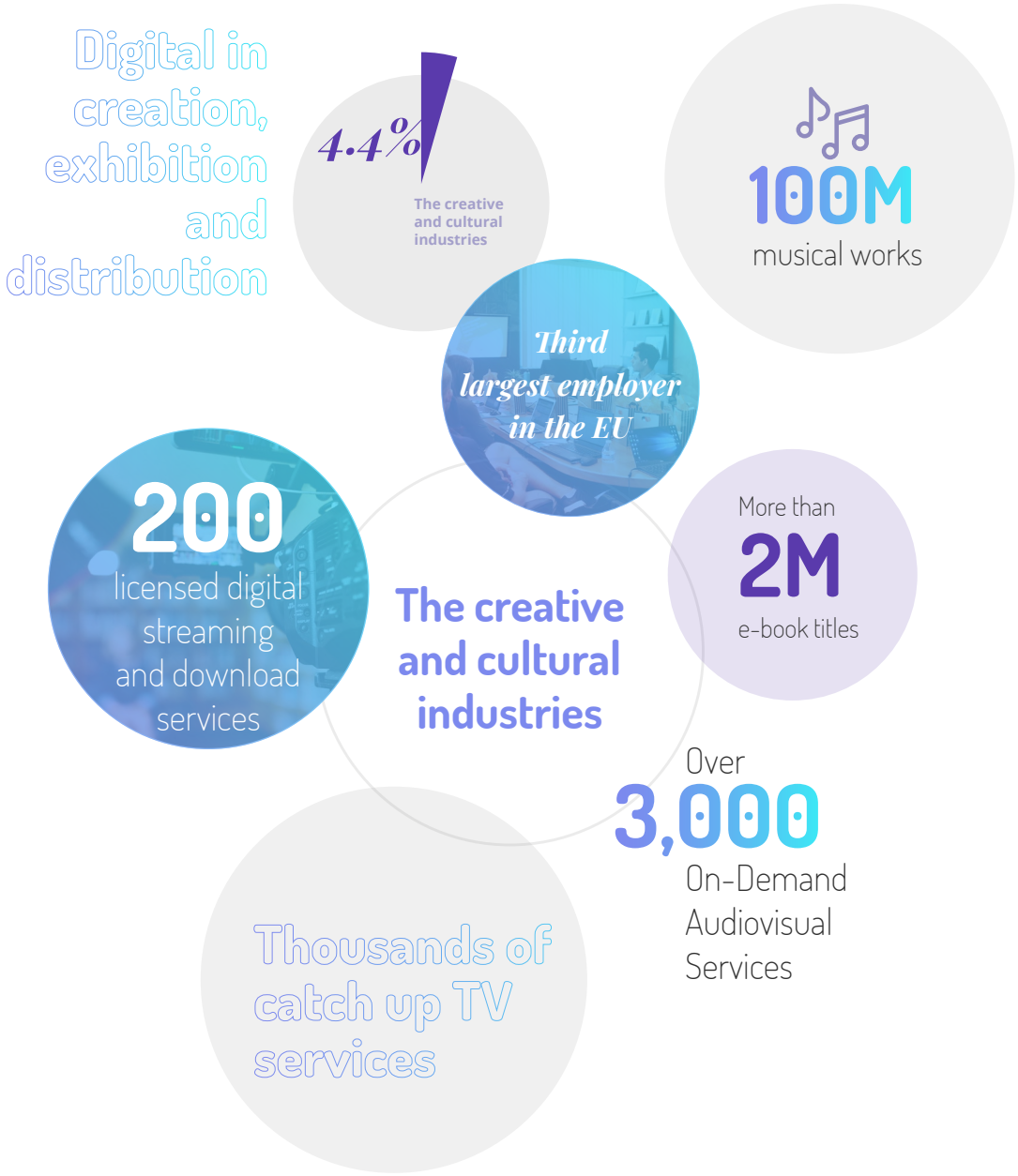
CREATIVITY WORKS!

THE DIGITAL SERVICES ACT:

Building a safe, trustworthy, and diverse online environment for consumers and businesses

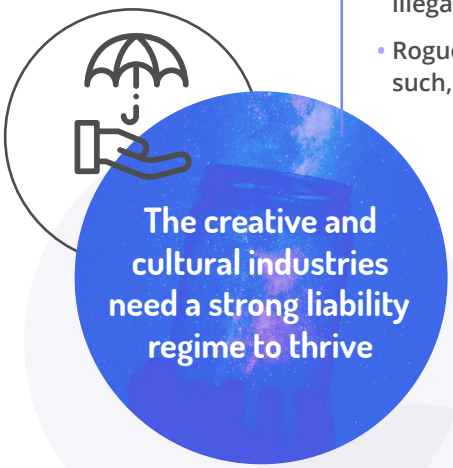
The creative and cultural industries



LaLiga · FIAD · eibf European and International Booksellers Federation · ISFE Europe's Video Games Industry · UNIC Union Internationale des Cinémas International Union of Cinemas · CEPI European Audiovisual Production · IMPALA · fse · European Writers' Council · VAUNET German Media Association · Creativity Works · MPA · MEDIAPRO · IVF International Video Federation · CEPIC Centre of the Picture Industry · Premier League · LFP Ligue de Football Professionnel · Federation of European Publishers · ACT Association of Commercial Television in Europe · IMP The Global Voice of Music Publishing · FIAPF Film Producers Worldwide

Creativity Works!, the leading European coalition of the creative and cultural industries, welcomes the European Commission's ambition to build a **safe, trustworthy, and diverse online environment** for consumers and businesses.

Key points of the Creativity Works! policy paper on DSA:



The creative and cultural industries need a strong liability regime to thrive

- DSA should uphold IPR and avoid granting new liability privileges;
- Tried and tested remedies to tackle illegal content must be preserved;
- Rogue operators are to be treated as such, with strict measures in place.

What is illegal offline is also illegal online

- Towards effective notice-and-action mechanisms: Both prevention and fast removal of illegal and unlicensed content should be the rule - not the exception;
- Expertise and a track record of accurate notices should be the main criteria for "trusted flaggers";
- No tolerance for repeat infringers: The adoption of mandatory repeat offender policies by online platforms are an important tool to ensure online safety and tackle illegal content.

Making the online environment safer for users and consumers

- KYBC to be extended beyond online marketplaces;
- Disinformation should be effectively tackled;
- Public access to the WHOIS database would enhance transparency online.

1 The creative and cultural industries need a strong liability regime to thrive

Only a strong liability regime can deliver a safe and trustworthy online environment, effective enforcement as well as ensure that the Internet continues to be the vibrant and engaging place we all enjoy.

The DSA should not grant new liability privileges

New digital services have emerged since the adoption of the ECD in 2000. Some of these services actively intermediate and profit from the work of our businesses and the millions of professionals in Europe's creative sector. These digital services' activities are **not** of "a mere technical, automatic and passive nature" (see Recital 42 of the ECD and the CJEU judgment in L'Oréal v. eBay). These may include social media platforms, search engines, app stores, user-uploaded content services, file sharing services and media sharing platforms.

We believe that more clarifications are needed in certain places, particularly on the concept of neutrality. According to **Recital 18**[1], a service is provided "neutrally" when it is based on *"a merely technical and automatic processing of the information provided by the recipient of the service".* Although we welcome the Commission's intent to codify CJEU case law[2], caution is required:

- Digital services have become far more complex and the choice of the provider to automate certain functionalities is no guarantee of a "neutral" approach to the content it hosts;
- Recital 18 provides that an intermediary services provider who *"plays an active role of such a kind as to give it knowledge of, or control over"* information provided by a recipient of the service should not qualify for the liability exemptions. Though this is correct, it is also somewhat misleading as services that provide the content themselves, or that have editorial responsibility over the content, would not qualify as intermediaries in the first place;
- The key criterion should remain *"optimising the presentation or promoting the content"* (regardless of whether this happens in an automated way or not) in line with CJEU case law (L'Oréal/eBay).

Digital services profit from trillions of annual uses of works across our sectors. This is also true of those that unduly profit from unlicensed or infringing content. The optimisation of illegal (i.e. unlicensed) content drives massive advertising revenues for these digital intermediaries. This is further evidence of the fact that they are not neutral or passive vis-a-vis the content that is made available and augmented via their platforms. The licensing and revenue loss problems caused by services that misuse Safe Harbour to profit from unlicensed content, often mean that this revenue is not only lost to the creative sector, but to Europe.

Lastly, the CJEU has made it abundantly clear that the active role leading to the loss of the liability privilege is linked to promoting illegal content – *not to disabling it*. The Commission confirmed this in both its Communication of 28 September 2017 on Tackling Illegal Content Online and the ensuing Recommendation[3]. This is also reiterated in Article 6 of the DSA proposal.

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[1] Recital 18 states that the liability exemptions should not apply when the services provider, instead of providing the services neutrally, by a merely technical and automatic processing of the information provided by the recipient of the service, "plays an active role of such a kind as to give it knowledge of, or control over, that information."

[2] Namely CJEU rulings in Google France and L'Oréal v. eBay (C-324/09).

[3] *"The mere fact that an online platform takes certain measures relating to the provision of its services in a general manner does not necessarily mean that it plays an active role in respect of the individual content items it stores and that the online platform cannot benefit from the liability exemption for that reason. In the view of the Commission, such measures can; and indeed should, also include proactive measures to detect and remove illegal content online, particularly where those measures are taken as part of the application of the terms of services of the online platform."* See COM (2017) 555 final Communication on Tackling Illegal Content Online Towards an enhanced responsibility of online platforms, p. 10

Existing remedies against illegal content must be preserved

As intermediaries are often not directly liable for illegal content but are still best placed to address it through no-fault injunctions, the DSA should **not** inadvertently undermine these.

Therefore, the DSA should not:

- Encourage action against individual end-users/ infringers, as is to a degree implied by Recital 26, when an intermediary is better placed to address illegal content in an effective manner;
- Increase red tape and unnecessary interference in Member States' judicial laws. It is essential to clarify that Articles 8 and 9 are explicitly limited to cross-border orders.

Rogue operators should not be given a free pass

- We also caution against use of the concept of *"deliberate collaboration"* (see **Recital 20**) which is too high a threshold and difficult to prove. The criterion of *"engaging in or facilitating illegal activities"* would be more suitable.
- While there is consensus on avoiding a one-size-fits-all approach for the entire scope of the regulatory package, the DSA should tackle rogue players and unlicensed services regardless of their size. Moreover, we warn against excluding certain players from the Chapter III obligations and creating loopholes.

> *New digital services have emerged since the adoption of the ECD in 2000. Some of these services actively intermediate and profit from the work of our businesses and the millions of professionals in Europe's creative sectors.*

What is illegal offline is also illegal online

In order to protect both businesses and consumers, the same rules should apply both online and offline. The DSA goes in the right direction of upholding IPR protection in the digital space, but some provisions require to be adjusted or strengthened in order to create a safe, trustworthy and diverse online environment.

Providers of online services should not facilitate or enable, the provision of, access to or searchability of illegal, copyright-infringing or unlicensed content.

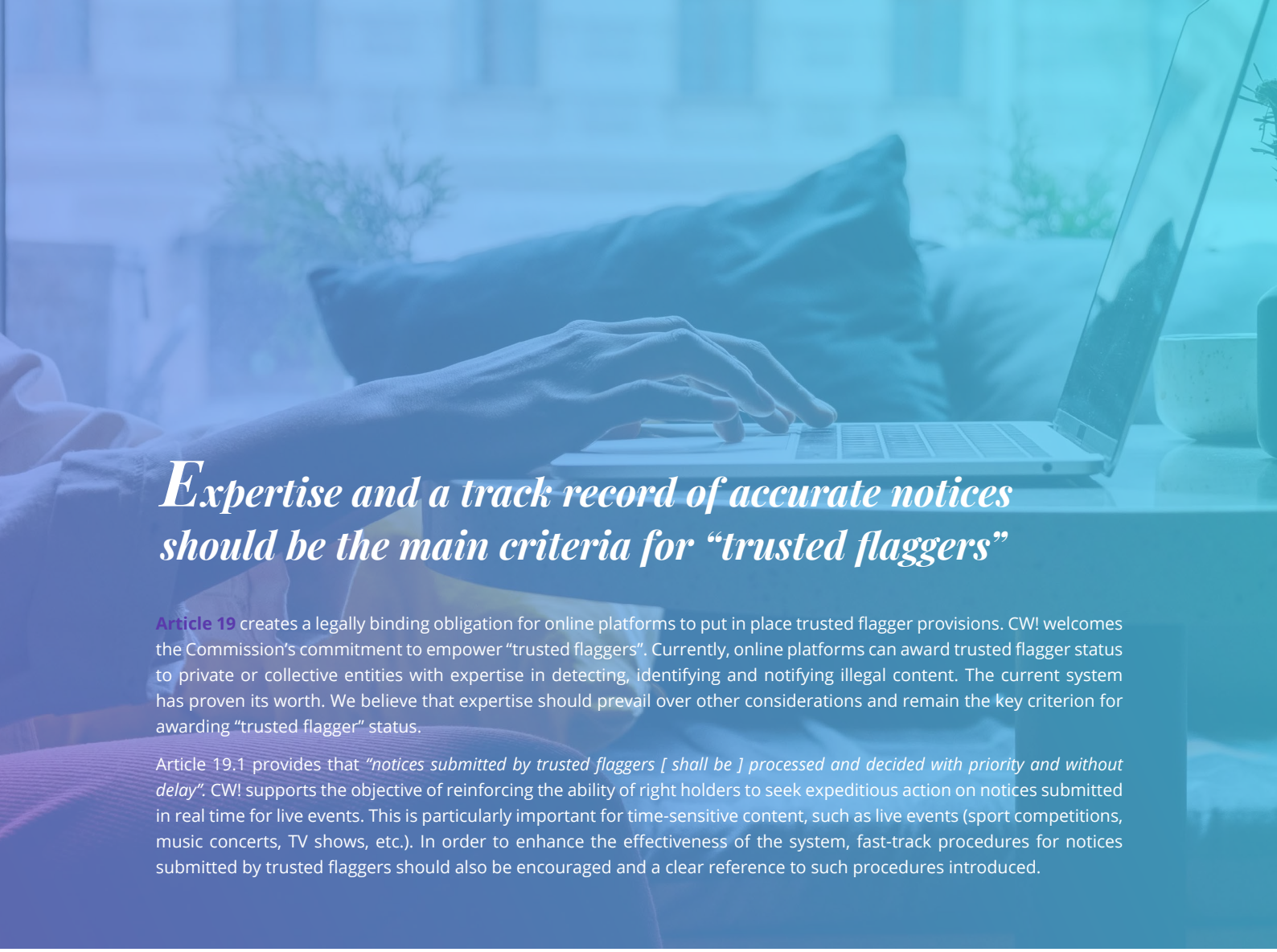
Towards effective notice-and-action mechanisms

Both prevention and fast removal of illegal and unlicensed content should be the rule - not the exception.

CW! welcomes the objective of harmonising notice and action mechanisms *"so as to provide for the timely, diligent and objective processing of notices on the basis of rules that are uniform, transparent and clear and that provide for robust safeguards to protect the right and legitimate interests of all affected parties"* (Recital 41). However, we believe that some additions to **Article 14** are essential:

- Introducing a real outcome-oriented obligation to act for providers of hosting services, not just an obligation to put in place a notice and action mechanism;
- Considering fast-paced technological developments, the list of information to be provided by notifying entities (see Article 14.2) should be more future-proof (for example, URL is already outdated and does not apply to apps). In line with European case law, identification of the work or copyright holder involved in accordance with industry norms should be sufficient to notify an unlicensed work. To this extent, the DSA presents the opportunity for the EU to ensure the rights of Europe's creators and creative sectors are no longer subject to a 'whack a mole' pursuit of individual files, uploads, sites, cyber lockers etc.

In addition, the DSA also presents an opportunity to introduce expeditious 'notice and stay-down' obligations (i.e. permanent removal) for notified content (including for equivalent infringements), with a focus on relevant services. This unique legislative circumstance should not be missed. All digital services in operation today in Europe either directly operate or sub-contract to utilise Automated Content Recognition (ACR) technologies capable of removing illegal content. New technologies or practices are not required, rather it is a matter of getting the regulatory standards right to realise 'what is illegal offline should be illegal online'.



Expertise and a track record of accurate notices should be the main criteria for "trusted flaggers"

Article 19 creates a legally binding obligation for online platforms to put in place trusted flagger provisions. CW! welcomes the Commission's commitment to empower "trusted flaggers". Currently, online platforms can award trusted flagger status to private or collective entities with expertise in detecting, identifying and notifying illegal content. The current system has proven its worth. We believe that expertise should prevail over other considerations and remain the key criterion for awarding "trusted flagger" status.

Article 19.1 provides that *"notices submitted by trusted flaggers [shall be] processed and decided with priority and without delay"*. CW! supports the objective of reinforcing the ability of right holders to seek expeditious action on notices submitted in real time for live events. This is particularly important for time-sensitive content, such as live events (sport competitions, music concerts, TV shows, etc.). In order to enhance the effectiveness of the system, fast-track procedures for notices submitted by trusted flaggers should also be encouraged and a clear reference to such procedures introduced.

No tolerance for repeat infringers

Article 20.1 states that *"Online platforms shall suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content"*. The adoption of mandatory repeat offender policies by online platforms are an important tool to ensure online safety and tackle illegal content. CW! welcomes the introduction of such a provision. In order to ensure its effectiveness, four additions could be considered:

- The scope of the obligation should be extended to all providers of hosting services;
- Termination - as opposed to merely suspension - should be made possible, particularly in cases of repeated suspension;
- Providers of hosting services should introduce mechanisms to prevent re-registration by suspended or terminated entities;
- To guarantee effectiveness, sanctions should be required when a user repeatedly (as opposed to "frequently") provides an item of illegal content (and not "manifestly" illegal).

Copyright & DSA

While Article 1(5) and Recital 11 state that the DSA Regulation *"is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected"*, potential for overlap and conflict remains between the DSA proposal and copyright law, particularly when it comes to procedural harmonisation (notice and action, injunctions, orders for information). Piracy may be driven by all types of online services falling within the scope of the DSA.

We would welcome the following additions to enhance legal certainty:

- The mention - in Recital 11 - of "*intact and in no way affected*" terminology which is used in other EU copyright legislation;
- National copyright law (which includes implementation of the EU law) shall continue to prevail.

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Making the online environment safer for users and consumers

The time has come to stop trading consumer safety and protection for profit.

Expanding the scope of KYBC obligations

The transparency rules provided by Article 5 of the ECD have proved ineffective as fraudulent commercial entities can easily remain anonymous. **Article 22** is a welcome endeavor to address the matter as it introduces an obligation for online platforms to know the identity of traders using their services *"to promote messages on or offer products or services to consumers located in the EU"*. However, this obligation is only limited to online platforms which allow *"consumers to conclude distance contracts with traders"* (i.e., marketplaces).

Creativity Works! calls for a *broadening of Article 22's* scope in order to achieve effective and comprehensive "Know Your Business Customer" (KYBC) protocols for digital services.

- *KYBC should not be limited to online marketplaces*. A business needs a domain name provided by a registrar/registry, as well as a hosting, advertisement and a payment service provider - to operate online. These services are provided by intermediaries who have a direct relationship with the business being set-up. As a result, to be effective, KYBC obligations should cover all providers of intermediary services, including *infrastructure services (registries and registrars, hosting providers, content delivery networks, advertising exchanges, proxy services etc...);*
- The new obligations would create minimum burdens on legitimate entities who already ask their traders to identify themselves and already apply simple due diligence checks on the basis of publicly available data, including through national company registers, European Business Register (EBR) and Ultimate beneficial owners register (UBO register - 5th anti-money laundering directive);
- These protocols would be tremendously beneficial to consumers by effectively protecting them from scam websites, operators of online services distributing illegal gambling, substandard or falsified medicines, sexual abuse material, counterfeits, malware and more. They would also impose no burden on legitimate businesses, all of which are easily identifiable.

Disinformation requires to be effectively tackled

Disinformation can have some of the most damaging impacts online and represents a real threat to democratic values. A robust co-regulatory framework is therefore needed to tackle disinformation.

The European Democracy Action Plan indicates that the Digital Services Act should be the vehicle for such a framework by establishing a co-regulatory backstop for the measures including a revised and strengthened Code of Practice on disinformation. The systemic risk (art. 26), risk mitigation (art. 27) and legal basis for Codes of Conducts (art. 35) are welcome in this regard. However, those need to be clarified and reinforced to make sure that disinformation can be fully tackled:

- Codes can become effective binding instruments delivering meaningful transparency and oversight;
- Transparency measures with regards to moderation, advertising and access to data for researchers and regulators are also welcome in this regard;
- The role played by EU institutions and regulators in the drafting and enforcement of these Codes can be strengthened.

Public access to the WHOIS database would enhance transparency online

Content providers use WHOIS information about the registration of domain names and related information to verify the identity of business customers. In May 2018, the Internet Corporation for Assigned Names and Numbers (ICANN) adopted a temporary policy intended to comply with the GDPR. This policy gave the relevant registrar or registry the authority to decide whether to accept or reject access requests, and required that they grant access to entities that have a legitimate purpose for such access.

In practice, almost all access requests (well over 90% in the experience of one group[4]) are now denied, even when they conform with the requirements of ICANN's temporary policy. This contributes to a lack of accountability and facilitates the use of domain names for illegal purposes.

The high access denial rate has led to further decreasing compliance with Article 5 of the e-Commerce Directive, which requires online service providers to make publicly available a set of basic identity and contact information that is very similar to WHOIS data.

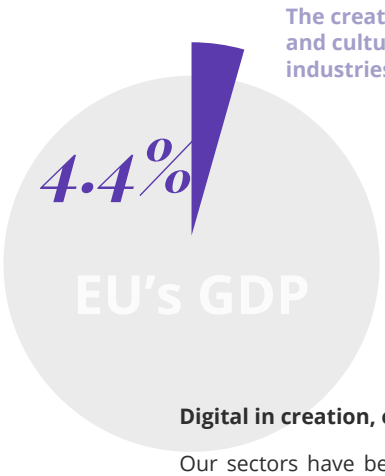
The GDPR was never intended to cut off access to data for legitimate purposes. Access to WHOIS data is essential to combat illegal and harmful content online, and protect the health and security of the public.

To this end, CW! warmly welcomes the Commission proposal for a revised Directive on Security of Network and Information Systems (NIS 2 Directive) which includes helpful provisions on accessibility to WHOIS data (Article 23, Recitals 59-62). This is a first step only. NIS2 does not indeed envisage any data verification mechanism, nor does it include an obligation to cease the provision of services when information provided is inaccurate or incomplete.

Creativity Works! urges EU decision makers, as part of the DSA, to confirm that the WHOIS data for both generic and European country code top-level domains will be made publicly accessible again, as it was for decades prior to May 2018.

[4] https://www.acte.be/wp-content/uploads/2020/08/ACT-Perspectives-on-the-DSA-FINAL.pdf

What we stand for



The creative and cultural industries: 4.4% of the EU's GDP

Our members create, produce, finance, publish, distribute and showcase creative content - be it films, TV series, shows, original content, news programmes, music, pictures, books, video games, sports events, and much more. Together our industries employ 15 million people[5] (directly and indirectly) in Europe, making us the **third largest employer[6]** in the EU. The Creative and Cultural Indutries (CCIs) accounted for 4.4% of EU GDP in terms of total turnover (compared to 4.2% in 2013)[7]. The economic contribution of CCIs is greater than that of telecommunications, high technology, pharmaceuticals or the automotive industry.

Digital in creation, exhibition and distribution

Our sectors have been digital for decades – deploying digital technologies in creation, exhibition and distribution. We continue to consistently develop new services, formats and content – to meet consumer demand for culturally diverse and quality content. While European citizens enjoy going to the cinema, concerts, football games, readings or photo exhibitions, they also have access to large and diversified creative content offerings, digitally distributed on an unprecedented scale.

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100M
musical works

+3,000
On-Demand Audiovisual Services

2M
e-book titles

Content makes the online world a vibrant and enjoyable place for all

The creative and cultural industries have proven their importance in the everyday lives of European citizens during these arduous times. Europeans have access to almost 100 million musical works, on more than 200 licensed digital streaming and download services; thousands of catch up TV services; over +3,000 On-Demand Audiovisual Services (VOD); more than 2 million e-book titles; and countless images. In addition, video games deliver experiences that enrich the daily lives of more than 54% of all Europeans, and have been an important support system for players during Europe's lockdown[8]. Together, we help make the Internet the vibrant and engaging place we all enjoy while driving technological business developments.

Online content needs appropriate protection and promotion

However, we continue to face challenges in protecting and promoting our content online. Intellectual property rights remain the foundation and lifeblood of our sectors. IP rights need to be respected and enforced for our sectors to be able to fully seize the opportunities of the online ecosystem. **The COVID-19 crisis has magnified some of these challenges to, and infringements of, IP rights,** which further drain the creative and cultural sectors' growth and jobs while undermining consumer trust in the online ecosystem, as well as damaging overall economic growth.

Digital services profit from trillions of annual uses of works across our sectors. This is also true of those unduly profiting from illegal, unlicensed or infringing content through massive advertising revenues. It leads not only to licensing and revenue loss problems for the creative and cultural sectors but can also have the most damaging impacts online and represents a real threat to democratic values, that our sectors are upholding.

The members of CW! see the DSA as a unique opportunity to translate the declaration "What is illegal offline is also illegal online" into concrete actions.

The members of CW! see the DSA as a unique opportunity to translate the declaration "What is illegal offline is also illegal online" into concrete actions and look forward to closely working with EU decision makers to make that happen.

Creativity Works! - April 2021

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[5] IPR-intensive industries and economic performance in the European Union" study, EUIPO & EPO, 25th September 2019, see table p. 8

[6] European Commission, June 2016 - Boosting the competitiveness of cultural and creative industries for growth and jobs by Austrian Institute for SME Research and VVA Europe and VVA

[7] See the "Rebuilding Europe" report by EY, January 2021

[8] See an ISFE-commissioned Ipsos MORI study carried out during Q1 and Q2 this year that looked at video game player behaviour during the pandemic: https://www.isfe.eu/wp-content/uploads/2020/09/IpsosMori-Gaming-during-Lockdown-Q1-Q2-2020-report.pdf

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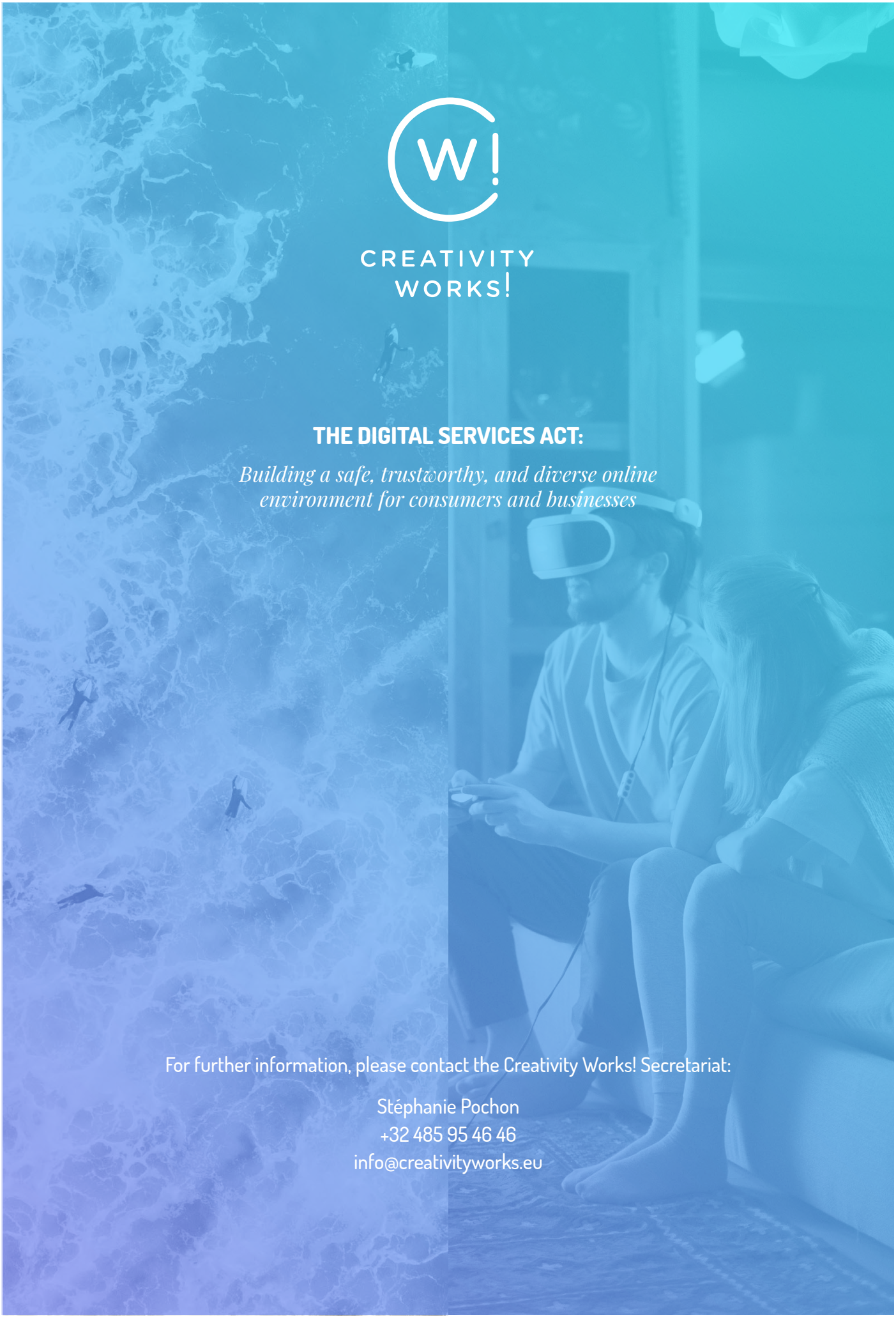

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