

## QUESTIONNAIRE

### Types of creative content and services online

#### **1. Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?**

APT is an association which represents the majority of Italian independent television producers, active in the production of TV dramas (TV-films, mini-series, series, serials, collections, soap operas), light entertainment programs, documentaries and cartoons.

The members of APT are 54 independent production companies, which make up an extremely relevant part of the total turnover of the sector.

Due to the obstacles indicated below, Italian independent producers, members of APT, are able to produce content for online transmission only to a very limited extent. Such content is normally of very short duration (5 to 7 minutes).

### Consumption, creation and diversity of online content

#### **3. Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.**

The online content market in Italy is still largely undeveloped, as compared to other European countries.

Indeed, whilst the Italian telecommunications sector in general has experienced a substantial growth (and is second only to the UK), there are great delays in the production of digital content<sup>1</sup>.

This is due to the peculiar structure of the Italian TV sector and to the behaviours of the two main operators active in the market, Rai and Mediaset, as briefly summarised herein below.

#### **3.1 The economic context of the TV sector in Italy**

The Italian TV sector is highly concentrated and characterised by a strict duopoly, in which the two analogue broadcasters, RAI and Mediaset, hold a collective dominant position.

This is what has recently appeared from the analysis carried out by the Autorità per le Garanzie nelle Comunicazioni (Communications Authority, hereinafter, “AGCOM”) in relation to the market for broadcasting transmission services, to deliver broadcast content to end users, which found that **“RAI and Rti [i.e. Mediaset] hold a collective dominant position”**<sup>2</sup>.

The inevitable consequence of this market situation is that almost all of the demand for Italian independent TV productions currently comes from Mediaset and Rai.

As it was emphasized by the AGCOM, *“the cost for the acquisition of the rights in audiovisual content imposes in certain cases the broadcasting to a large audience, so as to allow to recoup the investment”*<sup>3</sup>. This means that only the operators which can count on significant audience ratings (and, therefore, advertising revenues) - namely Rai and

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<sup>1</sup> See the *“Report of the Inter-ministerial Commission on digital content in the Internet era”*.

<sup>2</sup> See decision n. 61/06/CONS *“Public consultation on the definition and analysis of the market for broadcasting transmission services, to deliver broadcast content to end users, on the assessment of the existence of a significant market power by the undertakings active in it (market n. 18 among those identified by the recommendation of the European Commission on relevant product and service markets within the electronic communications sector)”*, and the relevant draft measure, available on the Commission website <http://forum.europa.eu.int/Public/irc/info/ecctf/library?l=/italia/registerednotifications/it20060424&vm=detailed&sb=Title>

<sup>3</sup> See decision n. 61/06/CONS and the relevant draft measure. This was underlined also in the *“European Charter for the development and the take-up of film online”* (hereinafter *“European Charter”*), which states that *“availability of films is directly related to the possibility of financing the high costs of their production”*.

Mediaset - can really acquire the rights for the transmission of the great majority of independent TV programmes (whose production costs are generally very high).

This situation caused (and still causes) very significant distortions in the relationships between the two main broadcasters and all the non-vertically integrated producers.

Mediaset and Rai - which are still “necessary” commissioners for the independent producers, despite the emergence of new transmission means/platforms - have consolidated, throughout the years, a policy of “total buy out” of all the categories of rights – not only the ones that they can directly exploit (for analogue and digital transmission), but also those relating to transmission channels/platforms in which they do not operate (pay-tv, DVB-H, etc.) – with the sole purpose (or, in any event, with the effect) of preventing other operators from having direct access to TV content.

In practice, the two broadcasters become the exclusive holders not only of the rights for the transmission of the works on the analogue network, but also of all rights relating to any transmission means/platforms (already invented or to be invented) and to any distribution channels, with no limits in time and number of uses.

In almost all cases, they also become the exclusive holders of the rights for the transmission of audiovisual works outside Italy.

**As a result, the offer of TV content for online transmission (and for all other transmission channels/platforms) is currently in the hands of the two broadcasters<sup>4</sup>.**

### ***3.2 The effects of the broadcasters’ total buy out policy***

The acquisition, by the two broadcasters, of all categories of transmission rights (relating to all transmission channels/platforms) has had the ultimate effect of obstructing the free movement of the products and the development of new transmission platforms.

In this respect, suffice it to consider what has been rightly pointed out by the Italian Antitrust Authority, according to which in the market for free TV, as in the market for pay-TV, “*competition between operators is linked to the availability of TV content particularly attractive for the viewers. In this way, the inclusion, in the contracts for the acquisition of TV content entered into by companies with significant market power, of exclusivity clauses, especially relating to several platforms and/or for long (pluriennial) duration, and of clauses for the protection from the transmission of the programmes on other channels, may constitute an element capable of preventing the entry of new operators, or at least of raising their entry costs*”<sup>5</sup>.

This is exactly what happened in this case. By imposing contracts providing for the acquisition, with no limits of duration and number of uses, of the exclusive rights for the transmission of TV programmes on all platforms and transmission channels (already invented and to be invented), Rai and Mediaset have been capable of restricting the access to audiovisual content by online operators (and by all other operators active in the emerging markets), thereby obstructing the development of this new distribution channel.

**5. How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?**

The development of new distribution channels would be highly beneficial to the audiovisual industry in Italy.

If Italian producers were allowed to retain their rights in the works they produce and access alternative distribution means/platforms, they would be able to lessen their dependence from the two analogue broadcasters and grow significantly, investing new capital on innovative and technologically advanced programs.

This would, in turn, lead to the creation of a wide offer of content for online transmission, thereby fostering competition, innovation and growth in the audiovisual industry, to the benefit of consumers.

The current legal and regulatory framework in Italy is greatly deficient in this respect.

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<sup>4</sup> It is worrying that Rai and Mediaset have already concluded agreements with the mobile operators for the supply of content for online transmission. This situation not only limits the variety of offer of online content, but is capable of reducing to a great extent the production of programs specifically designed for online transmission.

<sup>5</sup> See the Inquiry on the TV sector carried out by the Italian Antitrust Authority (decision of 16/11/2004), p. 101.

The only measure intended to preserve the position of the independent producers towards the analogue broadcasters, by granting them the propriety of secondary rights, was introduced by the AGCOM in 2003 (pursuant to law n. 122/98).

Such regulation<sup>6</sup> provides that, after the expiry of 7 years (5 years for documentaries), broadcasters shall assign the “residual” rights on such works to the independent producers.

However, such measure had no practical effect, as Rai and Mediaset, ignoring the provisions of the regulation, never agreed to assign independent producers the rights in their works, even following the expiry of the 7 (or 5) year deadline provided by the AGCOM.

In this respect, APT believes that the adoption by the European Commission of measures such as the ones indicated at par. 33 below would strongly contribute to an effective application of the regulation by the two analogue broadcasters.

### **New business models and transition of traditional ones into the digital world**

**8. Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?**

The possibility for Italian producers to offer their content on all different transmission platforms/means and across Europe (and beyond) is currently impeded by the economic context which characterises the TV sector.

As we explained in further details above, Italian producers are, in nearly all cases, deprived in perpetuity of all rights in their works, relating to all kinds of transmission means/platforms and to all countries in Europe and outside Europe.

It is only by allowing the removal of such barriers that audiovisual works will be able to circulate on all platforms and across the national boundaries.

**11. What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?**

As mentioned above, producers in Italy are not able to retain rights in the works they produce.

This means that they are not able to fully exploit the economic potential of their audiovisual productions and attract new investments on capital markets.

Moreover, they are not able to access the Community funds provided by the “*MEDIA*” programme.

As Italian producers are deprived of all rights in their works, they cannot benefit from the European subsidies, although Italy is one of the 5 major countries financing such program (together with France, Germany, the UK and Spain)<sup>7</sup>.

This has strongly limited the growth of the Italian TV production industry, whose stage of development is far behind than that of other European countries (e.g. France and UK).

It is not a coincidence that in Italy, contrary to what happens in the rest of Europe, the independent TV production industry (although it is competent, creative and skilled) is very fragmented, with a virtually artisan structure, and composed, almost exclusively, by small-size undertakings.

As they are not able to fully exploit their productions and do not have access to the Community funds, the Italian independent producers have not been allowed to grow significantly and develop new and more technologically sophisticated products.

It is only by breaking this vicious circle and allowing independent producers to retain their rights that it will be possible to guarantee the creation of a competitive environment in all transmission means/platforms and the development of a strong audiovisual industry in Europe, capable of competing on international markets.

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<sup>6</sup> See Decision n. 185/03/CSP, “*Approval of the regulation concerning the criteria for the assignment of shares of the residual rights deriving from the time limits of the rights for TV exploitation acquired by broadcasters*”.

<sup>7</sup> Only those producers, owners of the rights on the works, which assign them to the broadcasters for periods no longer than 7 years can benefit from Community funds (Media Programme). Currently, therefore, Italian producers, deprived perpetually of all the rights on the works they produce cannot, in practice, have access to European subsidies.

APT also believes that, in order to encourage the development of a strong audiovisual industry in the whole of Europe and to foster competition in this sector, online service providers should be subject to the same obligations of supporting the creation and transmission of European and independent works, currently provided for other audiovisual operators by the Television without frontiers Directive<sup>8</sup>.

The proportion obligations and the investment quotas provided by such Directive have had very positive effects on the development of independent productions. As online transmissions are due to play an increasingly important role in the audiovisual sector in Europe, APT believes that it would be necessary to extend the obligations to promote and invest in the production of and access to European and independent works also to online service providers<sup>9</sup>.

A different approach to online transmission would also result in unjustified exemptions and distortions of competition between channels and would undermine the principle that all channels should contribute to the development of a competitive European audiovisual sector.

### **Licensing, rights clearance, right holders remuneration**

#### **16. How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?**

As correctly stated in the European Charter, *"availability of films is directly related to the possibility of financing the high costs of their production"*.

This is why, with a view to developing this market rapidly, commercial agreements between online service providers and content producers *"should be based on the principle of the availability of films on a fair, economically sound basis"*<sup>10</sup>, so as to allow the creation of contents specifically designed for online transmission.

This is what happens in some more developed European countries, where specific systems allowing a fair remuneration of independent producers have already been introduced.

### **Legal or regulatory barriers**

#### **18. How does the country you mainly operate in encourage the development of creative online content and services?**

In Italy the only attempt to encourage the development of creative online content and services was made last year, with the signing of the so called "Patto di Sanremo" on 2 March 2005.

The Pact was signed by the Italian Government and by around 50 operators active in the sector: right holders, production companies, distribution networks, with the purpose (among others) of encouraging *"the creation and the competitive development of sustainable business models providing remuneration for the players active in the value chain, for the growth of the content market"*.

To this end, the Pact gives some general guidelines to be followed by the operators (right holders, connectivity suppliers, production companies and distribution networks) in the drafting of codes of conduct.

This initiative, although it is noteworthy, does not seem to have led to any real effects: as far as APT is aware, no codes of conduct have been drafted and no agreements reached between the parties involved.

In the light of the economic context which characterises the audiovisual sector in Italy, a system of self-regulation is not, in itself, sufficient to guarantee the development of the online market, without the adoption of more decisive and concrete measures by the EU and the national institutions (please see below par. 32 and 33).

### **Release windows**

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<sup>8</sup> See articles 4 and 5 of Directive n. 89/552/EEC, as amended by Directive n. 97/36/EC, and art. 3f of the Commission's *"Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC"* (hereinafter "Commission's Proposal").

<sup>9</sup> This is already the case in some more developed European countries, such as France.

<sup>10</sup> See the European Charter, par. 1.2.

**19. Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?**

Release windows are currently not applicable because there is no subsequent exploitation of audiovisual content, as analogue broadcasters retain all rights in the works, relating to all kinds of transmissions means/platforms, in perpetuity.

### **Digital Rights Management systems (DRMs)**

**25. Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?**

APT believes that the use of DRMs (at present very limited) should be fostered and encouraged as much as possible, as they represent effective means to fight piracy.

APT’s members are currently evaluating the possibility of digitalizing all the works that they have produced, and, to this end, they are in the process of applying for International Standard Audiovisual Numbers.

### **Complementing commercial offers with non-commercial services**

**30. In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?**

APT strongly supports the creation of online archives of audiovisual productions.

In APT’s opinion, this would rightly complement commercial offers and would help developing public interest in audiovisual content.

### **What role for public authorities?**

**32. What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?**

In the implementation of the relevant European provisions (please see par. 33 below), national governments should safeguard pluralism in the media and ensure the protection of competition with a view to avoiding the abuse of dominant positions by the incumbent operators (i.e. analogue broadcasters).

In order to achieve these aims, the first step for national governments should be the introduction of a legislation implementing the relevant European provisions (please see our suggestions at par. 33 below) and capable of regulating, in a fair and non discriminatory manner, the exploitation of the rights relating to the different transmission means/platforms, so as to allow the original producer of a work to exploit it on all available channels (even those that do not exist at the time of its creation).

In this way, national governments will support the making available of rights for licensing of audiovisual content on new platforms and, therefore, will support the growth not only of the independent production industry but also of online service providers, digital channels and new media platforms.

Since the negotiating strength of independent producers is likely to remain limited, national governments should set out principles (also by way of guidelines) to be applied when agreeing terms for the acquisition or commissioning of independent productions in order to guarantee that the relevant agreements will be fair and economically sound.

Particularly, these principles should: (i) secure a clear and transparent process for acquiring/commissioning independent productions; (ii) guarantee a fair pricing taking into account the high costs faced by independent productions; (iii) secure that satisfactory arrangements are made about the duration of “exclusivity windows”; (iv) make provision for a fast dispute resolution mechanism in the event of a dispute arising between the parties (national communications authorities may have a role as final arbiter in any dispute).

It is of fundamental importance, also, that national authorities foster inter-professional agreements on the development of new business models between independent producers and content distributors (online services providers, telecom operators, broadcasters, etc.) on the basis of the principles set out by national governments.

Finally, national governments should put in place incentive schemes:

- to promote the development of high quality independent audiovisual products of social, linguistic and cultural relevance which take into account national specificities (the circulation of this kind of works may promote a satisfactory degree of cultural and linguistic diversity in the common market);
- to promote investment in the development of the technological infrastructure necessary to allow all citizens to access online contents. For example, improving the distribution of the required devices in the schools.

**33. What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?**

APT believes that the European Commission should promote the adoption of measures aimed at introducing in all Member States a common set of rules capable of regulating, in a fair and non discriminatory manner, the exploitation of the rights relating to the different transmission means/platforms, so as to allow the original producer of a work to exploit it on all available channels (even those that do not exist at the time of its creation).

Such measures should impose on incumbent operators:

- to conduct transparent and separate negotiations for the various transmission channels/platforms (analogue, digital, DVB-H, pay-tv, etc.). Each transmission right (for each transmission channel/platform) should, therefore, be the subject of a separate contract, to be negotiated in fair conditions and with modalities which allow to attach a value to each right;
- not to make the purchase of the rights of exploitation on the analogue network directly or indirectly conditional upon the assignment of the rights relating to different transmission channels/platforms;
- to become owners of the rights of audiovisual works only for a limited duration and for a limited number of uses.

With reference to support measures, incentive schemes should be put in place at European level in order to finance substantially independent producers which invest in the development of new technologically advanced products for online distribution, in making available films in multilingual versions, in creating innovative format.

Finally, APT believes that the proportion obligations and the investment quotas provided by articles 4 and 5 of the Television without frontiers Directive and the obligation to promote the production of and access to European works provided by art. 3f of the Commission's Proposal should be extended to online service providers (please see par. 11 above).