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# EBU Comments

## on the European Commission's public consultation on its Reflection Document on "Creative Content in a European Digital Single Market"

### EXECUTIVE SUMMARY

**The EBU calls for urgent *legislative action*** with respect to copyright licensing in the digital age.

All European providers of audiovisual media services (including broadcasters) should be enabled to maximize their contribution to the Information Society, to the benefit of consumers and stakeholders alike. Practice has shown that "soft law", or the mere encouragement of stakeholder dialogue, is not the answer.

The EBU notes that there is a ***clear lack of Europe-wide instruments*** with specific rules to ***facilitate the licensing of rights*** by audiovisual media service providers, as defined in the Audiovisual Media Services Directive, and to create the necessary ***legal certainty***. The EBU argues that the current legal framework for licensing rights should be modernized and extended, on the basis of ***technological neutrality***, to cover all new media platforms, based on the following principles:

- **A single**, **coherent framework for audiovisual media services** provided under the editorial responsibility of the media service provider. This framework should apply to ***audiovisual media communications*** to the public, i.e. linear (broadcasting) and non-linear "broadcast-like" (including audio-only) media services. For the purpose of rights licensing, non-linear media services which are "broadcast-like" must be differentiated from mere *retail* on-demand services of individual content.

- **Facilitating rights licensing** by applying existing legal rules and practices for rights clearance and collective licensing to audiovisual media communications to the public in a ***technologically neutral* way**. All linear and broadcast-like non-linear media services should benefit from the rules and practices applied to traditional broadcasting, as both linear and broadcast-like non-linear services compete for the same audience.

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Consequently, in concrete terms the EBU proposes:

1. **Applying a similar *"country-of-origin" rule, as implemented for the communication to the public by satellite in the EU territory,* to all audiovisual media communications** to the public (linear and non-linear broadcast-like) offered by European media service providers on any media platform. This enables right holders to grant audiovisual media communication rights to all such media service providers, via a single, EU-wide licence.

2. **Extending the mandatory collective licensing regime** established for **cable retransmission** under Articles 9 and 10 of the 1993 Satellite and Cable Directive to the simultaneous, unaltered and unabridged ***retransmission of broadcasts by any third party, irrespective of the delivery technology.***

3. **Allowing the legitimate provider of audiovisual media services to make *incidental reproductions*** which are necessary for technical purposes and incidental to the process of communicating the service to the public, so as to create a coherent, unitary licensing regime.

4. **Explicitly entitling, and for certain uses preferably obliging, Member States to make use of *"extended collective licensing"*** regimes, in order to facilitate ***one-stop-shop*** licensing arrangements. Such extended collective licensing systems should apply, in particular, to "broadcast-like" non-linear services including the use of ***broadcasters' archives*** or so-called ***start-over services***. Where it concerns music as an integrated part of audiovisual (including radio) programmes which are made available in non-linear broadcast-like services, and notably as ***catch-up services***, Member States should even consider going a step further so as to ensure that the licensing of this use to the audiovisual media service provider includes both the necessary rights and the worldwide musical repertoire via a one-stop-shop system. Where the linear use of the content of those services is already cleared via collective licensing, it does not make economic or practical sense to create another regime for the non-linear broadcast-like use of the same content.

5. **Subjecting collective rights management to a harmonized European framework** setting out the definition, the main tasks and obligations of collective management societies (and entities acting as such fiduciaries), including dispute resolution mechanisms. This would provide a guarantee for a level playing-field in Europe between collective rights management societies and other entities which operate *de facto* as collective rights management, and in particular vis-à-vis users.

## 1. INTRODUCTION: The urgent need for copyright reform

Within the context of the debate on Creative Content Online, the EBU would like to raise awareness of the particular role of broadcasters. First of all, broadcasters' traditional activity of delivering linear scheduled programme services, predominantly by wireless distribution, is now only one aspect of their activities. Broadcasters deliver their content on a *multiplicity of technical platforms*, and clearly this will become more and more so in the near future, whether through wired or wireless connections, and in both linear and non-linear services. For example, delivery of programmes on demand, either by online streaming or through podcasting, separately from their linear scheduled broadcasting, is already commonplace. Moreover, broadcasters are a prime supplier of public value for European citizens. For example, public service broadcasters invest EUR 10 billion in new original European programming each year. The role traditionally played by public service media is just as relevant on new digital platforms: providing a trusted "public space" offering audiences innovative new content of the highest editorial standards.

Secondly, broadcasters are providers of audiovisual media services in the sense of the Audiovisual Media Services Directive as they bear the editorial responsibility for the choice and assembly of the content of their services. In addition, broadcasters are also the largest investors in local and original audiovisual content and producers thereof. Given the steady increase in online and other media platforms, who need to offer quality content to the consumer, it is therefore crucial to recognize that broadcasters remain the entities making the necessary financial and organizational investment in assembling and scheduling (and partly producing) the programming (the mere transmission as such can also be carried out by a third party). This explains why an effective rights clearance regime is of the utmost importance for broadcasters and non-linear broadcast-like media service providers, in the sense of the Audiovisual Media Services Directive, and why the future of Content Online is inextricably intertwined with the legal framework for that regime.

Finally, as indicated in earlier EBU submissions, Content Online cannot be dealt with via copyright rules alone. The entire regulatory framework for audiovisual media, and in particular the Audiovisual Media Services Directive, but also for the infrastructure under the Telecom Directives, as well as the issue of "net neutrality" needs to be embedded in a *coherent set of rules* so that they all contribute effectively to achieving the common goals of the Information Society and the Internal Market, and to providing the necessary legal certainty to the relevant market players.

In the light of the foregoing, the EBU welcomes and supports the Commission's explicit wish to play a pro-active role in ensuring a culturally diverse and rich online content market for consumers. The EBU shares the Commission's view that the responses to most of the challenges mentioned in the Reflection Document must be of a common European nature, in line with the policy guidelines of the Digital Agenda recently presented by the President Mr José Manuel Barroso, which call for targeted action focussing on both practical solutions and the possible need to update existing legislation. The EBU also shares the Commission's view that "different trends and considerable challenges arise depending on the type of digital content" and therefore welcomes the Commission's sector-specific approach in this context.

In the EBU's view, the aims of the new approach in copyright law should be:

- *to encourage the availability of legitimate services, as one of the most efficient ways of fighting piracy;*

  Consumers are entitled to expect, offline and online, attractive legal offerings of high quality. Without ensuring user-friendly access to sufficient legal offers, the young (and particularly the very young) generation will ultimately refuse to accept the rationale that copyright protection is a necessary incentive and reward for creativity. It is therefore essential, as the Commission indicated, that legal offers can evolve to allow consumers to access content also on a cross-border basis.

- *to remove existing impediments to the circulation of content via new media, and to avoid the creation of new restrictions on access to content;*

  As a matter of urgency we must avoid a situation where the Internal Market for online content becomes more fragmented than that of analogue media services across Europe. This requires pro-actively facilitating the licensing of rights for legitimate audiovisual media services in the digital environment.

- *to confirm media platform-neutral rules, and particularly regarding rights clearance*;

  Supporting the development of the creative industries and their contributors requires audiovisual media content to be made easily, readily and widely accessible to the consumer on all media platforms, through any technology, and regardless of whether on a simultaneous, time-shifted or on-demand basis.

*whilst preserving the fundamental objectives of copyright protection, including securing adequate compensation for all right holders.*

Promoting the attractiveness of lawfully-available services also entails ensuring that there are sustainable economic models for users of copyright. Maintaining the full strength of the existing rights must be combined with the above-mentioned aims so that these rights can be licensed and paid for in the most appropriate, cost-effective, efficient and secure way and, with respect to collective rights management, ideally through one-stop-shop licensing systems.

## 2. POSSIBLE EU ACTION: CONSUMERS' / COMMERCIAL USERS' ACCESS (Reflection Document, points 5.1 and 5.2, pages 14-19)

### *a) Main challenges and the need for legal certainty*

With particular respect to the online dissemination of ***music*** with its multiple layers of rights ownership, audiovisual media service providers (including television and radio broadcasters) face a specific and very important challenge concerning the future licensing framework, and not least in the sense of cultural diversity. For example, it should not be overlooked that in the audiovisual media sector the primary source of

legal uncertainty is created by basic misconceptions of the (legal) need for multi-territorial licensing. This is because a single act of audio or audiovisual media communication requires only a single licence from one society, so that multi-territory licences are needed *only for "retail-like" on-demand servi*ces. Furthermore, licensing structures which operated smoothly in the analogue world for audiovisual media services providers can, and should be, easily extended to online uses (linear and non-linear) by those media service providers. In this context, it is worth noting that a recent study confirmed earlier positions adopted by the EBU that the latest developments in music rights management lead to a fragmentation of repertoire and/or rights, with the result that "there is no truly multi-territory and multi-repertoire system in place".[1] We must strive for solutions which preserve the legitimate interests of efficient and truly representative collective societies (and the interests of all music right holders to receive adequate remuneration) so that in *each* Member State they can grant access to the *worldwide musical repertoire* to audiovisual media services (see also below under 3.*a)*).

The EBU also agrees that there is an urgent need to facilitate or at least clarify the rules and practices for the collective licensing of some rights in online services, and particularly given that the very broad definition of the reproduction right overlaps with the communication to the public (and "making-available") right in the digital world (see also below under 2.*d)(i)*).

***b)*** ***<u>Towards enhanced licensing efficiency while fostering easy access to more content</u>***

In a world of continuing technological evolution, ***all audiovisual media service providers have to adapt to the evolving needs and expectations of the public***. Consumers wish audiovisual content and, in particular, public service content to be available in a way which allows them to choose the time of consumption. Examples of those demands for both linear and non-linear services are:

- "*catch-up*" *services* (and similar offerings) from broadcasters;
- *hybrid television receivers*, giving instant access to both linear programmes and non-linear services, and
- *time-shifting services* offered by digital platform operators (such as "start-over" services).

In parallel to these trends is the ***diversification of media platforms***. Today, consumers use various platforms for their information, cultural and other interests. This means that audiovisual media services need to be present on a large number of platforms in order to be available to all consumers. A modern European copyright framework should thus facilitate such multi-platform availability of legal content, for national and cross-border services alike. Obviously, the creation of a modern framework which is conducive to such wide access necessitates a dramatic improvement in ***the possibilities for audiovisual media service providers to clear the necessary rights for their services***.

Consequently, a new European copyright framework should assist all audiovisual media service providers to meet the justified expectations of consumers, while maintaining the strength of the creative industries and the enforceability of their rights. Better access to

[1] See Collecting societies and cultural diversity in the music sector, IP/B/CULT/IC/2008_136, 06/2009, study on behalf of the European Parliament, Directorate General for Internal Policies.

content will not only fulfil the requirements of users and consumers but will help promote the circulation of legal content, to the advantage of all participants in the content delivery chain.

**c) <u>No one-size-fits-all</u>: Distinguish "broadcast-like" from "retail-like" online services**

A proper distinction needs to be made between on-demand services which are "broadcast-like" and those which are "retail-like", as the first type falls within the category of audiovisual media services, as defined by the Audiovisual Media Services Directive. Audiovisual media services are different from the *commercial sale* of individual content items (feature films, CDs, songs, etc.), and particularly as audiovisual media services are provided with editorial responsibility for the content. In contrast, "retail-like" online services are *specifically intended and construed to offer end-users* (often in different countries) *the possibility to purchase a permanent copy* of the material *on the basis of a commercial transaction* (e.g. a "download-to-own" copy sold for a unitary price per item or as part of an "all-you-can-eat" package). This situation would be almost identical to the commercial distribution (sale) of physical copies.

The above-mentioned distinction is not only in line with the Audiovisual Media Services Directive, but also corresponds to the reasoning for the introduction of the "making-available" (on-demand) right in international *copyright* law. This right was intended specifically to cover the "Internet kiosk" type of services, i.e. "retail-like" commercial sales of books, CDs, DVDs or individual songs, films and other protected products through online operators such as Amazon and iTunes, as it was predicted that these services could ultimately replace traditional retail shops for such products. The making-available right was not intended to cover any and all kinds of non-linear media services (communications to the public).

***Consequently, licensing rules and collective management systems which have proved effective for linear media services,*** to the benefit of right holders and users alike***, should as far as possible be extended to non-linear broadcast-like uses by such media service operators***. This can be achieved by covering both linear and broadcast-like non-linear use under the notion of "*audiovisual media communications*", because all such services are competing for the same audience as broadcasts, and the nature and the means of access to such services would lead the consumer reasonably to expect regulatory control of the content via the scope of the Audiovisual Media Services Directive. This would include all those services which are already subject to the Audiovisual Media Services Directive, as well as all radio (audio-only) services sharing the same characteristics as such services.

Such a modern concept and distinction are helpful for various reasons:

- They guarantee that a direct audiovisual media communication to the public by any European provider of an audiovisual media service (in the sense of the Audiovisual Media Services Directive) is regarded as one single act and *is thus to be licensed under a single (national) clearance regime* (so that the licence is equally valid for any other Member States where the audiovisual media service is received - see also below 2.*d)(ii)*);

- All linear and broadcast-like non-linear services would follow a coherent regime of licensing. All copyright-holders would remain fully entitled to authorize, or not, the use of their rights in a non-linear media service via their individual or collective agreement with the media service providers;

- For broadcasting and broadcast-like services also from the perspective of *authors and other right holders*, the decisive issue is not a distinction between broadcasting and non-linear use but receipt of adequate remuneration for communication to the public (given that both broadcasting and broadcast-like on-demand services fall within that right);

- In any event, where rights clearance between *audiovisual producers* on the basis of exclusive rights and media service providers takes place on an individual basis (for example, in the relationship between film producers and broadcasters), this licensing practice would be fully maintained;

- It would be necessary only for the category of commercially-oriented, "retail-like" services to develop new licensing methods (such as multi-territorial licensing if the sales transactions as part of those online offers are intended to occur in various countries).

**d) <u>Facilitate rights licensing</u> for all audiovisual media services**

A modern copyright licensing framework for audiovisual media communications should have a *technological/platform-neutral basis*; this would create a coherent media and copyright regulatory environment in Europe with a uniform concept, thus ensuring easier access to quality content.

For a number of issues raised in the Commission's Reflection document, the above-mentioned distinction would have the following consequences:

*(i) <u>Incidental reproduction</u>: Consolidating online rights into a unitary licence*

All online transmissions (except those which are "live") require a prior reproduction of the content before the actual transmission. In order to create a "unitary licence" for such activity, the authorization given to the audiovisual media service providers for such transmission should encompass the possibility of making any reproductions *which are necessary for technical purposes and incidental to the process of communicating the service to the public*. This means that all audiovisual media communications (linear and non-linear) should follow this "unitary licence" approach. Otherwise, for example, a collective licence for an audiovisual media communication could be frustrated by a different entity invoking the reproduction right. Consequently, it must be ensured that such communications which are a single act under copyright, and the rights to which are granted either by law or by agreement, can be licensed via a coherent, single rights clearance regime.

*(ii) Communication to the public by satellite as a model for online communication by European providers of audiovisual media services*

The Audiovisual Media Services Directive regulates "audiovisual media communications", i.e. including both broadcasting and non-linear broadcast-like services, on any media platform. The 1993 Cable and Satellite Directive provides for the notion of a (direct) "communication to the public by satellite". Extending this notion to all European audiovisual media communications to the public (by reference to the definition in the Audiovisual Media Services Directive) allows the ***application of the EU-wide "single licence"*** approach (i.e. a licence based on the law in the country of the communication's origin or, in the Commission's words, the country "with which the service provider is most closely linked") for all European audiovisual media services on any media platform (i.e. linear and non-linear broadcast-like services). Similarly as with the licensing of satellite rights, this model would ensure that in the relationship between the right holder and the audiovisual media service provider any online licence to an audiovisual media service provider is EU-wide by default, but the parties involved remain free to agree contractually on the *modalities of implementation*. Thereby, this model facilitates EU-wide licensing to all European audiovisual media operators, just as the current satellite model helped European satellite providers to flourish.

*(iii) Cable licensing as a model for all simultaneous and integral retransmissions of broadcast channels*

The cable licensing model for simultaneous and integral retransmission of broadcasts should be extended to all situations where broadcast channels are retransmitted integrally and simultaneously, irrespective of the delivery technology. Indeed, the current limitation of the ***European licensing regime for the retransmission of broadcasts*** to cable (and microwave) platforms only is outdated. There are numerous other situations where a simultaneous and integral retransmission of broadcast channels takes place which, in economic terms, are fully comparable to the cable retransmission model. The decisive factor in this comparison is not the media platform used for such retransmissions e.g. mobile platforms and (closed network) IP platforms, whether DSL-based or over the Internet), but whether a third party is engaged *on its own account* in a *commercial offer to end-users*, i.e. providing access to the channels only to the paying subscribers of the retransmitting entity (whereas the respective platform may also be financed by advertising), whatever technical means of delivery this entity may employ. In all those situations, European media providers may wish to license the retransmission rights of their national programme services to the retransmission operator, just as the licensing of retransmission rights to cable operators takes place today. This will happen only if the retransmission rights can be cleared easily and effectively. Today, only cable operators have the benefit of the licensing system introduced in 1993, so that such an operator needs to clear the retransmission rights only with the broadcaster, and the remaining rights with the collecting societies. However, it is doubtful whether other operators of retransmission activities are also legally entitled to profit from that system.

Moreover, it should not be overlooked that this licensing scheme for cable retransmission has shown itself to be an efficient legal framework for fostering transfrontier access to broadcast channels in Europe and is still a valid and effective basis for the retransmission contracts of broadcasters and other right holders in the cable sector. Consequently, the Commission needs to harmonize this matter in order to uphold the principle of the free flow of information in Europe and the transfrontier exchange of national programmes for promoting European culture and a common understanding.

The modern concepts proposed above are to be preferred, as they allow for a much easier introduction of appropriate steps to improve the copyright licensing framework, as compared to the possible development of a Community-wide copyright law or alternative forms of remuneration. Further study would be required of the consequences of these two suggestions.

## 3. POSSIBLE EU ACTION: PROTECTION OF RIGHT HOLDERS (Reflection document, point 5.3, pages 19-20)

The EBU supports the statement in the Reflection Document that "especially in the area of licensing of authors' and composers' rights in musical works the traditional "property rights" approach is entwined with cultural aspects and considerations relating to the collective representations of authors' interests" and that "future EU policy in the field of online licensing has to recognize that (…) considerations of licensing efficiency need to be reconciled with concerns about collective representation of certain rightsholders".

### a) Collective rights licensing: Enhance one-stop-shop arrangements

Collective licensing can take various forms, apart from the purely voluntary version. The facilitation of rights management via collective licensing will ultimately lead to the provision of additional services and more possibilities for remunerating right holders. In the field of collective licensing, the following principles should apply:

- Collective management of rights particularly in fields of large-scale usage such as the licensing of *petits droits* music rights should be ***tailored to the one-stop-shop needs of audiovisual media service providers***. For example, collective agreements for the use of music by broadcasters have proven to be an effective licensing tool for *linear* media services, and those agreements should therefore be extended to include *non-linear broadcast-like* services. If need be, a *mandatory* collective licensing regime should be considered with respect to music used as an integrated part of an audiovisual media service in order to guarantee the desired result (i.e. for ensuring both the worldwide repertoire and the necessary rights clearance), and especially if a system which has proven its effectiveness would become fragmented between various repertoires and rights management entities.

  For example, it would make no sense to create a different licensing structure for the ***"catch-up services"*** of broadcasters, because the contributions to the programmes involved have already been subject to an extensive individual or collective rights clearance process. A mere extension of these arrangements

already in place, and particularly with respect to the music integrated into such programmes, would therefore be the most appropriate and effective solution. To achieve that aim, it should be guaranteed that the rights necessary for such an extension of the existing collective agreements are made subject to, or are not withdrawn from, the collective licensing regime.

- Further collective rights clearance systems should be available at the European level as a ***possible tool-kit to be implemented on the national level by Member States***.

  In particular, the ***"extended collective licensing"*** systems as known in the Nordic countries are lacking on a European level. Those systems allow an association of right owners to negotiate with users certain framework agreements on the licensing of rights and on remuneration. In the Nordic countries those systems have existed since the 1960s and have proved to be an excellent tool for appropriate rights clearance on adequate terms for all parties involved, and not only for "orphan works" but also for other purposes, such as for (certain) uses by schools, universities, museums and other cultural institutions. The basic approach of the extended collective licensing system is that a collective agreement signed by a user with an organization representing a substantial number of (a certain category of) right holders, is deemed to entitle that user to use other protected material of the same nature even if the right holders of such material have not expressly mandated that organization. However, these right holders remain entitled to opt out from the collective agreement. Thereby, an extended collective licence interferes as little as possible with the freedom to contract and aims at maximizing the effective management of rights, whilst providing the user with the necessary protection against claims by outsiders.

  A typical example of broadcast-like services for which the "extended collective licence" provides a possible solution is the ***online use of broadcasters' archives***. The problem of broadcasters' archives (i.e. their own and fully financed productions) follows on from the introduction of the exclusive making-available right without appropriate rules for the clearance of that new right. This has resulted in a loss-loss situation for all stakeholders involved. Some Member States, and in particular the Nordic countries, introduced special provisions in their copyright law with a view to facilitating such use via one-stop-shop collective licensing agreements. A general consensus exists that something needs to be done concerning broadcasters' archives, given that the magnitude of this problem goes far beyond that of individual orphan works. However, the requirements of a diligent search for the right holders are not suitable for broadcasters' archives as these requirements establish only when a work can be considered to be of an "orphan" nature. The sheer volume of yearly contracts pertaining to the broadcasters' archives shows that the requirements for a diligent search would not solve, but merely exacerbate, the administrative burden and, thus, cannot be an appropriate and functional tool for the necessary rights clearance. This explains why all collective licensing solutions concerning broadcasters' archives established so far in some European countries are *different* from the legal solutions provided for orphan works. (A diligent search for the right holder remains, of course, relevant for the distribution of the remuneration.)

Another example of non-linear broadcast-like services which were clearly not intended to be covered by the exclusive on-demand right are so-called ***"start-over" services offered by digital cable operators.*** These services allow viewers of a linear programme to interrupt it or to restart it from the beginning and may be considered a form of on-demand use in some countries. The concept of "extended collective licence" would make the rights clearance involved subject to a form of collective licensing regime.

Consequently, the European framework should preferably oblige Member States to introduce extended collective licensing systems for some specific uses, and in particular for the online use of broadcasters' archives and for certain content included in audiovisual media services, in order to facilitate and secure rights clearance for audiovisual media service providers. Apart from these specific uses, it should be left to the stakeholders in each Member State to decide for which *other purposes* they may wish to use such collective licensing systems for achieving the desired results.

***b) <u>European governance framework</u> for collective rights management***

The enhanced importance of the collective management of rights makes it necessary for the ***supervision*** of such management to be harmonized through a ***binding legal framework on a European level with a set of minimum requirements*** for the good conduct of collecting societies. Such a framework should set out the definition and the main tasks and obligations of collective management societies (and entities acting as such fiduciaries), including dispute resolution mechanisms. This would provide a guarantee for a level playing-field in Europe for all societies and entities which operate *de facto* as collective rights management vis-à-vis users.

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