"Creative Content in a European Digital Single Market: Challenges for the Future"

Reflection Document of EU Commission's Directorates General for Information society and for Internal market

Comments from RTL Group

RTL Group welcomes the opportunity to comment on the joint Reflection Document of DG INFSO and DG MARKT on the Challenges for the Future of Creative Content in a European Digital Single Market, as this document addresses several fundamental aspects of our company's business.

Executive Summary

1. RTL Group ensures widespread distribution of audiovisual content and of music to consumers across Europe. Digital content is made available on a daily basis to more than 200 million consumers on all transmission modes, from digital terrestrial to digital satellite and from online to mobile, in linear and in non-linear form. RTL Group is committed to serve the European citizens and to allow that its content be accessed wherever and whenever possible.

2. RTL Group endorses the Commission's approach to distinguish digital content according to the type of content. The exploitation of audiovisual content is intrinsically linked to the concept of territorial exclusivity whereas music, to the contrary, calls for highest possible consumption on anybody's service or platform.

3. RTL Group points out that "online" is to be regarded as another mode of distribution of content and that there is nothing such as "content online" which could be looked at in isolation. It is not conceivable to have a copyright regime for content "online" which is distinct from digital content distributed via transmission modes other than online.

4. Commercial practices in rights acquisition and rights licensing have to adapt to the new online reality. However, fundamental principles such as the primacy of contractual freedom for the acquisition of rights, the principle of technical neutrality and fair remuneration of right holders have to be preserved.

5. RTL Group takes the view that the 1993 Cable and Satellite directive, in conjunction with the 1989 Television without Frontiers directive, has worked well and facilitated cross-border distribution of TV programmes. The country-of-origin principle for satellite transmission and the mandatory collective administration provisions for cable

retransmission of simultaneous broadcasts have proven to be successful tools in the achievement of a single market.

6. RTL Group is favourable to an extension of the Cab/Sat directive, if reviewed, for linear/simultaneous transmission on mobile and online services. The application of the country-of-origin principle to any form of primary broadcast including online transmission would, as it did for satellite transmission, immediately solve the problem of multi-territory licenses and limit the commercial user's obligation to license but mono-territory rights. Mandatory collective administration provisions for linear/simultaneous online retransmission would facilitate the distribution of such services by satellite, online and mobile platform operators.

7. RTL Group recalls that the exclusivity of the broadcasters' neighbouring right in relation to secondary acts of exploitations of primary broadcasts by third parties is the logic extension of the exclusivity as granted under the initial contractual agreement for the acquisition of primary rights. This exclusivity of the broadcasters' neighbouring right therefore is inherent to the principle of primacy of contractual freedom.

8. An obligation for broadcasters to acquire multi-territory rights for TV content, or for TV producers to license audiovisual rights, on a pan-European basis does not make sense, as there is no actual business case supporting this practice (due to the European multi-language landscape) and as this would undermine the territorial exclusivity, which is the cornerstone of our industry and of the financing of the audiovisual production sector.

9. Conversely, RTL Group notes that the unavailability of multi-territory licenses for the global music repertoire for satellite, cable and online distribution of audiovisual and music services continues to persist. The refusal to offer such multi-territory licenses through a one-stop-shop system is the result of artificial obstacles and clear market failure. Legislative intervention therefore is unavoidable.

10. In this respect, RTL Group welcomes the Commission's proposal to consolidate the making available right and the reproduction right into a unitary license. The Commission, in doing so, acknowledges that the direct licensing structures (the so-called "Option 3") have ultimately failed.

11. RTL Group endorses the call for a framework directive on collecting societies and urges the Commission to present a proposal in the near future. A framework directive should integrate the Recommendations made by the UK Monopolies and Mergers Commission. The EC Commission has to ensure transparent information on activity-based cost in relation to each GEMA-category administered by music authors' collecting societies, both to authors and to commercial users. Competition for administration services to right holders and competition for copyright administration services to other collecting societies will only occur if such information is made available.

12. Extended collective licensing schemes are unsuitable to solve the problem of rights clearance for multi-territory use. The scope of these schemes is national only and right holders have the possibility to opt-out from extended collective licensing schemes.

13. A single European copyright title is unsuitable to overcome the territoriality of copyright. A right holder is entitled and cannot be prevented from "slicing" a European copyright title into 27 national rights and license each of theses rights individually to different commercial users (as is also possible for the Community trademark).

14. RTL Group opposes any form of flat rates or any other mechanism of compensation for "mass dissemination of copyright protected work" in the audiovisual sector. Remuneration has to be based on individual negotiations between righstholders and commercial users.

15. RTL Group urges the EU Commission not to undertake any specific regulatory action in the audiovisual sector without a thorough impact assessment and consultation of all stakeholders.

I. Introduction

1. RTL Group and the European Digital Single Market

RTL Group is well placed to submit comments to the challenges for the future of a European digital single market since it is an important actor in both the creation and the distribution of audiovisual content. Fremantle Media, RTL Group's production arm, is one of the world's leading producers of television content such as talent and game shows, drama, daily soaps and telenovelas, including The X Factor, Got Talent, Idols, Good times – Bad Times, The Apprentice, Neighbours, Family Feud and The Bill. RTL Group's broadcasting activities comprise 39 TV programmes in 9 EU member states. RTL Group broadcasters invest heavily in the acquisition of attractive audiovisual content but also in the production of inhouse and/or commissioned TV programmes. RTL Group television channels, production activities and 32 radio stations are extensive users of music. They broadcast a wide variety of genres and contribute to the European cultural diversity.

A substantial part of RTL Group's TV and radio services are cross-border. Today, RTL Group serves TV audiences in France, Belgium and the Netherlands out of Luxembourg. RTL Group's German TV programmes, which primarily serve a national audience, operate so-called advertising windows[1] for Austria and Switzerland. These commercial cross-border exploitations of TV programmes are accompanied by satellite distribution and cable retransmission outside the target countries. Thus, many of RTL Group's TV programmes are available to consumers not only in the target countries but also to audiences in other parts of the single market. The cross-border availability of TV programmes and audiovisual services is likely to increase even further through online and mobile distribution.

RTL Group's continuous success as a major European player is thus highly dependent on (i) its capacity to adapt content to local tastes and (ii) on its ability to move with its audiences in terms of distribution means. This requires presence on all distribution platforms, from the "traditional" terrestrial, satellite and cable distribution to the new online environment. The

[1] Advertising windows are a commercial option for TV programmes targeting the same language zone, in particular German and French. In an advertising window, the programme content remains unchanged with the only difference of exchanging the commercial advertising.

merging of traditional TV with the internet is already a reality and the massive penetration of the new technology into the consumers' homes is just a question of time.

RTL Group is thus committed to expand into purely digital activities. The digital world offers RTL Group, as both a content company and a company with a strong brand, many opportunities for new business models. RTL Group already today provides a broad range of services such as video communities, social networks and online games, and is gradually expanding its mobile TV activities. Video on demand and in particular catch-up services are more popular than ever all around Europe. RTL Group is committed to make programmes widely available to viewers in short form (clips and programme extracts) and long form (substantive programmes) via a variety of on-line platforms. These include RTL Group's channels own on-demand services and, where appropriate, third party sites which aggregate content or with which we have a particular partnership. These include the broadcasters own on-demand services such as RTLnow (Germany, Austria, Switzerland); M6 Replay (France), RTL Gemist (The Netherlands), Demand Five (U.K.) and also third party websites. Fremantle licenses audiovisual content direct to video-on-demand or download to own services such as iTunes, blinkbox, Joost, Klik TV, Voddler and others. Fremantle also makes original content for online services, such as Freak, an online drama of 16x4 minute episodes made in partnership with MySpace UK, PrintFriends, an online series on YouTube, ToyBoize (a scripted comedy series) and many more.

Commercial practices in rights acquisition and rights licensing have to adapt to this new reality. The fair remuneration of underlying rights owners is a key element but this has to be set within the context of the commercial reality of these on-line services which are still at a nascent stage of their development. Future regulation has also to be built on the principle of technological neutrality.

2. RTL Group is facing obstacles in the distribution of audiovisual services

The Commission points out that, within the internal market, providers offering so called creative content continue to face numerous obstacles in the distribution of products and services. We believe however that, some of the constraints may be entirely justified in certain sectors but completely artificial and arbitrary in other sectors. A sector-by-sector analysis, as suggested in the Reflection Document, therefore is key. A thorough analysis of the sectors should ultimately enable the Commission to distinguish between justifiable and unjustifiable obstacles. RTL Group agrees with the Commission that unjustifiable obstacles may have to be removed through targeted legislative action.

RTL Group is generally sceptical towards legal intervention. We have a clear preference for solutions provided by the market. However, legislative action is appropriate and even required in cases of evident market failure.

In 2000, RTL Group has challenged the unavailability of multi-territory licences for the global music repertoire for satellite, cable and online distribution of its TV and radio services. Ten years later, despite the EC Commission's CISAC-decision of 16 July 2008, the obstacles for multi-territory licensing by broadcasters of the global music repertoire continue to persist. Collecting societies were unable and, as it seems, also still unwilling to provide for workable solutions. Such market failure needs to be addressed by targeted legislative action (see below music section).

II. Preliminary remarks

RTL Group would like to make the following preliminary remarks:

1. RTL Group welcomes that the Commission places the discussion on creative content in the context of the European digital single market. Indeed, the digital single market is broader than and goes beyond content online. Online is another mode of distribution which exists next and parallel to terrestrial, satellite and cable distribution. There is nothing such as content online which could be looked at in isolation. Consequently, **it is not conceivable to have a copyright regime for content online which is distinct from digital content distributed via transmission modes other than online**. It would be absurd if rights for the same content (such as a TV programme or a linear or non-linear on-demand service) would be licensed differently, depending on the transmission mode used.

2. Digital and online distribution, however, are specific to the extent that it makes it very easy for anyone to copy and edit/alter someone else's work. Therefore, one should **contemplate specific enforcement regimes for piracy**. RTL Group understands that the Reflection document was not aimed at addressing this specific issue, but would like to emphasize the urgent need to seriously consider this issue and act accordingly during the next mandate of the EU Commission.

3. Creative content in a European digital single market needs to be assessed from two different angles. It is essential to distinguish between rights acquisition on the one hand and rights licensing on the other hand. At EU level, rights acquisition is and should continue to be solely governed by the **principle of contractual freedom**.

4. RTL Group fully supports the Commission's objective of creating a modern, pro-competitive, and consumer-friendly legal framework for a genuine digital single market for creative content. **Competition law has a prominent role** to play in this debate. RTL Group therefore believes that the Commission should ensure the involvement of all Commissioners into the debate.

5. RTL Group agrees with the Commission that the challenges to a European digital single market vary according to the type of digital content. The exploitation of audiovisual is distinct from the exploitation of music, as much as publishing and video games is distinct from audiovisual and music. Consequently, **there is no "one size fits all" solution for the various types of digital content** discussed in the Reflection Document. RTL Group will limit its comments and observations to its core activities, namely audiovisual and music.

III. Audiovisual content

1. TV Broadcasters' significant role in the production and distribution of audiovisual media services

RTL Group notes with surprise that the Reflection document does not mention broadcasting at all. Audiovisual content cannot be reduced to "film and video on demand". Digital audiovisual is also not restricted to online. Much of Europe's audiovisual content is distributed via digital terrestrial, digital satellite and other digital platforms. Broadcasters play a significant role in digital Europe.

TV broadcastings occupies a prominent role in the creation, production and distribution of audiovisual content. Producers look also continuously for new programmes and talents. Broadcasters invest massively in the acquisition of primary broadcasting rights and they spend significant amounts for the distribution of their services in order to reach their target audiences. Consumers on average spend 227 minutes on average (Europe) in front of their TV screens; TV still is – and will remain during a long period of time - the most important means of bringing audiovisual content to the European citizen.

The TV industry is not static but develops with and follows its audiences. TV programmes not only need to be present on all distribution modes; broadcasters and producers also have to respond to changing viewing habits. Consumers expect to consume and access TV content not only at the time of actual broadcast but also on a time shift basis. Today, catch-up services and preview offerings form part of consumers' expectations. In addition, consumers want to access all kinds of additional services built around successful TV programmes. Over the past years, TV broadcasters have developed into providers of both linear and non-linear media services.

It is essential to underline that TV broadcasters are an important part of the creative content industry. Broadcasters are different from mere content aggregators and also different from platform operators. They act as editors of creative content, support creative talent and distribute all of this creative content to large audiences. The "added value" to creative content contributed by broadcasters is ultimately the justification for the grant of the broadcaster's neighbouring right. The Commission is fully aware of the long lasting negotiations of an update of broadcasters neighbouring rights at international (WIPO) and at European (Council of Europe) level.

2. Specificities of audiovisual content

Audiovisual is the combination of images, sound and language. Language is an essential feature of an audiovisual work. The English language version of the latest James Bond is distinct from the French language version as is the German or Spanish language version. It is therefore generally accepted that each language version of the same audiovisual work is a separate licensable product.[2]

Another important feature of audiovisual is its consumption. The viewing of an audiovisual work such as a film, a series or a documentary is generally a singular event; repeated consumption of the same audiovisual work is rather the exception than the rule and will in general only occur after a significant time lapse (months or years). It is therefore essential for

[2] See Recital 16 of the Cab/Sat directive.

a commercial user to enjoy full exclusivity in the exploitation of each release window. A broadcaster, whether pay or free, needs full exclusivity, i.e. no one else is offering the same audiovisual work (in the same language version or in a commonly spoken language such as English) in the territory or territories for which the rights have been acquired. The undermining of the exclusivity would have a severe negative impact on the value of the right.

3. Cross-border availability of TV content: Television without Frontiers directive and Cable and Satellite directive

a. No obstacles for retransmission of TV programmes in the European Union

The Reflection document states in its introduction that obstacles still stand in the way of the free movement of the digital distribution of products and services and that consumers are denied access to creative content on a cross-border basis. This assumption, however, is not true for TV programmes. The 1989 Television without Frontiers Directive in conjunction with the 1993 Cable and Satellite directive have paved the way for cross-border distribution of TV programmes. The Cab/Sat directive has facilitated the cross-border distribution of TV programmes by two important measures. The first measure is the adoption of the country-of-origin principle for satellite transmission; the second measure is the introduction of mandatory collective administration of rights for cable retransmission (Art. 9 Cab/Sat) with the exception of the broadcaster's neighbouring right (Art. 10 Cab/Sat).

The Cab/Sat directive has worked well and served its purpose. Many TV programmes are distributed cross-border and can be accessed either directly by a satellite receiver (direct-to-home) or are retransmitted by cable operators. The German RTL channels for instance are retransmitted in almost all member states. The fact that a considerable number of TV programmes are not retransmitted in the single market does not prove that their unavailability is caused by legal/regulatory obstacles. In many cases, there is either not sufficient market demand or there is no business case. The unavailability of a Portuguese TV programme in Germany or a German TV programme in Portugal may simply be the result of the fact that there is neither a business case for the broadcaster nor for the cable operator. The TV broadcasters do not sell advertising in Germany respectively in Portugal and they do not receive an additional remuneration by the advertisers for passing the advertisement in Portugal respectively Germany. Additionally, the German and the Portuguese cable operators may not have a business case to offer the respective programmes to their customers. It can therefore be concluded that the unavailability of TV programmes cross-border is not necessarily the result of an obstacle but of the lack of a viable business model.

b. Safeguard of territorial exclusivity by country or by language area for audiovisual works in a given language version is a necessity and cannot be considered an obstacle.

The necessity for full exclusivity, i.e. no one else is offering the same audiovisual work (in the same language version) in the territory or territories for which the rights have been acquired, is specific to audiovisual (see above under 2.). The loss of exclusivity would negatively impact the value of the rights and ultimately be to the detriment of creators and right holders. The protection of the full exclusivity may therefore lead to restrictions in the cross-border availability and access to TV programmes originating from other member states.

In reality, obstacles to access, if any[3], are however limited to common language areas (e.g. the German language or the French language) and to English language programmes (including subtitled programmes). Obstacles for European citizens to access such programmes (by encryption of the satellite signal or by the broadcaster's denial to authorise cable retransmission) are justifiable in both cases. This is obvious for common language areas; the English language is unique in as it is the lingua franca in much of Europe and therefore capable of undermining the territorial exclusivity granted for language versions other than English.

It can therefore be concluded that obstacles to cross-border access of TV programmes are justified for common language areas and for English language programmes.

Conversely, the cross-border transmission is possible when the above exclusivity is not undermined. The distribution of the Portuguese language version of the latest James Bond in Germany, e.g., does not undermine the exclusivity of the German broadcaster for the German language version of the same film and vice versa. Whether or not the broadcasters authorise the cross-border distribution of their German speaking or Portuguese language programme is ultimately a question of market demand and of a viable business case. The Cab/Sat directive facilitates this cross-border distribution by removing the possible legal hindrances.

c. Acquisition of pan-European rights for audiovisual does not make sense

The fact that consumers may not be able to access certain TV programmes originating in another member state has led some people to the assumption that such unavailability is the result of the territoriality of copyright and of undue market fragmentation. It is therefore suggested that broadcasters acquire pan-European rights so that territoriality ceases to be an obstacle.

The proposal for the acquisition of pan-European rights is flawed for the following reasons. First, the proposal ignores the specificity of audiovisual, namely language. Language is specific to each member state (with the exception of common language areas and the English language) and it makes no sense for e.g. an Italian broadcaster to acquire Italian language broadcasting rights for each of the member states of the European Union. Primary acts of broadcast will only occur in Italy and cable retransmission is facilitated by mandatory collective licensing provisions. Second, it can be assumed that there is no reason for a free-to-air broadcaster to acquire Italian language rights for any territory other than Italy, as the distribution of its programme in Europe (outside Italy) is possible via either the COO principle (satellite transmission) or the mandatory collective licensing scheme (cable retransmission). Third, it is contestable that Italian language rights have a separate value outside Italy but the content owners may still want to get paid for such rights. Fourth, there is no economically viable single market for digital audiovisual content because of the importance of language.

4. Targeted legislative action in audiovisual

The 1993 Cab/Sat directive is the most important regulation for rights acquisition and rights licensing in the audiovisual sector. It fulfilled its objective of fostering cross-border provision

[3] Many of the French TV programmes originating in France are nevertheless retransmitted in Belgian cable networks as much as many German programmes originating in Germany are retransmitted in Austrian cable networks.

of programmes. It is therefore helpful to recall the core principles of this directive, which should be maintained, when assessing the question of the need for targeted legislative action.

a. Acquisition of audiovisual rights - Primacy of contractual freedom and application of country-of-origin principle

The principle of contractual freedom in respect of the acquisition of audiovisual rights should be sustained

Article 3 (1) of the Cab/Sat directive establishes that satellite broadcasting rights may only be acquired by agreement. The acquisition of satellite broadcasting rights and the remuneration to be paid to the content owner (which will depend on the territorial scope of the contract) is thus subject to the contractual terms agreed between the broadcaster and the rights holder. Parties are therefore entirely free to determine the scope of rights for purposes of primary broadcast. The Cab/Sat directive specifically states that it is based on the principle of contractual freedom which will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned (Recital 16).[4]

The possibility to protect intellectual property rights by encryption should be maintained

Art. 2 (c) of the Cab/Sat Directive acknowledges that programme-carrying signals may be encrypted. This acknowledgement underpins the importance and economic value of rights for right holders and broadcasters. Right holders, for acts of primary broadcast, rely on full (unrestricted) exclusivity as much as broadcasters, for any subsequent use of their program signals, rely on full (unrestricted) exclusivity of their neighbouring right. The full exclusivity of the right holders is accepted as part of the contractual freedom and the full exclusivity of the broadcasters on their signal for secondary acts of exploitation is accepted in Art. 10 of the Cab/Sat directive. Neither of the two should be put into question since each party's exclusivity is the other side of the same coin. The creativity and the investment of both right holders and broadcasters can only be safeguarded if their respective exclusivity is maintained.

Maintain the application of country-of-origin principle

The Cab/Sat directive has facilitated the cross-border distribution of TV programmes through the adoption of the country-of-origin principle for satellite transmission. According to this principle, the act of communication to the public occurs solely in the Member State where, under the control, and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.[5] The European legislator's choice avoided the cumulative application of several national laws to one single act of broadcasting and hence limited the acquisition of rights for cross-border transmission to one single territory.

[4] The introduction of mandatory collective licencing for the broadcaster's exclusive neighbouring right would effectively undercut the principle of contractual freedom in as it would allow the re-transmission of foreign programs into common language areas (see above….)

[5] Art. 1 paragraph 2 (a) and (b) Cab/Sat directive

b. *<u>Licensing</u> of audiovisual rights – Facilitation of rights licensing for secondary exploitation through mandatory collective administration*

The Cab/Sat directive has facilitated the cross-border distribution of TV programmes through the introduction of mandatory collective administration of rights (audiovisual and music) for cable retransmission (Art. 9 Cab/Sat) with the exception of the broadcaster's neighbouring right (Art. 10 Cab/Sat).

The availability of authors' rights and neighbouring rights for cross-border transmission by securing mandatory collective licensing in respect of simultaneous retransmission rights should be guaranteed

Mandatory collective licensing guarantees the full availability of authors' rights and neighbouring rights for cross-border exploitation to commercial users.

Mandatory collective licensing greatly facilitates rights clearance for cable or other platform operators for the purpose of retransmission.

Mandatory collective licensing prevents right holders from the possibility of withdrawing rights from collecting societies (i.e. no fragmentation of the global repertoire for music and full availability of rights through a one stop shop).

Broadcaster's ability to control third party use of their signal by maintaining full exclusivity of the broadcaster's neighbouring right should be secured

In a context where broadcasters are faced with new technological means of distribution of their broadcast signals and a significant increase of platform operators, it is crucial for broadcasters to continue to enjoy full exclusivity of the broadcaster's neighbouring right as enshrined in Article 10 of the Cab/Sat directive

Broadcasters are dependent on their exclusive neighbouring right to control third party use of their programs and negotiate conditions of its delivery by platform operators (e.g. configuration of EPG, packaging (basic/premium packages) etc.)

Cable operators developed from mere infrastructure providers (re-distribution of broadcasters' programs) to content providers. Today, many platform operators are both infrastructure providers and aggregators of content, i.e. themselves creators and operators of TV programs. Broadcasters have to rely on an exclusive neighbouring right in relation to the retransmission of their programs to avoid discriminatory treatment by platform operators who are themselves broadcasters (and may therefore be tempted to gain a competitive advantage over third-party broadcasters by abusing their position as infrastructure providers).

The continued existence of the exclusivity of the broadcasters' neighbouring right is not a threat to the accessibility of a broadcaster's programs. Broadcasters in general have no interest to prohibit the retransmission of their programmes (Free-TV is dependent on the highest technical reach possible in order to re-finance program investment by advertising revenue) even on a cross-border basis. No one has an interest to object to the retransmission of a Portuguese, a Danish, a Hungarian TV program in another member state. Potential conflicts may only arise in case of cross-border retransmissions of programs in a language which is spoken in more than one member state such as German and French and the "lingua

franca" English.[6] In general, platform operators cannot complain about broadcasters' refusal to allow the retransmission of programs.

Mandatory collective licensing of the broadcaster's neighbouring right for cross-border retransmission could potentially be at odds with the territorial exclusivity granted under the contractual agreement between a broadcaster and a licensor of audiovisual content for acts of primary broadcasts. The lifting of the full exclusivity of the broadcaster's neighbouring right – the right to prohibit re-transmission - and its submission to mandatory collective licensing could severely undermine the value of audiovisual content. The broadcaster could no longer rely on the territorial exclusivity granted by the licensor (for which he paid a premium) and the licensor could no longer ask for a premium for content which is otherwise made available through retransmission of a broadcast originating in another member state. This situation would ultimately be to the detriment of the creative industries and their capability to refinance their investments.

c. The Cab/Sat directive and online distribution of audiovisual content

The Cab/Sat directive, as suggested by its title, deals with two transmission modes, namely satellite and cable. At the time of adoption of the Cab/Sat directive, satellite and cable were the only transmission modes which were relevant for cross-border broadcasting. Hence, it is fair to say that the Cab/Sat directive, despite its title, is a regulation which is technological neutral[7] and which does not favour one transmission mode over another transmission mode.[8]

Online has become a new transmission mode for creative content of any sort including audiovisual. Online linear distribution of TV programmes is no different from satellite transmission or cable retransmission: it may occur in the form of either a primary exploitation (such as simulcasting and webcasting) or a secondary exploitation (retransmission of a service by a platform operator). It is therefore obvious that the rules which govern satellite transmission and cable retransmission should apply mutatis mutandis to the online simultaneous retransmission of a scheduled audiovisual service.

Extension of the COO principle to simultaneous/linear online retransmission

The obstacles which impede cross-border provision of on-line or mobile broadcasts are similar to those which obstructed cross-border satellite broadcasting in the 1990's. It is indeed unclear today whether the rights for online exploitation (the "making available right" and the "reproduction right") have to be acquired for each of the territories in which the service can be accessed, or whether simulcasting, webcasting or mobile broadcasts should rather be assimilated to a primary act of broadcasting. Collecting societies representing phonogram producers' rights take the view that commercial users have to clear the rights for each territory in which an online service can be accessed (so-called "country-of-destination"- theory) but offer commercial users the possibility to acquire multi-territory rights through a one-stop shop. Collecting societies representing music authors' rights abstain from taking a clear legal position. They apply the "country-of-origin" principle for simulcasting whereas webcasting

[6] This applies to TV programs broadcast in English language including the broadcast of such programs with subtitles in another language.
[7] Art. 1 paragraph 3 Cab/Sat directive defines cable retransmission to include "retransmission by a cable or microwave system" and is therefore to be interpreted in a broad, technological neutral way.
[8] Terrestrial transmission does not play a major role for cross-border broadcasting. The terrestrial overspill is limited to areas near the border and thus enables cable retransmission in a neighbouring country but not on a multi-territory or pan-European scale.

and any other form of online distribution are licensed according to the "country-of-destination"- principle.

Cross-border online and mobile broadcast services are severely affected by the unavailability of a one-stop shop offering multi-territory music authors' rights for the global music repertoire. As a result, commercial users of music rights such as broadcasters are forced to conclude a set of multiple licenses, each covering the global repertoire for mono territory use.

Barriers in online distribution of broadcasting services can successfully be overcome by the following measures:

- Simulcasting, webcasting and mobile broadcasts of linear programmes (simultaneous transmission) are comparable to satellite broadcasting and should therefore also be regarded as primary acts of broadcasting.

- The "country–of-origin" principle, which currently only applies to satellite broadcasts, should be extended to cover all forms of *primary* acts of broadcasting (wireless and by wire) allowing a cross-border reception of programmes, irrespective of their transmission mode (terrestrial, satellite, mobile or on line).

Indeed:

- The reasons which have lead to the introduction of the "country-of-origin" principle for satellite broadcasts are equally applicable to on-line or mobile transmission of TV programmes.

- It is necessary to ensure technological neutrality for rights clearance. The application of different legal regimes to the distribution of a broadcast service severely undermines the achievement of the internal market. In respect of primary acts of broadcasts, rights clearance shall be done on the basis of the "country-of-origin" principle irrespective of the transmission mode(s) used.

The general application of the "country-of-origin" principle will allow broadcasters to clear all the rights with one single collecting society instead of having to clear such rights with 27 different collecting societies. The practical and legal problems to clear multi-territory rights for cross-border broadcast services would be overcome and broadcasters will only have to clear mono-territory rights for a cross-border service.

Legal uncertainties do not only exist in respect of primary exploitation of broadcasts but also in respect of secondary exploitations, in particular in relation to online retransmission by platform operators other than cable operators.

A revised Cab/Sat directive should therefore clarify that the regulation applicable to cable retransmission applies mutatis mutandis to any form of retransmission (by wire and wireless). The definition of *"cable retransmission"* laid down in Article1, §3 of the Cab/Sat directive, should be applied in a technological neutral way, and therefore cover ADSL and IP-Protocol based retransmissions.

Guarantee the availability of authors' rights and neighbouring rights for cross-border distribution by securing mandatory collective licensing in respect of retransmission

The principle of mandatory collective licensing in respect of (cable) retransmission rights should be secured and generally extend to all modes of simultaneous retransmission of a signal (ADSL, IP-TV).

Indeed:

- Mandatory collective licensing guarantees the full availability of authors' rights and neighbouring rights (global repertoire) for cross-border exploitation to users.

- Mandatory collective licensing greatly facilitates rights clearance for cable or other platform operators for the purpose of retransmission.

- Mandatory collective licensing prevents right holders from the possibility of withdrawing rights from collecting societies (i.e. no fragmentation of the global repertoire and full availability of rights through a one stop shop).

IV. Music

1. TV Broadcasters and music

Broadcasters are important commercial users of music rights. 30 to 40 percent of the revenue of music authors collecting societies stems from payments for the distribution of TV and radio programmes.[9] The importance of broadcasters is likely to increase further due to the increasing dissemination of non-linear audio and audiovisual services to European citizens.

Broadcasters are largely not in control of the music broadcast. It is the audiovisual producer who decides and negotiates the synchronisation right individually with the owners of music rights. Broadcasters acquire rights to audiovisual works from many producers around the globe, from Europe to the US (fiction and series), from Latin America (telenovelas) to Asia (Bollywood). Therefore, broadcasters are dependent to have access to the global music repertoire through a one-stop shop.

It is important to note that it is contradictory for owners of music rights who have negotiated and licensed synchronisation rights to audiovisual producers in the first place to subsequently invoke a prohibition right towards commercial users such as broadcasters in the exploitation of an audiovisual work. The European Commission should therefore consider to extend the mandatory collective administration applicable to cable retransmission also to acts of primary broadcasts.

2. Specificities of music

Music is different from all other types of digital content discussed in the Reflection document. The consumption of music and the remuneration of owners of music rights follows a completely different pattern.

[9] This includes payments from both commercial and public service broadcasters and payments by cable operators for (cable) retransmission.

Language in music has been largely irrelevant for hundreds of years and is even more so in today's world. Opera works in Italian, German, English or French language, be it Rossini or Verdi, Mozart or Händel, Purcell or Bizet, have made their way through Europe irrespective of the language and irrespective of the European citizens' capability to understand the text. This has not changed. Popular music sung in languages other than the domestic language in a given member state makes its way to the charts, be it Italian, Spanish, French, German or other languages.

Consumers like to listen to their favourite songs again and again. The remuneration of authors and music publishers is linked to the frequency of use. The more often a song is played, the higher the revenue the right owners collect. Authors and music publishers therefore promote their songs, try to climb the charts and have the highest audience possible. The more popular a song becomes, the more it is played, the higher the revenue they collect. Music at its best seeks to conquer international markets and travel the world. Exclusivity to a single commercial user is almost unheard of and does not make economic sense. Music works completely different to audiovisual and book publishing where language and exclusivity are important factors to the exploitation of a work.

3. Obstacles for the availability of multi-territory licenses for the global music repertoire

The Commission is well aware of the numerous obstacles for the availability of multi-territory licenses for the global repertoire for music rights in the European Union. RTL Group has been pushing for such licenses for more than a decade and has initiated the CISAC case. The Commission's prohibition decision of 16 July 2008 is an important milestone for overcoming the territorial delineation in the administration and licensing of music rights. However, competition law cannot force a specific solution for multi-territory licenses on collecting societies. Regrettably, most collecting societies still refuse to provide for practical solutions for the creation of a one-stop shop for the worldwide repertoire. The withdrawal of the reproduction right of the Anglo-American repertoire for online and mobile and the emergence of direct licensing structures for Anglo-American repertoire of the major music publishers outside the traditional scheme of collective rights management has further complicated the availability of multi-territory licenses for the global music repertoire.

It seems that the Commission acknowledges that the direct licensing structures outside the network of the reciprocal agreements have failed to fulfil the Commission's expectations for the availability of multi-territory licenses. The Commission, in its Reflection document, states that "(T)he licensing of musical compositions and of sound recordings is further complicated by the fact that most online forms of dissemination require the simultaneous clearance of the digital reproduction right and the "making available" right."[10] The Commission finally conceives that the separate clearance of these two set of rights through separate transactions from two distinct licensing entities, i.e. the clearance of the making available right by the collecting society generally limited to the domestic territory and the clearance of the reproduction right by the music publishers' direct licensing structures for multi-territory use, is nonsensical. It therefore suggests that "consolidating these two "online" rights into a unitary licence would greatly facilitate online rights clearance."[11]

[10] Reflection document, page 5.
[11] Reflection document, page 16.

The Commission's suggestion for consolidating the two rights into a unitary license, which we fully support, means in practice that the major music publishers are requested to give up their direct licensing structures. Instead, they are indirectly asked to have the reproduction rights for the Anglo-American repertoire administered again by all of the collecting societies through membership agreements (as they still do for the mechanical reproduction right). The other option, i.e. the withdrawal of the making available right by the hundreds of thousands of authors from the local collecting society and the subsequent transfer to the publishers' direct licensing structures is theoretically possible but for practical reasons not achievable.

4. Clear market failure to provide multi-territory licenses for the global repertoire

The obstacles to the availability of multi-territory licenses are in RTL Group's view predominantly artificial.

The emergence of direct licensing structures (CELAS, D.E.A.L., PAECOL etc.) is a consequence of the collecting societies' failure to collect royalties for online and mobile use, to be cost-efficient and transparent and to find appropriate remuneration schemes between the authors and the publishers within the collecting society. This analysis is confirmed by the fact that music publishers did not withdraw mechanical reproduction right from the collecting societies. This can only be explained by the fact that the music publishers succeeded to "force" onto the collecting societies a cap on the administrative cost (max. 7 percent) under the Cannes Agreement and the Extended Cannes Agreement. Music publishers would not have achieved economically better terms for the use of mechanical rights in direct licensing structures. It can therefore be assumed that the major music publishers would consider to have the reproduction right for the Anglo-American repertoire be administered again by collecting societies if the societies managed to remove the reasons for withdrawal.

The territorial delineation between the collecting societies is artificial in respect of satellite, internet and online use. In its press release of 16 July 2008, the Commission has rightfully stated that "the [CISAC-] decision allows collecting societies to maintain their current system of bilateral agreements and to keep their right to set levels of royalty payments due within their domestic territory." It has also stated that the CISAC-decision will benefit authors and users alike.[12]

In sum: the unavailability of multi-territory licenses for the global music repertoire is caused by market failure. The Commission should therefore consider to "cure" this situation by legislative action.

5. Legislative action

Framework directive for collecting societies

The adoption of internal market legislation in the area of collective rights management has been on the agenda for more than ten years. It is meanwhile generally accepted that the management of rights is the third pillar, next to the harmonisation of national copyright and the harmonisation of enforcement of copyrights, which would complete the harmonisation edifice of copyright in the EU.

[12] MEMO/08/511, Antitrust : Commission prohibits practices which prevent European collecting societies offering choice to music authors and users – frequently asked questions.

The European Commission has commissioned numerous studies[13], organized an international colloquium on collective management of copyright under the Portuguese Presidency in March 2000[14], held an International Conference in Strasbourg in July 2000[15] and in Santiago de Compostela in June 2002[16], adopted a Communication on the Management of Copyright and Related Rights in the Internal Market in April 2004[17], and supported an International Conference on Copyright for Creativity in Dublin in June 2004[18].

The European Parliament has endorsed and actively called for the adoption of a Community framework for collecting societies for many years. In December 2003, the European Parliament adopted its Report on a Community framework for collecting societies for authors' rights, the so-called "Echerer" Report. This was followed by the European Parliament's resolution of 13 March 2007 on Cross-border collective copyright management[19] which called for a framework directive on collective management of copyright. In 2009, the European Parliament commissioned a Study on Collecting Societies and Cultural Diversity in the Music Sector. This study was published in June 2009.

Despite of all the preparatory work and the numerous calls on the European legislator, no framework directive has yet been proposed.

RTL Group abstains from summarizing the suggestions and proposals for a framework directive in this paper. However, RTL Group would like to draw the Commission's attention to the following:

First: the UK Monopolies and Mergers Commission published a report entitled "Performing rights – A report on the supply in the UK of the services of administering performing rights and film synchronisation rights". This report has been presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty in February 1996. It gives an insight in the functioning of a collecting society and it is the most detailed study that has ever been published in this area. Its analysis, conclusions and recommendations are still valid today. The UK Monopolies and Mergers Commission has made recommendations to the Secretary of State for remedying or preventing the adverse effects identified in its report. RTL Group attaches these recommendations and invites the Commission to consider them in preparing a framework directive.

Second: transparency has to provide for clear allocation of cost, both direct and indirect, for each sector of exploitation, i.e. for each GEMA-category. The information on activity-based cost is necessary in order to allow authors to make a decision which rights (per GEMA-

[13] Etude sur la gestion collective des droits d'auteur dans l'Union Européenne, Deloitte & Touche, ITEC Group, 1998

[14] Colloquium of the Collective Management of Copyright and Neighbouring Rights in the Digital Environment, "Situation and Perspectives", Evora, 23 - 24 March 2000.

[15] International Conference on Management and Legitimate Use of Intellectual Property, Strasbourg, 9-11 July 2000.

[16] International Conference on European Copyright Revisited, Santiago de Compostela, 16-18 June 2002.

[17] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on The Management of Copyright and Related Rights in the Internal Market, 16 April 2004.

[18] International Conference on Copyright for Creativity in the enlarged European Union, Dublin, June 22-24, 2004..

[19] Published in OJ of 13 December 2007, C 301 E/64. The European Parliament's resolution is specifically linked to the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).

category) is best administered by which collecting society and to allow users to make a decision where to acquire rights. The publication of the "average cost", as currently practised by most societies, is meaningless.

Third: in the past, most collecting societies have rejected the call for a framework directive. It is therefore interesting to note that GEMA now openly supports the European Parliament's call for a framework directive on collecting societies[20].

IV. Additional Comments

1. Extended collective license unsuitable to facilitate digital Europe

The Reflection Document refers to "Extended collective licensing" as one of the possible EU actions for a single market for creative content online. This instrument could, as the paper suggests, foster consumer access to culture and knowledge across the EU and also create more effective protection for creators.

Extended collective licensing schemes are well established in the Nordic member states. These schemes have been introduced to solve the problem of non-represented right owners, both national and foreign, and apply to forms of mass use of rights, in particular broadcasting, re-broadcasting, cable retransmission and reprographic reproduction. Extended collective licensing is particularly relevant for music rights.

However, collective licensing schemes are unsuitable to solve the problem of clearance of rights for multi-territory use for the following reasons. First, extended collective licensing is limited to the clearance of rights in the territory for which such scheme has been introduced. Its legal effect is limited to mono-territory use only and does therefore not provide a solution for multi-territory licensing of rights. Second, and more importantly, right holders have the possibility to opt-out from extended collective licensing in which case collecting societies can no longer license the global repertoire. The withdrawal of the reproduction rights for Anglo-American repertoire for online and mobile uses by all of the major music publishers from the EU/EEA music authors collecting societies has impressively demonstrated the "limits" of extended collective licensing.

Only mandatory collective licensing is capable of preventing undue fragmentation of rights. The European Commission has introduced mandatory collective licensing provisions already in 1993 with the adoption of Art. 9 Cab/Sat directive. It should consider to enlarge the application of such provisions to other forms of mass use of music rights for which individual clearance is not a viable option. Allegations by some stakeholders according to which mandatory licensing provisions would violate International Copyright Treaties such as the Berne Convention are unfounded. No signatory to the Berne Conventions has ever contested the legality of Art.9 Cab/Sat directive.

[20] Stellungnahme der GEMA vom 03.03.2009 zum Schlussbericht der Enquete-Kommission „Kultur in Deutschland" des Deutschen Bundestages, Seite 8.

2. The creation of a single European Copyright title is unsuitable to overcome the territoriality of copyright

The Reflection Document discusses at length the possibility of the creation of a European copyright title. It is suggested that such European title would create a tool for streamlining rights management across the Single Market, doing away with the necessity of administering a "bundle" of 27 national copyrights.

The creation of a European copyright title is not a solution to overcome territoriality in the EU. This can easily be demonstrated by referring to the Community trademark, the single European title for trademarks, which was introduced in 1996. It is undisputed that the owner of a Community trademark may "slice" the single European title into 27 territories and license each territory separately to potentially 27 different licensees. It is therefore unrealistic to believe that a European Copyright title would remove the problem of territoriality.

Instead, the European Commission should revert to an extension of the "country-of-origin" principle for multi-territory and pan-European online uses. This is a much more effective means of "combating" undue fragmentation and should be coupled with mandatory collective license obligations for uses for which individual licensing is not workable.

3. Flat rates or other forms of "collective" remuneration for the online distribution of audiovisual content would have a negative impact on the creation and financing of such content

RTL Group opposes any form of flat rates or any other mechanism of compensation for "mass dissemination of copyright protected work" in the audiovisual sector. Remuneration has to be based on individual negotiations between rightsholders and commercial users. Any flat rate system could be regarded as an implied permission to reproduce and disseminate our content on online platforms without getting compensation.

Luxembourg, 12 January 2010

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