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DLM comments to the public consultation of the EU Commission's Reflection Document on „Creative Content in a European Digital Single Market“

The Directors' Conference of the German Regulatory Media Authorities for Private Broadcasting (DLM) welcomes the possibilities to comment on the Commission's Reflection Document on a new approach to promote creative content in a digital world.

One of the main objectives of the German Media Authorities is to ensure diversity and quality of broadcasting content within the dual broadcasting system in a convergent digital environment.

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I. General remark

The Commission intends to take a pro-active approach to ensure a culturally diverse and rich online content market for consumers. DLM, like many others, supports the general objective of a broad access to diverse information and attractive content offers. However, it seems doubtful if a new approach to author's rights law –alone - can achieve this goal. In DLM's view, a much broader approach to creative content online markets is necessary which includes a favourable environment for creators and market intermediaries and pro-active measures for the promotion of the production and distribution of legal content offers.

II. Main issues

In respect to the Commission's objective to create "a modern, pro-competitive and consumer friendly legal framework for a genuine Single Market for Creative Content Online", DLM would like to raise the following points which should be taken into account in discussion on a reform on author's rights law:

1. It seems advisable to analyse in a first step each sector of the creative industries separately in view of the challenges brought about by digitisation and online distribution

In DLM's view there is not "one genuine Single Market for creative content online". As the Commission rightly points out in its paper, different types of creative content have developed within different systems and market conditions due to, e.g., cultural and linguistic differences or subsequently the more national or international character of the content. The market structures in the three sectors which the Commission analyses in its reflection paper – music, books and audiovisual – are very different, with a worldwide oligopolistic phonographic

industry in the music sector, a hugely diverse publisher's landscape and a rather heterogeneous film producer and broadcaster industry which again varies from Member State to Member State and reflects different cultural priorities. The same is true for the different weight that intermediaries and collecting societies play in these sectors and for the number and variety of right holders involved. In order to manage the complexity of the subject, DLM favours a bottom up approach and proposes to look at each of the sectors and their specific problems separately before engaging in the creation of a harmonised author's rights law for creative content online.

The proposed "bottom up" approach would focus on practical solutions by taking account of the characteristics of each creative content market and then might allow in a second step to find common principles that could be harmonised on EU level.

2. The double nature of creative content as an economic and cultural product must be taken into account

Creative content is an economic but also a cultural product. Any discussion on a targeted legislative action in author's rights law should not only take into account the possible effects on growths and jobs and the reinvigoration of the single market project but also on the implications for the long term development of the culture industries and the European notion of culture.

3. For each sector an adequate balance should be achieved between the rights of users to access creative content EU-wide at any time, the economic interest of the industry to pursue viable business models, the public interest in a broad and diverse culture industry and the fundamental objectives of author's rights protection including adequate remuneration for

their creative work. The creation of an EU-wide or multi-territorial licensing process for the distribution of audiovisual works would fail to strike that balance.

One key concern expressed in the Commission's reflection paper is the fragmentation of the European audiovisual market due to widely practised agreements on exclusivity and territorial transmission rights. As one possible solution, the creation of a multi-territorially or pan-European licensing process is suggested. While it is certainly true that consumers want to access a wide choice of content any time and at any place in the EU (page 9) - and probably as cheap as possible-, these interests must be balanced against economic feasibility and long term cultural and competition effects of such a licensing process. Contrary to music, audiovisual content has a very restricted window (value) of commercialisation (wirtschaftliche Verwertbarkeit) –. Generally, consumers want to watch an audiovisual content not more than once or twice. That is why exclusivity plays an important role from an economic point of view in terms of return on investment. Also, a large amount of programs and films reflect national or regional, even local as well as linguistic specifics. In these cases, it makes a lot of economic sense to restrict the distribution to specific territories or linguistic areas. A licensing system which would force producers and broadcasters to market their programs or films on an - expensive - pan-european basis, would be the economic death to many small and medium sized producers and broadcasters, reduce the offer and variety of regional, local or non-mass attractive content and quality and would thus be contrary to the objective of an economic sound and culturally diverse audiovisual landscape.

Also, the creation of a pan European licensing process would lead to a massive concentration and vertical integration of the audiovisual industry with all the risks this implies for competition, cultural diversity and economic growth and jobs.

4. Transparent collective management of rights is an efficient tool to enable the cross border offers of audiovisual content throughout Europe.

The production and distribution of audiovisual content is often hampered by the fact that the rights clearance for music as part of a film, a program or a trailer is burdensome, costly and long, given the large amount of rights holders and the fact that the rights cannot be cleared with one partner. As the main purpose of an audiovisual content is to tell a story or a message through pictures whereas the music plays an accessory part, a reasonable solution could be an “extended collective agreement system” comparable to the system already practised in the Nordic countries.

5. It could be an appropriate option to transpose the principles of the management of copyright and related rights applicable to retransmission by cable and satellite to other platforms of cross-border broadcast retransmission following the principle of technological neutrality.

The Cable and Satellite Directive (*COUNCIL DIRECTIVE 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission*) already provides a legal framework to facilitate the cross-border transmission of satellite and cable broadcasts. It would be consistent with the principle of technology neutrality anchored in EU-policy to apply the general principles to new platforms like Internet or DVBH.

6. The objective of release windows is to ensure diverse audiovisual platforms for movies and in particular a broad cinema landscape for cultural reasons. This objective should be balanced against the business interest of companies offering EU-wide VoD services and the consumer interest.

The Commission rightly points out that release windows can act as a barrier for the emergence of an attractive and innovative cross border VoD market. This is true, but accounts the same for pay per view or high premium cable platforms. It should also be remembered that the objective of the timely graduated release schedule is to give each distribution channel in the audiovisual distribution chain an exclusive "window" in which to profit from the movie. The aim is to ensure diverse audiovisual platforms for movies and in particular a broad cinema landscape to the benefit of the consumer.

The other question is whether the reduction of the time lapse between the VoD and other releases as proposed by the Commission will really result in a true European market for VoD. As movies of different linguistic origin are shown first in their native speaking country before they travel to other countries, even a reduction in the release window would still lead to different release times and act as a barrier to a European VoD market. The "fragmentation" of the European market does therefore not mainly result from the existence of release windows but lies in the fact that, particularly for audiovisual content, different consumer preferences exist in the Member States that are linked to cultural and linguistic traditions.

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