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EBU Comments

to the EC Commission's 2nd public consultation paper
on Creative Content Online

1. DRM

Question 1

It should firstly be noted that a recent study by the European authors' society GESAC¹ concluded that DRM systems (and particularly compared to the system of private copying levies) reveal a significant number of inherent drawbacks, such as the following:

- DRM-oriented distribution of IPR protected goods may not result in a reduction in the prices paid by consumers, as it would mainly shift the current revenue from private copying levies to the DRM industry;
- Given that DRM currently generates problems of interoperability with certain consumer devices, DRM systems limit the uses that consumers can make of IPR-protected goods;
- DRM would increase information and enforcement costs, and
- DRM would fail to minimize the spill-over effects on the economy as a whole.

The GESAC study concluded not only that DRM could not replace copyright levy systems but also that DRM systems would, in the absence of full standardization or interoperability of DRM technology, reduce consumer choice and restrict competition in the ICT and CE industries and the markets for IPR-protected goods, raising the prices to be paid by consumers.

In view of these conclusions, it should be recognized that **DRM systems cannot generally be considered a "key enabler" for all types of online services**. As explained earlier in the EBU Comments on the EC Commission's Consultation on Copyright Levies,² there are a variety of factors to be taken into account concerning the question of whether any media company would

¹ The full GESAC report (by the EconLaw Strategic Consulting firm) is available (in English) at http://www.gesac.org/FR/prisesdeposition/Copieprivee/download/COPIEPRIVEEFR_20071108_Rapport%20ECONLAW.pdf.

² See the EBU comments on the EC Commission's Stakeholder Consultation on Copyright Levies in a converging world, at http://www.ebu.ch/CMSimages/en/leg_pp_copyright_levies_140706_tcm6-46484.pdf, pages 2-4.

decide on applying DRM measures, so that the most realistic view on this matter, at least today, is that DRMs are likely to be used only for a limited number of (premium audiovisual) content delivery services. It is significant in this context that experience in the music industry has shown that consumers' non-acceptance of DRM measures applied to online sales of musical recordings has influenced such sales so negatively that major record producers seem to have largely abandoned those measures and are opting for alternative, more consumer-friendly solutions (such as advertising-based subscriptions).

As general guidelines for commendable practices as regards the development of DRM systems which are acceptable to all stakeholders concerned, including consumers, the EC Commission and Member States should foster the adoption of interoperable DRM systems, and in particular by

- actively encouraging DRM systems to provide *equal access for content providers to all digital media platforms*, by reinforcing the underlying principles of regulatory audiovisual policies, such as the free movement of audiovisual media services, on the basis of the country-of-origin principle;
- ensuring that DRM schemes for digital reception technology *refrain from imposing any form of encryption for free-to-air services*, and that such technology is kept attractive for all viewers and listeners of digital content, while preventing the creation of "gatekeeping" effects through the abuse of proprietary rights;
- promoting DRM systems which guarantee *full interoperability* between various digital media platforms and receiving devices *from the consumer's perspective*, and preferably via open standards.

Questions 2 and 5

These questions have been answered in part by the earlier EBU submission.³ In short, it is not realistic to expect that enhancing DRM interoperability and transparency to a satisfactory level can be left to market forces alone. Any serious attempt to achieve such goals would *need to be complemented by regulatory measures*, such as the mandatory disclosure of interoperability information (e.g. as exists under French copyright law) and strict labelling requirements to ensure maximum transparency for consumers.

Moreover, in view of the fundamental role of the consumers' perspective on the acceptance of DRM systems, it must be ensured that *copying of free-to-air (or free-to-view) radio or television broadcasts for personal use*, i.e. for time-shifted viewing or listening, *continues to be possible regardless of any technical protection measures*.

³Attached hereto are the extracts on DRM issues, taken from the earlier submission of the EBU on the Content Online consultation of 2006.

Questions 3 and 4

The development of ADR mechanisms may be generally preferable with regard to the protection of consumers' interests in resolving disputes on EULAs. However, as the *application* of DRM measures is mainly a business decision, it is unclear how any ADR mechanism for that particular element is supposed to work in practice, and in particular on which (regulatory) basis. Moreover, care should be taken to avoid DRM systems being artificially developed as non-interoperable, with the intention of creating (possibly commercially-orientated) ADR procedures administered by the same DRM producing entities.

2. Multi-territory rights licensing

Question 6

Given that the purpose of the Content Online project is to create a strong and more consumer-friendly Single Market for European content, to the benefit of both European content providers and citizens, the envisaged Recommendation should generally foster the licensing of rights of any kind, whether these could be called "multi-territory" or otherwise.⁴ In particular, the Recommendation should recognize the need for online content providers, such as broadcasters, to adapt their rights acquisition, remuneration and distribution policies to the time-shifting and place-shifting use of their content by consumers, as well as to the increased number of content providers (including those offering retransmissions of broadcast channels) in the digital marketplace.

Consequently, insofar as online and other access to European broadcast productions is concerned, every European citizen should have access to a wide range of diversified, pluralistic, and comprehensive broadcast programmes; at the same time, all audience categories should benefit as much as possible from any technological progress and should therefore be able to enjoy broadcasters' services on all distribution platforms.

On the issue of multi-territory licensing, the EBU considers that the points mentioned in the Staff Working Document (page 26) as possible arguments against applying the law of only one country, on the basis of the country-of-origin principle, to on-demand online services are not convincing for radio and television broadcasters' services. If we are to develop "European media champions" and promote cultural diversity online, licensing for European broadcasters' online services must be facilitated in accordance with the legal framework for other broadcast services received across Europe, such as satellite services, and following on from a technologically (more) neutral approach such as the new Audiovisual Media Services Directive. Consequently, further in-depth analysis of this rule for online services should not be postponed until the EC Commission reviews the 1993 Satellite and Cable Directive but should be taken up now.

⁴ For the full text of the EBU position on the Commission's initial Content Online enquiry see http://www.ebu.ch/CMSimages/en/leg_pp_onlinecontent_231006_tcm6-47764.pdf.

Question 7

Generally, the future copyright framework should facilitate and promote the one-stop-shop ("*guichet unique*") approach through collective licensing. For example, it would be a huge anomaly if, instead, collective licensing of music rights to broadcasters were made more complicated by fragmenting the rights and/or repertoire over different, or possibly even an additional number of, societies.

Concerning the proposed distinction between a "primary" and "secondary" (but multi-territory) licence, it would need to be clarified how this could facilitate EU-wide licensing. If it is intended to recommend that right-holders grant such a secondary licence, it may be wondered why right-holders have so far been reluctant to grant such licences. Moreover, the EBU's experience with mere "encouragement" of right-holders to license certain rights is that such measures do not necessarily yield positive results. In its press release, the Commission openly acknowledges that the Film Online Charter has not been implemented and has thus effectively remained a "paper tiger".

On the other hand, the situation may be easier if the "secondary licence" is intended to encompass only so-called "secondary exploitation rights". For example, insofar as secondary music rights are concerned, which is the case for music incorporated into broadcast programmes, the collecting societies should remain in a position to grant broadcasters licences for the world music repertory, and for their online services. For that purpose, nothing is easier or more cost-effective than extending the collective agreements which already exist.

Question 8

A great diversity of European content, such as European broadcasters' archives, can be distributed, e.g. via online niche markets, only if the copyright framework allows the broadcasters to acquire the necessary rights efficiently, whilst ensuring fair remuneration for right-holders. Although the details of such a framework would be set out mainly by the Member States, the future Recommendation should explicitly mention the need for a European regulatory initiative in order to stimulate such action by the Member States. An initiative of this kind should also recognize the crucial importance of "extended" collective licences (as exist in the Nordic countries), since that system has proven useful for facilitating collective contractual arrangements for making archives available online.

3. Legal offers and piracy

Question 9

Respect for copyright in the online environment is not only a "business-to-consumer" or "author-to-consumer" issue but also a matter of "business-to-business". At stake is the possibility of consumers accessing content through different networks and electronic devices, and thus the

possibility for operators of such content offers to clear the necessary rights. Consequently, the assumed lack of active licensing of rights for new platforms is not limited to the Internet alone, particularly since much of this "inactivity" is simply due to the complications arising from the Internet's feature of a publicly and globally accessible network. There are also new media platforms, such as DSL, IP-TV and mobile telecommunication networks which either do not use this feature of the Internet at all or use only a non-public part thereof (so-called "walled garden"), but whose operators are similarly in need of an effective method of rights clearance with respect to the content they wish to offer to their subscribers. For example, if these operators wish to retransmit entire broadcast channels via their networks simultaneously with the original or "off-line" broadcast of such channels, it would seem obvious that such network operators should have the *same obligations* to acquire the necessary rights as other operators engaged in such retransmitting activities (e.g. cable operators - see the summary of elements which are crucial for the cable distribution of broadcast channels, attached hereto). On the other hand, such operators should then also be entitled to benefit from the same possibility of a *simplified rights clearance regime* as the system which cable operators enjoy under the 1993 Satellite and Cable Directive.

Question 10

The system as proposed by the French Memorandum of Understanding would seem to allow a new authority to issue warnings to consumers participating in illegal file-sharing, possibly leading, after several warnings, to the suspension or even termination of the relevant consumer's Internet service contract. It is a very positive sign that the said Memorandum is supported by a large number of different stakeholders in France, thereby confirming their joint preparedness to combat piracy effectively. However, it should also be noted that on the implementation side, this raises quite a number of questions, such as the possible impact of such a monitoring system on "fair dealing" rights (or other exceptions or limitations under copyright) as well as on consumer and data protection rights. It would also need to be guaranteed that such a system had sufficient technical reliability to distinguish properly between illegal and legal file-sharing activities. Further reflection would also be necessary on the assumed practical effectiveness of such a system (and the alternative solutions to illegal file-sharing) if it is not enforceable against ISPs outside the EU.

Question 11

The EBU has insufficient experience with respect to so-called "filtering" mechanisms. Although such mechanisms may be worth exploring, similar uncertainties would seem to exist as those raised under Question 10, and particularly with respect to usage of protected material for non-commercial purposes. In addition, the more such a mechanism is supposed to operate in an automated manner, the more safeguards may be needed to ensure that it does not give rise to conflicts with other constitutional rights, such as freedom of speech or the freedom to provide information. This requires further study and discussion.



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Annexe 1

Extract from

EBU Comments of 23 October 2006
on the EC Commission's public consultation paper
on Content Online in the Single Market

DRM and Public Service Broadcasters

The notion of DRM includes both technical *anti-copying protection measures* and the electronic *administration of contractual rights*, in the sense that contractual usage terms can be enforced by certain technical measures (e.g. limiting a certain usage to a particular period of time). Consequently, DRM must not be confused with Conditional Access systems (e.g. for pay-TV services) which deal only with *contractual access*.

For public service broadcasters, private copying of their broadcasts *for time- and place-shifting purposes* is an essential element of their mission. After all, public service broadcasters have an obligation to reach all citizens, including those who missed their favourite programme at the time of broadcast or wish to enjoy that programme when they are elsewhere. Copying broadcast for time-shifting viewing or listening is accepted on a world-wide basis as an exception under copyright law, and the EBU strongly believes that such private copying of free-to-air (or free-to-view) radio or television broadcasts for personal use should continue to be possible in the digital era.

DRM systems can therefore be considered an acceptable means of managing and ensuring the distribution of broadcast material in the online environment only on condition that they fulfil various requirements, as set out in detail in the 2003 "EBU Memorandum on Digital Rights Management". One of the main requirements is that the DRM system should be *appropriate vis-à-vis the actual piracy threat*. For example, it is often insufficiently realized that actual piracy of premium content (new feature films or music CDs) takes place long before such content is broadcast, e.g. immediately after or even *before* the film or CD has been released. Consequently, it would not be realistic to expect that piracy of such content could be prevented effectively at the stage of free-to-air broadcasting. DRM must always allow the broadcaster itself to decide how it wishes to protect its signal.

It is sometimes suggested that DRM technology will ultimately replace the traditional means of management of rights and payments. However, this suggestion is erroneous, at least today and for the near future, as it fails to take account of the *structural deficiencies in technical protection measures*. It would require an unrealistic multitude of contractual arrangements, it underestimates the range of business deliberations, such as costs, and it neglects the fact that the private copying exception is not harmonized.¹

¹ See the EBU comments on the EC Commission's Stakeholder Consultation on Copyright Levies in a converging world.

Currently, no technical protection measure for digital broadcasting exists which meets the EBU requirements. Furthermore, EBU Members would consider implementing such measures only in cases where they are in accordance with European industry standards for free-to-air broadcasters, such as currently being developed within the DVB fora.

General policy on DRM

The public will embrace new media services and technical devices only if these allow them *easy access* to, and *consumer-friendly usage* of, interesting content of quality. This widespread access to new media services, which is generally desired, will (continue to) require that such services be made available on a non-discriminatory basis to the general public. In policy terms, national agendas and EU-level initiatives (e.g. regulation, charters, exchange of best practices) should therefore include the point that the development of DRM systems for (both offline and online) digital broadcasting must keep broadcast reception technology attractive for all viewers and listeners, via open and interoperable standards, and provide equal access for broadcasters to all media platforms, including online. In particular, DRM schemes should foster the underlying principles of European Community law and policies, such as the *free movement of all broadcasting services, on the basis of the country-of-origin principle*.

Inherent risks for interoperability

Given the consumer's desire for optimal use of the particular characteristics of new media platforms and devices (such as time-shifted use, mobility and interactivity) and the need for Europe's media to meet changing consumer patterns, the EBU considers that interoperability among consumer devices used for the enjoyment of broadcast and similar media services is of prime importance.

DRM schemes have inherent risks for interoperability, as a result of the different proprietary systems or the consequences of system updates, etc. and also from both a competition and copyright law perspective. One example is the "bundling" of a technical copy protection measure to a conditional access regime. Free-to-air broadcasters must remain free to decide whether they wish to refrain from any encryption of their signal, at whatever stage of the transmission. Another example is the abuse of DRM schemes beyond the issue of copyright, where DRM is not mainly intended for mere protection against piracy but rather as a means of gaining unrestrained monopoly control over anyone's *legitimate* access to that material for a particular (lawful) use, including, for example, time-, space- or format-shifting usage.²

The 2006 European Charter for Film Online aims at "promoting technologies that are secure, cost effective, robust, and interoperable, ideally based on open standards, across multiple platforms and devices". For the role of standards in DRM systems, Europe must decide for itself how to develop, and respond to, its own sector requirements, i.e. given the specific media landscape and its existing and future regulatory environment. More importantly, however, interoperability can be realized only if it involves genuine commitment by the key players in the market(s) concerned; *merely aiming at "promotion" will not suffice*. This can be illustrated by the recent introduction in French copyright law of measures to provide information necessary for interoperability.

² For further information on this issue, see the EBU comments to the EC Commission's (DG Competition) Consultation on the application of Article 82 of the EU Treaty to exclusionary abuses.

Given that the non-interoperability feature of a media product or service may well be the main reason for becoming a market leader, the risks of DRM schemes for interoperability are apparent and are certainly not limited to situations involving "dominant positions". Thus, apart from competition law (which applies only under certain conditions) the regulatory framework for online content cannot restrict itself to mere encouragement but should strive to guarantee effectively the full interoperability of digital broadcast services and platforms by expressly prohibiting all the above-mentioned abuses and "gatekeeping" effects of DRM. This could be done through a DRM Charter or similar instrument which provides positive examples of stimulating good DRM systems and includes a "blacklist" of abusive systems and other negative practices.

Summary of cable retransmission of broadcast channels

- **Licensing agreements for the cable retransmission of broadcast channels involving multiple collecting societies and other right-holder groups have been a well-established practice in Europe for several decades and occasion the lowest negotiation and administration costs of all possible business models.**

- **Global (i.e. multilateral) licensing agreements, i.e. single contracts involving all categories of right-holders on the one hand and cable operators (or national associations thereof) on the other, are favoured by broadcasters. Even in countries where cable operators have refused to conclude global licensing agreements, multiple right-holder groups have successfully licensed their repertoire to those operators.**

- **The proposal by cable operators that broadcasters should be obliged to acquire and manage all cable retransmission rights on behalf of the cable operator is unacceptable for broadcasters and would create higher transaction and administration costs. The question as to which (whose) retransmission rights the broadcaster would wish to acquire should remain the broadcaster's own free decision. Consequently, *such a proposal should be unequivocally rejected.***

The rights clearance model proposed by cable operators in the Solon study, whereby the broadcaster should be obliged to clear all rights for the television channels that the cable operator wishes to offer to its paying subscribers, is apparently based on a desire to transfer the cable operators' legal and financial responsibility to the broadcasters. However, this would obviously contravene well-established licensing patterns which have successfully facilitated the cable retransmission of television programmes for many years. Moreover, for the reasons set out below, making broadcasters a mere rights clearance entity on behalf of cable operators and burdening them with the cost of the cable distribution activity is neither legally justified nor feasible in practice:

- ❖ Under copyright law, the *raison d'être* of the exclusive cable retransmission right is the *intended economic benefit* of this activity by the cable operator. This follows on from Article 11bis(1)(ii) of the Berne Convention, from case-law of the European Court of Justice and from national copyright laws and European recommendations. Consequently, given that cable operators use television programmes (and the relevant rights) for their own business purposes, they are legally and financially responsible for acquiring the cable retransmission rights from all right-holders concerned.

- ❖ The act of cable retransmission, for which consumers must pay a subscription fee, is operated and managed only by the cable distributor. Given that the latter is selling the retransmitted programmes to consumers *for commercial purposes*, the copyright liability for such retransmissions should not be placed on the shoulders of any right-holders in the value chain.

- ❖ For the simultaneous, complete and unchanged cable retransmission of (foreign) broadcasts, the 1993 Satellite and Cable Directive introduced a simplified rights clearance system, facilitating the *collective licensing* of retransmission rights of certain right-holders. This system, which helps copyright users to obtain the retransmission rights which they need, was adopted *specifically at the request of cable operators*.
 - ❖ Under the 1993 Satellite and Cable Directive, broadcasters are intentionally provided with the necessary *flexibility* to negotiate their rights as they deem appropriate. In the model proposed by the Solon study, the economic risk of the negotiations for all the retransmission rights would be a burden entirely for the broadcaster alone.
 - ❖ The proposed model would therefore involve more negotiations, because it would require additional discussions between the broadcasters and the other right-holders, thereby creating *higher transaction and administrative costs*.
 - ❖ Unlike the case of multiple-party licensing agreements, where right-holders sit around the same table with cable operators, in the proposed model broadcasters cannot sufficiently anticipate whether (and, if so, in which countries and under which commercial circumstances) their channels will be retransmitted in the future. The broadcasters would thus have *no solid basis for negotiations* with the other right-holders.
 - ❖ Today, retransmission rights are remunerated by cable operators according to actual usage/consumption, e.g. on the basis of the actual subscription model and the retransmitted channels. In the proposed model, collecting societies would have to ask for payment from broadcasters *without knowing in advance the scope of actual retransmissions*, i.e. which channels would be retransmitted and on which commercial basis (subscription model, fees, etc.). This would also lead to an *unjustified and unnecessary increase in negotiation costs*.
 - ❖ These difficulties can be further illustrated by broadcast retransmissions via the *new media platforms*, as the business models of the new media operators were not known in advance to broadcasters and other right-holders.
 - ❖ New media platform operators do not expressly enjoy the benefit of a mandatory collective licensing scheme for clearing the retransmission rights which they need. Consequently, the legal framework for simultaneous, complete and unchanged retransmission of broadcasts creates an obvious *incentive for a similar system of rights clearance* for broadcast retransmissions by such other media operators.
-