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EBU Comments

to the EC Commission's public consultation paper
on Content Online in the Single Market

Executive Summary

- 1. Public service broadcasters' involvement in online content services is needed to provide the necessary safeguards for media pluralism and the fulfilment of fundamental European policy objectives in the digital environment, such as social cohesion, cultural diversity and public information services.*
- 2. Fulfilment of the foregoing means that broadcasters must be able to acquire the necessary rights to provide their viewers and listeners with access to their programme services via both offline and online delivery. However, such delivery of content services by broadcasters will be impossible if the (music) collecting societies are not in a position to grant the necessary rights. Member States should therefore be encouraged to improve conditions for the online availability of European content, by introducing mechanisms to facilitate the process of collective licensing for online content services, in coherence with the legal framework for other services which can be received across EU countries.*

In particular, collecting societies operating in the field of music should continue to be in a position to grant licences for the entire world repertory, and also for any online services by broadcasters. With particular regard to phonograms, producers should be obliged to entrust their rights to collecting societies, so that the latter are in a position to grant licences in parallel to those of the authors' societies.

- 3. One of the potential strengths of the European online industry is the great diversity of broadcasting content. Moreover, a large part of Europe's audiovisual heritage is contained in broadcasters' archives. Appropriate measures should be introduced which ensure that broadcasters are entitled to make their archives available to their audiences, subject, where applicable, to fair remuneration.*

4. ***"Net neutrality" should be the subject of further explanation and study, and preferably also as part of the forthcoming "Telecom Package" review.***
5. ***DRM systems must be acceptable to all stakeholders, including consumers, and must respect the basic principles of copyright law. Moreover, to avoid "gatekeeping" effects the abuse of proprietary rights should be prevented. DRM systems must not be used to impose any form of encryption, but must keep digital reception technology attractive for all viewers and listeners, via open and interoperable standards, and provide equal access for broadcasters to all media platforms.***

Questions 1 - 5:

It may be assumed as known which online content services are currently offered by European broadcasters, and by public service broadcasters in particular, given that they are among the most popular websites in each country.

EU policies generally recognize the need, across all outlets, platforms and terminals, for (more and new) quality content, and in particular *locally-produced original content, in all European languages*. Indeed, this is essential for the success of both the European creative industry and the take-up of new online content services in Europe.

In general, new creative businesses using the Internet as well as new receiving devices (such as computer screens, mobile phones and other hand-held devices) require *new types of content services which make optimal use of the characteristics of the online platform and such new devices* (examples being time-shifted use, mobility and interactivity). More and more citizens are looking for such alternative services, in addition to traditional (linear) programme services. Consequently, broadcasters must also offer their content in the form of such services (such as podcasting), which correspond to expectations.

At the same time, these expectations make it clear that another crucial factor for the success of European online content services will be *interoperability*, which should be considered primarily at the "consumer level" and not at the "content provider level". The objective must be to ensure that the citizen has access to the maximum range of content.

In the context of online content services, *public service broadcasters have a special role to play*. Given the desire to ensure the widest possible access to a broad range of quality content for all, as well as to underpin pluralism and freedom of information and expression, the growth and diversity of creative industries across Europe, and European

competitiveness, which are all part of the renewed Lisbon strategy (the so-called i2010 initiative), online content services from European public service broadcasters will be indispensable. In particular, to meet the new challenges of the knowledge-based society the universally accessible services of public service broadcasters function as a benchmark for quality and act as trusted guides in an increasingly diversified and fragmented digital environment. Moreover, public service broadcasters are a well-known contributor to social cohesion and integration for all members of the public (bridging the so-called "digital divide"), they have a tradition of spearheading the introduction of new communication technology in the pre-competitive phase of the market cycle, where activities are not commercially self-sustaining, and they are particularly important for media pluralism in the light of the increasing trend towards concentrations in traditional and new media.

Questions 6 and 7:

One of the potential strengths of the European online content industry is the *great diversity of broadcasting content*. It is well known that broadcasters, and in particular public service broadcasters, contribute to a greater appreciation and dissemination of the diversity of national and European cultural heritage. On numerous occasions European institutions have recognized the important role played by public service broadcasters in the promotion of cultural diversity in the Information Society by developing new services and new technology.

European broadcasters hold in their archives a huge stock of productions made or commissioned by themselves, around ten million in radio and two million in television, going back to the very beginning of broadcasting. *Such archives constitute a unique and invaluable vivid record of the countries' political, social and cultural life*. Today's public and future generations are entitled to expect that the new possibilities of audiovisual communication, which are the backbone of the Information Society, will also be used to revive this heritage, whether through *niche services or on-demand services*. In fact, such services will become an indispensable component of public broadcasters' overall programming activities. Archive productions should make a major contribution to some of the new online content services offered in this way.

Consequently, practicable solutions are needed which are sufficiently flexible to ensuring that European citizens can enjoy this heritage, to which, otherwise, they would largely be denied access on account of administrative and/or economic problems. The alternative, viz. no support at all, would mean that a large proportion of the archive material would simply be dead. Worse still, *with no prospect for future use, such material would not even be preserved for posterity*. This would run contrary to any reasonable policy on archiving in the public interest.

- **What are the current deficiencies?**

In its recent Recommendation on "digital libraries", the Commission has recognized the need for a practical solution to so-called "orphan works". A very similar problem exists with respect to broadcasters' archives. However, finding the rightholders in a given broadcast production (which may be up to 100 persons) *is only part of the wider problem*. Some may not react or may make grossly exaggerated financial demands, or may refuse to accept a reduction in the initially-agreed repeat fee. A major record producer of a music extract integrated in the production may not be interested at all. For any of these reasons, it will often not be worthwhile even attempting to clear the rights. When the administrative effort would still be worthwhile, the necessary rights will ultimately be cleared. However, experience shows that this concerns only a (far too) small proportion of the archive material.

Moreover, the usual cooperation between broadcasters and *collecting societies would be helpful, but is not sufficient*. Broadcast production contracts are normally concluded with programme contributors on an individual basis, with the exception of a few categories of works/rights (especially in the field of music) Consequently, collecting societies - even where they already existed at the time when the archive production was made - do not hold all the necessary rights in question, and particularly with regard to the on-demand ("making available") right.

- **What needs to be achieved?**

Member States must ensure, by whatever means they deem necessary and adequate, that broadcasting organizations are entitled to use (and to authorize others to use) their own archive productions from a given time for new online and on-demand services. Such use should be subject to payment by the television or radio producer of equitable remuneration, as appropriate, to the rightholders who contributed to the production.

In this context, some concepts call for further explanation:

- "**Necessary**" means that a Member State needs to provide a remedy only for cases where minimal legislative intervention would be indispensable. In practice, the nature and extent of such measures are bound to vary from one country to another;

- "**Broadcasters' own archive productions**" obviously means those radio and television programmes which were produced by the broadcasting organizations themselves ("in-house productions") or by production companies commissioned and financed for that purpose by the broadcasting organizations under their own editorial control;

- "**Equitable remuneration**" means that if a collecting society actually hold the rights in question with regard to the archive production, rights clearance will take place in the usual manner. However, if such societies (or unions) are to be given an *additional* role in this context, this could be done only through legislative measures ensuring that outsiders could not effectively block a collective authorization granted by them;

- "**From a given time**": To avoid protracted and costly litigation, the legislator could set a calendar date, with all production contracts concluded before that date being covered by the legislative measures.

The urgent need for such legislative measures has been recognized. Some countries (e.g. Denmark, Latvia) have already implemented special legislation, while other countries are in the process of finding a solution (other Nordic countries, Germany).

Questions 8 and 9:

Online Content services are crucial opportunities for broadcasters. After all, *the main output of broadcasters is primarily content*. The cost of audiovisual content creation, production and acquisition accounts for the majority of any broadcaster's budget. Making the programmes of broadcasters available to the public throughout all the platforms and means of access preferred by individual users, including the Internet, allows the public to derive the greatest benefit from content which has already been paid for.

For various reasons, *these services are even more important for public service broadcasters*. First of all, the Internet allows for broadcast services which cannot be provided in such an efficient manner by linear means. Examples include weblogs permitting dialogue between editors and viewers and listeners, electronic programme guides and websites which provide complementary information on broadcast programmes, or special interactive elements which make programmes more attractive (e.g. programme-related games for children).

Moreover, on-demand services are an *additional offer to viewers or listeners who wish to have access to public service content "anytime, anywhere"*. For example, viewers or listeners may be given individualized access to a broadcast programme during a certain period after its transmission on a television or radio channel. This "podcasting" service has already proven increasingly popular. The effect for the viewer is similar to the use of a personal video recorder at home (time-shifting).

In addition, *on-demand delivery may sometimes be necessary to reach all segments of the public*. Fragmentation of audiences and access due to a multitude of platforms makes it an increasing challenge for broadcasters, and particularly for public service broadcasters to achieve the desired or required universal reach. Additional on-demand delivery of public service programmes contributes to stabilizing or extending this reach.

There are also cases where *on-line delivery may be the most appropriate way of providing public service content to certain sections of the public*, compared to traditional broadcasting. This may particularly concern minorities, vulnerable sections of the public, or those sections which for various reasons are difficult to reach with conventional transmissions. These may include young people who are "tuned in" to new interactive platforms, persons with disabilities, and citizens living outside the reach of terrestrial or satellite transmissions.

New business models for online services often depend on broadcasters' content. The availability of broadcasters' programmes is often crucial for the take-up and success of new business models for online services. In particular, the start-up phase may not generate sufficient revenue to finance the production of new, original content of quality. Content provided by broadcasters, and in particular public service broadcasters thus often plays an important role in increasing the sustainability of online services.

It is therefore of *decisive importance that the necessary rights clearance for all these services should be facilitated*, and in particular through cross-border collective licensing (see below).

Questions 14 - 17:

Need for collective agreements for online services (which include music extracts)

In the view of broadcasters, there is an absolute necessity to ensure continuing with the possibility of one-stop-shop blanket licensing of the worldwide repertoire of musical works, from one national collecting society. So far, many collecting societies for the use of *musical works* have updated their agreements with their members, in order to meet this need for both offline and online uses by broadcasters (including on-demand rights for pieces of recorded music forming an integral part of television or radio programmes). However, this extended mandate would remain pointless (and create no benefit for anyone) if *parallel* collective licensing of *commercial phonograms* which carry these musical works were not also ensured.

A minimum step to facilitate such contractual arrangements for online licensing is the creation of *coherence in the legal framework for cross-border services*, which means coherence in creating legal certainty for offline and online cross-border broadcast services. Otherwise, the crucial country-of-origin principle in the Television without Frontiers Directive and its specific role in the 1993 Satellite/Cable Directive would run the risk of being undermined, and the main political objectives of these Directives would be frustrated.

- **What are the current deficiencies?**

The 2005 Recommendation on Music Online Services is intended to boost online *sales* of music recordings (e.g. by iTunes), but it is inadequate for fostering the availability of online services by European broadcasters. Collective licensing of music to broadcasters can be effective only if the rights management societies are able to grant broadcasters all the rights necessary for both their offline and online services, and in particular for their on-demand services. In fact, broadcasters have raised this need for effective collective licensing ever since the online context made this requirement apparent (see the Appendix for "the Right Rights Deals" taken from the BBC's presentation at the 2006 EBU Copyright Symposium). Consequently, broadcasters continue to insist, *as*

reflected in Recital 26 of the 2001 Copyright Directive, that major phonogram producers should not be allowed to abuse their position so as to prevent one-stop-shop world-repertory collective licensing, as it exists - and must continue to exist - for musical works. In fact, once music rightowners were to begin dividing their rights among individual collecting societies for specific uses and/or for specific countries only and on an exclusive basis, this would obviously have various negative consequences, and notably for the availability of European music and other European content in online services.

Moreover, broadcasters question the legal need for a "multi-territorial" licence when it comes to communication to the public (online streaming or simulcasting), including the on-demand delivery of their programme services. This assumption overlooks the fact that mere *receivability* of broadcast signals is only the *result* of a prior act (the transmission to the public), and not the act itself. Just like the act of satellite broadcasting under the Satellite/Cable Directive, online streaming and podcasts are physical acts which take place in a given country and should therefore be subject to the copyright law of that country only. It would be an anomaly if European broadcasters had to clear the right to satellite broadcasting under the law of one single country but then clear the rights for virtually all the countries in the world if that same satellite broadcast was to be simulcast over the Internet. The same anomaly would exist for programmes which are first broadcast and later podcast. Indeed, the application of the principles of the Satellite/Cable Directive to those cases would be fully in line with the (future) Audiovisual Media Services Directive.

It is crucial for the realization of a single audiovisual area in Europe that any remaining obstacles to that goal are removed, and even more so if such obstacles seem to be *artificially* created with the intention of hindering European companies from entering the online content market. If any country seriously claimed to have full copyright jurisdiction over all Internet activities of all broadcasters worldwide and online music rights were not managed collectively via the one-stop-shop approach, millions of infringements would take place on a daily basis. Common sense demands realistic solutions. Broadcasters therefore request that in order to facilitate the licensing of their online services the Commission should actively promote the creation of *legal certainty* for all such services within the Community, so that the free movement of online audiovisual services by European online content suppliers is guaranteed. This is necessary to ensure that that accepted principle cannot be undermined by dubious arguments in support of extra-EU countries which would be only too eager to subject online radio or television programme services which originate in Europe to their own prior authorization.

- **What needs to be achieved?**

Legal certainty in coherence with solutions for other cross-border transmissions

Online availability of European content should be enhanced by removing any remaining obstacles to the free movement of online audiovisual services by European entities,

while ensuring equal treatment for all suppliers of audiovisual media services within the Community. In an ideal world, a new clarification would be needed in parallel to the one which has been provided for satellite broadcasting in the 1993 Satellite/Cable Directive. However, although revision of that Directive is long overdue (see below), that project could be subject to a long-term process, and the Lisbon agenda requires that European online content be made available *today*.

For this purpose, Member States should adopt measures to promote *simplified licensing arrangements* for suppliers of online content, in order to facilitate rights clearance and subsequent online availability of their content. This can be done by *creating legal certainty for all cross-border services which are based on the act of communication to the public*, in coherence with other existing solutions for transfrontier communications. The practical result thereof should be that the contractual acquisition of the necessary rights, as in the case of satellite broadcasting, complies with the legislation on copyright and related rights in the Member State in which the communication is initiated. Such legal certainty would ensure that cross-border licensing of Internet simulcasts and podcasts of European broadcasters can and does take place, while at the same time promoting the continuation of collective management agreements and their smooth application in practice.

Simultaneous retransmission of broadcasts over any "new media" platforms

The Satellite/Cable Directive also includes a precedent for other types of cross-border transmissions, and notably for broadband. The established system of simplified clearance of cable distribution rights should be extended to comparable cases of retransmission of broadcasts by commercial third-party operators over wired, mobile and other wireless "new media" platforms, such as broadband (e.g. DSL), mobile telephony and digital terrestrial or satellite platforms, provided that such retransmission takes place simultaneously, in full and without any modification and, in particular, provided that the individual subscribers to the retransmission service are clearly identifiable and that they are charged by the third-party operator for access to the programme service.

Further information on this issue is available on the EBU website.

Question 20:

The issue raised with respect to "network neutrality" is complex and does not yet seem to be ripe for a clear answer.

First of all, the Commission does not provide a precise definition. Most likely, it involves the issue whether or not discriminatory practices by providers of Internet services should be allowed, but this raises another question: to which of those services would or could such practices be applied (e.g. only to P2P services or also to website

hosting or e-mail messaging services, for all kinds of audio, voice and video transmissions or only for streaming video, and for all types of applications or perhaps only for wireless networks)?. Are such practices to be applied to content providers or to consumers of Internet services, or perhaps to both? Furthermore, it may not be known to the interested parties which possibilities for managing bandwidth currently exist. These points are, of course, closely connected with the question of the circumstances under which a practice could be considered discriminatory.

Next, it may be assumed that there are various arguments in favour of maintaining the current network neutrality, as the creation of a "two-tiered Internet" does not, at first sight, seem to be generally desirable. In particular, if discriminatory practices were to "favour the rich" (whether on the side of the content providers and/or on the side of consumers) and thereby increase the "digital divide", that would clearly run the risk of undermining the policy of ensuring the widest possible access to all sections of the public and of running counter to the promotion of cultural diversity, media pluralism and the freedom of information. However, the possible approaches to prevent that situation can be manifold. For example, the (former) *Wikipedia* web page on network neutrality listed six different proposals which could be considered.

Finally, as this issue could also involve telecom operators as providers of broadband services, it needs to be analysed whether such a neutrality safeguard would be in line with existing (or future) access rules to facilitate access by broadcasters to communication networks and associated facilities. It would therefore seem appropriate to deal with this issue also as part of the forthcoming review of the European regulatory framework for electronic communications and services (the "telecom package" review).

Questions 21 - 23:

Broadcast piracy causes serious harm to broadcasters, who therefore need substantial legal protection. Particularly for the transmission of individual news items, and major sports or cultural events, the existing level of protection is far from sufficient to combat modern-day piracy (above all, via the Internet) in an effective manner. Moreover, the availability of illicit copies of radio and television programmes prevents all rightowners concerned from licensing the content of such programmes in certain ways or in certain countries. Protection against broadcast piracy is thus necessary not only for broadcasters but also in the interests of both the public at large and the copyright society as a whole.

In a recent article ([The Broadcasters' Neighbouring Right: Impossible to Understand?](#), available at the EBU website www.ebu.ch), the EBU once again explained the specific nature of the broadcasters' neighbouring right and the urgent need for broadcasters to have the legal means of protecting themselves against piracy of their broadcasts, such piracy having become all too easy in a digitized and globalized electronic media world. Further information on this issue is available elsewhere on the EBU website.

With regards to peer-to-peer (P2P) technology, the EBU and a number of its Members are currently studying and experimenting with its possible use for broadcast services. P2P solutions have the potential to become a complementary means of media delivery to the public, overcoming the traditional shortcomings of Internet "unicast" delivery of mass-appeal productions (such as the Eurovision Song Contest) resulting from bandwidth congestion. Given that "legacy" methods for content delivery over the Internet have become very costly, P2P technology could be seen as a potential means for cost-efficient distribution of certain radio and television programmes.

Questions 25 - 29:

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.

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

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.

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.

Questions 32 and 33:

See the comments regarding questions 7 and 14-17.

Appendix