



EUROPEAN BROADCASTING UNION

*Legal Department*

UNION EUROPEENNE DE RADIO-TELEVISION

*Département juridique*

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**EBU Intervention  
at the Public Hearing on Content Online  
Brussels, 11 October 2006  
(Heijo Ruijsenaars)**

**Debate No. 2: Licensing and rights clearance**

From the website Nytimes.com, 17 September 2006 (Article by Richard Siklos: A Video Business Model Ready to Move Beyond Beta):

"VIDEO mania is in full swing. [Amazon](#) is finally doing movie downloads. [Apple](#) is touting a new wireless gizmo to beam movies from laptops to TV screens. NBC is introducing a video syndication service that might pit it against [Google](#) and [Yahoo](#), and it's joining the other big networks in putting its shows online for free with advertising. (...) the world has gone batty over video. Thirty-second clips, three-minute spoofs, half-hour sitcoms, TV dramas that haven't been shown in decades, rap videos, Hollywood blockbusters and feeds from TV news outlets big and small are flooding online."

Obviously, this quote raises the question: Where is Europe? More specifically, where is **European content** online? Ladies and gentlemen, it is this particular content and its online availability that we are talking about today. And this shows the particular importance of today's topic for European broadcasters.

From a speech by Mr McCreevy, "Music licensing for the 21st century", given at the Music Publishers' Congress, Brussels, 3 October 2006:

"I want Europeans to be able to access their favourite works wherever and whenever they want, on whatever platform they want. Mobile phone. Internet. It shouldn't matter." (...)

"We need to get our framework for licensing right. (...) Insisting upon managing copyright on a territory-by-territory basis makes no sense when there are no borders online."

The EBU could certainly agree with these thoughts. But it would be a serious error to believe that the Internal Market's Recommendation of October 2005 would be a panacea for all sectors. It is certainly not for broadcasters!

The EBU provided its comments on this Recommendation earlier on, but the main reason why the Recommendation is inappropriate for the broadcasting sector is simple: it is intended only for *sales of music recordings*, or what might be called the "iTunes" of this world. For some, this may be regarded as useful, but does it really help to promote *European content*?

In any event, the 2005 Recommendation has some undesirable consequences for broadcasters:

- it creates a *risk of destroying the benefits of the one-stop-shop system* of collective licensing for broadcasters (with possibly negative consequences for the availability of local European content); the EBU also explained this to the Competition Unit of the EC Commission in the CISAC proceedings;
- it creates legal uncertainty for online services by operators *other than iTunes*.

**Need for a twofold solution:**

- 1) *Where rights clearance by collective licensing takes place for off-line broadcast content, these agreements must be extended to include online distribution, at least where it concerns the same content already covered by those agreements.*

For example: *podcasting* of radio and television programmes is increasingly popular. This shows that the public wants to consume broadcast content in different ways, and European broadcasters must be able to meet this legitimate demand, not only for the benefit of the public but also because otherwise the pirates will make this offer.

- 2) *The need for legal certainty for online services is more urgent than ever.*

For example, in Europe, we already have several legal principles for cross-border services:

- the freedom for broadcasting services embedded in the EU Treaty;
- the country-of-origin principle enshrined in the Television without Frontiers Directive, which is now being extended to include online services;
- rules which facilitate one-stop-shop licensing agreements, and notably in the 1993 Satellite and Cable Directive. It should be recalled that while one satellite can cover the whole of Europe, these rules were specifically devised to pursue the objectives of the Television without Frontiers Directive. Also, they have shown that they work very well in day-to-day practice.

These principles and rules are crucial for a competitive Europe online. This means that we cannot afford to tolerate any practices under copyright which would be in conflict with the goals of these principles. If European broadcasters can clear the right to

satellite broadcasting to the whole of Europe via a one-stop-shop collective licence, it would make no sense to apply a multi-shop approach if the same satellite broadcast is simulcast over the Internet. The same reasoning applies to the rights clearance for programmes which are first broadcast and later podcast.

Of course, it could be argued that the above-mentioned issues should be dealt with in the review of the 2001 Copyright Directive and/or the Satellite and Cable Directive. It is true that the latter review, in particular, is long overdue (e.g. for extending the principles of rights clearance to similar modes of delivery, such as broadband and mobile). But experience tells us that this process could take an unknown number of years; if we wish to be competitive, European broadcasters need practical solutions *today*.

For the avoidance of doubt, this should *not* be misinterpreted as a plea for abolishing the territoriality of copyright. It is not necessary to take such a drastic step, as it is not really an inherent problem of copyright as such. What we are asking for is only a common sense approach, which must be in full coherence with the existing rules for legal certainty for cross-border services. It is a question of creating an *effective system* for the *exercise* of copyright, in order to foster lawful online services in Europe. There is no international rule which would prevent such a system.

#### **Debate No. 4: Cultural diversity**

There is no real need to stress the importance of cultural diversity for public service broadcasters. In fact, one of the potential strengths of the European online content industry is the *great diversity of broadcasting content*, which reflects both the national and the European cultural heritage. Broadcasters, and in particular public service broadcasters, are responsible for the dissemination of this diversity. This is recognized in various legal texts.

However, it should not be overlooked that European broadcasters hold in their archives millions of productions made or commissioned by themselves, going back to the earliest days broadcasting. *This is a unique record of the countries' political, social and cultural life*, which people expect to be made available, and most likely through niche services or on-demand services.

Consequently, we need practicable and flexible solutions to ensure that European citizens can enjoy this cultural heritage.

**What are the current problems?** *Again, this may be a typical copyright problem, but in reality it is mainly a practical issue.* In its recent Recommendation on "digital libraries" the EC Commission recognized the need for a practical solution for so-called "orphan works". This is very similar to the difficulties which exist with respect to broadcasters' archives. However, for broadcast productions, finding the rightowners is *only part of a much wider problem*.

- 1) Broadcast productions are complex; in contrast to finding the creator of a painting or photograph, rightholders to be found may concern up to 100 persons.
- 2) Even if everybody is found, some people may not react or may simply refuse to accept a reasonable deal. If there is not much money involved, a major record producer of a small piece of music integrated into the production may not be interested at all. If only one of all these possibilities occurs, the project would practically be killed off.
- 3) The usual cooperation between broadcasters and collecting societies would be helpful, but is *not sufficient*. Not all rightholders are represented, and the societies 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?** The Commission will need to set a task for the Member States, because the desirable solutions will inevitably differ from one country to another. The task is for Member States to ensure that broadcasters can use their own archive productions for new online services, subject to payment, where appropriate, to rightholders who contributed to those productions. However, the (regulatory) means for doing so, and any further details, will have to be left to what the Member States deem necessary.

We are not asking for a revolution. Some Member States (e.g. Denmark and Latvia) have already implemented special legislation, while others are in the process of finding such solutions (other Nordic countries, Germany, Switzerland). But we need a level playing-field for all broadcasters in Europe.

#### **Debate No. 6. Digital Rights Management**

With respect to digital broadcasting, and the consumer's enjoyment of such broadcasts, the risk of DRM for the necessary interoperability of receiving devices is far too large to leave the development of this area entirely to market forces alone. It is therefore suggested that proper *industry guidelines* for DRM should be established, and in particular by assembling positive examples of stimulating "good" DRM systems (e.g. the new provision in French copyright law to supply information for interoperability) and including a "blacklist" of abusive practices and other negative examples. This could probably be done by means of a "DRM Charter" or similar form of co-regulation.

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