



Cable Europe

## **Cable Europe response to the European Commission's Consultation on the Online Commerce Roundtable Report on Opportunities and Barriers to Online Retailing of Music**

30 June 2009

The European cable TV industry currently provides broadband, telephony, digital TV to over 73 million customers. Cable Europe, the European Cable Communications Association, represents all leading European cable TV operators and their national trade associations. The aim of Cable Europe is to promote and defend the industry's public policy positions and business interests at both European and international level, and to foster co-operation among its members.

Cable Europe welcomes the Commission's Online Commerce Roundtable initiative and the opportunity to comment on its report on opportunities and barriers to online retailing of music. We intervened as a third interested party in the CISAC antitrust case as a supporter of the Commission's decision and here too we would like to support the assessment made by the Roundtable for the need of the development of an effective system of rights management in which a collective effort of all those involved in the music industry is made to make the legal distribution of music online as easy as possible for all users – big and small.

The current European copyright framework is characterised by a high degree of inefficiency and partially impedes the EU from achieving overarching goals including the further development of the internal market, competition and fast digitisation.

In the current system especially Cable operators are subject to high transaction efforts and opportunity costs as a result of uncertainties caused by copyright regulations pertaining to the clearance of cable distribution rights. Therefore we believe that an improved, less costly and more consistent and transparent rights management and clearance system across Europe is needed.

### **A system of one-stop shopping**

Cable Europe does agree with most of the Roundtable's participants statements. We do indeed consider that the current copyright system is compromised because of the territorial restrictions.

We do believe that an efficient copyright clearance system can only be achieved with the possibility for each collecting society with which a user comes to an agreement, to also give clearance for the repertoires administered by the competing collecting societies, without amounting to exclusive reciprocal representation agreements.

If this were not to be the case, content providers and operators of electronic communications networks who only communicate copyright protected works to the public in a single Member State, would be penalized. The reason is that, at present, they only have to deal with one or two national collecting societies with whom they can clear the world repertoire. Cable operators therefore want to avoid the situation where they would need to negotiate with a multitude of collecting societies representing the same rights, but different users. Clearly that would be unacceptable since their transaction costs would increase dramatically.

Moreover, next to the need of lifting territorial restrictions, other restrictions to the clearing of copyright and neighbouring rights should urgently be removed in order to create a strong and competitive online content offering in Europe. For example, the fact that, in certain Member States, collecting societies refuse to license certain rights to specific users is an impediment to create this European offering.

This altogether demonstrates that there is indeed a strong need to harmonise – i.e. simplify – the different clearance mechanisms currently in place.

### **A system of one-stop shopping for the global repertoire**

Cable Europe believes that a system of one-stop shopping for the global repertoire - such as pursued by the Commission in a series of competition cases since 2001 as explained in the report - would allow for the development of a sound competitive environment with many competitors and a diverse and attractive content offer; it would also enable cultural diversity to flourish and ensure that all European music gets equal playtime and remuneration on European airwaves and networks.

In this sense, we support statements made by participants of the roundtable such as Apple's views against the fragmentation of rights in paragraphs 43 or 26: *'the "recent withdrawal of rights from collecting societies by various publishers means that the local national collecting society is no longer able to offer a so called blanket licence, but rather the various rights may now have to be sought via a myriad of different licenses from different licensors';* or iTunes' believe in paragraph 59 that *'no blanket licence (i.e for the global repertoire) for any territory in Europe is currently available due to the withdrawal of parts of the global repertoire from the collective management system by some of the publishers (e.g. EMI's withdrawn repertoire is now being licensed by CELAS only)'.*

## **Music as part of a broader programme offering**

In paragraph 31 EMI observed that the "*administrative burden on users of musical rights in the borderless world of the Internet is very significant as, in order to bring the rights necessary to stream music across the EU or to sell music as a download, such users must obtain a licence from a large number of entities and the complexity becomes even more striking when a user wants to broaden its offering to include video representations, lyrics and other rights that are not controlled by collecting societies, as these rights must be obtained by going directly to each publisher(s) of the underlying composition. In EMI's opinion, this complexity discourages innovation and locks out all but those with the resources to approach online services with a pan-European footprint.*"

Cable Europe's members distribute radio and television programmes by analogue and digital means, provide video on demand services and offer broadband internet access and voice telephony. Cable operators are therefore confronted with the clearance of a number of rights for both music and audiovisual works.

Taking into account the Recommendation on cross-border collective management of online musical rights<sup>1</sup>, we consider that different approaches towards music and audiovisual licensing regime and between online and offline is not efficient. The clearance of musical rights cannot be isolated from clearance of all other rights or differentiate between online and offline. Many different types of rights are involved in the distribution or making available of a channel or a VOD offer and together these rights constitute a package on its own.

The growing complexity and multi-territory nature of much of the European cable business does not sit comfortably alongside today's EU rules. Under the SATCAB Directive<sup>2</sup>, broadcasters who choose to distribute their channels across national borders within the internal market can clear the rights for satellite distribution or distribution on the public internet either directly with the producers or with the musical rights society in their home country. Whereas, if those same broadcasters also want to have their channels distributed via cable in different Member States, such distribution would need to be cleared in every single Member State separately.

This kind of discriminatory treatment should ever more so be avoided in regard to new markets in which over the top providers (Joost, Babelgum, etc)

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<sup>1</sup> Commission Recommendation of 18 October 2005 (2005/737/EC) on collective cross-border management of copyright and related rights for legitimate online music services OJ L 276, 21/10/2005

<sup>2</sup> 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

and platform operators, using different technologies, but all offering on demand services to consumers, compete with each other.

It is therefore clear from the above that the revision of the SATCAB Directive is essential at this stage:

- A clear technology neutral approach should be explicitly confirmed for primary and secondary broadcast.
- The system of collective management of rights should be recognized as having the same weight as 'all rights included packages' provided by broadcasters who wish to do so to cable operators, as this would increase the overall efficiency of the rights clearance system.

## **Conclusion**

To conclude, we believe as stated by Which? In paragraph 50 that *'it is necessary to find solutions with all stakeholders involved in a balanced way, not only in order to combat piracy and counterfeiting, but also to eliminate the current barriers to the legitimate online business'*.

The EU should help to install a new, more efficient copyright-clearance system which would help all market players, including the Cable companies, to streamline their transaction and management costs. Key to this new system is competition between collecting societies which should increase the efficiency of the system and help to drive the i2010 Agenda forward. However, it is also key to avoid the accumulation of market power with only 2-3 large copyright societies in Europe.

The European Commission should formulate a recommendation to all member states related to a consistent application of the existing legislative framework, calling for:

- Competition among collecting societies in Europe or, in the absence thereof, strict ex ante control based on the model provided by the regulatory framework for electronic communications
- More transparent reporting of licence and money flows on the part of collecting societies
- A more market-oriented pricing process
- A technology-neutral, cross border 'all rights included' copyright clearing
- A balanced implementation of Articles 9 and 10 of the SatCab Directive: on the one hand guarantee a "single face to the customer" by forcing rightholders to negotiate only via collecting societies (Art. 9) and on the other hand enable one-stop-shopping with audiovisual media service providers or with the producers of audiovisual media content, by allowing them to clear all necessary rights themselves with third parties and/or collective rights management organisations with a

view to offering 'all rights included products' to aggregators of audiovisual media services. (Art.10)

- The European Commission could also think about a new holistic clearance Directive that will provide with a system of clearance of rights for all kind of service content exploitation forms (fixed, mobile, online, cable, DTT etc...) with horizontal (multiterritory) and vertical (one actor in the value chain to clear at once all the exploitation forms) clearance included.