

ONLINE DISTRIBUTION OF AUDIOVISUAL WORKS

GREEN PAPER

BEUC Response

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Ref.: X/2011/117 - 17/11/11

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 EC register for interest representatives: identification number 9505781573-45 

Summary

BEUC regrets that despite numerous previous consultations identifying the key challenges regarding the availability of content online, no concrete measures have yet been taken at European level to ensure consumers have access to Europe's cultural diversity.

BEUC has identified the following as the main problems preventing the establishment of a Digital Single Market for audiovisual content:

- **lack of consumer-friendly legal offers** for audiovisual content that respond to consumers' expectations;
- **complexity of licensing systems**, particularly in terms of legal uncertainty as regards the scope and the rights that need to be cleared;
- **absolute territorial exclusivity** and market fragmentation is irreconcilable with the Treaty, as confirmed by the European Court of Justice in the recent Premier League case;
- **national chronological and territorial release** windows make no sense in the online environment;
- **outdated copyright exceptions and limitations** fail to establish a balance between the rights of creators and the rights of the general public;
- limited choice between **payment systems**.

As regards the different solutions put forward by the Green Paper, BEUC calls for:

- **Single day and date release across Europe** through all channels of distribution, both off- and on-line;
- Monitoring of the **implementation of Article 3i of the Audiovisual Media Services Directive** to ensure the share of European works in the catalogue of programmes offered by on-demand audiovisual media service providers;
- Clarification of the **European Commission's own assessment of the feasibility of extending the Scope of the Satellite and Cable Directive** and public consultation on concrete proposal;
- **Revision of the current system of copyright exceptions and limitations** with the aim of restoring the balance exclusive rights and the rights of consumers and society as a whole;
- **Introduction of a new exception for non-commercial use of creative, transformative or derivative works**, which reflect a certain amount of creative effort and are created outside the professional context;
- Harmonisation of the **notion of authorship**;
- Measures to protect authors from **unfair contractual arrangements** with publishers and producers;
- Support the proposal for a **binding WIPO treaty fro improved access for Blind? Visually Impaired and other Disabled Persons**.

Back to the beginning?

BEUC is concerned by the significant delay of the European Commission in proposing concrete measures in the field of digital content. Over the past four years, a number of consultations were launched at EU level and a number of reports published which helped to identify the main challenges related to the lack a digital single market for online content. The 2008 Green Paper on Copyright in the Knowledge Economy¹, the 2009 Reflection Paper on Creative Content², the 2010 EU Digital Agenda³, the Monti Report on the Future of the Single Market⁴ have all identified the same problems.

However, the European Commission has regrettably decided to launch a new round of consultation addressing the same issues. The same questions regarding licensing, copyright ownership, release windows, authors' remuneration, copyright exceptions and limitations were addressed in 2008 and 2009. The Green Paper does not bring any new ideas or solutions. It does not provide for an indication of the Commission's assessment of the current bottlenecks to the online distribution of and access to online content.

In contrast, in the field of IPR Enforcement the European Commission has demonstrated exceptional reflexes and has decided to revise the IPR Enforcement Directive 2004/48 which was only implemented by Member States in 2009 even despite the lack of evidence as to its effectiveness. That the European Commission has decided to revise the Directive is also surprising as it has not provided an assessment of its economic impact on innovation and the development of 'Information Society Services', as explicitly requested by Article 18 of the Directive 2004/48.

Need for a balanced and forward-looking approach

The current copyright framework has and is failing to keep pace with rapid digital developments. The phenomenon of disintermediation which is inherent to the Internet, has called into question the 'traditional' distribution systems of the content and information industry, laying bare its inefficiency and its incapacity in adapting to the challenges of the digital environment.

Consumers want to have access to diverse online content, irrespective of their country of residence or their nationality. They also should be able to benefit from the realisation of a truly competitive Internal Market and access to diverse online content of the highest quality and at a fair price. Authors are entitled to have their rights protected and receive fair compensation for the use of their works on the internet. Copyright law should aim to foster innovation and promote creativity to the benefit of both authors and consumers. At the same time, it is important to provide the necessary incentives for the development of new business models allowing for the simultaneous distribution of content across the EU and via multiple channels.

The remaining geo-blogs and fragmentation along national borders result in keeping Europe's culture locked at national level. **Access to diversity is a precondition for cultural diversity.**

¹ http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf

² http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>

⁴ http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

With countless new opportunities arising from the ways in which content is accessed and distributed, the need to rethink the European legal framework and aim to achieve a fair balance between different stakeholders, promote innovation as well as cultural diversity has arisen.

I. THE DIGITAL SINGLE MARKET FOR AUDIOVISUAL MEDIA SERVICE – POLICY APPROACHES

1. What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?
2. What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?
3. Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?

BEUC has identified a number of key obstacles that significantly impede the development of a digital single market for the online distribution of European audiovisual works.

Lack of supply

BEUC disagrees with the statement that there is no consumer demand for European audiovisual works. On the contrary, the main problem remains the lack of satisfactory legal offers for audiovisual works which respond to consumers' expectations.

According to the survey by the Open Rights Group (ORG), the main problems relate to a lack of availability, poor pricing and quality⁵. The ORG looked at how many recent best-selling and critically acclaimed films, including the top 50 British films; consumers can legally buy or rent online. The findings are self-explanatory: Only 43% of the top 50 British films can be bought or rented online; Only 58% of the British Academy of Film and Television Arts (BAFTA) Best Film award winners since 1960 have been made available; The average price on iTunes for online films stands at £6.72, while the average DVD price for BAFTA winning films is £5.843.

According to the European Audiovisual Observatory, the Video on Demand (VOD) turnover in the EU has increased by 250%, while more than 1100 films are produced within the EU each year. However, consumers are provided with hardly any choice regarding European works; the majority of works available are Hollywood productions which tend to dominate the European market. The same applies to TV programs and

⁵ <http://www.openrightsgroup.org/ourwork/reports/cant-look-now:-finding-film-online>

sport events to which consumers are refused access when trying to watch from another EU Member State.

BEUC also rejects the argument that it is impossible to compete against 'free' content. Consumers are increasingly willing to pay for legal content, including for films, TV shows and sporting events⁶. It is only by providing valuable services to the consumer that unauthorised copyright infringement will be reduced. According to a recent survey, 71% of global consumers say online content of any kind will have to be considerably better than what is currently free before they will pay for it⁷.

Shortcomings of the licensing system

The main problem with the current licensing schemes for audiovisual content relates to the legal uncertainty with the **scope and the rights which need to be cleared**.

Commercial users are confronted with divergent rules and rights when trying to establish multi-territory and pan-European legal offers for audiovisual content. In most countries, the rights to a film are transferred by the authors and performers to the film producer who then holds the rights and can licence the work. However, the **contracts by which rights are transferred to the producer do not always cover new means of exploitation**, thus necessitating renegotiation of the contract and additional licensing costs.

Furthermore, the **scope of the rights** granted under the transfer varies from one Member State to another, while the license does not include the soundtrack, which has to be licensed separately. An additional layer of complexity results from the lack of harmonised rights of performers (actors). As a result, actors enjoy/endure different rights in different Member States⁸.

In addition, the **EU copyright framework remains technology specific**. For instance, the current definition of broadcasting does not appear appropriate in an environment in which the means of transmission are converging and becoming increasingly interchangeable. In addition, a number of key notions, such as the notion of the "public"⁹, and what constitutes "on demand" distribution are not clearly defined in EU copyright law, thus resulting in legal uncertainty as to the rights needing to be cleared. Although rights are managed individually, **collective management is still relevant** when it comes to audiovisual works and their cable retransmission right, the licensing of musical works and the private copying exception. Therefore, the problems related to identification of ownership and the non-aggregation of rights which mainly affect the licensing of music, are also relevant to audiovisual works. Similarly, the lack of harmonised rules for the governance, accountability and supervision of collective management organisations adds to the complexity of the current licensing systems.

⁶ The Nielsen Company, February 2010, Changing models: global perspectives on paying for content online.

⁷ Idem 6.

⁸ As correctly outlined by the European Commission in its Reflection Paper on creative content, performers acting in audiovisual works enjoy the right of interactive making available under Article 3(2) of the Copyright in the Information Society Directive. They do not enjoy a right of communication to the public under Article 3(1) of the Copyright in the Information Society Directive; and they do not enjoy a right to single equitable remuneration from broadcasting and communication to the public under Article 8 of the Rental and Lending Directive.

⁹ It is an open question how many persons are necessary to constitute a public and to what extent the persons must have personal relationships in order not be regarded as a public. Defining the terms public is left to national law and to the courts of EU Member States.

Unless the European Union addresses the shortcomings of the current licensing systems, the risk that major distribution platforms, most of which are US-based, decide not to buy licences for European content, must be seriously considered. The forthcoming proposal for a Framework Directive must establish criteria for the governance, operation and supervision of collecting societies and simplify the licensing systems, reduce transactional costs and promote multi-territorial and pan-European licensing. It is crucial that the audiovisual sector is also included in the Commission's proposal.

Territorial exclusivity

Rights holders have so far defended the position that territoriality of copyright and market fragmentation is an objective reason which justifies price discrimination. However, the recent ruling of the European Court of Justice in the **Premier League case** clearly stated that *"a system of territorial licences for the broadcasting of football is contrary to EU law¹⁰"*. The Court took the view that **partitioning markets with the sole aim of creating artificial price differences between Member States and thereby maximising profits (price discrimination) is irreconcilable with the Treaty.**

This ground breaking ruling of the ECJ and the categorical rejection of absolute territorial exclusivity confirms the incompatibility of current business models for content online with the Internal Market. The judgment is likely to affect current business practices, not only in the broadcasting sector - as licenses conferring absolute territorial exclusivity are commonplace - but also in respect to motion pictures and other premium content offered by satellite pay-TV services. The judgment might also affect current practices regarding web-based television services and other online content services that are territorially restricted by way of 'geo-blocks' which prevent access for foreign users.

The refusal of access for consumers depending on their nationality or place of residence also amounts to territorial discrimination within the meaning of Article 20.2 of the Services Directive¹¹. Following the ECJ ruling, it would no longer be possible to justify territorial discrimination for reasons of maximising revenues by fragmenting markets through exclusive licences. The European Commission must publish the long-awaited guidance on Article 20.2 of the Services Directive.

Territorial and chronological release windows

Although **national chronological release windows** allow distributors to maximise their revenues, they also result in a fragmentation of the market along national borders and hamper the development of new digital distribution platforms. The traditional hierarchy with cinema as the first window followed by DVD, pay-TV, free-to-air TV and Video on Demand no longer makes sense with the emergence of new distribution channels. Banning the digital distribution of a film on VOD for four months and up to 3

¹⁰ Cases C-403/08 Football Association Premier League Ltd, v QC Leisure and C-429/08, Karen Murphy v Media Protection Services Limited;

¹¹ Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

years after the cinema release, as is the case in France, fails to reflect the reality of the 21st century.

Similarly, **territorial release windows** within the European Union and even between neighbouring countries with the same cultural background cannot be justified. For example, the European film *Océans* was released in Belgium on 27 January 2010 and in Sweden only 10 months later on 1 October 2010; the European film *Potiche* was released in France and Belgium on 10 November 2010 and in Germany 5 months later (March 2011)¹².

The current system of territorial and chronological release windows is detrimental to small, low-budget works with limited access to theatres and means of promotion; having to wait months before making the film available online does not make any sense at all. It also hinders the development of legal business models and their endorsement by consumers. As a result, consumers find themselves in a situation where they can choose between legal, but non-available or illegal, but available. Consumers cannot be expected to wait for months before they can download a movie that has already been promoted through social media, blogs and other communication channels.

Outdated copyright exceptions and limitations

Despite the objective of the Information Society Directive to harmonise and add legal certainty to the European Copyright framework, national laws vary significantly. Due to its optional nature¹³ and the broad latitude left to Member States, there has been no harmonisation of copyright limitations across Europe, thus resulting in legal uncertainty for creators, commercial users and consumers alike.

Exceptions to, and limitations of rights holders' exclusivity are an important mechanism for achieving balance in copyright law. They are the way in which public and consumer fair use rights are expressed. While an appropriate level of copyright protection can stimulate investment in and the production of content, thoughtful exceptions are equally essential to the Knowledge Economy by permitting technological development and ensuring that access to knowledge fuels the production of more knowledge. The need to encourage new works has to be put in perspective with the importance of exceptions to provide the appropriate conditions for creation, innovation and access to knowledge and the development of the Information Society.

However, from the consumers' point of view this balance is not reflected in the Information Society Directive. A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owner's exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often face unclear boundaries as to which acts are permitted under current copyright legislation, nevermind the fact that uses permitted under copyright law may be further restricted by unfair contract terms included in End-User Licensing Agreements and/or technical protection measures that are widely used to unfairly restrict permitted uses.

¹² <http://www.imdb.com/>.

¹³ The only mandatory limitation Article 5 introduces is a limitation to the right of reproduction in article 5(1). All other 20 limitations are optional.

BEUC calls upon the European Commission to further harmonise copyright exceptions and limitations with a view to create more certainty for consumers about what they can and cannot do with content acquired legally. This goal was clearly stated by the European Commission in its 2009 Reflection Paper on Creative Content¹⁴. Furthermore, it is crucial for the exception regime to be flexible and forward-looking.

Additional obstacles

Most often consumers are also given limited choice with regards to the **payment methods**. An international credit card is the most preferred choice while national or local cards may be refused, especially on global VOD platforms. Such refusal may amount to discrimination on the basis of nationality and/or place of residence in the meaning of Article 20.2 of the Services Directive and should be banned. The consumer must always have the choice between different means of payment.

4. What technological means, for example individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?

BEUC considers the question on technological means of access to have several flaws. First of all, it does not provide a solution to the licensing issue; the main problem consumers face is the non-availability of content in their country of residence, which is due to territorial exclusivity, the shortcomings of licensing systems and the legal uncertainty resulting from divergent national rules.

Secondly, technology has been widely used to restrict consumers' access and to enforce territorial restrictions. Online platforms of audiovisual content use the consumer's computer Internet Protocol (IP) address to restrict access or encrypt their services to make sure that they cannot be accessed outside the country of transmission.

Thirdly, the use of access technology would allow "perfect exclusivity", complementing restrictions imposed through contractual terms and conditions. Such an approach eliminates statutory copyright exceptions and would result in the 'perfect' lock-up of copyright protected material.

Fourthly, the use of access codes could be useful only for consumers who have already bought access in one country and want to make use of it in another. However, the problem remains when for example a French consumer living in Germany wants to access Belgian content online.

The European Commission refers to the Satellite and Cable Directive, noting the limited effect it had on prompting pan-European satellite broadcasting. However, the Commission only refers to the lack of consumer demand as the main reason, omitting to mention that the main reasons for the non-materialisation of pan-European satellite broadcasting have been contractual licensing practices reinforced by the application of signal encryption techniques all of which have allowed broadcasters and rights holders to continue segmenting markets along national borderlines.

¹⁴ 'Creative Content in a European Digital Single Market: Challenges for the Future'. A Reflection Document of DG INFSO and DG MARKT, 22 October 2009.

5. What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the "country of origin" in respect to online transmissions?
6. What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?

The current distinction between different distribution technologies as established in the Cable and Satellite Directive¹⁵ makes little sense in light of the convergence of media. While satellite TV, terrestrial TV and mobile TV are considered as direct communication to the public and therefore covered by the provisions of the Directive, this does not apply to cable and IP TV for which separate copyright clearance is required. Both satellite and internet services are borderless and should not be subject to different copyright clearance rules.

It is important that the European Commission adopts a technology neutral approach. In this context, the extension of the scope of the Cable and Satellite Directive to the online and on-demand environment can reduce transactional costs and enhance the availability of audiovisual works cross-border. Furthermore, the clearance of rights at the **country of origin** will enable small and medium sized entities that are specialised in local/national or niche works to acquire a license in their country of establishment which would allow them to offer content online across the EU.

However, BEUC recognises that the establishment of a single **definition of the country of origin** that would cover all types of works and content is extremely difficult, particularly when considering that determining the place of availability of a network-based service is by no means a straightforward task¹⁶. As regards the risk of forum shopping and a race to the bottom among VOD services to establish themselves in the territory with the lowest levels of remuneration, it is important to ensure the rights clearance taking place in the country of origin should also take into account the relevant remuneration for all countries wherein the content can be accessed.

Simply establishing the country of origin approach would not suffice to establish a Digital Single Market. The experience with the implementation of the Satellite and Cable Directive demonstrates that encryption technologies and territorial licensing have significantly limited the possible impact of the Directive. **Further harmonisation of substantive copyright law is a precondition** for effective implementation of a similar solution.

BEUC would also like to note the lack of progress regarding the extension of the country of origin principle since the previous consultation in 2009. The European Commission examined exactly the same option and stakeholders submitted their views, while the

¹⁵ 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, OJ L 248/15, 6.10.1993.

¹⁶ The Recasting of Copyright and Related Rights for the Knowledge Economy, Institute for Information Law University of Amsterdam; available at the website of the European Commission at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf

specific solution was extensively discussed during the Hearing on Audiovisual Works in December 2010.

7. Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?

Technological convergence and the development of Web 2.0 applications have significantly changed the role of consumers as regards content consumption. Consumers have been engaging with the new technologies and the opportunities offered to them to the point of becoming active players in the creation and dissemination of content, information and knowledge.

The rise of user-created content (UCC) is a major component of the notion of the participative Web¹⁷ while it has allowed for new business models to appear and for ICT technologies to be further developed. The European Commission correctly recognised that user-created content is playing a new and important role alongside professionally produced content in the 2009 Reflection Paper.

BEUC believes that user-created content needs to be clearly defined to ensure legal certainty. Such a definition should fall within the definition developed by the OECD, according to which user-created content is defined as content that is made “publicly available over the internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices”¹⁸.

It is also necessary to make a distinction between the right to produce user-created content that includes copyright-protected material for one’s own personal use, and the communication of such content to the public. In the first case, consumers are entitled to use for their private use copyrighted material to create new content.

However, user-created content is frequently shared beyond the domestic sphere, by being posted on the internet. It remains dubious whether the current European legal framework in the field of copyright law is adapted to the needs of user-created content. BEUC believes that the current exceptions to exclusive rights are too narrow to resolve the question of user-created content¹⁹.

User-created content needs to be given proper protection to allow for its continued development. BEUC calls upon the European Commission to explore in detail the opportunities and challenges related to user-created content and define the conditions under which user-created content can be communicated to the public, when it is done for non-commercial use and without prejudice to the rights of copyright owners.

BEUC would therefore support the **introduction of a new exception for non-commercial use of creative, transformative or derivative works**, which reflect a certain amount of creative effort and are created outside the professional context.

¹⁷ Participative Web: User Created Content, Working Party on the Information Economy on the Information Economy, OECD 2007.

¹⁸ “User created content is defined as content that is made publicly available over the internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices”, Participative Web: User Created Content, Working Party on the Information Economy on the Information Economy, OECD 2007.

¹⁹ In contrast, in the US the fair use exception allows for “transformative works”.

8. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?

Cloud computing is expected to have a significant impact upon the distribution and access to content. Consumers expect to be able to enjoy their content on the device of their choice irrespective of their location. The advent of cloud-based services allows consumers to access data via the internet from anywhere.

As a response to consumer demand, a consortium of the main industry stakeholders, including big studios, technology companies and consumer electronics manufacturers, have developed the cloud-based Digital Entertainment Ecosystem, UltraViolet²⁰. However, the specific format has a number of drawbacks likely to impact negatively on consumer experience:

- First, UltraViolet aims to lock up consumers' content through the use of Digital Rights Management systems (DRMs). DRMs have previously been tried by the content industry, but have been rejected by consumers.
- Secondly, UltraViolet is an initiative of the Hollywood studios in an effort to maximise the availability of Hollywood works; however, it remains to be seen whether European works will also benefit from the new technology.
- Thirdly, the format is not easy to use, as setting up an account requires numerous steps. Consumers will be requested to create an UltraViolet account to store their library and will need an additional account with another online service to be able to access their content.
- Fourthly, allowing industry to define consumers' expectations with regards to digital content risks shifting the balance to the detriment of consumers. The protection of consumers of digital content is intrinsically linked to the expectations they are entitled to have regarding the "normal functioning" and 'main characteristics' of digital content. It should not be for the industry to decide how many copies of the content consumers should be expected to make, but for the law to stipulate and define consumers' expectations.
- Fifthly, there are significant privacy concerns, given that different stakeholders can have access to information about consumers' purchases and preferences thus tailoring adverts to them through behavioural advertising or product placement.

In addition, the question of data portability is relevant in cloud services. Consumers should be able to transfer the content they have legally acquired when they decide to stop using a specific cloud service.

9. How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?

²⁰ UltraViolet (UV) is a digital rights authentication and cloud-based licensing system that allows consumers of digital home entertainment content to stream and download purchased content to multiple platforms and devices. UltraViolet is developed and deployed by the 70-plus members of the Digital Entertainment Content Ecosystem consortium, which includes film studios, retailers, consumer electronics manufacturers, cable companies, ISPs, network hosting vendors, and other internet systems and security vendors.

The development of centralised rights databases providing information about ownership of copyright could indeed facilitate the identification of rights holders, thus reducing transactional costs. Similar efforts are currently being undertaken in the music sector²¹ and could be used as the basis for other types of content. In addition, the initiative launched on the occasion of the EU Digital Agenda Assembly²², which focuses on the deployment of a standards infrastructure for the identification and description of rights and information exchange protocols is welcome. However, it is important to ensure that a similar database is open-platform and open-source, while the adoption of a common system for the handling of metadata, which allows for the identification of digital content files, is needed.

10. Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?
11. Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?

As outlined above, BEUC considers both platform and territorial release windows as outdated. Although beneficial to some intermediaries, broadcasters and distributors, the current system is not compatible with the Commission's commitment to establishing a digital single market, nevermind the fact that it goes against consumer choice and hinders the emergence of innovative business models for the online distribution of European works. In addition, it "promotes and encourages" the unauthorised distribution of films via the internet.

In a well-functioning market, commercial users and right holders should respond to consumers' preferences rather than dictate the terms on which consumers may access products.

BEUC calls for a single day and date release for all types of distribution, both off and online across Europe.

Reverse windowing, where films become available on VOD shortly before their release in theatres with the aim of building a fan base, have been successful so far.

As regards current funding schemes, BEUC is concerned with the practice followed in most EU Member States which subjects public support for film production to specific release windows. Similar funding schemes are out of date and efforts should be undertaken to increase funding for innovative distribution methods.

12. What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?

²¹ Global Repertoire Database:
http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/comp/emi_annex2_en.pdf

²² http://ec.europa.eu/information_society/events/cf/daa11/item-display.cfm?id=5994

BEUC would like to stress that the Audiovisual Media Services Directive²³ (Article 3i) explicitly requires Member States to ensure that not only television broadcasters, but also on-demand audiovisual media services promote European works. However, this provision is implemented differently by EU Member States, with the majority of them not including specific quotas or detailed provisions²⁴.

The availability of European works on all VOD platforms is essential to safeguard cultural diversity and ensure access to European works across the Union. It is crucial that the European Commission closely monitors the implementation of the AVMSD and provides guidelines to Member States regarding the specificities of Article 3i.

13. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?
14. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?

BEUC welcomes the proposal to launch a reflection on further harmonisation of copyright rules through the adoption of a European Copyright Code. The Lisbon Treaty establishes the competence of the EU to put in place a harmonised EU policy in the field of Intellectual Property Rights, including copyright²⁵. To this end, the publication of a draft “European Copyright Code” in the framework of the Wittem project²⁶ is very interesting and should become the basis for further reflection. It is regrettable that the Commission has not sought the views of stakeholders on the content of this Code, but preferred to repeat the same question as in 2009.

BEUC would like to invite the European Commission to clarify what the Copyright Code will consist of. In principle, the advantages of the adoption of a European Copyright Regulation may be significant. First of all, such a harmonisation will enable the establishment of the Digital Single Market for content online, as it will put in place a truly harmonised legal framework. Secondly, it will enhance legal certainty and transparency for rights holders and consumers alike while greatly reducing transaction and licensing costs related to the clearance of rights²⁷. Thirdly, it will prevent market fragmentation along national borders as a tool to maximise revenue to the detriment of consumer access to cultural diversity. Fourthly, a Regulation will give rights and limitations equal status and could restore the necessary “delicate balance” between exclusive rights of copyright owners and the rights of consumers²⁸.

²³ Directive 2010/13/ of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

²⁴ Multi-Territory Licensing of Audiovisual Works in the European Union, Report by KEA European Affairs-October 2010.

²⁵ Article 118(1) of the Lisbon Treaty reads as follows: “In the context of the establishment and functioning of the Internal Market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European Intellectual Property Rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements”.

²⁶ <http://www.copyrightcode.eu/>.

²⁷ K. Peifer, ‘Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen’, ZUM 1 (2006): 4, [Peifer, 2006].

²⁸ Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Information Law Series 19, Alphen aan den Rijn: Kluwer Law International, 2009.

However, it is crucial that a Regulation focuses on adapting the current copyright framework to the expectations of society as a whole rather than simply codifying existing legislation and increasing protection of existing economic rights.

As regards the proposal to establish a secondary and optional pan-European copyright title that would coexist with national titles, BEUC is concerned that such co-existence may further burden to the current complexity of rights ownership and rights clearance. A possible solution to problems with the dual system of national and Community copyright might be the clear definition of the areas of law to be fully harmonised. In order to adhere to the principles of subsidiarity and proportionality, the Regulation should only regulate those aspects necessary for the establishment of the Digital Single Market and which cannot be left to Member States. On the other hand, a similar co-existence would allow those commercial users who wish to offer pan-European content services to secure Europe-wide licenses, while local users who focus on national markets would be able to secure equally clear rights for those countries which are the focus of their concern instead of getting wider but more expensive licenses.

15. Is the harmonisation of the notion of authorship and/or the transfer of rights in audiovisual productions required in order to facilitate the cross border licensing of audiovisual works in the EU?

BEUC supports the harmonisation of the notion of authorship in order to increase legal certainty. The notion of authorship is central to copyright law, as it defines the work that is eligible for protection, the term of protection and the initial ownership of economic rights.

Despite the commitment of the European Commission to protect authors, the harmonisation efforts have thus far mainly focused on exclusive economic rights, leaving key notions undefined at Community level including the notion of authorship. In the audiovisual sector, ownership of an audiovisual work is shared between several stakeholders, such as the director, screenwriter and editor. The situation is further complicated by the divergence between the continental author's rights system and the Anglo-Saxon system of copyright²⁹.

16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for - online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?

17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?

18. Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their performances after they transferred their making available right? If so, should such a remuneration right be compulsorily be administered by collecting societies?

²⁹ Authors are the owners of copyright for works. In civil law countries the authors' rights system is used to grant the initial creators (director, screenwriters, editors, etc.) authorship or co-authorship of a film. In common law countries the copyright system is used to protect the role of the producer as the sole author of the film (Ireland and the UK). *Multi-Territory Licensing of Audiovisual Works in the European Union, Report by KEA European Affairs- October 2010.*

19. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works?
20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

BEUC would in principle support the establishment of an unwaivable right to remuneration, as long as this is not introduced as an additional right to already existing economic rights. Historically, economic rights have accumulated over time resulting in piecemeal copyright law which is not fit for purpose.

In addition, if the new right is to be managed collectively, clear rules on the governance, transparency, accountability and supervision of collecting societies is required. The adoption of the long expected legislative proposal on collective management of copyright and its implementation is a *sine qua non* condition before any discussion on the new economic right can be launched.

The EU copyright framework suffers from serious weaknesses which cannot be resolved by the introduction of new economic rights and the adoption of stronger and longer copyright rules.

Furthermore, if the new right to remuneration is to be collected from commercial users, it is more than likely that consumers as end-users will bear the additional costs. When considering the poor quality of available content, the exclusion of digital content from consumer protection law and the absence of clear consumers' rights regarding the use of content, asking them to indirectly pay for it makes absolutely no sense.

The real problem authors and performers face relates mainly to their contractual arrangements with the producer and the signing off of their rights against a lump sum amount. In addition, it may occur that the contracts signed do not cover the exploitation of works on new forms of use. The European Commission must address the real problems authors face.

III. SPECIAL USES AND BENEFICIARIES

21. Are legislative changes required in order to help film heritage institutions fulfil their public interest mission? Should exceptions of Article 5(2)(c) (reproduction for preservation in libraries) and of Article 5(3)(n) (in situ consultation for researchers) of Directive 2001/29/EC be adapted in order to provide legal security to the daily practice of European film heritage institutions?
22. What other measures could be considered?

BEUC welcomes the intention of the European Commission to look at the exceptions of Article 5.2.c and 5.3.n of the Copyright Directive with the aim of assessing whether they are adapted to the digital environment. However, we see no justification why the reflection is limited only to these specific exceptions. What is needed is a critical assessment of the whole system of exceptions and limitations with a view to restoring the balance between exclusive rights and the interest of the general public and consumers.

As regards film heritage institutions, we share the concern that they may be prevented from taking full advantage of the opportunities offered by digital technologies. There are a number of regulatory restrictions which prevent them from engaging in large scale digitisation of the material in their collections, as well as legal uncertainty as to the scope of their application³⁰. BEUC believes a clarification is needed to ensure any type of format-shifting which is necessary for the digital preservation of works should be permitted without authorisation and without remuneration. Film heritage institutions should be entitled to make the number of copies needed for the preservation of their collections.

It must also be clarified that digitisation of content already in the public domain does not create new rights. Despite the significant divergence in national legislations, the notion of originality generally requires some sort of intellectual, creative or personal input. BEUC strongly believes the simple act of format shifting does not achieve the required degree of originality and should not give rise to new exclusive rights over the digitised copies. Material in the public domain is an important source of use/reuse and inspiration, as well as a driver for innovation and creativity. It is important to ensure that this material is not locked up.

IV. ACCESSIBILITY OF ONLINE AUDIOVISUAL WORKS IN THE EUROPEAN UNION

23. Which practical problems arise for persons with disabilities to have access on an equal basis with others to audiovisual media services in Europe?
24. Does the copyright framework need to be adapted to improve accessibility to audiovisual works for persons with disabilities?
25. What would be the practical benefits of harmonising accessibility requirements to online audiovisual media services in Europe?
26. What other actions should be explored to increase the availability of accessible content across Europe?

Article 30 of the United Nations Convention on the Rights of People with Disabilities recognises the right to "*enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats*"³¹.

It is estimated that over 81 million adults in Europe have hearing defects and 30 million people serious sight loss³². These people are not able to interact with digital content unless the content is made accessible. The main problems are obvious and relate to the lack of interpretative services such as audio description, subtitling and captioning to name a few. However, these problems are not only relevant to disabled people, but are

³⁰ Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3: under paragraph 3.1. Exceptions for libraries and archives, the European Commission states that the exception of article 5.2.c of the Copyright Directive does not contain clear rules on issues such as "format-shifting" or the number of copies that can be made under this exception.

³¹ United Nations Convention on the Rights of Persons with Disabilities:
<http://www.un.org/disabilities/convention/conventionfull.shtml>

³² Action on Hearing Loss RNID et al. 2006.

also crucial components of a coherent strategy to increase availability of audiovisual content across Europe.

Disabled people should be able to access all the services available to others and therefore a fundamental right should be recognised in EU law.

The European Commission should revise the Copyright Directive and ensure that the exceptions become mandatory and are turned into clear rights of the users. This would also allow for harmonisation at EU level and facilitate the cross-border accessibility of works across the EU. The current exception for persons with disabilities is extremely weak³³.

The European Union must also change its position and support the call for a revision of the copyright exceptions and limitations at the level of the World Intellectual Property Organisation (WIPO). The EU must support the proposal for a binding WIPO Treaty for improved access for Blind, Visually Impaired and other Disabled persons. The Treaty would remove barriers to cross-border availability of content, create legal certainty and ensure that the right of access for disabled persons is not only recognised, but also properly implemented and enforced. A study prepared by the Standing Committee on Copyright and Related Rights in 2007³⁴ noted that *"copyright legislation is territorial in nature...where activity is undertaken across jurisdictions, it is usually, therefore, extremely difficult to determine with certainty what parts of that activity are lawful and what parts are not"*.

The EU should also support the development of technologies and their integration with digital content. Technology makes it possible to eliminate barriers to communication and to access information. Technologies allowing for automatic subtitling of videos and live events transmitted online, the development of mobile applications allowing subtitling and language selection, automatic generation of voices for audio description, automatic translation have already been developed. Therefore, the focus should be on their widespread integration into digital technologies.

END

³³ Article 5.3.b of the Copyright Directive allows Member States to exempt exploitations of a work if they are done for the benefit of the disabled persons, are of a non-commercial nature and are directly related to the disability.

³⁴ Judith Sullivan, Study on Copyright Limitations and Exceptions for the Visually Impaired, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696