CREATIVE CONTENT in a EUROPEAN DIGITAL SINGLE MARKET: A REFLECTION DOCUMENT

RESPONSE from the ASSOCIATION of COMMERCIAL TELEVISION

EXECUTIVE SUMMARY

Commercial broadcasters are key players in the content industry. We are at the same time creators, investors and distributors of content which confers us a unique position with respect to copyright: we are both owners of copyright and as well as mass users/purchasers of copyright. Content is the core of our businesses and broadcasters will therefore continue to invest in new productions – but this investment in Europe's creative community needs to be encouraged and safeguarded. The current system of release windows is essential for commercial broadcasters and other players to maintain a sustainable level of investment and the Reflection Document fails to address this crucial aspect, preferring instead to view the system of release windows as somehow a "barrier" to the Information Society. Little evidence is produced in the Paper to support this claim, indeed the Paper rather ignores strong evidence to the contrary, as the windows system has evolved significantly in line with market developments.

The role of broadcasting and television production as a whole is not properly discusses in the Reflection Document as a whole. This is perhaps unavoidable in a single paper attempting to cover many different sub-sections of the "content industry" – the structure and characteristics of the markets for "content" differ enormously between music, the printed word, and audiovisual content. While it may be appropriate for a political "reflections paper" to consider all the separate sectors in very general terms as "content", the Commission will, in the event that there is to be legislative follow up to any of the issues raised in the Reflections Paper, need to carefully take into account the specific features and needs which differentiate each industry within the cultural sector. Indeed, any follow-up to this Paper also needs to differentiate between issues of rights acquisition – where rights are usually individually traded – and rights clearance, where rights are often subject to collective administration. For the former, contractual models should always be favoured (subject of course to competition law and sector-specific regulation). For the latter, the existence of monopoly collective management societies – while welcomed by users as providing a one-stop shop – raises different issues of competition law and of regulation.

One of the essential features of the broadcasting industry which needs to be safeguarded is the concept of exclusivity. Exclusivity is not only the main driver that enables return on investment which is re-invested in new productions but it also represents a major differentiator among different players on a competitive market.

With regards to a potential revision of the Cable and Satellite Directive, there are three key features which must be retained at all costs: country of origin for satellite distribution, contractual freedom and the broadcaster's Article 10 exemption from the obligation to exercise its own or its acquired rights via collective administration.

While we are aware of the political appeal of "pan-European services", we would call for a sense of perspective as to the likely impact of such services on the audiovisual market. For simple reasons of language, many television services will remain primarily national. Transfrontier distribution of content does take place – but only where there is a market for it. Typically, this might involve neighbouring countries which share the same language, or countries which have experienced significant emigration and therefore have identifiable diaspora populations. We offer several examples in our submission. We conclude that these examples are strong evidence of the fact that the current legal framework does not prevent cross-border circulation of content. Legally, from an internal market perspective, the EU has the remit to safeguard the free circulation of goods, persons, services and capital but it cannot as such strictly define an area where a company should offer its services. Politically, a range of other issues including competition issues related to publicly funded broadcasters offering pan-European pay TV services and the impact on Europe's much-cherished linguistic diversity of distribution of content from elsewhere in the EU should also be considered.

The ACT believes that common rules on the governance and transparency of collective rights management organisations could help smooth out inefficiencies which appear in some markets.

We disagree with the suggestion that the current situation where the exhaustion principle applies only to tangible goods should or could be changed by way of legislation so as to apply to intangible goods as well. As argumentation, we recall the ECJ Decision in the Coditel I case.

Extended collective licensing will not solve, as the Commission appears to suggest, the issue of cross-border rights management for online content and on-demand services and should be limited to sectors where it could bring certain advantages. Any related consultations should be limited to those sectors.

With regards to alternative forms of remuneration, the ACT cautions against downgrading the exclusive rights into rights for remuneration through a global licence. This would seriously affect the value chain and the possibility to invest in quality professional content.

Overall, commercial broadcasters are sceptical as to the necessity and effects of a European Copyright Title. The Commission recognises in the Reflection Document that the current legal framework does not constitute an obstacle for cross-border

business models, in which case, such a fundamental overhaul of the copyright system would not be justified. Nor do we believe that it would decrease transaction and licensing costs. Finally, through analogy with the European Patent system where there is no obligation to license on a pan-European basis, a European Copyright Title would not be able to force a rightsholder to offer a Europe wide license unless contractual freedom were jeopardised.

Introduction: Broadcasting & Beyond

Europe's commercial broadcasters are responding enthusiastically to the challenges of the new media world. We refer later in this paper to the phenomenal growth in catch-up TV services. But this is far from being the only example. The ACT's member companies already offer content via linear broadcasting, online simulcast, IPTV, mobile distribution and to consoles such as the X-box. New initiatives such as hybrid broadband/broadcast systems are being developed. And nor is broadcasting itself standing still – witness the impressive uptake of HD services, and the forthcoming launch of 3D. Finally, broadcasters' investment in content is also constantly evolving, with new genres and formats being developed while respecting the fundamentals of European television : that commercial revenues are reinvested in local, original programming to respond to viewer demand.

What is important here is not so much our response to the challenge of the new era, but rather who is issuing the challenge. The source of this challenge is neither political or regulatory pressure, nor the many vocal evangelists for "new media". The challenge to which we are responding is issued by a more important constituency: European consumers. In their millions, Europeans have made it clear to media companies that they still value the content we produce, but that they increasingly wish to consume that content on different platforms, or at different times. Like any business, the media sector must identify and respond to that demand.

For the avoidance of doubt, our comments on "content" are restricted to audiovisual content and, where appropriate, to those music rights which are relevant to audiovisual media.

PART ONE: THE POSITIONING OF BROADCASTERS IN THE CONTENT INDUSTRY VALUE CHAIN: CREATORS, INVESTORS AND DISTRIBUTORS

It is well understood that broadcasters are in a unique position in any debate about copyright, as we are simultaneously significant owners of copyright (in our own productions) as well as mass users of the copyright of others (notably including music rights, embedded in the content we distribute). While outside observers sometimes appear to believe that the future of broadcasting will be purely as aggregators for the content produced by others, fulfilling an entirely passive and intermediary function in the value chain., this is not a vision which we recognise and there is little evidence from the market to suggest that this vision is credible. Broadcasters – whether in the

private or public sector – continue to differentiate ourselves from the competition precisely through the content we produce, commission or acquire.

Not all broadcasters occupy exactly the same space in the value chain. Some are significant in-house producers, some are discouraged by regulatory barriers from having in-house capacity, others prefer to work by commissioning external producers to make the content. Further differences in terms of a broadcaster's programme strategy will arise at the level of programme genre. Different broadcasters adopt different programme strategies and their choice have budgetary implications. Some drama productions can cost a lot more per programme hour than many other genres, so a broadcaster who chooses to include drama productions in his schedule may well need to seek financing by co-production and/or pre-sales, while for a broadcaster whose schedule focuses on lower-cost genres, the more traditional model of majority financing by the commissioning broadcaster and a single producer (in-house or independent) might prevail.

Indeed, the primacy of content in the business plans of broadcasters is also partly enshrined in European law. The Audiovisual Media Services Directive left untouched the obligation from the old TVWF text that a "majority proportion" of broadcasters' output in certain genres should, where practicable, be of European origin. While the ACT is on record as regarding this as an unnecessary and outdated regulatory intervention, the continued existence of these obligations is clear evidence that the EU institutions regard the broadcasting sector as, unambiguously, part of the content industry.

Broadcasters are of course also important purchasers of audiovisual and film content, and therefore we have an important voice in relation to release windows.

The Reflection Paper comments, at page 9, that

> *"Release windows that are too long can hinder the emergence of attractive legal offers and stifle innovation."*

The good news then for the European Commission is that the windows system is fast evolving. This evolution is good evidence of how the content industry is responding to shifting consumer demand. Examples are the strategy of certain movie studios to progressively narrow the gaps between release windows as a deterrent against piracy and P2P filesharing. But it is of particular significance that the European television industry has been sufficiently flexible to introduce variations to the traditional window system – the (usually) seven-day period for viewing on a catch-up service in the past two years or so. Clearly, this has involved some negotiation, particularly in those Member States where legislation automatically assigns, regardless of financial contribution, many secondary rights to the "independent producer"– a system which we believe to be outdated and unsuitable to the majority of European markets (though outwith the scope of this paper).

But the fact variations to the traditional window system have been made to allow for the introduction of catch-up services is clear evidence that the market is capable of evolving to meet new consumer demands. This is also consistent with the history of regulatory intervention in this area. The original 1989 version of Television Without

Frontiers contained detailed rules on when various windows could begin. At the revision of TVWF in 1997, there was unanimity from all industry stakeholders – commercial and publicly-funded broadcasters, directors, producers, distributors – that these rules could be abolished and the regulation of windows left to contractual negotiations.

With the market adapting to new circumstances and showing every sign of working well, the primacy of contractual negotiations should continue to be respected.

The current system of release windows is essential to sustain investment. It is a striking omission that the Reflections Paper fails to deal with the challenge of raising financing for content production in the future. If there is a serious wish on the part of the European Union for those commercial companies which currently invest in content – broadcasters, producers, distributors - to continue to foster professional, quality content, and to produce new material rather than relying on back catalogue material, then the challenges of how to do this in a world of growing piracy, shrinking distribution windows and reduced revenues from presale of rights must be addressed via commercial negotiations between relevant parties Generalisations about "new business models" are neither satisfactory nor relevant, given that all media businesses are already actively looking into new models. And the evidence to date is that those new business models which have been tried in the content production sector (e.g., "pay what you want" for music or film) are suited to particular circumstances rather than anything on which Europe can build a sustainable content industry of scale.

PART TWO: THE POSITIONING OF BROADCASTERS IN THE REFLECTION PAPER

At one level, it may be thought surprising that there are few specific references to broadcasting in the Reflection Paper. Broadcasting and television production are notably not among the sectors listed in the opening paragraph as forming part of the "cultural and creative sectors". Ignoring the contribution, whether measured by hours of content or by investment, made by television to the creative economy is in contradiction to the practice in Member States[1] and is a particularly important point as we specifically call on the European Commission to carry out full, independent impact assessments on each sector of the content industry before considering legislation. The Commission itself states, at page 4 of the Reflection Paper, that

"different trends and considerable challenges arise ***depending on the type of digital content****"*[2]

This of course confirms the Commission's earlier observation that

"The business practices for the licensing of films and other audiovisual works are quite different from those prevailing in the music sector"[3]*;*

[1] See for example OFCOM Communications Market Review, August 2009

[2] Emphasis added

[3] Commission Staff Working Document: Study on a Community Initiative on the Cross-Border Collective Management of Copyright (7 July 2005), p 24:

We agree with these Commission analyses. While it may be convenient to stimulate debate to group together in a common Reflections Paper disparate content sectors such as books, video games, music, film and television, the more detailed analysis must be carried out on a sector-by-sector basis to allow for the differences between the various forms of content to be fully explored. Too often, both in this Reflection Paper's conclusions and in the many Commission speeches on this subject, the sector-by-sector approach is neglected in favour of sweeping generalisations about "innovation" and "new business models".

There are a number of reasons underpinning this view. For example, merely to distinguish between rights issues as between the music and television industries gives rise to the following observations:

- language plays a different role in the two sectors. The popularity in Europe over the last decade or so of "world music" is evidence that it is quite possible to enjoy a song without understanding the language in which it is sung. It is of course impossible to enjoy a television programme in the same way. It is appropriate for politicians, not businesses, to place a high value on the "linguistic and cultural diversity of Europe" – from our point of view, Europe's linguistic diversity is simply a fact. While subtitling and dubbing can help, these raise a range of further commercial and operational issues which inter alia militate in favour of a system of staggered release windows;

- music is consumed/enjoyed in a different way from audiovisual content. Consumers regularly listen to their favourite music numerous times. For the vast majority of film and television content, this is simply not the case.

- As a result, exclusivity in content is a long-standing cornerstone of audiovisual media businesses' commercial strategies, whereas music is distributed according to a different model (a television broadcaster will have exclusive rights over a programme, a radio broadcaster will typically have no such exclusivity over playing a CD[4]);

- music rights are generally subject to collective administration – carried out by a network of de facto national/territorial monopolies – while audiovisual content is traded on a commercial basis between individual buyers and sellers (notwithstanding the administration of certain secondary rights through the AGICOA system).

- music rights are, for broadcasters, frequently "embedded" in audiovisual content – i.e., it is not possible for a broadcaster to acquire from a distributor the right to show a movie without the film soundtrack. So a system which provides one-stop access to the global music repertoire is essential given the impossibility of individually negotiating clearance for the thousands of pieces of music used every week by broadcasters. Collective management provides such a system,

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[4] In the latter case, this would be under the legal licence granted under the Rome Convention

- However, today, satellite transmission, cable retransmission and online rights are still licensed separately, on different basis and in different territories by the collective societies**.**

- while music can be, and frequently is, distributed on a global scale, there are a range of wider, structural issues which need to be taken into account when considering any move away from territorial distribution of broadcast content. These issues – and we are not qualified to comment on all of them - include the interests of independent producers, small countries, European sport, media pluralism and the sustainable funding of public broadcasting.

PART THREE: COMMENTS ON THE REFLECTION PAPER: GENERAL

We are concerned at some of the assumptions underpinning the Commission's thinking.

For example, there appears to be an inadequate appreciation of the essential role of exclusivity in media companies. Quite simply, good content costs money – whether speaking of professional journalism, of rights to popular sports events, or of the development and production of original content. In as far as one can speak of a European model of television, it has so far been characterised by a high level of re-investment in all of these genres of content. This reinvestment is made possible only by allowing the broadcaster a period of exclusivity in which to generate, at least, the advertising, subscription, or other revenues necessary to cover the initial outlay. During the discussions on the New Regulatory Framework for Electronic Communications, it was clear that Commission officials and MEPs understood the need to generate an adequate Return on Investment when discussing next generation networks. EU policymakers must allow market players to apply exactly the same commercial logic when considering the content (news, entertainment, sport, film etc), which will attract viewers to these networks. Exclusivity is also a means of differentiating offers. The pay-tv model requires content that the customer is willing to pay for. This underpins our strong support for the market-based, evolutionary system of contractual windows we refer to above.

Increasingly, it is hard to believe that there is any such thing as "content online". First, "content" is an insufficiently precise term – very few consumers decide to "acquire some online content", in a way which assumes total substitutability between music/books/audiovisual/games. And, as we explain above, the policy issues raised by each sector are very different – hence each should be the subject of a separate impact assessment before proceeding to any new regulation. Secondly, all content will shortly be available both on- and offline, so policy development should not differentiate unnecessarily between the two modes of distribution.

Business models are evolving fast and broadcasters are enthusiastically meeting the challenge of developing legal offers. For example, RTL Group recorded 470 million video downloads across its sites in 1H2009, a 97% YOY increase. Against this background it is incomprehensible for the European Commission to state, as former

Commissioner Kuneva did on 5 November, that "the market for digital content is failing dramatically";

There are no legal barriers to transfrontier distribution of audiovisual content and again the market is providing where there is demand – we set out a number of examples at pp 12 ff below;

Further, we believe it is essential when discussing the future framework for copyright to be absolutely clear about which rights are under discussion. The issues, and our responses to those issues, vary along the following lines:

a) rights subject to collective administration vs. rights individually traded;
b) rights acquisition vs. rights clearance – the former is a contractual matter, whereby the rights for primary use are acquired via individual negotiation, the latter is a mater of licensing for secondary exploitation

We would urge the European Commission, in the event that they do decide to take this issue further, to be absolutely clear as to exactly which activities are under discussion and, crucially, to be clear that any amendments which would have the effect of widening the scope of discussion would require a separate impact assessment.

Our conclusion is that radical moves such as a "European copyright title" are not justified by market developments.

PART FOUR COMMENTS ON THE REFLECTION PAPER : SPECIFIC POINTS RELATING TO THE CABLE & SATELLITE DIRECTIVE

Any possible revision of the directive will, of course, need to follow established Commission practice, involving stakeholder consultation and proper market impact assessment by external experts. At this stage, it seems to us that there are five questions or statements which need to be discussed, openly and on the basis of actual evidence rather than preconceived, abstract notions

1. Has the CabSat directive served its purpose?
2. Key features of the directive
3. Has the move from a broadcasting business model to a multi-platform one posed difficulties of rights clearance?
4. Is the re-use of archive material a problem?
5. How far are "copyright issues" a barrier to transfrontier distribution of audiovisual content?

1. Has the CabSat directive served its purpose?

ACT member companies are among the stakeholders most affected by this directive. Not only are we simultaneously major programme service providers, owning our own rights as broadcasters and producers and mass users of third party rights, but the move beyond a broadcast-only business model has led all commercial broadcasters to seek to distribute content across as many platforms as are necessary to generate a return on

investment. This multi-platform world, in which we are simultaneously programme service providers and users, means a great deal of practical experience in rights clearance has been built up, both on established platforms such as cable and satellite as well as newer digital platforms.

Our starting point is that the directive has provoked relatively little discussion of the need for its reform, and as such its continuation in its current form would not be problematic to the television business.

2. Key features of the directive

In the event of any review of CabSat, it would be vital to retain:

- COO for satellite distribution;
- contractual freedom;
- the broadcaster's Article 10 exemption from the obligation to exercise its own or its acquired rights via collective administration

as we believe the first bullet point to be relatively uncontroversial, we will focus on the second and third.

Freedom of contract, as set out notably in Recital 16 of the 1993 directive, is not only a fundamental principle of commercial law which we would expect not only to be upheld by the European Commission in relation to rights acquisition but also clearly given priority over more "operational" matters such as rights clearance. It also has demonstrable benefits to the European programme-making and sports businesses. Rights holders have an incentive to exploit their rights in the way that earns them the most money, whether that be on an exclusive or non exclusive basis. Effectively, the exclusivity premium paid by broadcasters to rights holders supports the production of superior content. If rights holders think that they can make more money distributing content on a non-exclusive basis they are, of course, free to do so.

The Article 10 exemption goes to the essence of broadcasters' business strategies. As recently pointed out by Professor Hugenholtz,

> "this exceptional status is wholly justified. Broadcasting organisations are easily identifiable, so no need for channelling their copyright claims through a collecting society has ever arisen". [5]

By specifically excluding the broadcasting right from those rights subject to mandatory collective licensing, Article 10 CabSat makes clear that broadcasters retain control over our own signal and have the right to determine where, and by whom, this signal can be re-transmitted. This is not an academic point – broadcasters spend much of our time in negotiations with platform operators to determine which platforms may carry our programme services. Such negotiations are, in many countries, influenced by other, non-copyright, legal considerations at both the national and EU level (must-offer, must-carry, competition law).

[5] « Convergence, Copyrights and Transfrontier Television », IRIS Plus/European Audiovisual Observatory, August 2009

It is essential for the strategic development of the broadcasting/audiovisual industry that broadcasters retain control over the distribution of our programme services. It is through the individual viewer's identification of a particular programme service, and the character of a particular offering, that the broadcasting industry maintains and grows its market share. Any move away from the Article 10 protection – and, even if this is not the intention of the European Commission, we can expect that other stakeholders will call Article 10 into question – would have the effect of transforming broadcast content from a valuable commercial property into something resembling a mere "utility". Attempts to regard content as a utility underestimate the added value which is provided by an exclusive media partner, particularly in terms of marketing the content and ensuring it is scheduled and promoted in a manner which is regarded as appropriate by the rightsholder and, where relevant, the original creators.

Additionally, the fact that a channel can be received via a terrestrial signal does not automatically mean that it should be freely available on other distribution networks such as encrypted DTT, cable and IPTV. In these networks there is a third party operator involved who benefits commercially by charging a subscription fee to its end users or who may sell other services such as telephony, broadband or other television services.. It is not reasonable that an operator should be able to build a business using content that it obtains from broadcasters for free or with a fee that is not negotiated directly with the broadcaster or its agent.

Another point relevant to keeping Article 10 intact is technical security and better protection from piracy. It is vital that broadcasters control the distribution of a channel and its content in order to prevent piracy. The rightsholders (particularly the large studios) from whom broadcasters license content require a high level of content protection to be met and the broadcasters generally support such controls. Most rightsholders require operators to have in place sufficient Digital Rights Management (DRM) or encryption technology to enable them to control and restrict the access to content to authorised subscribers; copy generation management systems (e.g. CGMS-A and HDCP) which implement copy protection technology to prevent high quality copies being made unlawfully. Such provisions are passed on to operators only contractually, when the broadcasters have exclusivity on their signal and the ability to negotiate freely on the carriage of their channels.

3. Has the move from a broadcasting business model to a multi-platform one posed difficulties of rights clearance – or of rights acquisition?

The shift in business model has of course caused all interested parties to review their contractual practices. The acquisition of rights for online ventures can give rise to very significant, sometimes difficult or protracted, negotiations with rightsholders. And there have certainly been occasions where negotiations have broken down – notably over the possibility of distributing content via mobile platforms or the internet in some Member States.

But on the other hand there have been many more examples where parties were indeed able to find a contractual solution. The fact that many broadcasters, private and public, have successfully launched catch-up services in the last 12 months is evidence

that, where the commercial imperative is sufficiently strong, contractual solutions have been found.

However music rights clearance can still raise very specific issues. One ACT member company operating several online services in different countries reports that it has to date been unable to enter into any blanket licence covering all online services in the different territories. The unclear situation of the online services certainly does not encourage companies to develop such services, to the detriment of both the users and right holders

We do not regard the fact that some negotiations have broken down as anything other than a normal commercial reality and it certainly does not in itself justify a complete overhaul of the copyright framework. This is a matter for negotiation, not for legislation.

4. **Is the re-use of archive material a significant problem?**

In our experience, which we accept distinguishes our business from that of film makers or book publishers, the re-use of archive material does not present a serious problem.

In contrast to, say, the film or music industry, commercial television is a relatively young medium, with many ACT member companies having entered the market only in mid-1980s when viewer demand, increased capacity, and political liberalisation brought about the end of state monopolies over broadcasting in many European countries. Additionally, much of the material we produce and distribute is designed more for immediate entertainment than as anything with any longer-term significance – the historical value of many talkshows or entertainment programmes is marginal – for this reason, the archiving of television content in many genres in Member States is often on a "sample" basis rather than one of legal deposit. Indeed, production values have developed so fast in television, particularly since the liberalisation of the mid-1980s, that many programmes from earlier years may be unlikely to appeal to today's viewers.

There are of course exceptions to this general rule. Some programmes "stand the test of time" better than others. And some television content is genuinely of historical interest. Our experience is that problems with clearing rights to such content are not sufficiently common to justify new primary EU copyright legislation – especially as the issue identified appears unrelated to the goals of the Cable & Satellite directive, the revision of which is proposed as a possible solution. There is already a healthy market in library material both for films (genre-specific and classic movie channels are available on many satellite platforms) and for those television programmes which do have a secondary market value (e.g., the exploitation of BBC library content such as Top Gear both in the UK and via BBC Worldwide).

In the event that legislative action is proposed, there is an additional competition issue in the broadcast sector which needs to be considered. Unlike commercial broadcasters, publicly-funded broadcasters do have significant archives (typically dating back to the 1930s). In the event that intervention is proposed in the broadcasting sector, the EU should insist that such content - already paid for by public

money - should be made available to all users rather than automatically reverting to the pubcaster, especially when that archive content dates from the monopoly era of public sector broadcasting in the Member State in question. This would appear to be consistent with the "cultural" objective being pushed by those advocating such an intervention – though we recognise that as a competition matter it is perhaps outwith the competence of the two Directorates-General responsible for the Reflections Paper.

5. How far are "copyright issues" a barrier to transfrontier distribution of audiovisual content?

All commercial broadcasters have teams looking at how to expand and develop the business. We are yet to be convinced that pan-European distribution is a feasible way to do so.

We are aware that the EU institutions occasionally receive comments and enquiries from. citizens who cannot receive all broadcast services from their Member State of origin throughout the EU. However, for a mass medium such as broadcasting, unless these complainants add up to a coherent, identifiable, target market, it may be that there is still no business case for a broadcaster to acquire primary broadcasting rights for a broadcast service which could be successfully commercialised from a small number of disparate individuals. "Rights problems" are often cited as what is behind this state of affairs. In fact, it is a mistake to reduce this issue to one of "rights", and the situation is rather more complex. Indeed, the issues raised are different depending on the method of distribution and financing (free to air, encrypted, linear or non-linear, etc). In as far as rights are relevant, our experience is that it is not the downstream clearance of rights which is an issue, but rather the commercial view taken by rightsholders and broadcasters as to whether there is a viable market for transfrontier distribution. Only the former is, in our view, capable of being addressed under the Cable & Satellite directive, which suggests that the perceived "problem" may not be solved by revision of the CabSat directive.

A purely legislative approach will create further anomalies across the EU. Specifically, we believe there are at least four different categories of transfrontier distribution. We provide examples below for how the first two are catered for:

- common language areas: the market has evolved ways to deal with the distribution of content within, e.g., the German-language or French-language zones;

- diaspora channels: broadcasters from countries which have experienced significant emigration have frequently developed services to serve those communities, especially in geographical areas where the target population is clustered;

- lesser-spoken languages: the market for services in many European languages is likely to be very small (and hence perhaps better served on an on-demand basis?) in much of Europe;

- services in more widely-spoken European languages, including subtitled movies produced outside Europe with global appeal: specific potential issues could arise, in the event of any attempt to introduce a mandatory collective licensing scheme for the broadcasters' neighbouring rights, for such content.

Much of this debate is focussed around satellite pay-TV. This platform has succeeded in many Member States for a number of reasons: quality of technology, choice of content, branding, technological innovation, customer service, technical support and marketing. The need to establish, train and retain networks of retailers, technicians and customer support staff across Europe to the level pay-TV operators demand in their home markets would be a significant additional cost which would need to be factored in to any decision as to whether the rights acquisition cost could be refinanced. Nor is this simply a pay-TV phenomenon. The free TV business also generally respects national or linguistic boundaries – again, for the simple reason that FTA broadcasters generally believe that differences in the national/regional/linguistic culture of European consumers mean it is better to adapt programme offers to the taste of the target audiences. Of course, from a more political perspective this also has the benefit of increasing the linguistic and creative diversity of the European content sector, in line with the wishes of many European politicians.

We will set out our thinking on this in some detail, as we understand that this is a major concern of many in the EU institutions. Our view can be summarised as follows: that the market provides for some transfrontier distribution of broadcast content today, and can be expected to provide for more in the future. But that there are limits to what can be distributed via a broadcast model.

5 (a) the market for transfrontier services today

In general, it is a necessary condition for a cross-border programme service to succeed that the broadcaster in question is able to identify a large, homogenous target group and tailor a service which will be of interest. This typically means (i) a neighbouring country with a common language, or (ii) a significant diaspora wishing to access content which, because it is broadcast in the language of the diaspora, is of minimal interest to the rest of the market.

The examples given below demonstrate that the purchase of primary audiovisual rights for broadcasting on a transfrontier basis is possible; we reject the allegation that television programming is not available on a transfrontier basis. But even if the opportunity exists, broadcasters and media companies believe that in the majority of cases the costs of acquiring these additional rights – together with the costs we identified above - would not be covered by the additional revenue generated.

ACT member companies distribute their programme services on a cross-border basis as follows (the list is not exhaustive):

Neighbouring Countries

- BSkyB distribution of its own and third party relayed channels from the UK to Ireland

- Sky Deutschland distribution of the entire bouquet (10 own + 19 third party channels) from Germany to Austria

- Canal + in Switzerland (French-speaking territory)

- Various TV4 channels, including TV4 Fakta and TV4 Science Fiction – thematic channels offered by the Swedish broadcaster TV4, available on a pan-Scandinavian basis

- Canal+ (previously Filmnet) – a premium film and sports bouquet, available since the mid-eighties on a pan-Scandinavian basis including Finland

Diaspora Channels

- Antenna 1 Europe - a pay-TV service which distributes the programming of the market-leading Greek channel, Antenna 1, to the Greek diaspora in Europe via Hotbird. (Similar Antenna services are offered to Greeks living in the US and Australia)

- Euro D/Showturk – channels offered by, respectively, Dogan Media Group and Çukurova Group aimed at the Turkish-speaking diaspora.

- I-TVN – a pay-TV service, originally available in the US, Australia and Germany and aimed at the Polish community in those countries. Operated by TVN Poland.

- Pro TV International and Antena 1 International: Launched respectively in 2000 and 2006, these Romanian language TV channels target Romanians residing abroad in Europe, North Africa and the Middle East. Distributed via satellite, and operated respectively by Pro TV and Antena 1, the market leading Romanian channels.

Similar models are being devised to serve other expatriate communities – for example, the CME-owned Studio 1+1, the market leader in Ukrainian television, has recently launched 1+1 International, a Ukrainian-language TV channel for people from the Ukrainian diaspora. So far, this is aimed at the main Ukrainian-origin communities in the USA, Canada, Israel, rather than in Europe – but the commercial strategy is similar to the channels listed above.

Nor are the international strategies of European commercial operators restricted to Europe. The Spanish broadcaster Antena 3 also broadcasts Antena 3 Internacional to the Latin American and US markets via cable, satellite and online.

Otherwise, the patterns of intra-European migration have tended to be so diffuse that it has not been possible for a viable broadcasting business model to be devised to serve smaller numbers of expatriates, as this would involve acquiring rights at a cost which the broadcaster would be unable to recoup, due to the small size of the market.

Localised Content from International Players

A third model by which content is distributed across frontiers is via the commercial strategies of major international broadcasters. While it is true that, in the late 1980s, broadcasters such as MTV Networks or Discovery Channel began broadcasting to the whole of Europe via a single, English-language feed, these companies have also responded to changing viewer demand. Typically this has been by "localising" content – which can range from a relatively simple linguistic reversioning to a more complex exercise of adapting a programme format to a local market.

Satellite Distribution of Free to Air Channels

Germany is a good example of a market where many national FTA channels are also distributed internationally. The main commercial channels, RTL, ProSieben, Sat1 and RTL II are all available in around 25 European territories outside Germany[6].

5 (b) the market for transfrontier distribution tomorrow

The market for distribution of content is evolving rapidly. IPTV rights (to TV sets via set top boxes) are now widely being granted by the studios to broadcasters. In addition to technological developments, content rights owners are increasingly granting broadcasters all rights for the transmission of their channel via all means of television distribution (subject to security provisions) including satellite, cable, IPTV, and sometimes internet and mobile. So, as and when certain platforms become part of the normal commercial TV distribution, the content owners come to accept that such rights should be granted as part of the initial grant of rights, so that the broadcaster can distribute the primary broadcast of the linear channel appropriately, provided security is dealt with and the exclusive rights of broadcasters in other territories are not impinged upon.

For the reasons we set out at 4(a) above, we believe that a broadcast-based model, dependent, whether advertising or subscription based, on a critical mass of viewers to recoup the necessary additional expenditure, is not appropriate to meet the disparate, diverse patterns of demand among expatriates in the EU. On-demand models, with individual payments, may by contrast be more appropriate, although the underlying issues of whether the additional rights acquisition costs can be recouped remain the same. Such services remain in their infancy – catch-up TV has, for example, only been a mass market phenomenon for around eighteen months – and the market should be given time to develop before considering new legislation.

5 (c) Internal Market Aspects

The EU is tasked with abolishing national obstacles to free movement of goods, persons, services and capital. However, in a free market, regulators do not in general have the power to dictate to businesses the area in which their services should be offered. Thus, while there can in the Single Market be no legal barriers to a company established in Member State A offering its services in Member State B, equally there is no compulsion on the company to do so.

[6] For example, RTL Television is distributed in Bulgaria, Denmark, Estonia, Finland, France, Croatia, Latvia, Lithuania, Luxembourg, Moldova, Netherlands, Norway, Austria, Poland, Portugal, Russia, Sweden, Switzerland, Serbia, Slovakia, Slovenia, Czech Republic, Turkey and Hungary

It is instructive to note that the European Commission acknowledges the importance of the sale of rights along national lines in certain circumstances – notably DG Competition's intervention insisting that a separate sale of Irish rights to the English FA Premier League was organised, rather than selling Irish broadcast rights alongside UK rights,

In the media business, where language is obviously crucial, there may be a natural limit to the potential of pan-European services. The newspaper market – where the factors of language are equally relevant, but there are no comparable "rights issues" may be instructive. Transfrontier (in fact, even intra-national) distribution of printed newspapers is rather limited, and comes at a price premium.

5 (d) Additional Reflections

The question has also arisen in our internal thinking on this issue: are all European languages and territories alike?

By this, we mean that the target audience for, say, Greek-language content in Finland is small and relatively easy to identify. As such, the rights costs involved would also be correspondingly low. The market could probably be relied upon to work out a price for the Greek material, assuming always a distributor felt it worth taking the risk offer this material to the target group But one could not make the same assertion for all European languages; the market might not be able to work out a meaningful price for material in European languages which are widely spoken as second languages, particularly as the impact may vary depending on whether the material is dubbed or subtitled. Again, there are wider concerns here about linguistic and cultural diversity which are of a political, not a commercial nature, but we would expect these aspects also to be taken into account in the Commission's ongoing work on his dossier.

Additionally, there are competition issues to consider. In the event that, as we suggest, on-demand services financed by micropayments are the optimum way to meet the consumer demand for transfrontier content, this raises a competition issue relating to publicly-financed broadcasters. Such operators receive state funding, levied on a purely national basis, in exchange for a "public service remit" which is also defined at national level. Only residents of the Member State in question are obliged to pay this tax/fee. A move to a micropayment model for overseas distribution of this content may appear logical (otherwise all overseas residents would be "free riding" on the taxes and fees paid by the citizens of the Member State of origin) but it raises significant further issues. First, the transformation of a purely nationally-financed public broadcaster into a pan-European operator also collecting pay revenues is a radical step which, under the July 2009 Communication would require an ex-ante evaluation by an independent authority, and would for many publicly-funded operators require the introduction of separate accounting for this new revenue stream.

Among the competition issues which might be raised in such proceedings is whether such additional revenue should be taken into account in reducing the state aid granted to the public broadcaster. And, although this is a not a matter for commercial operators in the first instance, it may be necessary to amend some public remits, which are usually described in terms only of serving the national population.

Although we recognise that the Reflections Paper is a Commission paper on the future of copyright, not on regulation of public broadcasters, the ACT would be concerned at any move to extend the public service remit of publicly-funded broadcasters from a predominantly national matter – as accepted by the institutions in the Amsterdam Protocol on Public Broadcasting - to a European scale, particularly as many publicly-funded broadcasters already operate international satellite channels, thereby presumably fulfilling whatever remit they believe they have to serve the relevant expatriate community. An exceptional model is BBC Worldwide, which has leveraged the advantage of the English language to serve an audience beyond the UK expatriate market.

The impact on certain specific markets also needs to be more carefully considered. For example, distribution within a language zone. This is not an issue which only concerns commercial television. In a recent interview at www.digitalfernsehen.de, the Marketing Director of the Austrian public broadcaster ORF, Mr Pius Strobl, justified their decision to encrypt broadcasts of ORF 1 to prevent overspill into Germany as follows:

> "the fact is that we could neither afford nor justify any rights acquisition beyond Austria. As a rule of thumb you can assume that buying rights for the German-speaking territories would cost ten times as much as for Austria alone".

Mr Strobl goes on to explain that his broadcaster is legally entitled only to operate within Austria.

PART FIVE: COMMENTS ON THE REFLECTION PAPER : OTHER MATTERS

1. The governance and transparency of collective rights management organisations

As mass users of rights, commercial broadcasters have always believed that collective management is necessary to clear music rights. But, depending on the national circumstances, many commercial broadcasters experience various problems with music collecting societies. In particular, some markets report inefficiencies which negate the main benefits of collective management. Common rules on governance and transparency, as suggested at p 20 of the Reflection Paper, could help resolve some of these issues.

We note in particular from a recent paper published by GEMA that this leading European collecting society shares the opinion of the European Parliament (Resolution of 13 March 2007) that an EU framework directive in this area should be proposed, a point we mention to illustrate that our comments should not be construed as being hostile to the collecting societies.

We would suggest the following issues be addressed:

a. Transparent criteria for setting up a collecting society, i.e. public authorisation, independent scrutiny and user consultation/involvement in the process;

b. Reporting obligations should not be excessive;

c. Increased transparency of the division between administrative fees and copyright fees;

d. Reasonable and clear criteria should be used when setting tariffs, such as the concrete use of the repertoire, proportionality, etc, as well as including exchange of information "guidelines" with different categories of users, avoiding any kind of misuse of the monopolistic position of the society;

e. Abuses of dominant position – e.g., unreasonable increases in tariffs, or discrimination in favour of the public broadcaster – should be caught by existing competition law but increased transparency would be helpful here;

f. Societies should be in the position to license each others' rights through a network of agreements, so that any European society could grant a multi-territorial licence for the worldwide repertoire – though there will always be the occasional exception;

g. In order that users be informed of alternative licensing opportunities, collecting societies should state the territories in which they are active, while retaining the blanket licence system

h. Effective external control of collective management – whether by copyright tribunal, by other independent authorities, arbitration, courts, national competition authorities, and also by the EU Commission (to control abusive dominant behaviour in the Single Market).

i. Need central licensing for transfrontier broadcasting through competition rules, retaining the possibility of clearing rights individually with the rightsholder or through digital rights management.

2. Should the making available and reproduction rights consolidated into one licence?

We do not believe that this suggestion, floated at pp 16-17, would bring about any meaningful benefits for our sector.

There is evidence that the market may be moving in this direction, i.e., where the mechanical rights are directly related to the ability to exploit the performance rights, then they should be licensed together with the performance rights, as they are, in this context, inseparable.

In the UK, the reproduction and making available rights for on-demand applications rights are asserted and licensed in one single "joint licence" by PRS for Music (formerly known as the MCPS-PRS Alliance), while MCPS also license, on an

exclusive basis, the mechanical and communication to the public rights in respect of MCPS Production Music (also known as "library music" to differentiate from commercial music).

However it is instructive to note the Commission floating this idea, several years after the so-called "Option 3" model was raised by a previous Commission initiative. The ACT, together with other user groups, was critical of Option 3 structures on the grounds inter alia of the split copyright issue, i.e., that Option 3 only applied to the reproduction rights, thereby obliging users to deal with 27 national systems for the making available right as well as the new Option 3 structures – effectively making the system more complex rather than less. We welcome what we regard as an implicit admission from the European Commission of the flaws in Option 3 models.

3. Exhaustion

The Reflection Paper looks into the principle of exhaustion as a potential tool to prevent rights holders from exercising their rights according to the copyright legislation in force in each Member State. The exploitation of copyrights on a country by country model is not only the cornerstone of the business model enabling re-investment in new content (see above) but it is also grounded both in Community acquis and Community jurisprudence as recognised in the Commission Reflection Paper. As the Reflection Paper clearly states at p 11, the application of the exhaustion principle for intangible goods would contravene the ECJ Decision in Coditel I case. The Court held that there was no infringement of Articles 59 and 60 of the Treaty (freedom to provide services) when the beneficiary of an exclusive right relied on that right to prevent cable-retransmission from a member state to another member state without prior authorisation specifically for that territory. It is also important to retain the distinction the Court outlined between films and other types of artistic or literary works circulating as tangible goods. Films are exploited by being shown which is in principle an act of endless repetition and it generated revenue based on the number of showings and also the timing of its broadcast.

4. Extended Collective Licensing

The Reflection Paper introduces its consideration of extended collective licensing with the comment that "*the essential policy objective is to simplify the cross-border management of rights for online uses such as online […] video services (e.g. user generated content service on You Tube and emerging on-demand TV programmes")*

Again, we are unconvinced that cross-border rights management is the problem here. Certainly, for content which is genuinely "user-generated" (as opposed to illegally uploading already created material) it is hard to see that rights management will be an issue – as the "user" would presumably have the rights in their own creation. And for on-demand TV services, as we have explained above, there is no legal barrier to these being offered on a pan-European basis (indeed, the Reflection Paper at p 20 mentions the fact that some such services are being launched, with EU funding).

But operationally, we cannot see any practical advantage in introducing such a reform, and in fact would rather identify possible dangers in encouraging those who merely aggregate, rather than produce or invest in, content, to further disregard the

importance of exclusivity in the content sector. Nor, indeed, would such a scheme work in practice – assuming that a rightsholder has the right to inform a given collecting society that he no longer authorise that society to represent his rights, it seems unclear how this would actually work in practice. Our understanding of the system in those Nordic countries which have extended collective licensing is indeed that there is always a possibility to exercise an opt-out.

The apparent conclusion at p 15 of the Reflection Paper that " *a rather more nuanced approach to exceptions and limitations might be in order in the medium term"* is one that we would support also with regard to extended collective licensing. If, as the Reflections Paper seems to suggest at p 14-15, there is a specific problem, e.g., with regard to orphan works or out of print books, then the consultation should be specific to those sectors which are concerned – i.e., excluding broadcasters for the reasons we set out above.

5. Alternative Forms of Remuneration

Under this proposal

"ISPs would owe rightsholders a form of compensation for mass reproductions and dissemination of copyright protected works undertaken by their customers".

While at first sight this idea might be regarded as "better than nothing" – the intention is that this compensation be applicable only to unauthorised file sharing and reproduction – we would be concerned that this might amount to a de facto global licence for content which is currently subject to an exclusive right and would oppose any attempt to downgrade exclusive rights into rights to remuneration.

Other ideas being discussed, although not explicitly in this Reflection Paper, include the notion of a "copyright flat fee". As this is not specifically raised in the Reflection Paper, we do not intend to answer at length, beyond stating that broadcasters should, as rightsholders, of course participate in any such fee, just as broadcasters should be entitled to benefit from copyright levies in those EU Member States who have chosen to introduce them.

We would conclude that, overall, industry thinking on alternative forms of remuneration is at a very early stage and there is no evidence that these forms of remuneration will be anything more than minor additional revenue streams, and certainly not substitutional for the core business of media : of generating sufficient advertising and/or subscription revenue around our exclusive distribution of content, thereby allowing for reinvestment back into content.

6. Towards a European Copyright Title?

From the foregoing, it should be clear that the commercial television business views any proposal to move towards a pan-European copyright regulation with considerable misgivings. The correct interpretation of Article 118 of the Lisbon Treaty is not a

matter on which we are qualified to comment, beyond noting that there are different interpretations[7] as to its applicability to copyright.

We do not agree that such a framework would reduce transaction and licensing costs to any significant degree.

The Reflection Paper itself makes the point that "*the present legal framework does not in itself prevent rightsholders from commercialising their works on a multi-territory basis. The problem lies more on the side of commercial and contractual practice" (p.12).*

This statement – which, subject to reservations about the word "problem", we support – goes to the heart of many of our difficulties with the approach proposed: reform of the copyright legal framework may be an inappropriate tool to change business practice. We would therefore ask the Commission what would be the relevance of overhauling the copyright system and current commercial practices in Europe in these circumstances? What evidence does the Commission have for its apparent assumption that the territorial model for exercising intellectual property rights under the current legislative framework prevents multi-territorial business models?

However, even if the Commission were convinced of the case for reform, we are unsure that it would bring about the desired effect. If the precedent of the European Patent were followed, there is no obligation on a patent-holder to licence simultaneously across Europe. Unless businesses' contractual freedom is to be completely overturned, we do not believe that the Commission has identified a workable solution here. This is perhaps unsurprising, given our view that the issues identified are capable of being resolved by market players rather than regulatory intervention.

ACT
5 January 2010

[7] House of Lords: European Union Committee, The Treaty of Lisbon: an impact assessment, pp 219-220