Response of the Association of Commercial Television in Europe to the Commission Public Consultation on the future of electronic commerce in the internal market and the implementation of the Directive on Electronic commerce (2000/31/EC)

The Association of Commercial Television represents the interests of 29 private broadcasters with services covering 34 European countries present on all distribution platforms (terrestrial cable, satellite, online). Our members are diversifying their offers and in particular as consumer demand evolves, they are distributing their content on an increasing number of platforms including online and increasingly on demand.

In responding to the Commission questionnaire, we would like to underline three main points:

- The **"country of origin"** principle is crucial for media companies to be able to operate efficiently – continuing our current services and launching new innovative ones;
- The principle of **"territoriality" of copyright**, as recognised in the EU and international acquis, is an important tool for rightsholders or commercial users who acquire these rights to monetise the content adequately and create an offer with a value-added for consumers which will distinguish them on the market;
- The issue of **liability of ISPs and intermediaries/hosts**: considering the contradictory nature of the decisions taken by national courts, the ACT would encourage the Commission to provide guidance in order to increase legal certainty on the limitations on liability provided for under the e-commerce directive but only in so far as intermediaries who offer services consisting of hosting are concerned. ISPs have a role in helping copyright owners fight online piracy. Member States should facilitate cooperation between ISPs and content providers on the issue of piracy, For example, in order to ensure a level playing field, national governments could consider obligations on all ISPs to notify customers of alleged copyright infringement.

Issue 1: The development and practice of electronic commerce (Question 30)

As we will develop later on in our response under Issue 2, online audiovisual services have seen a rapid development in Europe from 150 in 2007 to 696 in 2009. However, the question of viewing sports and cultural events through streaming is an issue which is covered by the Audiovisual Media Services Directive and should not be raised in the context of the eCommerce Directive.

Issue 2: Questions concerning derogations from Article 3 (Article 3(4) and Annex) - Questions 35 and 36

The preservation of the "country of origin' principle (COO) is a key requirement for anyone seeking to offer cross-border e-commerce services in Europe. In particular for the broadcasting industry, this would ensure coherence with the COO which the Commission and

many Member States fought hard, with industry support, to retain in the Audiovisual Media Services Directive. COO guarantees a straightforward legal basis and legal certainty for businesses in Europe in the context of a single market for the provision of services. It helps avoid duplication or in some cases multiplication of administrative procedures and the application of different legal systems which would eventually deter many business from offering cross-border services or would create unjustified legal burdens.

With regards to various references in the Commission consultation document to the lack of cross border information society (content) services, the ACT would like to point out that the (very valuable) freedom to offer services in the internal market creates no legal or commercial obligation to do so. Commercial operators such as broadcasters may offer services where they can identify a demand and a viable market. Copyright and neighbouring rights, as well as audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, should therefore continue to fall outside of the scope of both the E-commerce directive and the Services Directive

A comprehensive re-affirmation of the principle of territoriality of copyright has been made in a recent answer by Commissioner Michel Barnier to a parliamentary question[1] where it is stated *that there are no instruments based on which operators can be forced to distribute their services over the whole of Europe or in a certain area. The principle of territoriality is compatible with the EU legislation and is also rooted in international agreements.*

Consequently, it is an artificial and flawed perception that copyright is a barrier to the development of cross-border content services and official figures from the European Audiovisual Observatory substantiate this: while in 2007, there were only 150 video-on-demand services available in Europe[2], in 2009 the EAO reported an increase to 696 services[3]. Furthermore, we would refer you to the recently adopted report led by MEP Marielle Gallo on Enforcement of intellectual property rights in the internal market, which in recital W states that "*current Community law constitutes no impediment to the development of multi-territory licensing systems"*.

Issue 4: The development of the press on the internet (Questions 50 and 51)

We are not going to comment at length on this issue as this mainly concerns the printed press but as our business model also relies heavily on retaining control over distribution of our content (be it produced in house or acquired from third parties) we believe it is important that in all cases the originators of the content should have control of the way, the platform and the terms under which their content is re-distributed. It is a question of the image/branding the content originator may wish to maintain in relation to third party distributors.

Issue 5: Interpretation of the provisions concerning intermediary liability in the directive (Question 52)

The Internet is becoming increasingly popular for the distribution of content and as specified in the EAO Study on Video-On-Demand and Catch up services in Europe published in 2009, 56,6 % of these services are offered on the internet and 30% through IPTV. The ACT is concerned that by offering information society (content) services to end users for which they

[1] Question E-3085/09
[2] Press release: Plus de 150 services de vidéo à la demande sont opérationnels en Europe, http://www.obs.coe.int/about/oea/pr/vod_mif2007.html
[3] http://www.obs.coe.int/online_publication/reports/vod_2009.pdf, page 116

have no contractual rights, certain intermediaries are unduly reaping the benefits of broadcasters' heavy investments in content creation. This can only have a detrimental impact on the sustainability of content creation in Europe.

The ACT notes that the directive was adopted ten years ago and that the intermediaries' activities have changed/evolved: for example, the web2.0. As a result, the ACT would encourage the Commission to provide guidance on whether certain internet intermediaries which offer services consisting of hosting should avail themselves of the limitations on liability provided for under the e-commerce directive, for those information society (content) services which such intermediaries also provide to end users (in a number of cases without prior authorisation from the relevant rights owners) and organise such services (content) in a catalogue. In our view, such guidance could increase legal certainty and could potentially lead to an increase in the number of legal (online content) services available to end users. Moreover, in some Member States, right owners would benefit from a more efficient implementation of the notice and take down procedures.

The ACT notes the increased number of cases in various EU countries over the past years which involve issues around the level of responsibility of intermediaries which offer services consisting of hosting as well as information society (content) services and not in the least the sometimes, contradictory nature of the decisions taken by national courts. This notwithstanding, it may well be the Commission could usefully comment on specific situations and, as noted above, provide guidance on whether the above online intermediaries which offer information society (content) services to end users for which they have no contractual rights should avail themselves of the limitations on liability provided for under the e-commerce directive.

The ACT does not dispute the legal exemptions provided for in the eCommerce Directive in Articles 12 to 15 however ISPs have a role in helping copyright owners and their legitimate licensees fight online piracy. Furthermore, in order to ensure a level playing field, the Commission should encourage national governments to establish an efficient and effective legal framework for all ISPs against online piracy, e.g. by establishing the obligation for ISPs to notify customers of alleged copyright infringement. Discussions are currently ongoing and at different stages in several countries in Europe.

Question 66: Google vs. LVMH

Commercial broadcasters continue to massively invest in new innovative content and services which provides added value for consumers and at the same time distinguishes their offers on the market. This means that there is a certain reputation and image to defend in connection to their brand and our members see obstacles to their ability to protect their brands due to the new technologies which exploit legal uncertainties in the text of the Directive.

ACT, 5 November 2010