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ASSOCIATION of COMMERCIAL TELEVISION in EUROPE

response to

Public Consultation on the review of the EU copyright rules

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TYPE OF RESPONDENT : Representative of broadcasters

I. Introduction

Online distribution is a great opportunity for commercial broadcasters and our sector has long understood the imperative to diversify our business models. Without exception, European media groups are enthusiastically launching new services, seeking out new revenue streams and enhancing the existing offer to consumers. We highlighted a number of these initiatives in a brochure published in 2011, "Content and Consumers"', and our members' online offers have continued to dramatically increase ever since. Consumers today can enjoy films and television in more ways, on more devices and at better quality than ever before. There are now over 3000 on-demand audiovisual services available in Europe[1], compared to fewer than 700 at the end of 2008. All this growth has been realised in parallel to the continued strength of linear, scheduled television services.

Far from presenting barriers to these new innovative services, the robust but flexible European copyright acquis underpins all these services, whether offline or online, broadcast, catch-up, streamed or on-demand. As such, respect for copyright is the foundation stone not just of the European television industry, an €84.4bn sector in our own right, but also of the wider creative content industry. According to a recent OHIM Observatory Study[2] copyright intensive industries account for 4.2% of EU GDP and 3.2% of EU jobs.

Without a strong copyright law, commercial operators would have no incentive to reinvest in the next season of creative, journalistic and sporting content. Indeed, according to a previous study[3] carried out for the European Commission, 44% of total European broadcasting revenues were reinvested into content. For the main commercial broadcasting groups this investment amounts to over €15 billion a year or €41 million a day.

So, why question such a well-functioning system?

We have three concerns about process: evidence, timing and the need for proportionate stakeholder representation.

First, an evidence base for questioning the system has not been established. In fact the opposite is true. The ACT and its members invested considerable resources in playing an active part in the Licenses for Europe (L4E) initiative. The various parts of the commercial audiovisual value chains made 14 presentations to WG1, three to WG2 and five to WG3. This represents a considerable body of evidence – all publicly available on the Commission website - in support of our contention that industry is responding to the demand and the needs of users and consumers and is delivering content on digital platforms. The opposing case for radical copyright reform was barely made in L4E, and when it is voiced tends to be underpinned by generalisations and anecdotes rather than factual evidence.

[1] Audiovisual Observatory.

[2] Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, September 2013

[3] *"Mapping the Cultural and Creative Sectors in the EU and China"*, January 2011

We fail to see why the Commission intends to set out its intentions on such an important policy field for our sector as soon as summer 2014, apparently in the face of the weight of evidence from the L4E process and other studies[4]. In addition, the ACT understands that the Commission has asked economists Charles River Associates to undertake a thorough economic analysis on territorial licensing and the internal market which has yet to be completed or published, yet it appears to have already decided its position on the need for reform in this area without waiting to take account of its findings. We suggest that the Commission should not take a position on the need to reform in this area before proper studies have been duly considered. There is also a risk that the process may turn into a "numbers game", with anti-copyright groups and certain politicians manipulating the process by supplying pre-prepared anti copyright answers to the consultation and urging large numbers of individuals to send these in. We sincerely hope that the Commission will not be unduly swayed by such orchestrated mass responses and instead insist that due weight is given to the origin and substance of evidence.

Finally, it is important that this consultation is not seen in isolation. Full-scale copyright reform is far from the only way in which any imbalances in the system can be redressed. Examples of more targeted approaches include current copyright reviews taking place in some Member States, the EU directive on Orphan Works and the directive on Collective Rights Management. Proper implementation of the transparency requirements in this latter directive, together with scrutiny from national competition authorities, should assist the cross-border flow of content and lead to a gradual clarification as to the pricing between some Collective Management organisations.

[4] "*Creative Media Europe : Audiovisual Content and Online Growth*.", E-media institute, March 2012; *"Study on the economic potential of cross-border pay-to-view audiovisual media services"* TNS opinion, Plum, the futures company - Study prepared on behalf of the European Commission – January 2012; *"Why territories matter"*, Olivier Bomsel and Camille Rosay, October 2013; *"The value of territorial licensing to the EU"*, Enders Analysis, October 2013.

II. Rights and the functioning of the Single Market

1. *[In particular if you are an end user/consumer:]* ***Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?***

☑ NO

2. *[In particular if you are a service provider:]* ***Have you faced problems when seeking to provide online services across borders in the EU?***

☑ NO

Cross border access can be delivered by the market under the current copyright framework. There are no legal obstacles to the trade in AV productions on a multi-territory basis. If a broadcaster wished to acquire rights for any number of European markets, it would be a commercial negotiation between that company and the appropriate rightsholder.

Commercial broadcasters assess the viability of cross-border AV distribution based on various considerations, which include consumer demand, commercial appetite, language, cultural differences, ability to provide customer support in more than one language, local consumer protection requirements and the significant cost of marketing a service in foreign territories. Delivering content to the consumer has a price. Besides technical distribution costs (including CDN), there are costs involved linked to, for example, costumer support in different languages, the application of different consumer protection rules and local marketing. In the absence of monetisable demand, delivering content outside of the home market will involve a non-recoupable cost.

Example: A free service will typically refinance itself via advertising, which is tailored at specific markets or products or aligned with the advertising campaign in other media of that respective country by that respective advertiser. Therefore, for example, an Austrian user might not be able to access the German website but would be redirected to the (identical/mirrored) Austrian website.

Further regulatory intervention is not needed in this area. The ACT and other audiovisual industry stakeholders made the following key points in the EC's Licences for Europe process:

- Broadcasters are one part of a complex series of value chains, each stage of which has its own business rationale and investment decisions to underpin strategies on distribution;
- In today's multi-platform, multi-window world, territorial distribution is frequently the optimum way, via exclusivity and price differentiation, of maximising revenues. Crucially, this revenue then flows back into new investment in content. Around 44% of the €86bn broadcaster turnover in Europe is reinvested in new content production annually[5];

[5] EC Study: Mapping the Cultural and Creative Sectors in the EU and China, January 2011

- Not only do national language, tastes and interests vary, but programme genres are key factors in determining value across markets. Sport – which viewers wish to watch live – raises different issues from a drama series or classic movie. Even within genres, different commercial factors will inform the distribution strategies of popular regional sports (ice-hockey, rugby, etc) from those with global appeal. Distribution strategy will often be decided on a programme-by-programme basis. Initiatives such as 'download and play' or one-day subscription packages for sports channels are being trialled;
- Consumer demand is uneven. The Plum study[6] commissioned by for DG MARKT is good evidence of this point. Plum estimates the total demand for transfrontier audiovisual services at €760m annually (0.7% of the EU television market). But demand is uneven across the 702 markets analysed. In over 200 such markets, the value is below €10,000 p.a. In others, where the demand for such services is higher – e.g., Romanian language services in Spain or Italy are valued at over €40m p.a. - commercial broadcasters often already provide services for many such expatriate groups; Indeed, wherever monetisable demand exists, that demand is being addressed – and this is happening without the need for legislative intervention;
- An EU AV market without territorial exclusivity would also have an adverse impact on non-economic goals of media regulation such as cultural and linguistic diversity.
- Exclusive territorial distribution indeed works for everyone in the value chain, from producer to consumer – and ensures sustainable investment in content:
    - Consumers – have access to content in their language that fits their interests, at a price they can afford.
    - Content Producer/Rights holders – gives them the option to generate maximum return on their investment by segmenting rights between one or a series of broadcasters or choosing to retain rights to exploit themselves.
    - Distributors – majority of platform operators focus on one country or territory because it allows them to develop and exploit specialist market knowledge and deliver brands, infrastructure, marketing, customer support that best serves national/regional consumers.
    - Broadcasters – allows them to tailor channels to the audience – local language, content that most appeals to the market, locally commissioned content, targeted advertising – through a local distributor who has the market knowledge and expertise to deliver their channels to the audience.
    - Advertisers – advertising is the biggest single revenue stream for European television and is highly national (as products are different). Channels that are not targeted at national markets are of relatively little value to some advertisers.

[6] TNS opinion, Plum, the futures company, March 2012, http://ec.europa.eu/internal_market/media/docs/elecpay/plum_tns_final_en.pdf

5. *[In particular if you are a right holder or a collective management organisation:]* ***Are there reasons why, even in cases where you hold all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on a service provider (in order, for instance, to ensure that access to certain content is not possible in certain European countries)?***

☑YES

See our response to Question 2.

6. *[In particular if you are e.g. a broadcaster or a service provider:]* ***Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?***

☑ YES

See our response to Question 2.

7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?

☑ NO

See our response to Question 2.

8. Is the scope of the "making available" right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?

☑YES

ACT members do not encounter problems regarding the interpretation of the scope of the "making available" right in practice. From our point of view, any potential issue can be dealt with through commercial licensing negotiations. If any interpretation issues would arise, national courts and the European Court of Justice are best placed to handle these.

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[7])?***

☑ YES

[7] Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

10. *[In particular if you a service provider or a right holder:]* ***Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?***

☑ NO

Both rights are centralised with the audiovisual producer. Facilitated by national systems of presumptions of transfer, audiovisual rights are centrally retained by the producer, which makes licensing of audiovisual works easy and straightforward.

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

11. Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

☑ YES

The question whether the provision of a hyperlink leading to a work triggers the making available right, remains subject to a case-by-case assessment, and may depend on whether or not a new audience is reached, as recently confirmed by the ECJ in its Judgment in Case C-466/12 (Nils Svensson and Others v Retriever Sverige AB) of 13 February 2014. .

14. *[In particular if you are a right holder or a service provider:]* ***What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.***

Exhaustion is a limitation to copyright that was created to allow the first buyer of a physical good to resell that copy of the item without interference of the rights holder. The idea of exhaustion of rights was conceived when it seemed obvious that a new copy would have certain advantages over a resold copy in the market, in terms of absence of physical wear and tear. In the digital world, where the resold item is identical to the original, exhaustion would be unfair and harm the business model of the copyright owner. One purchased digital copy could potentially be resold millions of times on the secondary market, which would - as a direct effect - destroy the first market. Applying the rule of exhaustion to digital copies would indeed have the exact same effect as legalising file sharing and would create a strong disincentive for content service providers to invest in "download to own" platforms, as it would reduce their ability to monetise rights in subsequent windows.

Also, the digital nature of the service or good makes it difficult to identify a particular 'item' and assess whether it has been resold and is no longer in the possession of the first acquirer.

The rule of "exhaustion" should therefore only remain applicable to the distribution of tangible properties on material support (a book, a CD, a DVD,…), as confirmed by ECJ jurisprudence. A general rule of non-exhaustion for the making available right has therefore

correctly been codified in Article 3(3) of the Information Society Directive. We see no reason to reconsider this well-balanced legislation.

As correctly stated in the questionnaire, the decision in the UsedSoft case law was based on the Computer Programs Directive and can therefore not be applied to subject matter that falls within the scope of the Information Society Directive. Unlike the Computer Programs Directive, the Information Society Directive states that the making available right is not subject to exhaustion, as stated above.

15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?

☑ NO

16. What would be the possible advantages of such a system?

We don't see the possible advantages. The centralisation of the rights in the hands of the audiovisual producer makes information on the protected rights a very straightforward exercise. Opening and closing credits are also generally used to identify the rightholders involved.

On the other hand, we are not opposed to voluntary industry initiatives that seek to create tools for rights identification for specific genres or categories of works. Many such initiatives have emerged over the last past years where the market has identified a need to do so.

Some of our members are involved in such initiatives, such as the Linked Content Coalition and the Global Repertoire Database project . The involvement of the Commission as convenor is welcome, on condition that there is no move towards standardisation of any of these database projects on a compulsory basis – this role should be an enabling one, with any projects remaining market-led.

17. What would be the possible disadvantages of such a system?

If this question relates to a mandatory system of registration, we envisage multiple disadvantages such as:

- Administrative burden and costs involved for rightholders;
- The database would never be complete as non-EU originated works couldn't be subject to a registration requirement. This would create confusion as to whether or not a certain work is protected.
- It would be impossible to keep such a database completely up-to-date given the great volume of works protected by copyright that are created every day.

19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?

Many of our members use identifiers and have experienced an increase in the efficiency and accuracy of music reporting to collecting societies and contributors.

The Global Repertoire Database project is an interesting case study of public-private collaboration.

However, it should be recognised that such mechanisms do not constitute licensing vehicles. There should be no move toward standardisation of rights ownership and permissions databases on a compulsory basis. Licensing of professionally-produced audiovisual content should be left to individual commercial negotiations.

20. Are the current terms of copyright protection still appropriate in the digital environment?

☑ YES

There is no compelling evidence to suggest that the current terms of copyright protection are ill suited to the digital environment.

III. Limitations and exceptions in the Single Market

21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?

☑ NO

Cultural and political differences between Member States make it unnecessary and undesirable to agree on a list of mandatory exceptions. The current EU copyright framework provides Member States with the flexibility they require in order to be able to foster technological innovation and allow the market to adapt to the fast pace of technological change.

It is nevertheless important to ensure that exceptions and limitations are correctly implemented at Member State level.

22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?

☑ NO

The provisions under art. 5 of the 2001 Information Society Directive are shaped in a flexible way so that courts, and ultimately the Court of Justice of the European Union (CJEU), are

placed in a position to adapt them to the evaluation of new unauthorised uses of copyrighted works, taking also the "three-step test" in due consideration. There is no need to interfere in the flexibility that the current EU copyright framework provides to Member States

23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

Exceptions are intended to address situations of market failure. Absent any evidence of market failure there is no need to add any new limitations and exceptions.

See also answers to questions 21 and 22.

24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?

☑ NO

See answers to questions 21 and 22.

25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

See answers to questions 21, 22 and 63.

26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?

☑ NO – Please explain why and specify which exceptions you are referring to

See answers to questions 21 and 22.

E – lending

39. *[In particular if you are a right holder:]* ***What difference do you see between libraries' traditional activities such as on-premises consultation or public lending and activities such as off-premises (online, at a distance) consultation and e-lending? What problems have you encountered?***

If a new exception were to be introduced to enable libraries to make digital copies available to the general public, this would disincentivise rights holders audiovisual content service providers from commercialising such works as the library's digital copy would compete unfairly with any licensed service offering the same content.

Disabilities

52. What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?

The EU regulatory framework is well equipped with measures that support Member States in their national initiatives related to accessibility services in full respect of the proportionality and subsidiarity principles. From a copyright perspective, the 2001 Copyright Directive provides already for exceptions for disabled and we believe this is a balanced approach.

Accessibility requirements applicable to broadcasters are provided for under statutory laws in a number of Member states. Moreover, concrete legislative steps to encourage audiovisual media service providers to ensure that their services are gradually made accessible to people with a visual or hearing disability were adopted under the Audiovisual Media Services Directive, in December 2007. The rules under the Audiovisual Media Services Directive aim to make audiovisual content increasingly accessible for persons with disabilities. Indeed, under this Directive, Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability , for example through the use of sign language, subtitling, audio-description and easily understandable menu navigation. These requirements apply to public and commercial audio-visual media service providers alike.

ACT members have adopted many measures to improve the accessibility of their digital TV services and equipment to customers with differing levels of disability, whether in compliance with statutory requirements for the provision of sign language, audio description/narrative and subtitling and/or voluntarily in line with their corporate and social responsibility policies.

ACT members believe that industry-led initiatives are the best means to deliver accessible solutions to consumers with differing abilities, in the absence of significant market failure(s).

User-generated content

63. If your view is that a different solution is needed, what would it be?

There are several considerations of a general nature to take into account that all lead to the conclusion that no exception for user-created content should be introduced into the Directive. Exceptions are intended for situations of market failure and we are not aware of any market failure in the case of UGC– quite the opposite. Many rightholders license their content effectively to UGC platforms, which is probably why users were unable to identify why the current copyright system would be a barrier in this regard during the L4E dialogue.

In addition, and as recently demonstrated in the L4E dialogue, there is no common view on what UGC actually is.

Even more importantly, an exception for UGC would be in contradiction with the three-step approach present in the Berne Convention, the TRIPS Agreement and enshrined in the 2001 Directive as well.

The introduction of an exception along the lines of the "fair use" defence for transformative uses in the US would not be effective in the EU. As the fair use principle is based on US jurisprudence which has been subsequently codified in the Copyright Act, it would be difficult to import as such in the EU legal framework. It is also worth mentioning that the US system has not proven to be perfect and does not offer the necessary clarity for rights users on the one hand and an appropriate level of protection of the rights holders on the other hand.

In this regard, the Commission should also reflect on who would actually benefit from a UGC or fair use exception? Large ICT players might take advantage of the uncertainties and unpredictability that a new exception would trigger. In a system where the boundaries of exceptions would be based on the outcome of complex and time-consuming proceedings, individual authors and/or content owners having little or no financial means at their disposal might feel reluctant to undertake potentially expensive litigation.

The ACT members consider that the current copyright framework in Europe is well equipped to foster consumers' creativity. On the one hand, rightholders license their content to UGC platforms and offer licenses for small scale use. On the other hand, there is a well-established regime of exceptions that provide the necessary flexibility such as the "free use" in Germany or the "parody, pastiche and caricature" in France.

IV. Private copying and reprography

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[8] in the digital environment?

☑NO

Our sectors' priority is to offer content through licensing. When licensing is impossible in practice, levies remain a tool in most European countries to compensate right holders for the copies made of their content. However, this matter should be dealt with at national level, as a particular approach in one Member State may not be appropriate in another.

[8] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

V. Fair remuneration of authors and performers

72. *[In particular if you are an author/performer:]* ***What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?***

Introduction

It is a matter of common ground between broadcasters, producers, and policymakers that appropriate remuneration for creators should be ensured.

The model adopted by the majority of EU operators is one where all remuneration rights (for both primary and secondary uses, including online uses) are included in the lump sum payment(s) made to authors and/or performers, directly or through authorised bodies. A few Member States, such as Spain, provide for separate equitable remuneration for audiovisual performers alongside the exclusive making available right.

We have seen no evidence that the model of lump sum payments fails to deliver adequate remuneration to rightsholders and believe that the introduction of an unwaivable right to remuneration for online distribution, especially if it is subject to mandatory collective management would harm producers, creators and consumers alike.

A mandatory collectively managed right to remuneration is not in the interest of the creator

As opposed to a remuneration right, the exclusive right gives authors and performers the right to authorise and prohibit the use of their rights and therefore to freely negotiate the conditions linked to the authorised use. The mere right to remuneration is a restriction to the exclusive right: it gives a fixed right to money, but takes away the author's/performer's right to ensure the best possible remuneration.

A collectively managed right to remuneration is a form of "expropriation" that raises substantial issues at national level, not least from a constitutional point of view. In addition, it wouldn't necessarily serve the author's/performer's interest, as they would lose the opportunity to negotiate in their best interest.

Many creators are therefore opposed to compulsory collective management of their rights, as expressed by the Federation of European Screenwriters (FSE) in their response to the Audiovisual Green Paper[9]:

"The application of a statutory right to compensation collectively managed is an inadequate solution in our opinion. It effectively removes our right to make available and will therefore produce minimal compensation."

If a remuneration right would be introduced alongside the exclusive right this would result in double payments for the same use or be recouped at the basis.

[9] http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/fse_en.pdf

The benefits of buy-out contracts for producers, creators and consumers

For the creator:

The business of audiovisual production and distribution is a business of risk-taking. A producer has to raise funds, organise locations, insurance, hire authors, actors and many others and obtain necessary clearances, rights and licenses, without knowing if the production will be successful. Some productions make money, while others lose money or break even. Producers are often limited liability companies with a large portfolio of rights on which to spread the risk and or therefore likely to be risk-prone.

In contrast, most authors/performers may be risk-averse, and may prefer a secure upfront payment that provides them with a salary to live from, without having to worry about the potential impact of a flop on their income. And, as confirmed by the OHIM Observatory Study on Economic contribution of IP-intensive industries[10], our sector pays a large premium above the European average salaries. Therefore, many creators may prefer to receive a lump sum in exchange of their rights transferred to the producer. By transferring the rights to the producer, they also transfer the entire risk of the exploitation: they may not have a proportional share in the potential success, but crucially neither do they share in the potential losses. A secure income, upfront of the potential exploitation, may be preferable, not least in times of economic crisis.

A compulsory "per use" payment model would necessarily be recouped by reducing initial payments as it imposes a sharing of the (positive and negative) risk related to the uncertain gains/losses between creator and producer, while a lump sum transfers all the risks on the producer. In case of an unsuccessful online exploitation the creator would therefore lose income in this scenario.

Finally, creators have an interest in the development of the online market. An unwaivable right to remuneration could have the negative impact of reducing the amount of new production, the production of which generates the vast majority of creators' income.

The best guarantee for fair remuneration is the competitive pressure resulting from a healthy and competitive market.

For the producer/broadcaster/platform:

Audiovisual producers are in the best competitive position in order to cover costs, to secure return on investment and make profits in order to create new works. Discovering new talents, financing the productions of innovative content and helping new creative works to reach the consumers is an expensive and risky business, that requires the involvement of those who can take such financial risks and which must, therefore, be rewarded for doing so.

Traditionally, the incidence of collective management/licensing in the audiovisual (AV) sector is very limited since exploitation rights are centralised in the producer who relies on the consolidation of rights to finance, produce and distribute AV works. This model is a "one-stop shop" mechanism, that is key to the functioning of the audiovisual sector, and should be maintained. This system has preserved the audiovisual sector from the fragmentation that exists in other sectors.

[10] Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, September 2013

The fact that it is only the producer who is able to authorise commercial exploitation of content, whether national or transfrontier, makes for a very efficient system in which commercial users – including other broadcasters – are certain that they can acquire all necessary rights from a single point of contact. This system, we believe, works equally well in the online environment as the offline one and simplifies licensing procedures extremely well.

A limitation to the producer's freedom to buy out contributors would seem to go against the Commission's aim in producing a more simplified and streamlined copyright system that should encourage more content to be available online. Such a proposal would appear rather to be introducing new barriers.

In many cases, when the creator is already remunerated in a buy-out contract, such a remuneration right would also lead to double-payments. In Spain, where a system of an additional remuneration right exists, the system has been detrimental to the audiovisual industry.

For the consumer:

The uptake of online distribution services would be handicapped by an additional layer of remuneration and administration, at the end of the day harming the interests of consumers.

Another issue is the fact that many operators don't split out a separate fee for online distribution of content, with the online service typically bundled in with a number of other free and pay services, some of which are purely communications services with no audiovisual content element (triple play). To give a very specific example: the majority of catch-up TV services to date are not offered against specific remuneration, but rather are offered as additional services to viewers. A compulsory "per use" payment model would therefore discourage the availability of such services.

In any event, the final user (distributor/platform), that would be obliged to pay the remuneration right, would be willing to pay less to the producer, which takes money out of the virtuous cycle of investment in new content. The platforms could also choose to pass on the additional cost of the remuneration right to the consumer which would result in more expensive content.

Conclusion

The introduction of a mandatory collectively managed right to remuneration would create a complex new layer of collective management, which would harm the uptake of new services and would be detrimental to the interests of producers, creators and consumers alike.

The best way to ensure that the authors and the performers obtain appropriate remuneration would be to promote the right conditions to stimulate investment in content, including for distribution on the internet. In this respect, stability and certainty in the copyright framework is of key importance.

73. Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?

☑ NO

See our answer to question 72.

VI. Respect for rights

Introduction

When the Enforcement Directive was first proposed in 2003, the need for a robust anti-piracy protection was already a vital priority for our sector, but the majority of piracy cases involving broadcasters concerned hacking of set-top boxes or pirated smart cards for pay TV services, and therefore were dealt with by the Conditional Access directive. Such cases remain very important for broadcasters. But as technology has developed, so have the methods used to commit digital theft and piracy will continue to mutate and grow.

Live television today is the fastest-growing segment of copyright infringement[11].

New technologies used by broadcasters enrich the market with new content offerings. But they also carry risks for the world's broadcasters, producers and creators by making it easier to profit from the use of broadcast signals without their consent. Signal misappropriation through illegal means jeopardises broadcasters' ability to protect and invest in the acquisition and creation of content, as well as our role in organising, scheduling, promoting, and distributing content. This, in turn, adversely affects jobs in our sector and our ability to serve their audiences with news, information and entertainment.

Broadcasting is also a key driver of social cohesion and cultural development - vital in an increasingly fragmented world. The technical signal embodying all that activity must be protected, on any platform.

This is why broadcasters call for a toolkit of anti-piracy measures, rather than a single solution, including one tackling illegal offers from non-EU countries. Infringements of intellectual property rights taking place outside the EU indeed constitutes a major source of concern. The European Commission's efforts to address this problem through bilateral and international trade initiatives, notably at the World Intellectual Property Organisation, are to be supported strongly. We would urge the Commission and Member States to continue to work at the global level for such an improved level of protection in order to grant a safer environment to those stakeholders who ensure the financing of professional quality content which lies at the heart of a thriving convergent media environment. In particular, the private copying exception should not be used to justify the online communication to the public of broadcasters' signals, for commercial gain or otherwise, without the owners' permission.

The ACT has already drawn attention in another context to the central importance of signal integrity in converged media markets. In our response to the Commission Green Paper on Preparing for a Fully Converged Audiovisual World, we called on the Commission as a priority to

[11] The six business models for copyright infringement, a Google & PRS for Music commissioned report with research conducted by BAE Systems Detica, 27 June 2012.

"guarantee the signal integrity of broadcasters as a quid pro quo for editorial responsibility (this responsibility cannot be guaranteed if third parties interfere with the broadcast signal)…It is essential for the future of the EU audiovisual market to ensure the integrity of high value, highly-regulated content. Commercial overlays and other novel techniques should therefore not be possible without the prior consent of the owner of the content in question".

In day-to-day commercial negotiations, by contrast, much of the detail (contractual arrangements, platform regulation, existence or otherwise of copyright levies, identification of beneficiaries) differs from one market to another and should in the first instance be dealt with at national level.

75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?

☑ YES

For ACT members it is vital that the courts and national enforcement agencies focus on unambiguous cases of piracy -a movie uploaded via a torrents site, a football match streamed illegally on Chinese TV station website -which are of course those which cause commercial damage on a scale which undermines broadcasters' ability to invest in content. It is less the question whether copyright infringements have economical scale since any infringement causes commercial damage and more the question whether it is possible to eliminate or at least reduce significantly the illegal content offers in the digital environment. Effective and efficient systems that control and remove infringing content from illegal websites are essential here.

The political message should be clear: both rightsholders and intermediaries have a role to play in tackling the theft of content online. At national level, many of our member companies are engaged in negotiations as to the concrete form this can take (for example a voluntary code or MoU). This includes dialogues between advertising agencies and right holders to prevent advertising brokers from funding illegal websites. Cooperation with different intermediaries (advertising brokers, payment intermediaries, search engines…) enables one to "follow the money" and focus on mass illegal file-sharing sites or torrent sites, thereby avoiding targeting of end users.

This form of constructive negotiation among intermediaries and the content industry has not yet in every Member State led to more cooperation for the fight against piracy. But the form of constructive negotiation is something which should be encouraged and should be facilitated by the European Commission.

76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

ACT members think that Article 8(3) of the Directive is an important tool in achieving cooperation from intermediaries, in so far as it is correctly implemented in the member states.

Combined with voluntary cooperation (as discussed under Question 75), most member states have developed a toolkit of potential measures that can be taken and that is adapted to the needs of a particular Member State. We believe that this is the right approach.

On the other hand, considering the contradictory nature of the decisions taken by national courts, the Commission should clarify whether or not 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 in a catalogue. In our view, such clarification could increase legal certainty and could potentially lead to an increase in the number of legal (online content) services available to end users.

77. Does the current civil enforcement framework ensure that the right balance is achieved between the right to have one's copyright respected and other rights such as the protection of private life and protection of personal data?

☑ YES

VII. A single EU Copyright Title

78. Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?

☑NO

79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?

Cultural and political differences between Member States make it unnecessary and undesirable to replace national laws by a single EU Copyright Title.

Even if the Commission were convinced of the case for reform, and notwithstanding the enormous legislative effort required to consolidate all the acquis into one text, and the lack of clarity surrounding the legal basis which would need to underpin such a measure, we do

not believe that it would bring about the desired effect. It is also unclear if a unified title would still allow for licensing per territory, which is a practice that underpins the viability of audiovisual productions.

VIII. Other issues

80. Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.

It is important that the Commission looks at potential copyright reform from a holistic view, taking into account the economic health of the whole ecosystem.

Association of Commercial Television in Europe

Brussels

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