EBU REPLY TO THE EU GREEN PAPER
on the online distribution of audiovisual works in the European Union:
opportunities and challenges towards a digital single market

Executive Summary

The EBU welcomes the continuation of the debate on the online availability of
audiovisual services and looks forward to the conclusions and to the prospect of rapid
action. Convergence is happening now, and modernisation of copyright clearance rules
for audiovisual content is needed urgently, for the benefit of European competitiveness
and the Single Market. Doing nothing cannot be an option.

Closely connected with the availability of online audiovisual services is the collective
licensing regime, including the licensing of music rights for such services. Consequently, parts of the EBU's proposals should be dealt with in the forthcoming Framework Directive on Collective Rights Management, and this concerns in particular:

- Collective rights management solutions for the mass use of music in broadcast-
  like services;
- Availability of extended collective rights management solutions, where this is
  considered appropriate by the parties concerned;
- Governance, efficiency and transparency rules for collective rights
  management;
- Legal certainty for audiovisual media service providers with regard to the law
  applicable to the collective licensing: for broadcast-like services within the EU,
  only the law of the Member State in which the media service provider is
  established should be applied.

Action is also required most urgently to allow Public Service Media (PSM) to unlock
their archives. Member States should ensure, via appropriate legal means (for
example, through extended collective licensing), that the PSM under their jurisdiction
are entitled to use their audiovisual archives in new online services. Adequate solutions
should already be provided for in the proposed Orphan Works Directive.

In addition, rights clearance for the simultaneous, unchanged and unabridged
retransmission of broadcasts originating in Member States over any platform should
follow the same collective rights-licensing regime as is applied to cable retransmission
on a technologically-neutral basis. Moreover, the mandatory collective licensing system
for the underlying programme rights should be extended also to the retransmission by
distribution platform operators of the PSM's on-demand services which are inseparably
linked with their linear offer (this means that they are different from traditional, stand-alone video-on-demand offers); today, catch-up services are clearly inseparable from the original linear offer.

Finally, the EBU wishes to highlight the importance of net neutrality in guaranteeing the availability of PSM's services. PSM have a fundamental role to play in the new online environment in offering all European citizens varied content of high quality and in guaranteeing and promoting the fulfilment of fundamental European policy objectives such as social cohesion, media pluralism and cultural diversity. It is thus crucial to ensure that Internet broadband networks facilitate the exchange and dissemination of content, including the content of PSM.
1 Introduction: public service media in the changing audiovisual media landscape

The EBU welcomes the continuation of the debate on the online distribution of audiovisual works which offers a great number of opportunities and challenges for all stakeholders. Before replying to the relevant questions for Public Service Media organisations (PSM) we take the opportunity to give a short overview of the most important developments for media service providers and of how PSM have been facing the challenges.1

1.1 User behaviour continues to evolve - access "anywhere, anytime and anyhow"

Significant changes in the media landscape over the past decade are continuing. Linear radio and television services still dominate as the preferred way of consuming such content, but this content is increasingly being accessed in different ways and across different platforms.

1.1.1 Television and television-like services2

European households are watching more television than ever and *daily consumption continues to increase*. The average daily television viewing time in the EU 27 was measured at 210 minutes in 2010, up from 203 minutes in 2009.

There are different reasons for this development. *Increased choice, functionality and quality* brought by digital multichannel, DVRs and HDTV, as well as more leisure time have revived a consumption that was predicted to drop.

*Time-shifted viewing* is another important factor leading to an increase in the daily viewing time. A study carried out in the UK3 shows that the number of people using television on-demand services has grown significantly, up from 64% to 80% in 2010. The study also demonstrates that the main reason for watching on-demand catch-up television services such as BBC iPlayer, 4oD and ITV Player is to avoid falling behind the linear television schedules. On-demand viewing is considered as "back-up" viewing, and viewers increasingly regard television-like services, such as catch-up services, as an integral part of the broadcasters' offer.

Audiences also engage in *parallel activities*. The Internet has given viewers the ability to catch up on missed shows, to interact in real time via social media, and even to transact while watching. The study gives proof of people using other media devices while watching television: 60% claim simultaneously to watch television and go online at least two to three times a week.

The number of people viewing video on *mobile devices* increased by 66% between July 2009 and July 2010, and substantial growth was noted for on-demand video/television programming consumed on mobile devices, which increased by almost 100% in the same period.

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1 Most of the information provided in this introduction is based on EBU research, and particularly on two EBU reports "The European TV Market 2010" and "Public Radio and New Media Platforms".
2 Recital 24 of the Audiovisual Media Services Directive (codified version) confirms that "it is characteristic of on-demand audiovisual media services that they are "television-like", i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive".
3 Study by Thinkbox and Decipher.
The main driver behind mobile video viewing is the growing penetration of smart phones and more recently tablets. Smart phone take-up in the five biggest markets in the EU grew by 41% between July 2009 and July 2010. One of the reasons is the plentiful offering of easy-to-use applications, providing a customised content offer of on-demand and live-streamed television content. PSM focus greatly on news content.

Online video consumption through an iPhone app provided by the Dutch PSM NPO, for example, represented 12% of NPO’s total on-demand video viewing in January 2011, up from 4% in January 2010. The weekly consumption of the Swedish SVT Play through the mobile website increased between April 2010 and February 2011 by 311%. The news app of ARD in Germany was downloaded 740,000 times in the first two weeks after its launch in December 2010. France Télévisions recently launched its innovative and interactive information portal “FranceTV Info”, available via all connected devices (smart phones, tablets, etc.). The portal provides information in real time from 06.00 until midnight, relying on a specific news team and allows Internet users to ask questions or post comments. available via all connected devices (smart phones, tablets, etc.).

Increased interactivity also offers new ways of generating content - PSM engage with their audiences, who can influence the content. For example, in July 2010 the BBC News application was launched in the UK for mobile devices. The users obtain the same content already existing on the website but enhanced by a variety of live and on-demand audio and video content. The user can create a new personal news experience; he can generate content and send comments and pictures directly to the newsroom, and the user has access to blogs, analysis and commentaries.

1.1.2 Radio and radio-like services

Broadcast radio today remains very popular around the world, thanks in large part to its unique qualities of being free and easily accessible almost anywhere. In an average week radio reaches more than 90% of the population in many European countries.

The time people spend listening to radio remains high across Europe; in many countries daily radio consumption exceeds three hours. However, in many countries, radio listening via broadcast AM/FM networks has declined while digital and non-linear radio consumption has increased over the past few years.

Podcast audiences are growing in many countries. This asynchronous listening is becoming a part of everyday life of regular radio listeners who, owing to changing work-hours or life-styles, can no longer tune in live. Podcast listening is growing faster than live-stream listening, thanks partly to the ubiquity of mobile device applications. It is no longer the exclusive prerogative of young audiences; all age-segments of listeners are shifting to this convenient mode of listening.

The advent of the smart phones, bringing with it rapid growth in the availability of radio apps and an increase in popularity of interactive music services, is driving up growth in radio listening on the mobile devices.

Listeners, and particularly the younger generations, are increasingly accessing radio via social network sites such as Facebook, MySpace, Twitter and YouTube.
1.2 PSM distribution strategies diversify

PSM have a mission to offer quality content to their audiences in a multiplatform environment and they are responding to constantly developing interactive consumer behaviour. PSM are facing the challenge of audience fragmentation, resulting from increasingly broad digital offers by expanding their own channel and platform portfolios. This cross-platform approach has the advantage that it allows PSM to fulfil their mission in providing programming for all strata of society and to develop new formats.

1.2.1 Television and television-like services

PSM have strengthened their online presence over the past five years, and most PSM offer both catch-up and live streaming of television programming on their web properties. In some countries, the catch-up portal has been made available across platforms such as IPTV and game consoles.

Distribution strategies differ among PSM, and the scope of the content on offer differs from one PSM to another. Some offer most of their content through live streaming, while for most this service covers specific channels, special programmes or events. NPO in the Netherlands, for example, offers live streaming of its digital theme channels but not the main general-interest channels. SVT in Sweden, ARD and ZDF in Germany and TVP in Poland provide live streaming only for specific events such as sports and news programmes. VRT in Belgium offers live streaming of its 1PM newscast and, occasionally, sports of news events with its Videozone portal.

In parallel to the development of online television services, PSM also offer mobile television services. Many have set up mobile websites offering content tailored to mobile phones, as well as branded smart phone applications. As the penetration of smart phones and tablets continues to grow, interest in offering applications with programming, either on-demand or live, is rising.

More than half of PSM already offer their catch-up portal, live streamed television channels and specific television programming such as news through smart phone applications and increasingly through applications for tablets. The BBC, for example, launched its catch-up television and radio service, the BBC iPlayer, as an iPad application. RAI launched three applications for the iPad: RaiNews 24, Rai Storia and RaiSport. RaiNews 24 provides videos, photo galleries, and news updated in real time, RaiSport includes videos, sports news and statistics, while Rai Storia features videos dedicated to major events in history. France Télévisions launched a catch-up site, "Pluzz", accessible on smart phone and tablets. The number of videos viewed rose from seven million in October 2010 to 22 million a year later. Channel 4 was the first broadcaster in the United Kingdom to make its content available on an on-demand basis, with the launch of 4oD on channel4.com in December 2006. To date, 4oD has served over one billion views of full-length Channel 4 programmes initiated across television platforms and online. 4oD is available on third-party television-based platforms such as Virgin Media and BT Vision, as well as a stand-alone PC application.

A study conducted by IDATE looked into television diversification strategies on quadruple screens, i.e. traditional television sets, computers, mobiles and connected devices like tablets. The conclusion was that broadcasters focus on the computer as the main media, next to conventional television sets, in order to maintain their relationship with their audiences. Mobile devices come second in line in these strategies.
1.2.2 Radio and radio-like services

Multi-platform distribution is of major importance to most PSM, which generally offer **radio services on five or more different platforms**. The traditional analogue FM platforms and the Internet are the two dominant platforms for radio content distribution, followed by satellite, smart phone/tablet devices and AM. Digital broadcasting services for DAB/DAB+ radio sets are offered by 11 PSM. Some PSM transmit radio on digital television, over both terrestrial and cable platforms; a third offer radio services on digital television.

The Internet has become a vital platform for radio broadcasters to provide audio content **both live and on-demand**, and it has become increasingly common for PSM to adapt their content to mobile access on devices such as mobile phones and smart phones/tablets.

**Catch-up** radio services are less common, with less than half of PSM offering listen-again services. However, almost every PSM provides radio podcasts. Half offer more than 30% of their output through this type of online service.

Most PSM also offer participation and/or information through external **social media sites** and have set up smart phone/tablet applications for live or on-demand access. Other online services are RSS feeds, discussion forums, blogs, voting and the opportunity to comment on specific topics or programmes.

1.3 The future is hybrid

According to Digital TV Research, the number of television sets connected to the Internet will reach 551 million by 2016 for the 40 countries covered by the research. The proportion of households with connected sets will rise from 11% in 2010 to 43% in 2016.\(^5\) This development will enable **hybrid broadcast-broadband systems to become one of the main media distribution platforms**.

As has been demonstrated above, viewers and listeners increasingly consider broadcast-like services, such as catch-up services and podcasting to be an **integral part of the broadcasters’ offer**. Hybrid systems ("smart TV" and connected radio) bring the converged audience experience to the fore. They use both the broadcast and the broadband networks effectively and combine their technologies to permit the full range of media services.

Hybrid systems allow viewers to enjoy both traditional broadcasting and on-demand or time-delayed programming (e.g. catch-up television) and a host of new attractive, interactive and personalised services as well as easy access to Internet services, comfortably all in one and on one screen. Hybrid radio allows listeners to "participate" in a broadcast, as opposed to the traditional one-way broadcaster-to-listener monologue. Hybrid radio invites listeners to engage in "conversation" with their chosen station, sharing opinions and comments, "socialising" the experience, or enabling a user to search easily for more information.

The advent of hybrid television brings with it major opportunities for broadcasters and other stakeholders, but also a number of challenges for them, as well as various issues for regulators. Key points have been addressed in the EBU’s "Principles for Internet Connected and Hybrid Television in Europe", adopted in April 2011.\(^6\) The EBU calls for

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all hybrid systems to be designed in a way which respects certain basic principles outlined in the document.

1.4 PSM are an important player in the EU audiovisual sector

PSM invest heavily in diverse original European productions. Creative quality content and attractive services are also an important prerequisite for the roll-out of broadband networks. The importance of the content provided by PSM is very great, since they offer a mix of all genres; they have a mission to deliver independent, trustworthy and relevant information to the entire population.

PSM invest ten billion Euros every year in European content, with the result that, on average, their programming consists of 65% of own and commissioned productions. A Médiamétrie study in October 2010 confirms that PSM offer a great proportion of original production. At least two-thirds of the programmes are produced in their own country, and many PSM give as much as 90% of their airtime to local formats, while the same study revealed that commercial stations devote two-thirds of their airtime to US formats. In 2009, BBC1 and BBC2 had the highest share of their own programme production: over 90% of the total programming hours public channels such as RAI1 and TVE la 1 devote over 80% to their own formats. Channels such as RAI 3, TVE la 2, CT1, ORF, YLE, and RTVSLO devote more than 70% to their own production. In 2010 the channels of France Télévisions attributed between 72% and 84% of their airtime to European audiovisual works.

Continued investment in original production is the reason why PSM have a real treasure of Europe's cultural heritage contained in their archives. It is estimated that the EBU's European Members have a cumulative 28 million hours of radio and television archived content.

Despite increasing competition and the resulting media fragmentation, PSM are still regarded as a trusted guide and manage to maintain a stable audience share of about 28% on average. EBU Members reach an audience of 650 million per week.

PSM have large market shares. Four out of five PSM in the larger markets had stable or positive market share developments in 2010. RAI, the Italian PSM, reported a total market share of 41.3%. France Télévisions reported 31.6% for its three main channels, while the total share of the BBC remained stable at 32.6%. PSM are maintaining a pivotal or dominant role in the majority of European markets, with market shares that usually exceed 20%.

1.5 PSM provide services for all citizens

PSM make content and services available for all sectors of society. Television has a major impact on the way people think and live. PSM are aware of this impact and the potential for PSM to start a dialogue in society, to create communities and to make a difference. PSM are committed to showing diversity in their on-screen representation of society.

They produce programme genres which would otherwise be underserved, such as children's programmes, drama, factual programmes and educational programmes and news (including for children). According to the above-mentioned Médiamétrie study, European PSM are offering a larger number of original productions, news and factual programmes than their commercial competitors. All the main European public channels offer content for all viewers, proposing a mix of various genres, such as science, sport,

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7 Study on Diversity in European Countries, Eurodata TV Worldwide, October 2010.
documentaries, entertainment and education, including children's programmes, which would otherwise be underrepresented.

PSM are engaged in offering accessibility services and multi-channel and multi-platform offers increase these services. Hybrid systems are likely to improve further the viewing and listening experience of all audiences.

1.6 The audience mainly prefers national and regional content

There are 27 national public spaces with different cultural, societal and economic situations; most of the 27 markets are also separated by different languages. However, most PSM offer services cross-border over satellite and/or cable/IPTV for an increasing audience which wants to access content from other European countries. Almost every PSM has developed an international channel aimed at the national communities living abroad and other interested audiences.

The vast majority of transborder channels are national television organisations broadcasting in other countries with the same language. The number of pan-European television channels, focused on an international audience remains limited. Those few are high-quality channels and often provide their services in several languages, offering interactive websites, with complementary information. Nevertheless, they hardly reach 2% of the market share, since they attract the top end of socio-economic categories, which represents about 20% of the EU population.8

1.7 The Digital Agenda should support the public space

Without the online availability of diverse quality content the Digital Agenda objectives cannot be reached. Clearly, one of the main reasons why users connect and interact over broadband networks are attractive content services. PSM play an important role in producing content and developing new services and formats for a multi-platform and cross-media offering.

The Digital Agenda should put more focus on the following objectives:

- the need to support European and local creative content
- universality and social inclusion
- freedom of information and of expression
- online access to European content, including access to Europe's audiovisual heritage contained in the PSM archives.

A modernised and future-proof copyright system is of key importance for enhancing the role which audiovisual content plays in a dynamic Digital Agenda. A better framework for rights clearance will also help the circulation of legal content and reduce the appeal, and circulation, of illegal content. Efficient licensing processes benefit all right holders, all users and, ultimately, society as a whole.

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8 L'industrie télévisuelle: "International and Pan European News Channels: an overview", by Thierry Vissol.
The EBU calls for an urgent update of the licensing framework

Question 1: "What are the main legal and other obstacles - copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?"

The copyright licensing framework is crucial for the entire audiovisual media sector, and in particular for PSM, as the programmes which they commission cover a broad range of talent, contributors and underlying rights which shape and define the PSM's output in each Member State. Some individual programming (e.g. a major drama or documentary) can involve several hundred contributors. For example, in 2007-08 the BBC issued 305,000 contracts to contributors for in-house programming alone, and each week some 250,000 items of music are reported to the music collecting societies. However, PSM strongly believe that the current copyright regime is too complex, making it unnecessarily expensive to clear rights in the digital age.

Hence, one of the main obstacles to the ambition of developing a dynamic single market for content services is the complexity of clearing rights, and this complexity is exacerbated for the cross-border dissemination of those services within the EU. Cross-border rights clearance is already complex for a number of reasons but, from a legal perspective, the main problem lies in the lack of legal certainty with regard to the application of the territoriality principle of copyright relating to the communication of online content services within the EU.

The cross-border distribution of audiovisual content by PSM is highly dependent on the collective licensing framework. Consequently, there is an urgent need for clarification and common rules at the EU level in the field of collective rights management.

Regarding the applicable law, it is the EBU's view that, for cross-border content services which are accessible online, a strict application of the national territoriality principle in copyright would clearly be disproportionate if it would mean that a collective licence obtained by an audiovisual content provider only has legal value, as regards the substantive law, on the sole national territory of each Member State. Such a strict application of the territoriality principle would imply that all 27 national copyright laws, including the provisions relating to collective rights management would have to apply additionally to the cross-border communication of a audiovisual content service, as such a service would be accessible throughout the EU territory. It would mean that any European online content provider would need to clear all rights by separate national collective licences in each of the Member States.

How the territorial issue needs to be solved in a practical manner, in accordance with Article 56 TFEU on the freedom to provide services within the EU and the copyright holder's legitimate interest to be protected and receive fair remuneration, has been illustrated recently by the European Court of Justice. In the Premier League case, the Court clearly indicated that if the right holders agreed to an appropriate remuneration with the broadcasting organisation for a broadcast from a Member State, the legislation of the other Member States cannot be used to block or restrict access to this communication on their territory, taking into account EU law, and in particular Article 56.

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9 Judgment of the European Court of Justice of 4 October 2011 in joined Cases C-403/08 and C-429/08, Football Association Premier League and Others v QC Leisure and Others, Karen Murphy v Media Protection Services Ltd., paragraph 105 - 121.
TFEU. Consequently, in order to facilitate the cross-border distribution in Europe, the EU should clarify under which conditions a collective licence given by a collective rights management organisation to an audiovisual content provider under the law of a Member State should be recognised as legally valid by the other Member States on which territory the service is equally accessible.

For audiovisual media service providers, as defined in Article 1 (a) of the Audiovisual Media Services Directive,10 the law applicable to the collective licence given to the media service provider for online media services, including on-demand, should only be the law of the country in which the media service providers is established under the criteria of Article 2 (3) of the Audiovisual Media Services Directive.

This clarification would make it possible to confer a truly cross-border effect to the collective licence which would be given for the use of works and other protected subject-matter as integral parts of an online audiovisual media service.

To ensure the required legal certainty, the clarification as described above should follow on from legislative intervention at the EU level. Consequently, the proposal for a Framework Directive on Collective Rights Management must provide a solution to this question and provide for legal certainty needed by users of copyright and related rights in their online content services.

With respect to the media service providers, this point will be developed in more detail below, in the response to question 5 (see 3.2 below).

**Question 2:** "What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?"

Over the last 20 years the process of European harmonisation of copyright and related rights has resulted in the introduction of new forms of protection of rights or the subject-matter of rights within the legislation of EU Member States, thereby expanding the scope of intellectual property to an unprecedented level. While the rights were reinforced, the question of access to protected works, however, has not been really addressed. It could even be argued that the reinforcement of copyright may well have created new obstacles to the circulation of works on electronic networks.11

The ever more complex ways of using, aggregating and distributing content leads to very complex licensing processes. The complexity in turn leads to inefficiency. In this context easier licensing mechanisms, and more transparency of ownership, are needed. (See also Question 9 - further below in 4.1.)

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11 See IVIR Study "The Recasting of Copyright and Related Rights for the Knowledge Economy" Final report, 2006, p. 22. "One might even go a step further and argue that the process of harmonisation, which has led almost inevitably to approximation at the highest level of protection found in the EU, has had a detrimental effect on the internal market by creating more and further-reaching rights that are exercised at the national level, and therefore serve as obstacles to the free movement of goods and services."
Examples provided by EBU Members

For the BBC a particular problem is the high cost of clearing underlying rights included within programmes. The BBC spends around £1.1 billion on rights payments out of total programme expenditure of £2.4 billion. These rights payments are a critical element of the UK creative economy, ensuring that those involved in programme-making are rewarded for their efforts. The BBC also spends almost £10 million per year on the administrative function of rights clearance. This is money which does not go towards rewarding creativity. It is simply a deadweight loss which benefits neither producers nor consumers and reduces the amount of money available for programme-making and investment in content.¹²

In Germany, ARD and ZDF conclude at least 150,000 contracts each year. The increase in administrative costs alone between 2007 and 2008 was around 28%. ZDF struggled with the rights clearance of a documentary on the fall of the Berlin Wall ("Das Wunder von Berlin - The Miracle of Berlin"). This production included various "cut-materials" from different sources. A number of those cut-materials came from the "Deutsche Rundfunkarchiv", but not all of them. Clearing all the rights for this production caused enormous administrative work. Nevertheless, it was not possible to clear all the rights for all parts. Where ZDF intended, for its "History of German Broadcasting", to include extracts from a total of 67 of ZDF's own productions of all types, going back to 1963 when ZDF started broadcasting, the direct and administrative costs related to the necessary rights clearance were so high that it proved impossible to clear all the necessary rights within the envisaged time-frame.

The media service providers, defined in line with the definition in the Audiovisual Media Services Directive, occupy a special position from both a media law and a copyright law perspective, for the following reasons:

- They are characterised by the fact that they exercise editorial responsibility over the selection and the organisation of their programmes in on-demand audiovisual media services and they also assume legal liability for everything that the service communicates. These characteristics are not present with mere "Internet-only" operators or other intermediaries who do not fall within the Audiovisual Media Services Directive.

- At the same time, audiovisual media service providers use - and are partly even obliged to use - a considerable quantity of works and other protected subject-matter as an integral part of their audiovisual programmes, to the benefit of both the public and the creators.

- The authorisation to be able to use the content in the media services needs, for the most part, to be obtained either from the producers of the audiovisual works or from the collecting societies.

The producers of audiovisual works will continue to manage the use of their rights via individual agreements with the broadcasters and specify in those agreements the scope of the authorisation, including the territorial scope, allowing them to ensure the exclusivity which they wish to have on certain types of content and this is not problematic under copyright. On the other hand, the issues with respect to collective rights management are much more complex,

as collective rights management is more closely linked to the organisation of copyright and related rights as defined by the national copyright legislations.

- Efficient, transparent and legally certain processes for collective rights management are essential for the success and development of audiovisual media services and in particular those of broadcasters. This is obvious for the collective licensing of music incorporated in their radio productions which are accessible online, but is equally true for the use of music as an integrated element in films and audiovisual works communicated in their audiovisual media services. The same is true for the collective management of other rights in the audiovisual domain, in the case where the producers of the audiovisual works do not hold all the rights of authors and performers or on certain creative elements used in the audiovisual work.

With regard to the substantive law, the European Union should, therefore, in order to allow collective licensing which has, where parties agree, a clear cross-border effect, define a set of common rules for the collective rights management as a whole. This set of minimum rules should cover:

(i) The notion of collective management (when is a management entity a Collective Rights Management (CRM) society?);

(ii) The main obligations of collective rights management organisations towards both right holders and users, and notably with respect to transparency and governance;

(iii) The guarantee of a one-stop-shop with a representative music collecting society, with reciprocal agreements for users in need of the worldwide musical repertoire;

(iv) The existence in each Member State, and possibly even at the EU level, of efficient dispute resolution mechanisms.

The common rules should also stimulate efficient licensing practices in the EU Member States for some types of rights, such as rights in music for which the conclusion of individual licences, for example by broadcasters, are not feasible. CRM societies which comply with these rules should also be entitled to issue extended collective licensing (ECL) in all Member States. Combined with the legitimacy of reciprocal agreements between collective rights management organisations established in the EU, this would allow collective licensing on a large repertoire, such as the musical repertoire.

All these issues require legislative intervention at the EU level and should be covered by the proposal of a Framework Directive on collective rights management.

**Question 3**: "Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?"

The EBU strongly believes that the licensing framework needs to be improved to address copyright clearance problems. In its White Paper "Modern Copyright for Digital Media" of March 2010, the EBU proposed a number of concrete measures to make copyright licensing future-proof and technologically neutral.13

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13 For further background information, including details of the various reasons for the measures proposed by the EBU, see [www.ebu.ch/copyright](http://www.ebu.ch/copyright).
On both the European and the national levels rights clearance systems have become increasingly complex in the digital environment and are not suited to multi-platform use.

Example: Clearing the rights for Doctor Who

Doctor Who, a BBC in-house production, is one of the Corporation's best-known brands. In the United Kingdom this science fiction drama series attracts a broad family audience. Last year, the Christmas Day episode of Doctor Who attracted an audience of over 12.1 million, making it one of the most watched programmes of the year.

The table below shows the number of underlying contributor rights usually included in a single episode of Doctor Who archives. When the programme was originally made, the Production Manager would have been responsible for ensuring that all the underlying rights included in the episode were cleared for use on the BBC's public services. (Customary agreements would have granted permission, subject to further contractual payments, for unlimited transmissions and five years for public service use). However, if the BBC now wishes to repeat the episode or make the programme available on a new platform, it may need to request permission to do so from the underlying right holders or arrange a fee. In some instances this is relatively straightforward as the BBC can negotiate with a collective body with a mandate to act on behalf of all its members. In other cases, however, the BBC may need to seek permission for re-use from individual contributors. This is both time-consuming and costly.

Average number of contributions per episode

<table>
<thead>
<tr>
<th>Type of contribution</th>
<th>Average number of contributions per episode</th>
</tr>
</thead>
<tbody>
<tr>
<td>Music tracks+</td>
<td>2</td>
</tr>
<tr>
<td>Orchestras+</td>
<td>1</td>
</tr>
<tr>
<td>Specially commissioned music+</td>
<td>16</td>
</tr>
<tr>
<td>Walk-ons+</td>
<td>14</td>
</tr>
<tr>
<td>Actors+</td>
<td>15</td>
</tr>
<tr>
<td>Supporting or Additional Dialogue artists+</td>
<td>12</td>
</tr>
<tr>
<td>Directors+</td>
<td>1</td>
</tr>
<tr>
<td>Script*</td>
<td>1-2</td>
</tr>
<tr>
<td>Character format*</td>
<td>2+</td>
</tr>
<tr>
<td>Show runner*</td>
<td>1</td>
</tr>
<tr>
<td>Literary extracts*</td>
<td>1</td>
</tr>
<tr>
<td>Photographic stills*</td>
<td>23</td>
</tr>
</tbody>
</table>

+ Collective body with mandate
* Individual contract binding to third party group required (not retrospective)

Consequently, the EU copyright framework needs to be modernised. This can be achieved by an appropriate reform, focussing on rights clearance for the new media, as this is the most urgent problem of all content service providers.

A new European rule in the field of cross-border collective licensing may not be needed in exactly the same way for all on-demand services; in particular, it would be justified to make a distinction between broadcast-like (or broadcasting-related) on-demand services - which are thus characterised by the fact that there is a clear link between the

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existing linear (analogue or digital) service and the on-demand service - and other content services which are retail-like and provided by Internet-only operators. This corresponds to the fact that broadcasters have a special role under both copyright and media law, unlike mere content aggregators or similar intermediaries using the Internet simply as a distribution channel. The latter have no obligations for producing or distributing European content; nor do they assume any substantial editorial or legal responsibility for the content which they make available. Finally, audiovisual media service providers are clearly identified and registered in each Member State, in accordance with the rules on the establishment contained in the Audiovisual Media Services Directive. Consequently, there is a clear justification for treating the broadcast-like on-demand services differently from retail-like on-demand services.

These improvements to the legal framework would not only match the requirements of rights users and consumers; they would also foster the production and circulation of content to the advantage of all actors in the European cultural industry.

The EBU proposals include:

- Improving legal certainty by defining, in the European regulatory framework, the relevant national law applicable to a collective licensing granted to a audiovisual media service provider for the initial act of communication to the public of an audio or audiovisual media service. Providers of audio or audiovisual media services (e.g. a broadcaster) should be able to clear all rights, including for online and on-demand use, through a single licence under the law of the provider's country of establishment. This would avoid the cumulative application of 27 national laws to one single act of online cross-border transmission, for both linear and on-demand (broadcast-like) media services. At the same time, this system would preserve the interests of right holders as it would allow all right holders to agree on fair remuneration for the service, taking account of all aspects for the service concerned. Moreover, it would guarantee - as in the Satellite and Cable Directive - the right for the audiovisual producers to conclude agreements with the media service providers on an individual basis.

- A broader use of "extended collective licensing" (where appropriate);

The EU should promote the adoption of extended collective licences (ECL) as an additional model for clearing rights and, in particular, for audio and audiovisual media services where this is necessary or useful. The extended collective licensing schemes, as used in several European countries, have demonstrated their effectiveness in clearing rights for, inter alia, some legally defined or contractually agreed on-demand delivery of content, and opening up audiovisual archives to the general public via the Internet. These schemes have existed for nearly 50 years, and offer a pragmatic solution to the practical impossibility of controlling certain mass usage of works, while ensuring an important source of revenue for right holders. Importantly, the system remains, and should remain, voluntary, and in particular because the qualified collective management organisation should be representative of a large catalogue or rights of the same category, which means voluntarily entrusted by many right holders of that category, and also because right holders who are represented by that collective management organisation without being members retain the right, at any time, to opt out of the agreement and to manage their rights individually. In practice, this right is seldom exercised, which proves the attractiveness of the system.
• A solution for the broadcasters' use of music;

Collective arrangements for the use of musical works incorporated in the broadcasters' programmes already exist, but they should be extended to cover on-demand use for broadcast-like media services too. Where this cannot be achieved on a voluntary basis, there is no other option for Member States other than to make such collective solutions obligatory.

The EBU urges the Commission to include these concrete solutions in the proposal for a Framework Directive on Collective Rights Management which is expected in 2012, as there is an urgent need for modern and efficient rights clearance. At the same time, the EBU welcomes the attention given in the Green Paper to a number of its other specific proposals, as it gives another opportunity to describe clearly the advantages of these proposals, but wishes to stress that the above-mentioned issues would be better dealt with in the Framework Directive on Collective Rights Management.

The remaining points are:

• Use of collective licences for unlocking PSM's archives;

Member States should ensure, via appropriate legal means (for example, through extended collective licensing), that the broadcasters under their jurisdiction are entitled to use their audiovisual archives in new online services.

• Technologically-neutral clearance of retransmission rights;

Rights clearance for the simultaneous, unchanged and unabridged retransmission of broadcasts originating in Member States over any platform should follow the same collective rights-licensing regime as is applied to cable retransmission, irrespective of the platform and the transmission method used. The mandatory collective licensing system for the underlying programme rights should be extended to the retransmission by distribution platform operators of the PSM's on-demand services which are inseparably linked with their linear offer (this means that they are different from traditional, stand-alone video-on-demand offers); today, catch-up services are clearly inseparable from the original linear offer.

• A common-sense interpretation of the "incidental reproduction";

Whenever a right to communicate content to the public has been granted by a contract or by law, the right should cover the incidental reproductions necessary for the efficient and legitimate exercising of the communication act licensed. Two separate economic rights cannot be associated with the same activity.

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15 Notably in sections 2.1 "Rights clearance for online transmission of audiovisual media services" and 2.2 "Rights clearance for retransmission of audiovisual media services".
3 Detailed analysis of reform needed for audiovisual media services

3.1 Applicable law/extending the country-of-origin principle

**Question 5**: "What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the "country of origin" in respect to online transmissions?"

PSM focus primarily on their national audience. The lack of multi-lingual, multi-territory broadcast services as observed in the Green Paper 16 - if this is to be understood as truly pan-European services which target the general public in all EU Member States - should therefore not be a surprise.

PSM do, however, want (and are obliged by the public service remit) to make their content available "anytime, anywhere, anyhow" to meet their audience's demands. And in Europe even traditional broadcast services have always crossed borders via terrestrial and satellite overspill. As the Green Paper rightly states, there is a "well-established framework for the cross-border transmission and reception of broadcasting services across the EU. On the one hand, the Audiovisual Media Services Directive underpins the principle of the freedom to transmit and receive TV programmes in the EU. On the other hand, the Satellite and Cable Directive complements this framework, its purpose being the facilitation of the clearing of copyright and related rights for cross-border satellite broadcasting and cable retransmission services. There is currently no legal instrument specifically addressing the clearing of copyright and related rights for cross-border on-line audiovisual media services".

While the Audiovisual Media Services Directive, which transformed the Television without Frontiers Directive into a directive on audiovisual media services, extends in the field of media law, the application of a single national law to the initial transmission of non-linear audiovisual media services (on-demand) in the European Union, there is no similar provision in the field of copyright to complement the regime of the Satellite and Cable Directive to the communication of non-linear audiovisual media services online. The absence of such a legal clarification leads to legal uncertainty which, in turn, is detrimental to the further development of online content.

### 3.1.1 Need for legal certainty

The EBU considers it essential to improve legal certainty by establishing, on the European level, the applicable law for the initial act of communication to the public of an audio or audiovisual media service, at least with regard to broadcast-like services.

- Broadcasters' online content can be accessed from different territories, but this cannot lead to the conclusion that broadcasters would need to obtain a multi-territorial or pan-European licence. There is only one single copyright-relevant act of communication to the public which should be covered by a single licence under one national law.

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16 The Green Paper observes that "the majority of audiovisual media services focus on a national audience or a particular linguistic area. Multi-territory broadcast services have largely not emerged, and broadcasters often refrain from clearing rights on a pan-European basis because the consumer demand abroad and the potential for advertising generated revenue does not currently justify the additional costs related to the setting up of services and the licensing of content" (page 6).
A huge advantage of the application in copyright law of the law of the country in which the act of communication originates is to clarify in which cases so-called "multi-territorial" licences would be legally necessary. Owing to the national territoriality of copyright, "multi-territorial" licences should be necessary only if a media service provider is explicitly targeting, on the basis of objective criteria, a multitude of countries which do not share the same language. This is obvious when the media service provider carries out separate activities in several countries, for example by operating separate broadcasting services in those various countries. In that case, several national licences would need to be obtained by way of one or more licence contracts for these separate acts in different national territories. Another case may be where the media operator uses a variety of languages and includes advertising specifically targeted at the general public of different countries.

However, no multi-territorial licence would be needed if it concerns one and the same audiovisual media service which is communicated from one Member State and mainly targets the national audience of that Member State. The fact that such a service may also be accessible in other Member States would not be sufficient to deem such a service multi-territorial.

For the EBU the application of the "territoriality principle" to copyright within the Union should be clarified in a coherent and proportionate manner, and in particular with regard to the initial communication of audio and audiovisual European media services across borders. This can be done only by European legislation.

The question of how to determine the applicable law to collective licences of rights incorporated in media services is a fundamental issue, as this will stipulate which rules apply to the collective licence (such as legal interpretation of the licence conditions, tariff-setting, dispute settlement procedures, etc.), because the details thereof are currently (and may continue to be) different in each Member State. For media services activities, applying 27 different laws, tariffs and/or dispute resolutions is not done today and will never be feasible.

It makes perfect sense to extend the applicable law principle of the Satellite and Cable Directive as this provision was precisely intended to eradicate legal uncertainty and to avoid the cumulative application of several national laws to one single act of broadcasting. The solution adopted for EU-wide licensing for satellite broadcasting has already proven its effectiveness and appropriateness for the licensing of highly valuable rights. Recently, the European Court of Justice ruled in the Premier League case that, under Article 56 TFEU, a Member State could not prohibit or restrict the access on its territory of a broadcasting service communicated by satellite from another Member State and which incorporates protected matter under the law in force in the territory of the reception. Consequently, in compliance with the Treaty the principle of one applicable law should be extended to the communication to the public of audio and audiovisual broadcast-like media services via all electronic communications networks, including online. Such a technologically-neutral rule would be fully compatible with the 2001 Copyright Directive, and the approach of the European Court of Justice.

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17 Recitals 7 and 14.
18 Judgment of the European Court of Justice of 4 October 2011 in joined cases C-403/08 and C-429/08, Football Association Premier League and Others v QC Leisure and Others, Karen Murphy v Media Protection Services Ltd., paragraphs 105-121.
• It is also important to point out that this is the least intrusive solution to a very real, practical and urgent issue, and is therefore infinitely preferable to a complete overhaul of EU copyright, as would be required by a EU Copyright Title (see further under 4.).

• In the field of the media, the principle of one applicable law is nothing new. Since the Television without Frontiers Directive of 3 October 1989\(^\text{19}\) and the Satellite and Cable Directive of 27 September 1993, as clearly indicated by the Court of Justice in the Premier League case, the application of several national laws to television broadcasts by a broadcasting organisation based in one Member State of the Union has not been accepted in the EU. The Audiovisual Media Services Directive recently extended the application of a single national law to all audiovisual media services, on a technological neutrality basis, whether linear or non-linear (on-demand), i.e. the law of the country in which the media service provider is based.

As mentioned above, the Audiovisual Media Services Directive, however, does not deal with copyright. Consequently, on the copyright issue, the EU should now explicitly clarify that the law applicable to a collective licence granted for the communication of media services online is the law of the Member State in which the media service provider is established. In the absence of such a regulation, uncertainty continues to prevail as to how to determine the country responsible for applying copyright in the case of cross-border communication of a media service transmitted online from a European Union Member State, and this would continue to stifle the European online market as is the case today. Thereby, it cripples the competitiveness of the European audiovisual sector as compared to its non-EU competitors.

3.1.2 Perceived disadvantages

It is also important to address the perceived disadvantages of the applicable law principle in more detail.

• A persistent counter-argument is the fear for a so-called "race to the bottom".\(^\text{20}\) As the EBU proposal would simply define the relevant national law applicable at the European level to a collective licence granted to an audiovisual media service provider established in a Member State, the risk of a possible "race to the bottom" is as low as it was with the introduction of the applicable law rule for the communication by satellite originating under the control and responsibility of a broadcasting organisation in a Member State. In most instances, it would concern the same organisation in any case.

• The "race-to-the-bottom" argument may also be based on the fear of certain right holders that a Europe-wide rule would result in a form of competition among Member States and collecting societies within them seeking to attract content service providers by offering the most lenient level of copyright protection and favourable licensing terms. In the context of satellite


\(^{20}\) It is worth noting that the Commission, in the context of the 2001 Copyright Directive, had tried to generalise the solution previously adopted for satellite communication but encountered fierce opposition from right holders, who feared losing control over the broadcasting of their works on the Internet. The main argument put forward at the time by those opposed to localising the act of communication to the public in the broadcast's country of origin lay in the fact that a "race to the bottom" might ensue.
transmissions, the EBU is not aware of case-law or evidence that would demonstrate this to be a realistic threat. In fact, in the calculation of the amount of the payment to be made for the rights acquired, the parties will take account of all aspects of the media service, such as the actual audience, the potential audience and the language version, as indicated by Recital 17 in the Satellite and Cable Directive. This has been confirmed recently by the European Court of Justice in the above-mentioned Premier League case.

- It is sometimes argued that the application of the "satellite injection" rule has not prevented licences from being granted with limited territorial reach. Reference is often made to the Commission's 2002 review of the Satellite and Cable Directive,\(^{21}\) where it observes that some television services are encrypted and accessible by subscription only, and that even free-to-air television channels are sometimes communicated by encrypted satellite signals to ensure that they cannot be received and viewed beyond national borders.

  - This argument ignores the practical reality: the Satellite and Cable Directive has had a very real effect as it has led to numerous unencrypted satellite broadcasts of PSM in Europe and has been very helpful in increasing the availability of broadcasts across frontiers.\(^{22}\) It has also allowed broadcasters who want (and can afford) to provide a cross-border service to do so. However, it should be emphasised that the Directive never had the ambition of encouraging broadcasters to develop services targeting a truly pan-European audience. The European audience is interested in the cross-border availability of national programmes, but the market for truly pan-European audiovisual programming is much more limited.

  - The existence of encrypted services with a limited territorial reach is solely due to the fact that the Satellite and Cable Directive does not prohibit individual licensing which, as in the linear world, can be made subject to conditions. The limited territorial reach is simply a logical consequence of an exclusive right to authorise or prohibit the use of a work or other protected matter and the result of economic considerations by the licensing parties concerned. Nevertheless, those limitations must be in compliance with the competition law, as stressed recently by the European Court in the above-mentioned Premier League case.

- It is further important to note that the rules in the Satellite and Cable Directive should not be perceived as something special or exceptional. On the contrary, the Directive merely confirms, in an authoritative way, the result which a dogmatically correct application of existing copyright principles would reach.\(^{23}\) Copyright reserves certain acts of exploitation to the author. The author may authorise or prohibit only these acts. In contrast, the author has absolutely no legal control over the physical realities resulting from these acts. Just as there is no possibility to prohibit reading or listening, there is no legal means of preventing the public from watching/listening to a broadcast. The ability to

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22 According to the European Audiovisual Observatory there were more than 4,300 television channels broadcast by satellite in the 27 EU countries plus Croatia and Turkey on 31 December 2010. If we take into account the variety of language versions, there would be more than 4,500 television channels broadcast by satellite in these 29 countries. (Figures from Copyright Viewpoint.)
receive a broadcast programme is a result of a prior copyright-relevant act (the actual broadcasting transmission).

- The importance and relevance of the Satellite and Cable Directive was strongly underscored in the *Premier League* decision of 4 October 2011 to which the Green Paper refers regarding the issue of territorial licensing. The Court's decision emphasises that the freedom of broadcasting services prevents restrictions on the (subsequent) uses of the broadcasts, even where such restrictions could be based on intellectual property laws. This clearly implies a recognition that the country-of-origin-of-satellite-transmissions principle in the Satellite and Cable Directive is crucial (as without that rule satellite broadcasts would have been made impossible). The decision also indicated that geographical restrictions to the use of rights allowed by a copyright holder are in principle legitimate under the Treaty, provided that competition law is respected.

- Finally, leading up to the adoption of the Satellite and Cable Directive a possible case of abuse of the principle laid down in the Directive by broadcasting organisations was also identified as a hypothetical risk within the EU. Satellite broadcasters might choose as the centre of their operations the Member State which grants the lowest level of protection to authors and other right owners. Now that the exclusive rights of communication to the public are harmonised at a very high level within the EU, and taking account of the control ensured by the European Court, this seems highly unlikely. Abuse may occur, if at all, for reasons such as tax levels and other restrictive regulations, but hardly for copyright reasons.

The Green Paper invites views on the most appropriate way of determining the applicable law in respect to online transmissions by audiovisual media service providers. For media services it seems advisable to use the same criteria as are used under the Audiovisual Media Services Directive as the points of attachment for the country of establishment. There is no need for an additional set of attachment rules which would make the issue more complicated than necessary.

### 3.2 Technology-neutral retransmission

**Question 6:** "What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology-neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?"

#### 3.2.1 The rights clearance system for cable retransmission is a success

The Green Paper discusses the rights clearance for retransmission of audiovisual media services. After describing the Satellite and Cable Directive's twin-track copyright clearing process for the simultaneous retransmission, by cable, of programmes broadcast from other Member States, the question raised is "whether the

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25 With regard to the fear of delocalisation outside the EU, it should be noted that the application of the Directive and its country-of-origin principle is limited to the EU territory.

26 See, for instance, with regard to communication to the public within the meaning of Article 3 of Directive 2001/29, Case C-306/05 *SGAE* [2006] ECR I-11519, paragraphs 40 and 42.

27 Article 2§§3-5 of the Audiovisual Media Services Directive (codified version).

28 See 2.2, p. 8 of the Green Paper.
technology-specific provisions of the Satellite and Cable Directive need to be reviewed to develop a framework for cross-border retransmission of audiovisual media services that is technology neutral with regard to the delivery platform.

This proposal of extending the specific cable retransmission licensing regime to similar content delivery platforms was one of the EBU White Paper proposals to make this particular form of copyright licensing future-proof and technologically neutral.

**How the Satellite and Cable Directive operates:**

The Satellite and Cable Directive's simplified rights clearance system for simultaneous, complete and unchanged cable retransmission on a country-by-country basis has succeeded in promoting the availability of European broadcasting services in all European Union countries and has given greater legal security to cable retransmission companies with regard to the acquisition of rights corresponding to their exploitation. It introduces the mandatory collective licensing for the rights to authorise cable retransmission of works and other protected matter integrated into broadcast programmes, as individual licences from every holder in each individual part of the programme retransmitted would be impossible. The Directive exempts from the mandatory collective management the exercise of the rights held by broadcasting organisations to their own programmes because these rights can be obtained individually by the cable operators from the limited number of broadcasters whose services are to be retransmitted, unlike the other rights which, as licensees of copyright and related rights, the cable operators can only reasonably clear collectively, via representative collecting societies.

The Green Paper (under section 2.2) refers to "some debate around the need to maintain mandatory collective licensing for cable retransmission as opposed to giving freedom to rights owners to license on an individual basis". If this means proposing to transfer the cable operators' legal responsibility to the broadcasters, this would be unacceptable; the act of retransmission is operated by the cable distributor, for which consumers are asked to pay a cable subscription fee, so the broadcasters cannot be held liable for the cost of that activity. Moreover, this would put broadcasters in the role of a mere rights clearance entity for activities performed by the cable operators. Given that the latter are selling the broadcast programmes for commercial purposes to consumers, there is no justification whatsoever for placing the copyright liability for such retransmissions entirely on the shoulders of one of the right owners in the value chain. Article 10 of the Satellite and Cable Directive intentionally provided broadcasters with the necessary flexibility to negotiate their rights in the way the broadcaster deemed as the most appropriate.

Insofar as cable operators would complain about the cost of negotiations with "multiple collecting societies and right holder groups", this would be contradictory. In countries where a single global contract involving all categories of right holders was in place (providing, therefore, a true "one-stop-shop"), cable operators have unilaterally withdrawn from such global contracts and engaged in separate negotiations. This change in the bargaining position, made without approval by any of the right holders' groups, contradicts the affirmed desire of cable operators for simplification of negotiations.

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29 Cable television is available in almost all European countries apart from Greece and Italy. Cable television is still customarily supplied by small local companies, which explains why there are a large number of cable operators in Europe. There exist, for instance, more than 600 operators in Bulgaria, Poland and Romania. (Source: European Audiovisual Observatory.)
Furthermore, the model as proposed by cable operators would not make negotiations between the parties concerned better or "smoother" than before. In such a model the broadcaster would have to deal with all the other right holders' groups before it could eventually conclude the contract with the cable operator. This means that the proposed model would only add more negotiation phases to the process than in the case of "global agreements" where all parties sit around the same table. These additional negotiations are even more complicated given that at all those stages of the negotiations by the broadcaster the final position of the cable operator concerned remains unknown. The broadcaster would have to negotiate first, perhaps even on a preliminary basis only, with the other right owners, without the possibility for the broadcaster or the other right owners to know the outcome of the negotiations between that broadcaster and the cable operator. In their negotiations with the other right-owners, broadcasters cannot sufficiently anticipate whether and, if so, in which countries and under which circumstances (subscription models and fees) their channels will be retransmitted in the future, and broadcasters would thus not have a solid basis for their negotiations with the other right owners. The broadcaster would also have no possibility to renegotiate with the other right owner groups after it had made arrangements with the cable operator.

This difficulty can also be illustrated by broadcast retransmissions via the new media platforms, as in this area the business models of the new media operators were previously unknown to both broadcasters and other right owners.

3.2.2 An extension of the system to all distribution platforms

New digital platforms allow programmes to be retransmitted simultaneously across different networks beyond borders to all citizens of the European Union. Cable operators and certain digital satellite providers are no longer the only players on the broadcast retransmission market. Operators of DSL, IPTV and mobile telephone networks and other digital platforms operating according to exactly the same business model are also active on this market.

To ensure a level playing-field the rights-clearance system established by the Satellite and Cable Directive for retransmission rights should no longer be restricted to traditional cable distribution but should be made expressly applicable to the simultaneous retransmission of any (linear) audiovisual media service on any distribution platform.

The assimilation of (wireless) microwave retransmission systems to cable systems in Article 1(3) of the Satellite and Cable Directive is itself evidence of the initial intention that the simplified rights clearance system for cable redistribution established by that Directive should apply in a broader context. Since the reasoning behind this simplified system is determined not by its technical character but by the commercial nature of the retransmission activity made available by the third-party operator (i.e. only to paying subscribers for its services), it would be justified to have the same system extended - in a revision of the Directive or by other appropriate means - to simultaneous, complete and unchanged retransmission of broadcasts by any third-party operators which exploit broadcasts in analogous circumstances "on their own account", whatever technical means they may use.

In an important recent decision\(^\text{30}\) the Court of Justice of the European Union has implicitly confirmed the need for this technological-neutral approach. The Court distinguished between the broadcasting organisation that triggered the initial

\(^{30}\) Court of Justice decision of 13 October 2011 in the joined cases Airfield, Canal Digitaal v SABAM and Airfield v AGICOA (C-431/09, C-432/09, see paragraphs 75-81.)
communication to the public and other operators which intervene in the course of a communication for their own purposes with the result that they render the protected subject-matter accessible to a public wider than that originally targeted by the broadcasting organisation concerned. In such a situation, the intervention of those operators is thus not covered by the authorisation granted by the original right holders to the broadcasting organisation. (paragraph 75). The Court also highlighted that the operators' intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the retransmission service provider (paragraph 80). Finally (paragraph 81), it is noted by the Court that the provider does not enable its subscribers to access the communication of a single broadcasting organisation but brings together a number of channels from various broadcasting organisations in a new audiovisual product, the provider deciding upon the composition of the package thereby created.

The Court demonstrated that this exploitation by the delivery platform operator must be analysed as its own communication of author's rights and other protected matter to the public, irrespective of the technological means chosen for this communication.

New retransmission techniques allow a wider distribution of audiovisual works to consumers. Economic operators who retransmit third-party broadcasts to subscribers to their content distribution service need to benefit from a facilitated procedure for obtaining rights, irrespective of the platform upon which they operate. In practice, this is already applied in part, as broadband (i.e. DSL or IPTV) operators themselves ask to be included in existing global arrangements for cable redistribution and to be subject to the same or similar conditions.

Equality of treatment, legal security and compliance with copyright justify extending the simplified system for obtaining cable retransmission rights to all cases of retransmission of programme services broadcast from a European Union country by separate economic operators over wire and wireless "new media" platforms, such as broadband networks, mobile telephony and terrestrial or satellite platforms ("bouquets"), provided that such retransmission takes place simultaneously, completely and without any modification and, in particular, provided that the individual subscribers to the retransmission service are clearly identifiable and that they are charged by the distribution platform operator (separately or through the acceptance of advertising on the platform) for access to the respective programme service.

3.2.3 Inclusion of PSM's on-demand services inseparably linked with the linear offer

The on-demand consumption of broadcast programmes provided as "catch-up" within a certain period, is quickly becoming part of the standard offer of audiovisual media services. Such a service cannot be treated as a classic, stand-alone video-on-demand service. There are strong arguments for extending the mandatory collective licensing system for the underlying programme rights not only, as indicated above, to other platforms but also to the retransmission by distribution platforms operators of such on-demand offers of PSM which are inseparably linked with their linear offer (this means that they are different from traditional, stand-alone video-on-demand offers); today, catch-up services are clearly inseparable from the original linear offer.

In Germany, cable operators and other platform operators want to offer the non-linear services ("Mediatheken") alongside the linear programmes. The system in the Satellite and Cable Directive should therefore also expand to these services in order to respond to a clear market demand from platform operators and consumers.
For the sake of clarity, this would mean that the retransmission and on-demand rights held by the PSM itself in respect of its own initial transmission remain to be acquired individually from the relevant PSM, while the retransmission and on-demand rights in the other right holders’ contributions to the programmes which are not held by the PSM are to be cleared with the relevant collecting societies.

3.3 PSM’s archives and mass digitalisation

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

Question 22: "What other means could be considered?"

The Green Paper asks whether legislative changes are required to help film heritage institutions in digitising their archives, making them available online. Such institutions have expressed concern that clearing the rights for the works they hold is unnecessarily time-consuming and costly. They are worried that the current EU framework does not provide them with sufficient legal certainty to carry out all the necessary processes for the fulfilment of their responsibilities.

PSM experience similar problems when they try to unlock their archives. The EBU’s European Members have an estimated total of 28 million hours of radio and television content in their vaults.

In common with libraries, educational establishments, museums, archives and film heritage institutions, PSM contribute to creating a European cultural landscape by providing legal digital offers of quality programmes in their catalogues for citizens to discover and enjoy. Like them, they are facing large rights-clearance problems and associated administrative costs when one or more right holders involved in a given work cannot be identified and located. Solutions can be found in the interests of both PSM and creators, and the need for such solutions has recently been recognised in the Commission’s proposal for dealing with orphan works.

However, it is worth stressing the special position of broadcasters, as they are the major right holders to their own archives, and are therefore different from entities such as libraries which do not own any IPR in their material. Nevertheless, audiovisual works are usually the result of creative input from hundreds of creators and contributors. The rights of copyright-protected content embedded into audiovisual works also therefore need to be cleared. PSM believe that the future Directive on certain permitted uses of orphan works can be a useful tool for them, provided that a number of improvements to the proposal are made.

It is essential that the said Directive be designed in a way that is helpful for PSM to communicate lawfully audiovisual works of the European cultural heritage to the public, including online. Permitted uses under the Directive should be appropriate for the activities of PSM, as defined in their public service remit, but also permitted for possible commercial uses of their own audio and audiovisual archives, subject to adequate payment for the use of rights, managed by representative collective management organisations, and evidently in accordance with competition rules.

The Directive should provide balanced safeguards to ensure legal certainty for users and legal protection of all right holders concerned, in terms of both moral rights and
economic rights. To achieve this balance, no change to the exceptions listed in Article 5 of Directive 2001/29/EC may be needed. However, the Orphan Works Directive should foresee provisions to ensure that PSM have the necessary legal security to be able to use orphan works in the framework of their normal offline and online activities, and to honour contractual agreements with partners in cases where a work ceases to be orphan. Remuneration for all right holders concerned should be foreseen, the level being dependent on the type of use made.

It is also crucial that the Directive, based on the mutual recognition principle, does not hamper national rights management agreements for the use of creative content.

Furthermore, the orphan works issue is only part of a much bigger, and more fundamental problem which the said Directive does not seem to solve, namely the fact that money spent on mere administrative tasks is wasted and cannot be used for new creations and thus not to the benefit of the creators. The overwhelming majority of the audiovisual content in the PSM's archives was made before the Internet existed, so online rights are not covered by most existing contracts. Clearing the rights of the many contributors, for all types of use, is time-consuming, costly and sometimes impossible. Cumbersome rights clearance procedures without certainty about subsequent authorisations for use of the creative content inevitably threaten the availability of a diverse, high-quality and, most importantly, legal on-demand offer.

Consequently, if rights clearance processes can be streamlined, more funds for investment in yet more original European content can be released. Solutions are needed urgently. Extended collective licensing systems have proven a possible solution, and especially where no other feasible rights management arrangements can be found. Such systems should therefore be available in each Member State, so that they can be used, on a voluntary basis, wherever the parties concerned would deem that helpful.

This issue should be solved primarily through the Orphan Works Directive. However, with a view to ensuring that such problems do not re-appear in the future, new licensing rules should be adopted which are technologically neutral and future-proof, i.e. also providing sufficient safeguards when the duration of rights is extended or new rights are created. Extended collective licensing is such a rule.

3.4 Other actions

Question 26: "What other actions should be explored to increase the availability of accessible content across Europe?" (see also below under 4.7. Net neutrality)

3.4.1 A solution for the broadcasters' use of music

Providers of audio and audiovisual media services have longstanding arrangements with music collecting societies for the use of the world repertoire of music as an integrated part of their linear services. For these providers it does not make practical sense (and would lead to unnecessary administrative costs) to apply a different rights clearance regime for the use of that repertoire in their non-linear services, and particularly since it largely concerns the same programmes.

However, the existing regulatory framework does not sufficiently guarantee an effective collective licensing scheme for such non-linear media services. Moreover, although the licensing of music rights to such media service providers should continue to take place preferentially on a voluntary and collective basis, recent developments tend to increase
the risk of rights fragmentation and, consequently, the risk of further reducing the
efficiency of collective licensing of music rights for media service providers.

Consequently, the EBU proposes that, if voluntary collective management were no
longer to prove capable of providing this one-stop-shop, and if equivalent rights-
clearance measures covering, de facto, the entire worldwide musical repertoire could
not be introduced voluntarily under conditions offering sufficient legal security (including
via extended collective licensing), mandatory collective management of the right to
authorise such use of music and musical recordings as an integral part of programmes
delivered via media services originating in the European Union should be explicitly
provided for. Such a solution is entirely compatible with European law and international
treaties. Member States should be allowed to adopt such a mandatory collective
licensing solution. However, it is important to stress that this step can be taken only
where and when such collective licences to media service providers guaranteeing their
appropriate use of the worldwide music repertoire have not been concluded (or do no
longer exist).

3.4.2 A common sense interpretation of the reproduction right

Article 2 of the 2001/29/EC Copyright Directive stipulates that the exclusive
reproduction right applies to any form of direct or indirect, temporary or permanent
reproduction by whatever means and in whatever form, in full or in part, of works and
other matter protected by related rights. Reproduction in electronic form, even if
transient, is therefore concerned in principle.

Article 5(1) on exceptions and limitations merely exempts from copyright protection
temporary acts of reproduction which are transient or incidental and form an integral
and essential part of a technological process, and its sole purpose is to permit a) a
transmission over a network between third parties by an intermediary or b) a lawful
use. This exemption from the reproduction right indicates that a certain amount of
tolerance is essential in respect of incidental reproductions made strictly for the needs
of a lawful transmission or use, as this (purely material) reproduction does not, as such,
correspond to an economic use of the right.

In general terms, the conditions set out above must be interpreted strictly, because
Article 5(1) of the 2001/29/EC Copyright Directive is a derogation from the general rule
established by that Directive that the copyright holder must authorise any reproduction
of his protected work. However, when a person is authorised by a contract (or by
law) to exercise rights of communication to the public for a specific use, as is the
case when an audiovisual media service provider has acquired the authorisations from
right holders to communicate works and other protected matter to the public in a linear
or non-linear media service, it is obvious that the right of communication to the public
granted to the audio and audiovisual media service provider should encompass

31 An example of such a mandatory provision is Article 22c of the Swiss Copyright Act.
32 See the European Court of Justice decision of 16 July 2009, Case C-5/08, "Infopaq", available at
http://www.curia.int, on the strict interpretation of the notion of "transient" reproductions under Article 5(1)
of the 2001 Copyright Directive. However, the judgment does not deal with the notion of "incidental" (nor
has it been pleaded) under that provision. See also Declaration from Max-Planck-Institut "A Balanced
Interpretation of the 'Three-Step Test' in Copyright Law: the Three-Step Test does not require limitations
and exceptions to be interpreted narrowly. They are to be interpreted according to their objectives and
purposes". Available at http://www.ip.mpg.de/shared/data/pdf/declaration_three_step_test_final_
english.pdf
33 Recital 33 of the 2001 Copyright Directive defines a lawful use as follows: "A use should be considered
lawful where it is authorised by the right holder or not restricted by law."
reproductions to be made that are incidental and necessary to the legitimate and efficient use of the broadcasting licence granted.\textsuperscript{34}

It would be necessary, therefore, to consider such material reproductions to be exempted from the reproduction right, in accordance with Article 5(1) of the 2001/29/EC Copyright Directive, or to be included in the right of communication to the public granted to media service providers. Two separate economic rights cannot be associated with the same activity. Nor should the risk of double compensation for the same activity be created.

The solution should be a normative interpretation of the existing definitions of reproduction and public communication rights without reference to a technical process. Several authors of legal publications have suggested this solution.\textsuperscript{35} Such a common sense interpretation would be that, provided that a right to communicate content to the public has been granted by a contract (or by law), that right covers the incidental reproductions necessary for the efficient and legitimate exercising of the communication act licensed.

The above-mentioned \textit{Premier League} decision offers strong arguments for this approach, as the Court ruled that acts of reproduction which are performed within the memory of a satellite decoder and on a television screen for the sole purpose of enabling a "lawful use" of the works fulfil the conditions laid down in Article 5(1) of the Copyright Directive and may therefore be carried out without the authorisation of the copyright holders concerned.\textsuperscript{36} The Court held that such reproductions have no independent economic significance, as they form an inseparable and non-autonomous part of the broadcast reception process. The value of the reproduction did not go beyond the advantage derived from the mere picking up of the broadcast and its visual display. Similarly, reproductions made by the broadcasting organisation in order to prepare its transmissions have no independent economic significance as they form an inseparable part of the transmission preparation process.

\textsuperscript{34} In the European Copyright Code drafted by the Wittem Group Article 4.2 clarifies that the term "independent" (in "independent economic significance") means independent from a permitted use (i.e. permitted either by law or authorised by the right holder). Available at \url{http://www.copyrightcode.eu/}


\textsuperscript{36} Judgment of the European Court of Justice of 4 October 2011 in joined cases C-403/08 and C-429/08, paragraph 172.
The EBU's view on other questions and proposals in the Green Paper

4.1 Technological developments

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

The EBU does not believe that technologically-defined "access codes" would be the most appropriate way of making broadcasts or PSM's online content available to their audiences. In any event, such codes could never be regarded as an alternative to licensing models, and it is the latter framework which needs to be improved urgently.

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

In its IPR strategy the EU Commission addresses the issue of user-generated content and announces that a stakeholder consultation will take place in the second half of 2012. According to the Commission, "Users who integrate copyright-protected materials in their own creations which are uploaded on the internet must have recourse to a simple and efficient permissions system." (emphasis added by the EBU).

The problems associated with rights clearance are certainly not new; nor are they specific to UGC. However, because UGC is primarily characterised by amateur and semi-professional initiatives, these creators are generally speaking less knowledgeable about copyright issues and have fewer resources to invest in the rights clearance process.

More flexible and efficient licensing processes for copyright have been suggested in the digital context, including by the EBU. Current licensing regimes have been seen by some as unduly burdensome for the online world because of the costs involved or simply the inability to identify and locate the author or right holder of the original work. In some cases the right holder of a work will not be identifiable and cannot be contacted, and hence no legal use of the material can be made. According to the OECD, solutions such as new ways of licensing copyright or new technology to facilitate licensing could be explored and have - in some cases - been implemented. This could, for example, involve the creation of clearing houses/centres for the attribution of rights to UGC and other creators.

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

Technological developments have profoundly changed the way content is accessed and shared.

The EBU and its Members pro-actively monitor technological developments and their practical and legal implications (e.g. as illustrated by the EBU Viewpoint "The Future is Hybrid", Hybrid TV will have a much more immediate impact on the distribution of audiovisual content, as consumers will now be able to access broadcasters' programmes and online content via the same screen and at the same time).
With regard to "cloud computing", while some experiments with cloud-based solutions are taking place to a limited extent (e.g. when second-screen interactivity is being used which runs simultaneously with live broadcasts or as part of innovative projects), the main questions raised by this new technology seem to focus on data protection issues. In any event, it reinforces the consumer's demand to be able to access content from multiple devices. The above-mentioned proposals regarding the applicable law and the interpretation of the incidental reproduction would also offer solutions for the copyright issues regarding cloud computing.

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

The UK Hargreaves Review launched the idea for a Digital Rights Exchange, embracing the idea that the solution lies in the very technology that created the problem ("the answer to the machine lies in the machine").

The EBU would generally welcome more transparency and sees the creation of identification systems and rights ownership databases as a potentially valuable tool for such purposes. The European Union could play a role by stimulating such initiatives, such as the exchange of databases of rights information held by collecting societies. However, it should be realised that these projects will take years to develop, and will not replace efficient licensing mechanisms for mass use of rights. Consequently, in order to facilitate fast, reliable and secure rights clearances, the copyright licensing framework needs to be adapted as a matter of urgency.

4.2 Production, distribution and promotion of European works

See Questions 10-12 in the Green Paper.

Moving from the national-based support schemes to the European level, the MEDIA programme has proven over the years to be a very effective means of enhancing the distribution and circulation of non-national European audiovisual work and to be essential for the sector's well-being in general. If the programme is to constitute a cornerstone of the support to the European audiovisual sector and to distribution in particular, it needs to seize the opportunities and respond to the challenges brought about by rapid technological developments. Support to digitalisation, to pilot a project focused on furthering the potential of digital technology in the sector and to innovative ways of distribution (innovative use of translation/subtitling/dubbing/subtitling included), needs to be at the core of the future MEDIA programme. Furthermore, the degree of flexibility which would allow for the adjustment of the programme to the future developments in ICT should be increased so that the programme's beneficiaries can use the potential of these developments to the full, maximising the efficiency of the support to the sector.

**Question 10:** "Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?"

The current models of film financing and distribution have so far allowed the successful development of the sector. Film productions require huge investments and need a certain time to obtain a good return. There is no immediate reason to question its relevance in the context of online audiovisual services. If, however, an adaptation were thought necessary, it should at least allow the commercial exploitation specific to film products and build on contractual freedom.

An adaptation of the windows distribution system should not be primarily tailored to the interests of operators who are only interested in the immediate use for an indefinite period. In practice, it will be the market, which is increasingly characterised by the proliferation of platforms and technologies allowing access to digital content, that determines the right match between supply and demand.

**Question 11:** "Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?"

The EBU would, in general, welcome increased flexibility, although legally binding release windows in the context of State funding for film production in certain Member States should continue to be possible.

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

The obligation for media service providers to promote European works in their on-demand services is quite recent. The provision is more flexible than the obligation on television broadcasting as it contains no specific targets. Lighter regulation is justified by the choice and control the user can exercise and the difference in impact on society (Recital 58).

According to a recent study (based on a survey of 51 non-linear European services, including 11 such services operated by PSM) European works are significantly more prominent in the catalogues of PSM than other providers. Since catch-up catalogues are linked to linear content (which is mostly national) there are more European works in "catch-up" services (more than 90%).

Prominence is a very recent concept, and its implementation in the Member States is rather vague. It is also the most complex concept to transpose into actual definitions and practice. Here too, applying prominence of European works becomes less relevant where PSM are using their own back-catalogue for catch-up and on-demand services, as the catalogue will by nature be European. The homepages of catch-up services generally "push" only European programmes.

4.3 Copyright Code

**Question 13:** "What are your views on the possible advantages and disadvantages of harmonising copyright in the EU via a comprehensive Copyright Code?"

In its "IPR Strategy" the Commission announced that it would examine the "more far-reaching" approach of the creation of a comprehensive unitary European Copyright

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38 Article 13 of the Audiovisual Media Services Directive had to be implemented only by 19 December 2009.
Such a unitary European Copyright Code could be based on a codification of the existing EU copyright Directives where the need to go beyond the current harmonisation will be examined.

The EBU believes that such an undertaking will require a huge effort involving much study work. Clearly, the outcome cannot be expected in the short term. The complexity of the task of harmonising two very different legal systems (copyright and droit d'auteur) should not be underestimated. More importantly, however, such a Code will not provide a practical solution for the very real licensing problems encountered by broadcasters.

4.4 Copyright Title

**Question 14**: "What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?"

The Commission also entertains the idea of creating an optional unitary copyright title on the basis of Article 118 TFEU. It is suggested that such a title could be made available on a voluntary basis and co-exist with national titles. Such EU-wide copyright would not deprive national legislation of its substance but would lead to a dual system of rights as is the case with European trademark and design law. At this time there seems to be only a very brief description of a general idea. The Commission readily acknowledges that "feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection must be thoroughly examined". The potential impact for the single market, right holders and consumers, is as yet unclear. At this stage, without further details being known, the EBU cannot see how such a title could be more favourable to the copyright society than applying the one applicable law rule as proposed by the EBU, in line with the basic principles of the Treaty as indicated recently by the European Court in the **Premier League** case (see above).

Although the matter is not mentioned in the Green Paper, it is necessary to comment on another revolutionary idea, as analysed in a recent study for the Education and Culture Committee of the European Parliament on the feasibility from both a political and economic perspective of a "content flat-rate". The system as proposed would only cover cinema and audiovisual works. The study indicates that much in-depth study, and especially of the business model, is still required. However, it is particularly interesting to read in the conclusions that wider lawful communication/making available of online audiovisual content by authorised P2P or DDL offerings, within a private circle of "friends and family", could be developed on basis of extended collective rights management, as a complementary, voluntary scheme which will create value for the creative economy. The EBU would certainly prefer extended collective licensing as the most appropriate solution.

4.5 Authors' and performers' remuneration for online exploitation

See **Questions 15-20** in the Green Paper.

PSM fully support the high level of protection for copyright and related rights in the EU and support appropriate remuneration for all right holders. However, the proposal to introduce an unwaivable remuneration right raises a number of complex questions which are currently being studied by EBU Members.

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Audiovisual authors can be scriptwriters, film directors, composers of a film soundtrack, designers, editors, etc., or sometimes even, in the case of common law countries, producers. At EU level there is only a limited harmonisation of the definition of authorship in an audiovisual work: while the principal director of a film or audiovisual work is designated as an author of that work, Member States are free to extend further the list of other co-authors.

Moreover, the differences with non-EU countries must be taken into account. For example under national voluntary collective agreements in the United States, some authors may be entitled to "residual" fees, and this may have an impact on payments. More information is needed on the proposed system, its practical implementation, the right holders and the content services providers concerned, and its possible impact on the provision of video-on-demand services in Europe.

4.6 Accessibility for persons with disabilities


PSM have been at the forefront of developing delivery technology to help access to the media by those with disabilities. EBU Members have developed delivery systems to help those with hearing disabilities (subtitles, script mining and avatars for signing) and sight disabilities (audio descriptions).

Several EBU Members were partners in the consortium in charge of the DTV4all project which ran until the end of 2010 and aimed to facilitate the provision of access services on digital television across the European Union. The EBU participates in the ITU's recently created Focus Group on Audiovisual Media Accessibility (FGAVA) whose main objective is to address the need to make audiovisual media accessible for persons with disabilities. The EBU promotes the exchange and sharing of best practices, as well as specific efforts within the framework of the development of new technology (e.g. Hybrid TV, 3D TV).

The outstanding challenges are predominantly organisational, political and economic. The main barriers to the broader use of such technology are the limited resources of PSM and the fact that low cost receiving equipment is not universally available (as it is a small market, prices tend to remain high). Figures on actual usage can be difficult to obtain. In response to the lack of firm statistics needed to assess progress in television access services, the EBU has taken steps to plug the gap with surveys of European broadcasters.

Crucially at the European level, one size clearly does not fit all when it comes to access services. Europe is a diverse continent in terms of national and regional societies, their cultures and economic means. Some territories have made substantial advances with access services and are seeking to consolidate and optimise them. Others have only just begun to offer one or more such services and are feeling their way.

With more research and development it may be possible to develop technology which will lead to the automatic generation of services for those with disabilities. However, this will again entail relatively extensive (expensive) research for a relatively small market. Hybrid broadcasting could provide many services for those with disabilities.

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41 The test results and recommendations of the project are all available on the project's website: [http://www.psp-dtv4all.org/](http://www.psp-dtv4all.org/).

Accessibility is not a matter for broadcasters alone. Governments and the entire value chain (including the producers of equipment) need to care and to be closely involved.

4.7 Net neutrality

Question 26: "What other actions should be explored to increase the availability of accessible content across Europe?" (See also above section 3.4.)

The issue of net neutrality is equally important in guaranteeing the availability of PSM’s services.

PSM have a fundamental role to play in the new online environment in offering all European citizens varied content of high quality and in guaranteeing and promoting the fulfilment of fundamental European policy objectives such as social cohesion, media pluralism and cultural diversity.

As more and more PSM use the Internet to distribute their content and services, net neutrality principles are a fundamental instrument (as are must-carry rules on broadcasting networks) for enabling them to carry out their public service remit, and especially for ensuring that such legitimate general-interest objectives as media pluralism and cultural diversity are fulfilled. PSM can play an important role and help bring about a better balance within the online world, as they have done in traditional media.

It is thus crucial to ensure that Internet broadband networks facilitate the exchange and dissemination of content, including the content of PSM. This is of key importance for cultural diversity in Europe, as European broadcasters (both public and commercial) finance more than 80% of Europe’s original audiovisual programme production.

The "European audiovisual model", which implies the co-existence of commercial and public service media and places great emphasis on cultural diversity, needs to have an equivalent on the Internet too. In terms of pluralism and cultural diversity, both commercial and public space is needed on the Internet.

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