



EUROPEAN BROADCASTING UNION

Legal Department

UNION EUROPEENNE DE RADIO-TELEVISION

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**EBU RESPONSE TO THE EC COMMISSION COMMUNICATION
ON THE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS
IN THE INTERNAL MARKET**

EXECUTIVE SUMMARY

- The EBU fully supports the Commission's view that facilitation of effective rights management is crucial to the proper functioning of the internal market. At the same time, there is an ever-increasing call for the availability of cross-border broadcasting or parallel services for all European citizens. This implies the need to ensure not only good governance of collecting societies through the adoption of a framework Directive but also facilitation of cross-border licensing through appropriate Community legislation where the internal market would not otherwise function properly.
- To avoid practical obstacles to cross-border licensing over Internet and other communications networks, Community legislation should confirm by way of a clarifying definition, as it did in the case of satellite broadcasting, that mere reception of real-time streams such as Internet simulcasts of broadcasts has no relevance for the applicable law ("country of origin of the transmission" rule).
- In the digital age, just as in the analogue era, mass use by broadcasters of protected material such as musical works and commercial phonograms cannot in practice be authorized or remunerated other than through collective management agreements. Consequently, the achievement of collective licensing of certain on-demand rights requires stronger means than mere encouragement of the rightholders concerned.
- Apart from the points indicated by the Commission, the future framework Directive on good governance of collecting societies should include some additional principles concerning supervision.
- In giving its full support to the Commission's view on DRM issues, the EBU wishes to emphasize that DRM systems cannot in themselves be a policy solution. Acceptance by all stakeholders and compatibility with basic principles - rights and exceptions - of copyright law are both indispensable (see EBU Memorandum on Digital Rights Management: Annexe 3 hereto).



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EBU RESPONSE TO THE EC COMMISSION COMMUNICATION ON THE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS IN THE INTERNAL MARKET

The EBU welcomes the publication of the EC Commission's Communication on rights management in the internal market. As the Commission rightly emphasized in its press release, facilitation of effective rights management is crucial to the proper functioning of the internal market. At the same time, there is an ever-increasing call for the availability of cross-border broadcasting services for all European citizens. This implies the need to ensure, not only good governance of collecting societies through the adoption of a framework Directive, but also facilitation of cross-border licensing through appropriate Community legislation where the internal market in cross-border broadcasting or parallel services would not otherwise function properly.

The EBU comments are divided into three parts, dealing respectively with facilitation of cross-border licensing, digital rights management, and supervision of collecting societies.

I. Facilitation of cross-border licensing

a) Simulcasting broadcasts over the Internet or other communications networks

While the initial presumption of the Communication is that cross-border licensing should be market-led, the readiness of the Commission to consider, as necessary, the whole range of possible legislative options (including the most radical) clearly demonstrates the vital importance which the Commission attaches to this issue.

Broadcasting services have always crossed frontiers. The output of all national broadcasters in the European Union can be received in their neighbouring countries. Many satellite broadcasts can be received Europe-wide. The mere *reception* in other countries of cross-border broadcasts is not, and has never been, a separate act under copyright law. Receivability of broadcast signals is the result of a prior act (the transmission to the public), not the act itself. Not only radio broadcasts, especially on short wave, but also television broadcasts have been crossing frontiers for decades without there being any question as to their status under copyright law.

When the question was nevertheless raised in the context of satellite broadcasting by the so-called "Bogsch theory", the EU decided to dispel any possible confusion in this area. Thus, the 1993 EC Satellite and Cable Directive confirmed expressly that the act of satellite broadcasting takes place only in the country where (in short), under the control of the broadcaster, the signal is introduced into the chain of communication leading to the satellite. Thus, it was confirmed that the place of reception of such communication has no relevance for the applicable law. On the other hand, the Directive specifically recalls that reception is naturally relevant for determining the number of listeners and viewers to be taken into account with respect to remuneration. Consequently, given the inherent cross-border nature of broadcasting, the explicit rule for satellite transmissions cannot be regarded as some "exception" to the territoriality of copyright.

Recent repeated experience of EBU Members has now shown that similar clarification is necessary in order to *ensure* the proper functioning of the internal market in a parallel area of cross-border services, in particular the simultaneous transmission of broadcasts via Internet streaming (simulcasting). The suggestion that mere reception of broadcasts which are simulcast via the Internet constitutes an act of exploitation under copyright law is unacceptable. From the perspective of copyright law and the Internal Market, there is no compelling reason why the Internet simulcasting of broadcasts in Europe should be treated differently from satellite broadcasts.

Moreover, this issue gives rise to concerns under European competition law. As set out in more detail in the attached additional EBU Comments to the EC Commission competition directorate on, notably, the IFPI Simulcasting Agreement (see Attachment 1 hereto), several local collecting societies are claiming vis-à-vis EBU Members that the local consumption of an Internet simulcast received from a foreign broadcaster's website is to be treated as covered only by the receiving person's own national copyright law, and are thus attempting to force broadcasters to accept different tariffs for all territories (in principle worldwide) where the simulcasts can be received. These additional EBU Comments show why this claim (and others linked thereto) are contrary to, or at least incompatible with, principles set out by DG Competition. At the same time, this claim amounts to a contractual imposition on the foreign broadcaster that mere reception of a cross-border broadcast/communication to the public in other countries is a separate act under copyright law, which it is not and never has been.

In these circumstances, and so that there can be no possible confusion over what is the applicable law for the act of communication to the public in the case of real-time Internet streaming, the EBU proposes adoption in Community legislation of the following clarifying definition:

"The act of communication to the public by streaming, for simultaneous reception by the public, on the Internet or other communications networks occurs solely in the Member State where protected material is introduced, under the control and responsibility of the transmitting organization, into the network."

The above definition would thus provide a parallel clarification to that which has been provided for satellite broadcasting in the 1993 Satellite/Cable Directive.

In view of the current repeated attempts to impose practical obstacles to the proper functioning of the internal market, rapid legislative clarification would be necessary to *ensure* that cross-border licensing of Internet simulcasts of broadcasts can and does take place. On the basis that completion of the process of review of the Satellite/Cable Directive may be expected soon, ensuing legislative revision of that Directive could provide an appropriate location and early opportunity for inclusion of the above proposed clarifying definition.

b) Other improvements of cross-border licensing

Other proposals for modification of the Satellite/Cable Directive which the EBU has already made to the Commission in those specific contexts of cross-border licensing are attached hereto for easy reference (see Attachment 2 hereto).

The EBU wishes in addition to draw the Commission's attention to the fact that the EU legislator's expectation of facilitation of cross-border licensing in another specific context has not been fulfilled. As noted under section 3.2.1 of the Communication, Recital 26 of Directive 2001/29/EC on copyright in the information society urges phonogram producers to conclude collective licensing arrangements in order to facilitate clearance of the rights needed by broadcasters for the on-demand use of their radio or TV productions incorporating music from commercial phonograms as an integral part thereof. Given that this Recital has not had the desired effect, the reference in section 1.2.4 to the legislative option of mandatory collective management is therefore most apposite and welcome.

II. Digital Rights Management

The EBU fully supports the Commission's view on DRM issues, as outlined in paragraphs 1.2.5. and 1.3 of the Communication. In particular, acceptance by all stakeholders, including consumers, and compatibility with basic principles of copyright law are both a *conditio sine qua non* of any DRM system. This implies the availability of open standards for providing true and global interoperability, allowing for a horizontal digital broadcast receiver market, and at the same time permitting freedom of choice (for equipment, network, services and content) and preservation of privacy for consumers.

Moreover, the EBU wishes to underscore the Commission's current assessment that DRM systems cannot be a policy solution for ensuring an appropriate balance between all interests involved, as DRM systems are not in themselves the proper means for determining copyright protection or the exceptions and limitations thereto. When acts permitted by law, such as use for quotations or critical review, for reporting on current events or within other limitations in the public interest, are adversely affected by the use of technological measures (so called "technological lock-up"), effective legislative action must be possible to remedy such situations.

Any technological measures which may be developed in the future for digital broadcasting would be acceptable only if they meet the various (basic) requirements set out in the recent EBU Memorandum on Digital Rights Management, which is included herewith as Attachment 3. Consequently, any such technical protection measure must be appropriate and cost-efficient. In particular, such measures:

- must be strictly limited to addressing unlawful redistribution via on-demand services over the Internet,
- must include a safeguard for broadcasters against any direct or indirect requirement to encrypt or scramble the broadcast signal,
- must be attractive for viewers and listeners of digital broadcasts, by maintaining the existing possibilities for them to copy for private use, and
- must guarantee the protection of personal data of viewers and listeners.

III. Supervision of collecting societies

Firstly, the EBU wishes to express its view on the importance of collective management, both now and in the future. For collecting societies, broadcasters are their biggest clients. Broadcasters, for their part, could not do without some collecting societies, particularly in the field of music, where rightowners are far too numerous for broadcasters to be able to find them and negotiate with them on the basis of their individual rights. Consequently, it is very important to realize that mass use of protected material, such as musical works and commercial phonograms, for broadcasting cannot, in practical terms, be authorized or remunerated other than through collective management agreements. This principle remains as true in the digital world as it has been in the analogue era.

The EBU strongly supports the Commission's conclusion that the monitoring of collecting societies under competition rules should be complemented by a *legislative framework* on good governance, involving, *inter alia*, the establishment of a collecting society, the obligation to grant licences on reasonable conditions, the possibility for users to contest the proposed tariffs and the provision of common rules for adequate external control mechanisms. It need hardly be added that such a framework should be applicable to all societies or organizations engaged in the act of collecting and/or distributing on behalf of a category of rightholders, whatever their legal form.

However, with respect to the details of such supervision mechanisms, it is essential that other basic principles put forward by the EBU should also be taken into account, and notably that

- with regard to each category of rights for any given field of exploitation (e.g. performers' rights to remuneration for cable retransmissions) there should be only one

collecting society in any one country, or otherwise they should be obliged to act jointly if the negotiations concern the same user (see also below under 1.a);

- a copyright tribunal or specialist independent mediation or arbitration commission (either permanent or to be installed "ad-hoc" for a particular dispute) is to be preferred, instead of being (always) obliged to involve ordinary courts from the onset of any type of dispute,

- collective management should be subject to certain obligations (following on from both the Internal Market and European Competition Law) with a view to facilitate the acquisition of transnational rights and to foster the availability of cross-border broadcasting services for all European citizens (see above under Section I, including Attachment 2), and

- present mechanisms of supervision should be improved (in certain countries) by taking account of the following:

1. Minimum obligations for the establishment of collecting societies

a) Sufficient scope of repertoire; guarantees against "outsiders"

If there is more than one society representing the same category of rightowners, the minimum prerequisite for acting jointly towards the same user is that the society preferred by the user should have the legal obligation to guarantee to its contractual partners (the users) that they are held harmless from claims by any other societies. At the same time, it is obvious that for that purpose the society must have a sufficient repertoire to be able to issue such a warranty.

For example, Article 3(3) of the German Act on the Administration of Copyright and Neighbouring Rights specifies that the supervisory authority (the Patent Office) can refuse authorization if it is "unlikely, in view of the economic basis of the collecting society, that the rights and claims entrusted to it will be effectively administered". Such a clause would therefore be highly desirable particularly in countries where there are many different claims from various collecting societies with insufficient control over the scope of their repertoire.

A similar purpose of, and subsequent interest in, collective management agreements is that they should always contain a safeguard against claims by "outsiders", as those rightholders who have not specifically transferred or mandated their rights to the relevant collecting society should not be able to undermine the nature or extent of such agreements. Consequently, "extended collective agreements", a system which originated in the Nordic countries, is an effective legal mechanism whereby agreements freely negotiated between users and collecting societies of rightowners are *extended by law* to non-represented rightowners in the same category.

b) *Obligation to conclude general agreements with users*

One of the main reasons for institutionalizing a collective management organization is to negotiate the appropriate level of remuneration on a collective basis on behalf of the individual rightowners. Consequently, it is desirable to have such an obligation to conclude collective agreements expressed in the law which sets out the requirements for the establishment of a collecting society. For example, under the German law, the collecting society is *obliged to conclude general agreements on reasonable terms with associations of users*. (In practice, such agreements include certain tariff reductions of up to 20% if the users' associations commit themselves to encouraging their members to pay remuneration in accordance with the conditions of these general agreements.)

c) *Sufficient transparency*

The necessary transparency of tariffs imposes certain information obligations. For example, under the German law, collecting societies are specifically obliged to supply *information on the works and rightowners* for whom administration is being performed.

2. *Appropriate conditions (tariffs) and solutions for pending disputes*

As regards the need for appropriate conditions, adequate supervision should permit proper determination of the appropriate level of remuneration. For that purpose, such control should include the exchange of information ("guidelines") with categories of users on the criteria for such determination, such as *actual use*. Particularly for broadcasters, it would be desirable and in line with modern realities, national and EC court decisions and the EC Satellite/Cable Directive to indicate *actual audience* as a specific criterion.

Moreover, it is desirable to have a practical solution against possible abuses of a monopoly position, such as in cases where the collecting society claims damages for unlawful use of the repertoire, although the user has already made a serious offer of remuneration. For instance, a rule should provide that the exploitation rights are granted to the user on a statutory basis to prevent the collecting society from making unreasonably high demands so that it is in fact evading its contractual obligation. This solution already exists in Europe and is derived from the principle of negotiations in good faith under regular civil law. Such a solution can be made dependent on the *deposit of the amount which is mid-way between the position of each party in a separate bank account* for the benefit of the collecting society, usually on condition that the final level of payment will be settled in court or through arbitration proceedings.

3. *Other elements of adequate external control mechanisms*

a) *Scope of jurisdiction*

Particularly in countries with special arbitration boards, the existing regulations vary widely, not only with respect to the relevant bodies and their composition/structure but also on issues of jurisdiction, the means of exercising control and the possible remedies or sanctions. It is highly desirable *to fill in the gaps in the currently limited jurisdiction* of the special tribunals of certain countries. For example, to have jurisdiction over payments solely in respect of remuneration for the broadcasting of commercial phonograms would not suffice.

For example, in the United Kingdom the initial jurisdiction of the Copyright Tribunal (formerly the Performing Right Tribunal) was extended under the Copyright, Designs and Patents Act of 1988 in a number of respects and now covers (*inter alia*) the refusal of any copyright owner to grant a licence on reasonable terms if it relates to a matter which has been specified by the Competition Commission as operating against the public interest.

Moreover, extended jurisdiction could include a review of other possibly unlawful licensing practices, such as discrimination between licensees or the imposition of *restrictive conditions* in such licences.

Admittedly, extensive jurisdiction for a special arbitration body which includes, for example, jurisdiction over the grounds of any copyright claim, will raise the issue of the need for its decisions to be subject to *appeal in the ordinary courts*.

b) *Impartiality, special knowledge of copyright and reasonable costs and time limits*

It must be guaranteed that the special tribunal or commission is not only sufficiently *independent* from any interested sector but is also sufficiently *specialized* in the field of copyright, to ensure its *impartiality* (in a small country it may be difficult to find enough impartial specialists to create a special tribunal/commission) and to establish *fair costs, as well as reasonable time limits* for supervisory bodies to settle disputes or supervise negotiations.

3 Attachments



EUROPEAN BROADCASTING UNION

UNION EUROPEENNE DE RADIO-TELEVISION

Legal Department

Département juridique

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Attachment 1
to EBU response
to communication on rights
management

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

**Cases COMP/C2/38.014 - IFPI "Simulcasting"
COMP/C2/38.126 - BUMA et al. "Santiago Agreements"**

Additional EBU Comments

1. Introduction

For many years now, the transmission of broadcasts via cable and the Internet (the latter at least with respect to radio) has been a common activity for most EBU Members carried out within their public service remit as defined by the Member States. Today, the possibilities for transmitting broadcasts (whether or not simultaneously) over various media platforms are constantly growing. The best-known examples of such delivery for the near future are broadband and, to a more limited extent, mobile telephony via GPRS or UMTS. In fact, various experiments are already being carried out in several European countries.

In the light of the foregoing, it is quite remarkable that, apart from simultaneous retransmissions of broadcasts via cable, no legislator (apart from the UK)¹ has so far stipulated a clear legal framework for other forms of *simultaneous delivery* of radio or television broadcasts. With the upcoming review of the 1993 Cable and Satellite Directive, the time has now come to take the necessary steps towards addressing the urgent needs of the Internal Market for one-stop-shop licensing, and particularly for the *simultaneous Internet transmission* of broadcasts ("simulcasting"). Such steps will be set out in more detail in a forthcoming submission to the Internal Market Directorate of the EC Commission.

¹ Under UK copyright law, after implementation of the 2001 Copyright Directive, a "broadcast" means an electronic transmission of visual images, sounds or other information which (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them (...) and which is not excepted by subsection 1A (...). 1A: Excepted from the definition of broadcast is any Internet transmission unless it is (a) a transmission taking place simultaneously on the Internet and by other means (...). See: <http://www.legislation.hms.gov.uk/si/si2003/20032498.htm#4>.

However, in the present context we should like to draw the Commission's Competition Law Directorate's attention to one particular aspect of such simulcast transmissions which is directly related to competition law.

2. The IFPI Simulcasting decision

On 8 October 2002 the Commission granted an exemption, until 31 December 2004, under Article 81(3) of the EC Treaty in respect of a "model Reciprocal Agreement" between several *phonogram producers'* collecting societies. This model agreement was notified by the International Federation of the Phonographic Industry (IFPI) and is intended to facilitate, for an experimental period, the granting of so-called "multi-territorial and multi-repertoire licences" to radio and television broadcasters for the simulcasting of their programmes which include recorded music from commercial phonograms.

It is worth recalling that, in its comments submitted to the DG Competition on 21 August 2001, the EBU stressed that the notified agreement did not adequately respond to new demands, created by the Internet, from the broadcasting industry, for the following reasons:

- a) Under Article 15 of the WPPT, phonogram producers are denied an exclusive right for *both broadcasting and any "communication to the public"* of commercial phonograms (which cover simulcasting). In almost all EU copyright laws, phonogram producers have only a right to be remunerated for such uses through agreements with the relevant collecting societies. Consequently, IFPI's argument on behalf of the notified model agreement that, in the absence of an *express mandate* to the relevant collecting societies, the simultaneous Internet streaming of broadcasts incorporating commercial phonograms would otherwise be illegal is substantially flawed or, at best, ambiguous, and in some countries would even be in conflict with the interpretation of the law..
- b) The alleged need for "multi-territorial" licences for simulcasting broadcasts would seem to reintroduce the "Bogsch theory", which was clearly rejected for direct satellite broadcasting in the 1993 Cable and Satellite Directive. In that Directive, the principle was established that (in short) the act of satellite broadcasting takes place only in the country where, under the control of the broadcaster, the signal is introduced into the chain leading to the satellite, so that the place of reception of such satellite broadcasts has *no relevance for the applicable law* (whereas the place of reception would remain relevant for determining the actual or potential audience; see also below).
- c) Moreover, the notified agreement clearly neglects recital (26) in the 2001 Copyright Directive for the Information Society, which urges phonogram producers to facilitate the clearance of *on-demand rights* for broadcasters through the conclusion of collective agreements. On the contrary, the notified model agreement expressly prevents the collecting societies from granting any licences for on-demand use. By way of contrast, the musical works "petits droits" societies generally do include the possibility for on-demand use of their repertoire by broadcasters; however, this part of the agreements cannot be

fulfilled where the phonogram producers' societies exclude the rights for such use.

Consequently, the Commission is aware that, from a copyright law perspective, the notified agreement provides *no significant support for broadcasters* in the clearance of rights (of phonogram producers) for the Internet use of radio or television programmes which happen to include extracts from commercial phonograms.

Notwithstanding the foregoing, the Commission's decision in this case is important at least with respect to two related issues:

- *No implications for national copyright law*

With regard to the specific concerns expressed by the EBU (as well as by FIM, the International Federation of Musicians, whose rights are not covered by the notified agreement) regarding the *legal grounds* for the simulcasting licences, the Commission held that such concerns fell *outside the scope of the procedure*; its analysis in this case was strictly limited to assessing of the agreement under the relevant Community and EEA competition rules. Accordingly, the Commission did not assess these legal grounds, and its decision "in no way prejudices any other legal question which may arise from national copyright or general civil law and that would fall within the competence of national authorities and/or national courts". Thus, the decision cannot be used to provide any indication whatsoever of the copyright nature of simulcasting radio or television broadcasts over the Internet.

- *Competition between collecting societies must be real and effective*

On the other hand, the Commission took the initiative, supported by, *inter alia*, the EBU, to insist on including a provision *allowing for competition* between the societies granting such multi-territorial simulcasting licences to broadcasters, in the sense that any European broadcaster should be free to clear the rights, insofar as necessary, with any collecting society in an EEA country of its choice.

Concerning the *level of remuneration* proposed for such licences, the Commission acknowledged that the participating societies had not yet definitively decided how to structure the "aggregate tariffs". However, the Commission stressed that the desired competition between the collecting societies could be undermined in practice if such competition did not extend to pricing. Consequently, the notifying parties were urged to bring about *increased transparency* in their relations with broadcasters. The parties undertook to present to the Commission, by the end of 2003, a set of proposals for setting their tariffs. As far as known, no such proposals have been published or otherwise made available to interested third parties such as the EBU.

3. Current attempts by the phonogram producers' societies

It appears that concerning the negotiations on including simulcasting into the collective agreements for the broadcasting of commercial phonograms (at least for purposes of clarification) several EBU Members have recently faced (identical) claims from the relevant collecting societies which are *contrary to or at least incompatible with* the principles as set out above by DG Competition:

- the societies claim that the local consumption of an Internet simulcast received from a *foreign* broadcaster's website is to be treated as covered only by the receiving person's own national copyright law. This would amount to an attempt at contractual imposition on that foreign broadcaster that *mere reception* of a cross-border broadcast in other countries is a separate act under copyright (which it is not and never has been).
- the societies require payment for such use on a "per-track-per-stream" basis, which, though recognizing the relevance of the factor "audience", does not sufficiently take account of the lack of uniformity among statistical methods to measure Internet usage, including the unreliability of geographical data on website "visits". In addition thereto, such methods cannot reveal the nationality of the website visitor (which means that expatriates in foreign countries are treated as nationals of such countries). This would risk to contradict the requirement of increased transparency.
- the new remuneration proposed by the societies makes a distinction between an artificially low "administration fee" and a correspondingly high "copyright tariff", and the level of the latter part would *differ per country of reception* and would have to be paid in accordance with the proposed tariffs of the local collecting societies (by and large also on a pay-per-track-per-stream basis). This system would have the combined result that competition between the collecting societies, if any, would not really extend to pricing.

4. Evaluation

Whatever the legal basis of Internet simulcasting licences by the collecting societies for phonogram producers would be (notwithstanding the fact that the Commission's decision expressly did not touch upon that question), it is obvious that the proposed system of tariff-setting by the collecting societies for such licences needs to be rejected. This attempt to force broadcasters to accept *different tariffs* for all territories where the simulcasts can be received (and this is, in principle, worldwide) is not only legally, but also practically and politically, unacceptable. After all, in each country the payment of remuneration for the transmission of programmes (including commercial phonograms) by broadcasters in that country depends on a variety of factors which are determined solely by the national copyright law (and its history), and the level of remuneration is therefore always subject to negotiations between the broadcaster and the collecting society. The tariff-setting as now proposed by the collecting societies would not lead to any significant variation between the potential licensors, particularly if the applicable tariffs for reception in foreign territories were fixed in advance. Moreover, it creates the risk of arbitrary tariffs, e.g. for countries which do not have established collecting societies for the rightholders concerned. Finally, it would be contrary to the current audiovisual policy in Europe if simultaneous Internet broadcasting were to be made dependent on the laws in all countries of reception.

It is of crucial importance to recognize that this proposed tariff-setting practice significantly differs from merely taking account of the *potential or actual audience* of a simulcast. As with the spill-over audience in the case of a satellite broadcast (which may easily cover 40 or more countries in Europe), it is generally acknowledged that such an audience may be a relevant factor for determining the *level* of remuneration (unless the language used makes that factor negligible in practice). However, it is a long-established practice with all music collecting societies that such satellite audiences in foreign countries change *neither the applicable tariff nor the basis thereof*. It would be totally unjustified if the (limited) foreign audience of a simulcast would be used as a pretext to reverse that situation.

Hence, it does not need too much imagination to conclude that the recent (apparently concerted) practices of the phonogram producers' collecting societies as described above would virtually nullify any real and effective competition between the said societies in the EEA and are mainly intended to circumvent the present policy of the DG Competition as laid down in its preliminary decision on the IFPI Simulcasting Agreement.

5. Conclusion

In the light of the foregoing, we urge the Commission to investigate the proposed tariff-setting by the collecting societies with the utmost vigilance before issuing the final exemption to that particular part of the notified Simulcasting (model) Agreement. Introducing different tariffs for all countries of reception of a simulcast needs to be firmly rejected. With particular regard to the requirement of increased transparency, it must be ensured that tariff proposals reflect the technical reality that Internet simulcasting can reach only an extremely limited potential audience (approximately 10,000 people in total, depending on the server capacity, which is thus far lower than the audience for satellite broadcasts) and that they take proper account of the usual language barriers within Europe. *Actual use* and *actual audience* should play an indispensable role as objective and appropriate criteria for determining a fair level of remuneration.

It goes without saying that such scrutiny should also be applied with respect to other model contracts or provisions insofar as notified by music collecting societies for the express clarification that simulcasting and other webcasting activities are covered by their collective agreements with broadcasters.



EUROPEAN BROADCASTING UNION

Legal Department

UNION EUROPEENNE DE RADIO-TELEVISION

Département juridique

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Attachment 2
to EBU response to
communication on rights
management

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SUMMARY OF SPECIFIC EBU PROPOSALS ALREADY MADE TO THE EC
COMMISSION FOR MODIFICATION OF THE EC SATELLITE /CABLE DIRECTIVE

1. The same system of rights clearance in the Directive for simultaneous, complete and unchanged retransmission of broadcasts by cable distributors on a country-by-country basis should apply to the simultaneous, complete and unchanged rebroadcasting of broadcasts by third-party *digital satellite bouquet operators*, provided that the latter make the rebroadcast available only to paying subscribers of their service. Moreover, since the reasoning behind such a scheme is mainly determined by the commercial nature of the rebroadcasting activity, the same system of rights clearance should extend to such rebroadcasting by digital *terrestrial* bouquet operators.

Indeed, there would seem to be no reason why the same system of rights clearance should not be applied to simultaneous, complete and unchanged retransmission of broadcasts by all third-party operators which exploit broadcasts in analogous circumstances, whatever technical means they may use.

2. It is a fundamental principle that cable distributors have the legal obligation to clear all the relevant rights with the respective broadcasters and collecting societies representing the other groups of rightowners. Nevertheless, there can be certain very exceptional circumstances where a broadcaster may itself wish, for particular reasons, to clear all those rights not held by it on behalf of the cable distributor. Thus, a further revision of the Directive should make it possible for transnational satellite-to-cable programme services to have the specific *option, which they are free to take up or not*, of clearing all cable distribution rights with the relevant collecting societies (especially “petits droits” societies) in the country where the original *broadcast takes place*, instead of with the societies in all the countries where the cable distribution takes place.

3. Since experience has shown that contractual negotiations for global contracts tend to be much easier when all the parties concerned find themselves around the same negotiating table, it would be helpful if the Directive were to contain a certain obligation for the rightowner groups to negotiate together vis-à-vis the cable operators, at least where one of the parties so requests. On the other side of the coin, the Directive should specifically oblige cable operators (which even in smaller countries can number into the hundreds) to join together in one national association for the purpose of negotiating collectively with rightowners.
 4. With a view to improvement of the mediation provisions of Article 11, provisions in the German Copyright Administration Act could serve as a basis for a possible alternative solution (i.e. a decision of the Arbitration Board in relation to disputes over the tariffs to be applied by collecting societies is binding unless challenged in court; collecting societies are under an obligation to contract on equitable terms with users who request a licence). Another possibility would be an independent tribunal, with powers similar to that of the Copyright Tribunal in the UK.
 5. As regards broadcasting organizations, Article 12 of the Directive (following the 1960 European Agreement on the Protection of Television Broadcasts) recognizes that broadcasters may have legitimate reasons for refusing to have their programmes distributed in a given country or area, or by a given cable distributor. Thus the powers of a supervisory body, if any, are restricted to cases where the cable distribution right has been “unreasonably refused or offered on unreasonable terms” by broadcasting organizations. However, Article 12(2) merely authorizes Members States which already had such a supervisory body to retain it, and only until 1 January 2003. The Directive should be revised so as to enable any member state which so wishes to set up such a supervisory body, and to retain it without any limitation in time.
 6. Article 3(2) of the Directive should be amended so as to confirm that extended collective agreements may apply to satellite broadcasts in general and not merely to those which simulcast a terrestrial broadcast by the same broadcaster.
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EUROPEAN BROADCASTING UNION

UNION EUROPEENNE DE RADIO-TELEVISION

Legal Department

Département juridique

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Attachment 3
to EBU response
to communication
on rights management

EBU MEMORANDUM ON DIGITAL RIGHTS MANAGEMENT

Impact and importance of DRM for broadcasters

A universally-accepted definition of Digital Rights Management does not (yet) exist. Most frequently, the keyword DRM stands for the management of rights by digital means and thereby encompasses not only technical *anti-copying protection measures* but also the electronic *administration of contractual rights*. The latter could be the technical processing of rights "metadata" of protected matter (information on usage and/or media limitations, etc.), including the tracing and monitoring of usage of such protected matter. Anti-copying measures are intended to control digital copying, such as the number of copies, the storage or redistribution thereof or, where necessary, even to prevent the making of any such copies. In the enforcement of contractual terms, e.g. when the DRM scheme controls the length of time of viewing or listening, these types of DRM measures may partly overlap.

The basic idea behind the development of DRM is to facilitate the licensing and acquisition of copyright or neighbouring rights through technical means, while also preventing by such means premium content from being used without authorization. Although the idea of making licensing easier can generally be shared both by rightholders and users (as distributors) of protected content, it should also be realized that certain rights or mass use of protected matter, e.g. for multi-repertoire licensing in the area of music, cannot, in practical terms, be authorized or remunerated otherwise than through collective management agreements.

It is apparent that both radio and television broadcasters must be intensively involved in any discussion of a possible DRM scheme for digital broadcasting. For example, DRM solutions may be helpful with respect to controlling the *use* (i.e. redistribution) of protected content but they should not be applied with the intention of limiting *access* to such content. Widespread access to new digital services requires the desired competition to be maintained on all delivery platforms, in order to avoid a foreclosure of certain markets or similar "gatekeeping" effects.¹ Moreover, DRM measures should make the broadcaster's own administration of rights acquisition and licensing significantly easier, e.g. allowing for the automatic reporting of the use of musical works and commercial phonograms. In addition, concerning mass piracy

¹ See the EBU comments on the EC Commission's Working Staff Paper on "Openness and interoperability in digital television", of 14 February 2003, at the EBU's website at www.ebu.ch/departments/legal/position.php.

of their own premium content via the Internet, such as with respect to television programmes on major sports events, broadcasters have certain interests in controlling such illegal copying and redistribution activities.

On the other hand, the above-mentioned interests cannot fully determine the most appropriate technical solution. It must be taken into account that premium content which is particularly sensitive to mass piracy is included only in a very small part of the regular programme output of free-to-air broadcasters. Moreover, the main interests of today's (or future) e-commerce operators differ structurally from the regular activities pursued by EBU Members. As a general rule, technical protection should be proportionate to the actual piracy threat and apply where that threat actually occurs. Consequently, any DRM application for broadcasting would require sufficient *flexibility* to deal with various situations.

DRM issues are closely related (but not limited) to the implementation of the 2001 EC Copyright Directive for the Information Society. However, DRM is a *complementary* (technical) protection measure only and cannot - and certainly should not - be used to overrule the legal framework for copyright protection. It is of prime importance that any DRM system should include certain safeguards, such as for traditional exceptions or limitations under national copyright laws.

Insofar as DRM schemes are not limited to the control of unlawful usage via the Internet, they may also have an impact on the generally-desired transition from analogue to digital broadcasting. This means that, in addition to the obvious need for *absolute interoperability* and standardization, the extent of broadcasters' active implementation of DRM technology and the possible dilemma of encryption are at stake. It goes without saying that any DRM scheme must respect the principle of free flow of information and should not limit the possibilities for free-to-air broadcasting via satellite. Consequently, any technical solution should allow the broadcaster itself to decide whether or not it wishes to encrypt the broadcast signal at the source. Particularly in view of the free movement of broadcasting services in the Internal Market, DRM schemes should always support, and preferably increase, the public's access to a wide choice of European programmes.

Principles and requirements

N.B. The requirements under sections B and C are, to a large extent, specifications of the general principles under section A. The requirements under section D follow on also from the relationship of public service broadcasters with the general audience.

A. GENERAL PRINCIPLES

Any DRM system should respect the underlying principles of European Community law and policies, such as:

- the free movement of broadcasting services, on the basis of the country-of-origin principle,
- the promotion of cultural and linguistic diversity, and
- the strengthening of the European audiovisual industry.

In particular, any DRM system should be compatible with regulatory aims to help ensure that all European citizens have access to a wide choice of radio and television programmes from different Member States.

If DRM technology is used for broadcasting on a global basis, then broadcasters must first be granted the substantive rights (e.g. through a WIPO Treaty) upon which the legal protection of such technology can be based.

Any DRM system for broadcasting must guarantee the integrity of the broadcast signal and the editorial freedom of broadcasters.

B. BROADCASTERS AS CONTENT PRODUCERS

- 1. Anti-copying protection methods should be flexible and tailor-made, in proportion to the perceived piracy threat given the type of medium, the value of the content and the way such content is made available to the public**

DRM anti-copying technology should focus primarily on providing a reasonably effective remedy with respect to the unauthorized redistribution of premium content via on-demand services over the Internet.

- 2. No mandatory regulation, unless interoperability cannot be guaranteed otherwise**

Voluntary consensus on a single, open standard is the best solution. If that cannot be achieved, full interoperability of technical standards and no addition of unreasonable costs should be guaranteed, particularly from the consumer's perspective (i.e. allowing for a horizontal receiver/recorder market).

- 3. Due account of the legacy issue**

A certain period for equipment migration should be ensured, in order to meet reasonable expectations (of all parties involved) on the continuing usefulness of production, recording and other electronic equipment.

C. BROADCASTERS AS USERS OR DISTRIBUTORS

- 1. DRM systems should not be used to make obsolete the benefits for broadcasters resulting from exceptions or limitations under copyright law**

This applies, in particular, to the possibility of making incidental reproductions of protected matter for broadcasting purposes.

2. DRM systems should not interfere with the broadcast signal

Anti-copying protection is inherently different from conditional access. Consequently, DRM systems should always leave the choice of whether or not to scramble the transmission of the signal to the sole discretion of the broadcaster concerned. Visible, audible or time-delaying effects caused by copy-protection measures may occur only once the signal is captured or recorded on DRM-compliant devices.

3. DRM systems should facilitate or simplify the usual clearance of rights

The usual clearance of rights for broadcasting and related activities via collecting societies should not be hindered. Moreover, DRM systems should not be misused to obstruct the acquisition of transnational rights and/or the availability of cross-border broadcasting services, or as a means of foreclosing the markets for on-line and/or on-demand services.

4. DRM systems should be cost-efficient

DRM schemes should not lead to an increase in administrative costs or give rise to other costs for legitimate digital broadcasting. Moreover, the implementation of any DRM solution imposed by content providers is acceptable for broadcasters only against fair reimbursement of their costs. This applies, in particular, if it is required that a DRM scheme should be embedded into the broadcast signal.

5. No liability after implementation of DRM

DRM schemes for broadcasting are acceptable only under the strict condition that broadcasters are exculpated from any liability for infringement by third parties.

D. INTERESTS OF VIEWERS/LISTENERS

1. Private copying

DRM systems should allow broadcasting services' viewers/listeners to make a personal copy of programmes, in particular for time-shifting purposes. Concerning the private use of such copies, DRM systems should not negatively affect the attractiveness of digital technology for viewers/listeners, thereby jeopardizing a rapid change-over from analogue to digital broadcasting.

2. Platform neutrality

DRM systems should be equally suitable to all forms of broadcast delivery (e.g. terrestrial, cable, satellite, UMTS), in order to ensure the availability of broadcasting services to the public over different media platforms.

3. No prejudice to legitimate privacy interests

DRM systems should not require the registration of individual viewers/listeners or their signal-receiving equipment (i.e. other than for supplementary warranties or services). Moreover, DRM schemes which include the processing of data on, or control over, the personal recording activities of broadcasting services' viewers or listeners should be subject to their consent after they have been adequately informed of the purposes of such measures.
