Modern copyright for digital media

Legal analysis and EBU proposals

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Foreword

Public service broadcasters, represented by the European Broadcasting Union, have the task of offering the public the benefits of the new audiovisual and information services and new technology and of undertaking the development and diversification of activities in the digital age. In view of that important task, public service broadcasters invest heavily in high-quality, innovative and culturally diverse European content - news, documentaries, entertainment and fiction. This is reflected by the millions of productions which are found in EBU Members' archives and which represent the largest part of the audiovisual heritage in Europe.

The EBU is mindful that the interests of citizens are served by the contribution which *copyright* law has made, and can continue to make, both to the fostering of creative endeavour and to permitting the growth of industries dedicated to delivering the fruits of that endeavour to the public. Consequently, the EBU asked three external experts from France, Germany and the United Kingdom to analyse the current policy and rules of European copyright law with a view to improving that framework substantially. The analysis as set out in the present White Paper provides the basis for the EBU to put forward new ideas and concrete proposals to modernize EU copyright law. A synopsis of these ideas and proposals, summarized as "strong rights, easy access", is given in the Executive Summary below.

The digital era presents both new challenges and new risks for EBU Members' content. On the one hand, the content should be available on all current and future media platforms so that it is ensured that all citizens can be reached; on the other hand, such availability requires that the necessary rights clearance systems are efficient, and particularly since a lack of such efficiency increases the risk that Members' content will find its way onto the Internet through piracy. With the objective of serving the social, democratic and cultural interests of citizens, in their capacity as viewers and listeners to audio and audiovisual media content, the EBU puts forward in this White Paper a set of proposals as a contribution to the reform of copyright law to make it fit for purpose for the next phase of development of the information society.

Accordingly, the EBU's proposals strike a careful balance between protective rights and rights of usage. The public service broadcasters which comprise the membership of the EBU are well placed to strike such a balance, as they are both creators of copyright works and users of the works of others on a very substantial scale.

As will be seen in the Chapters which follow, the new framework must encompass far more than broadcasters' traditional activity of delivering linear scheduled programme services, predominantly by wireless distribution. Broadcasters are engaged in delivering their content on a multiplicity of technical platforms and in both linear and non-linear services. Delivery of programmes on-demand by online streaming prior to, simultaneously with or for some time after their linear scheduled broadcasting has become commonplace, as has the provision of programmes for downloading as podcasts or vodcasts for later consumption on devices such as MP3 players and other mobile devices. Accordingly, while for convenience this White Paper will refer to the activities and the proposals of broadcasters, the concepts of "broadcaster" and "broadcasting" are to be understood in a technologically-neutral sense and as encompassing the full range of such content-provision activities. The EU has already recognized the breadth of this category in adopting the concept of "audiovisual media service provider" in the Audiovisual Media Services Directive. The proposals made in this White Paper are focussed on the roles which EBU Members are already playing in this new world, and not solely on their traditional broadcasting activity.

Although the proposals in the White Paper are put forward on behalf of public service broadcasters, it is not suggested that a special copyright regime should apply to such broadcasters but not to those which do not have public service obligations. Only to a limited extent is it possible within copyright law to make a distinction between public service and other types of broadcasters. What will be clear from the White Paper, however, is that the copyright law reforms which are needed to enable public service broadcasters to fulfil their mission closely correspond in many respects to those which are needed to enable commercial broadcasters to exploit the opportunities afforded by new technology, to the benefit of consumers and right holders alike. Many of the proposed reforms are also closely matched to those which other providers of audio and audiovisual content need in order to be able to make the fullest use of those opportunities.

Consequently, the White Paper does not set out to list *"the needs of broadcasters"*. Rather, it is the EBU Members' proposal for the development of a framework within which copyright owners and providers of audio and audiovisual media services can operate and do business to mutual benefit and, in particular, to the benefit of all citizens. It is thus a contribution to the project, described in the Reflection Document of October 2009 published by the European Commission, of "creating in Europe a modern pro-competitive, and consumer friendly legal framework for a genuine Single Market for Creative Content Online". That project deserves thorough follow-up, and the present White Paper is intended to provide significant input for that debate.

Geneva, March 2010

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President of the EBU

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EBU Executive Summary

- Public service broadcasters fully support the high level of protection for copyright and related rights in the EU, including adequate remuneration for all right holders. The EBU is mindful that the interests of viewers and listeners are served by the contribution which copyright law has made, and can continue to make, both to fostering creative endeavour and to enabling the growth of industries dedicated to delivering the fruits of that endeavour to the public.

- The EBU and its Members believe that EU copyright law is in urgent need of a coherent legal framework for *simplified rights clearance* for the online world. This means that the existing framework on rights clearance needs to be modernized along the basic principles of a broad and inclusive policy approach derived from the needs of audiovisual media service providers.

- Audiovisual copyright policy in the EU should be based on the concept of communication to the public of linear and non-linear audio and audiovisual media services. This will ensure that existing licensing rules can be made technology-neutral and future-proof, so that rights clearance will be more efficient across the EU and the public's access to European media offerings will improve.

- To underpin this concept to the benefit of audiovisual media services, the EBU proposes legal solutions for both individual and collective licensing. These solutions embrace and extend the rights clearance principles already established in the Satellite and Cable Directive and provide a modern, technologically-neutral legal framework for collective licensing practices with respect to all audio and audiovisual media services.

- The proposals specifically focus on the needs of the audiovisual media sector, they do not suggest a complete harmonisation of the EU copyright rules. However, the EBU believes that the benefits will be wider and will greatly benefit the European digital economy.

- The EBU proposals do not call for the revision of the e-Commerce regime dealing with the retail sales of content such as music or DVDs. Nor do they fundamentally challenge exclusivity or the current practices of licensing of premium content such as films and sport.

The EBU proposals include the following:

1) Facilitate EU-wide online licensing through the concept of audiovisual media communication to the public

Rights clearance should focus on a concept of communication to the public of audiovisual media services, *covering both broadcasting and non-linear audiovisual media services* (broadcast-like services). In particular, the licensing mechanism applicable to satellite broadcasting (the so-called "country-of-origin" rule) should be extended on a technologically-neutral basis to all initial communications to the public of online audiovisual media services, i.e. including making programmes available to the public as part of a broadcast-like service.

2) Clearance of retransmission rights for any platform (principle of technological neutrality)

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 applied to cable retransmission, *irrespective of the platform and the transmission* method used. This would mean that the retransmission rights held by the broadcaster itself remain to be acquired from the relevant broadcaster, while the retransmission rights in the programmes which are not held by the broadcaster are to be cleared with the relevant collecting societies.

3) Avoiding separate rights for the same activity (or "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.

4) General adoption of the "extended collective licensing" model

The EU should promote the adoption of extended collective licences as an optional model for clearing rights for audio and audiovisual media services, including the making available of programmes in on-demand services. This means that under the national laws of all Member States, the possibility should exist to use extended collective licensing for situations where such a method is deemed necessary or useful.

5) Simplification of music licensing for audiovisual media service providers

Licensing of music rights to audiovisual media service providers should continue to take place preferentially on a voluntary collective basis. However, Members States should be obliged to submit non-linear broadcast-like services to mandatory collective regimes if the existing collective agreements cannot be extended to such use within a reasonably short period.

6) Use of collective licences for unlocking broadcasters' archives

The new framework should include a binding obligation for Member States to ensure, via appropriate means (for example, though extended collective licensing), that the broadcasters under their jurisdiction are entitled to use their archives in new online services.

7) Supervision of collecting societies

A EU-wide framework should ensure that collecting societies continue to provide one-stop-shop solutions to users, e.g. via reciprocal agreements and including all necessary rights. It should also ensure that all rights management entities function efficiently, transparently and under appropriate supervision. The guiding principles for such a framework should include (a) supervision beyond mere anti-trust control, (b) minimum obligations of collecting societies and (c) dispute resolution mechanisms.

Overview

Chapter 1 sets the scene by describing the responsibilities placed upon public service broadcasters by national governments and how those responsibilities relate to the achievement of the new Lisbon Agenda. It explains why broadcasters must be able to use new communications technology in order to meet those responsibilities and the range of activities in which they are already engaging to meet the demands and expectations of audiences. Collective licensing is identified as the key to pragmatic solutions with legislative intervention at European level now needed to support its application.

Chapter 2 describes why there is a need for a new vision on EU copyright policy. It identifies the limitations of the current focus in EU policy on reinforcement of rights and shows how this is at odds with the new EU agenda for access to content online. This explains the need for a broader approach which will remove existing barriers to the free circulation of content online, while preserving the fundamental objectives of copyright protection.

Chapter 3 sets out proposals for a new, comprehensive approach to these issues, highlighting first the principal problems that need to be addressed, defining the objectives of a new copyright policy, characterized in the description "strong rights, easy access". It develops a new approach to communication rights and to ensuring easier access to European content, concluding with a uniform and coherent approach to rights clearance for audiovisual media (including "radio-like") service providers.

Chapter 4 presents our specific proposals for reform of copyright law. The proposals take account of the *acquis communautaire* and of the need to respect the obligations accepted by Member States under the Berne Convention and other international instruments. The proposals are proportionate responses to the need for change identified in Chapters 1 and 2 and represent a logical development of models which have already proved their worth in facilitating the development of transfrontier broadcasting and cable retransmission of services and in other fields in which collective licensing offers practicable solutions to otherwise intractable rights-clearance problems. The Chapter also includes a discussion of the necessary supervision of the collective management of copyrights and neighbouring rights.

Chapter 1
Public Service Media in the Information Society

1. The public service remit and the creative economy

Why is it so important for public service broadcasters to be able to exploit the opportunities created by the development of the new technological platforms? The answer lies in the responsibilities which governments of EU Member States have placed upon them. The EU itself states that these may consist of a "broadcaster being entrusted with the task of providing balanced and varied programming while fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity."[1] In its recent Broadcasting Communication, the EU confirmed that "public service broadcasting needs to benefit from technological progress, bring the public the benefits of the new audiovisual and information services and the new technologies and to undertake the development and diversification of activities in the digital age". Moreover, the EU emphasizes that "public service broadcasters should be able to use the opportunities offered by digitisation and the diversification of distribution platforms on a technology neutral basis, to the benefit of society".[2]

It is simply not possible for public broadcasters to meet objectives of this kind if their services are not available on the platforms which the public increasingly uses as their principal means of accessing audio and audiovisual content.

In addition to the democratic, social and cultural reasons for broadcasters' presence on the new distribution platforms, there is a compelling *economic* reason: in the Information Society, broadcasters have the potential to make a substantial contribution to the realization of the objectives of the renewed Lisbon Agenda for European growth and employment.[3] European broadcasters play a leading role in the European creative economy, helping to ensure, in particular, the competitiveness of the European audiovisual production industry on the world market. In addition to the economic contribution which the broadcasters make, the social and cultural benefits which flow from the international dissemination of European audiovisual works and the availability of an enormous range and volume of such works for European consumption are manifold. When last measured officially, European television content creation was worth approximately €15.8 billion in 2002, and 60% of this was spent by publicly-funded broadcasters.[4]

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1 Commission Communication on the application of State aid rules to public service broadcasting (*Official Journal* C320 of 15.11.2001).

2 Communication from the Commission on the application of state aid rules to public service broadcasting, (*Official Journal* C257 of 27.10.2009), No. 12 and No. 81.

3 See http://ec.europa.eu/growthandjobs/index_en.htm. Commission Communication on Creative Content Online in the Single Market, COM (2007) 836 Final, paragraph 1.1. "The availability and take-up of broadband and the increasing possibility to access creative content and services everywhere and anytime, provide challenging new opportunities… With the emergence of new devices, networks and services, these challenges have to be addressed by content and network operators, right holders, consumers, governments and independent regulators. *Successful responses will be key to growth, jobs and innovation in Europe*." (emphasis added)

4 Impact study of measures (Community and national) concerning the promotion of distribution and production of TV programmes provided for under Article 25(a) of the Television without Frontiers Directive. Final Report, May 2005.

New technology also offers broadcasters the opportunity to provide viewers and listeners with access to programmes from their archives which the public has paid for under various funding models and which continue to have value both for the general public and for specialist audiences. Such archives constitute a unique and invaluably vivid record of countries' democratic, social and cultural life, a record which new communications technology makes it possible to revive through niche services and on-demand services. The EBU estimates that European broadcasters hold approximately 28 million hours of radio and television programmes in their archives. Broadcasters want to make these available.[5]

For this to be achieved, broadcasters need to be able to use new information and communications technology as it comes on stream. When they have been able to do so in the past, the beneficial results have been manifest. Public service broadcasters have a tradition of spearheading the introduction of new communications technology in the pre-competitive phase of the market cycle, where activities are not commercially self-sustaining.[6] Even now, with numerous commercially successful online content service providers in the market, few of them make any significant contribution to the creation of new audiovisual content of quality. The Audiovisual Media Services Directive[7] recognizes this shortcoming and seeks to address it (in Article 3i), requiring Member States to ensure, where practicable and by appropriate means, that on-demand service providers under their jurisdiction promote the production of and access to European works.[8] It will take time for the beneficial effects of this provision to flow through in the form of increased volume of European creative content. For the present, and well into the future, the business models for many of the online services will depend on the availability of broadcasters' content.

Public service broadcasters have an obligation to provide their programmes and services to all sections of the population, i.e. to all citizens, wherever they may be and whatever platform or device they may use for reception. This is part of the public service broadcasting remit. Public service broadcasters' involvement in new media content services is also needed for the fulfilment of fundamental European policy objectives in the digital environment, such as social cohesion, cultural diversity and public information services.

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5 For example, in a speech in June 2008 at the Banff World Television Festival, Jana Bennett, the Director of BBC Vision, announced that the BBC's objective was to make available online its entire radio and television archive, stretching back over 80 years.

6 For example, BBC Online, launched in 1997, became for a time one of the leading websites in Europe and undoubtedly played a part in driving forward the take-up of online services generally.

7 Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, *Official Journal* L332, page 27.

8 For instance, by way of financial contributions made by such services to the production and rights acquisition of European works or by way of the production and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

2. The new consumer demand

We have entered an era when it will not be acceptable to the audience that a programme broadcast on a linear scheduled service is not available on demand. In rights clearance terms, this will mean that both broadcasting and limited on-demand rights will always have to be obtained as a package, effectively erasing the difference between the two. Audiences will also expect that after an initial broadcast and a limited and free on-demand window, programmes for which they have already paid will be available on a long-term basis on-demand or for permanent download. The experience of the music industry in recent years shows that unless right holders act to meet this demand, the vacuum will be filled by copyright-infringing activity.

In contrast to the technology used hitherto by broadcasters to deliver their content, which was for the most part specific to broadcasting, the making available of broadcasters' content through the Internet means that the broadcasters are using the same technological platform as providers of very different kinds of audio and audiovisual services. Unless there is full convergence of distribution platforms, broadcasters face a serious threat of marginalization if they do not provide their services on platforms through which an increasing proportion of the population chooses to receive audio and audiovisual content. It is therefore imperative for their services to be on the new platforms as well as the old if their services are to continue to play the important social, cultural and democratic role which they currently do.

Typical examples of broadcasters' services utilizing the capabilities of the new platforms are:

- radio and television catch-up services; VoD streaming services (i.e. delivery of video on-demand without enabling the public to download the content);
- podcasts and vodcasts; i.e., audio and audiovisual programmes made available online for downloading onto portable devices;
- archives of audio and audiovisual material parts of which are available to be modified and adapted for personal and for not-for-profit educational purposes;
- radio services and versions of television programmes and websites adapted for reception on mobile telephones;
- additional audio, audiovisual and other material relating to broadcast programmes, before or after their broadcast, using the unlimited capacity of the Internet to supplement and enhance the viewers' and listeners' experience (such as providing further documentation on news or topical issues).

The take-up of such services is in correlation with changes in consumer behaviour as demonstrated by the increasing amount of time which people are spending online. The year 2007 was the first when over half of the EU population used the Internet regularly[9].

In order to meet this new consumer demand and to satisfy the audience's expectations, broadcasters should be able to offer their programmes on all the various platforms which are available. The offer from Europe's broadcasters seeks to achieve the "Martini Media" ideal of allowing the public accessing content anytime, anyplace, anywhere[10]. The expectation of the European public that this ideal will be realized is mounting, because the public is becoming increasingly aware of the potential of the new media platforms through the proliferation on them of other parties' content and of the broadcasters' own content provided without their consent. The most egregious example of this has been the enormous volume of broadcasters' content uploaded on YouTube without the broadcasters' or other right holders' consent. A demand is being created for broadcasters' material which they need to fill. In the case of the public service broadcasters, they have to do so because the public which has paid for the creation of the programmes has developed a legitimate expectation that those programmes will be available to them now that the technological barriers which made the provision of such access wholly uneconomic are being progressively lifted.

New platforms and receiving devices require, in addition to traditional (linear) programme services, new types of content services which make optimal use of the characteristics of such devices (examples being time-shifted use, mobility and interactivity). With more and more citizens expecting such alternative content services, public broadcasters must also offer their content in the form of these new services. However, these services require additional rights clearances, and these challenges are addressed by the White Paper.

3. Why is there a need for copyright reform?

What the White Paper addresses is the role which *copyright law reform* must play in enabling broadcasters to continue to fulfil their tasks and meet the new consumer demands. As the Commission has stated, "New policies may prove necessary to facilitate the accessibility, reuse and creation of high quality online content."[11] Those new policies must include copyright law reform to remove impediments which inhibit:

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9 Commission Staff Working Document SEC (2008) 470 accompanying i2010 Mid-Term Review, page 33. In 2007, television and radio services experienced the largest growth in all forms of online use, at 31%, compared to games, films and music at 24%. Rates of growth of online television and radio use in certain already well-developed markets were startling: over 80% in Sweden and the Netherlands, with 55% growth in the United Kingdom and 40% in France. SEC (2008) 470, page 20.

10 In a speech by Ashley Highfield, the BBC Director of New Media and Technology, at the *Financial Times* New Media and Broadcasting Conference March 2004, he coined the term "Martini Media" for this ideal.

11 Commission Staff Working Paper i2020 - "A European Information Society for growth and employment". 01.06.2005 - section headed "Objectives of the proposal" SEC (2005) 717/2.

- the ability of broadcasters to make European audio and audiovisual works created or commissioned by them available across all platforms;

- the ability of broadcasters to make their programmes available across all platforms and possibly across borders;

- the fullest possible exploitation by broadcasters of their audio and audiovisual content, because broadcasters must justify substantial investment in high-quality products.

These impediments to the achievement of the democratic, social, cultural and economic objectives outlined above have their roots in a different technological era. In that era, it was practicable for broadcasters to obtain licences from individual right holders in most types of copyright works for the limited range of exploitation then possible. Where rights did need to be managed collectively - such as for the broadcasting of music and sound recordings - or were managed individually, a clearance for certain specific platforms and a single country was generally all that was required. The legacy of this rights clearance system is twofold:

- First, Europe's public service broadcasters hold vast numbers of programmes in their archives which cannot be made available to the public on the new platforms because it is not feasible for the broadcasters to obtain the necessary licences from all the individual copyright owners whose works were used in them. The administrative effort required would be unsustainable, the problem of orphan works (which is only part of the broadcasters' difficulty) is as yet unresolved, and the ability of one *refusenik* among what may be dozens of willing right holders to block the use of a programme has proved in practice to be more than a merely theoretical problem;

- Second, in addition to the problems identified above in respect of individual right holders, the existing collective licensing mechanisms are under pressure from certain right holders to develop into alternative licensing schemes. For example, as regards music licensing to broadcasters the current developments have been adverse to re-clearance of programming for cross-border use.

The obstacles are, though, not only historical ones affecting archive programmes made under contracts of limited scope. European broadcasters making programmes today have to contend with right holders reluctant to grant them rights which will allow them to use their programmes on all the new media platforms. Sometimes the reluctance is motivated by concerns that broadcasters' use of right holders' works will compete with right holders' own primary exploitation. Sometimes it stems from concerns about creating opportunities for piracy. Sometimes it is simply the product of uncertainty about the wisdom of granting rights for technology whose capacities are not yet closely defined. Such concerns are not illegitimate, but they conspire to prevent broadcasters from being able to use all their programme output to the full extent that technology makes possible.

As discussed in more detail in the following Chapters, the solution to many of the above-mentioned concerns lies in collective licensing, voluntarily entered into wherever possible, but *created or underpinned by legislation when necessary.*

Where such an underpinning is absent, it has to be recognized that collective licensing arrangements have not always worked satisfactorily to facilitate the development of new forms of content delivery. The collective licensing of online rights in musical works for cross-border services is a case in point. The European Commission's Recommendation of October 2005 has not produced the one-stop-shop regime which operators of such services need. Broadcasters seeking to make their services available on-demand across borders (i.e. in addition to the usual overspill retransmission arrangements for linear broadcasts facilitated by the Satellite and Cable Directive)[12] face similar difficulties. The rights clearance problems become so formidable that it is simply not practicable for broadcasters to attempt to provide certain kinds of services. The prospects for a satisfactory outcome to music rights clearance problems from the users' point of view are becoming bleaker, with some music publishers withdrawing their catalogues from the collecting society network. For broadcasters, in respect of their linear services and their new on-demand offerings, it is essential that the collecting societies remain able to license the global music repertoire.

Pragmatic contractual solutions in the form of collective licensing agreements are going to be needed increasingly if the potential of new technology is to be realized because of the high number of uses and rights involved in the digital world. Such agreements will often be created on a voluntary basis. However, a new legal framework will still be required to underpin those solutions to the benefit of all legal services.

4. The necessity of regulatory intervention on the European level

As will already be clear, it is our view that intervention by the Commission is now required. As the Commission has said in the Reflection Document of October 2009: "A wide and competitive Digital Content Market consisting of legal services, attractive offers and fair conditions would raise consumer confidence in online businesses and foster access to culture and knowledge across the EU".[13] In order to create a level playing-field for legal online and other cross-border services operated from any EU Member State, it would not suffice (and could even create undesired discrepancies between Member States) if legislative action were to be undertaken only on the national level; a modernized and consistent regulatory framework needs to be established on a Europe-wide scale. Another reason for Europe-wide intervention is that the guidelines for a new regulatory environment for collecting societies can be developed Europe-wide only. Such a framework does not exclude the possibility that certain details having to be filled in by national legislators, with a view to adapting the new European principles to national law and practices.

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[12] Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *Official Journal* L248, 6.10.1993.

[13] Reflection Document "Creative Content in a European Digital Single Market: Challenges for the Future" published jointly by DG Info and DG Markt, 22 October 2009, page 14.

Nevertheless, to be effective and pragmatic, the copyright reform should *focus on the audiovisual sector*, as this is the most complex area under copyright law which is in most urgent need of legal certainty. It might be questionable whether such reform should be pursued under the heading of a "European copyright title" based on Article 118 Treaty on the Functioning of the European Union.[14] On the other hand, in our view there is no need for, and no practical advantage to be expected from, a full harmonization of EU copyright law as applied to EU trademark or design law.

What we are asking the Commission to do is intervene to open the doors to the full range and diversity of content which broadcasters wish to offer. This would accord with Article 167 of Treaty on the Functioning of the European Union, which requires that "The Union shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures". A decision by the Commission to intervene in the manner proposed in this White Paper would be fully justified in terms of the cultural value it would deliver. It would go a long way towards meeting the three inter-related objectives identified in the Commission Staff Working Document which accompanied the Commissions' Communication on Creative Content Online:

- "ensuring that European content achieves its full potential in contributing to European competitiveness and in fostering the availability and circulation of the great diversity of European content creation and cultural heritage

- updating/clarifying possible legal provisions that unnecessarily hinder online distribution of creative content in the EU, while acknowledging the importance of copyright for creation

- fostering users' active role in content selection, distribution and creation."[15]

The same document notes the view of those stakeholders who oppose intervention that "digital content markets are evolving and unpredictable, with new content, formats, distribution platforms and business models emerging and disrupting the status quo on an almost daily basis", and that "it is as yet unclear which approaches will be successful and which new entities might yet emerge as key market players".[16] Certainly it is in no-one's interest that the key market players should be those who flout copyright and engage in piratical activity. Our response is that broadcasters should, for the reasons already given, be enabled to enrich the emerging markets with their content, so that the models which succeed can include those offering European citizens the wealth of content which broadcasters have created.

A level playing-field for online cross-border audiovisual (and radio-like) media services operated from any EU Member State requires legislative action, in the form of a modernized regulatory framework, to be undertaken on the European level.

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[14] Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal* C115, 9.05.2008.

[15] Ibid. SEC (2007) 1710, page 22.

[16] Ibid. SEC (2007) 1710, page 12.

Chapter 2

Current EU copyright policy and the need for a new vision

1. Free circulation of creative content as a Fifth Freedom

As mentioned by the Commission in its Content Online Communication, the transfer of creative content services to the online environment "is an example of major systemic change". This means that the circulation of works should now be given priority in order to ensure that the Information Society can function properly while at the same time addressing the issue of piracy. That also signifies that a more comprehensive approach to this issue is necessary, which implies covering all obstacles to the achievement of this objective. This new approach must be *based on a general principle of EU law* which requires removing unjustified barriers to the circulation of legal content.

In its Communication "A Single Market for 21st century Europe", the Commission highlighted the need to promote the *free movement of knowledge and innovation* as the "Fifth Freedom" in the Single Market.[17]

The idea of implementing the free movement of knowledge and innovation as a "Fifth Freedom" in the Single Market is indeed a stimulating one. Although it is not expressly stated in the EC Treaty, the Treaty in its current form already enshrines this idea, which derives from the combination of several provisions, principles and policies of the Treaty, and in particular:

- the objective, defined in the Preamble of the Treaty, to promote the development of the highest possible level of knowledge for their peoples through a wide access to education and through its continuous updating;

- the freedom of circulation of goods (Articles 34 to 36 of the Treaty on the Functioning of the European Union; formerly Articles 28 to 30 of the EC Treaty), insofar as content distributed online is copied in material form and in some permanent way at the point of reception;

- the freedom of provision of services (Articles 56 to 62 of the Treaty on the Functioning of the European Union; formerly Articles 49 to 55 of the EC Treaty), and

- the education and culture policies of the Union (in particular, Article 167 of the Treaty on the Functioning of the European Union; formerly Article 151 of the EC Treaty).

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[17] "*Further efforts are needed to promote free movement of knowledge and innovation as a 'fifth freedom' in the Single Market* (emphasis added). The Single Market can be a platform to stimulate innovation in Europe. It encourages the spread of new technologies across the EU. It lends itself to networks - virtual and real - and fosters the development of a sophisticated logistics sector allowing for integrated management of the flows of goods, energy, information, services and people. It facilitates exchange of knowledge through the mobility of workers, researchers and students." COM (2007) 724 final.

The fifth freedom includes the free circulation of and access to creative content. The forthcoming European copyright policy should take account of this principle.

2. Access to rights and circulation of works as a rationale for copyright protection

Without questioning the fundamental aspects of copyright and the protection of existing rights, i.e. both exclusive and remuneration rights, it should be stressed that favouring a broad dissemination of arts and knowledge is one of the major rationales of the protection given to authors, publishers, producers and holders of related rights.

This point is particularly strong in copyright systems, where, historically, copyright policy is focused on public interest, and mainly on two public interest purposes: giving authors an *incentive to create* and *encouraging the dissemination of new knowledge*.[18]

These public interest purposes are less prominent in authors' rights systems which are explicitly based on natural law theory and centred on the protection of the individual author. They are present, however, in these systems, and explain major features of the protection scheme (mainly in relation to economic rights). It should also be noted that, to some extent, this dissemination objective is not only a public but also an author's interest as any user may become a future author and creativity is also hindered by excessively narrow IP rights.

The same observation can be made at the international level. The Universal Declaration of Human Rights guarantees the human right to enjoy the arts and to share in scientific advancement and its benefits (Article 27(1)) and recognizes the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 27(2)). This public interest purpose is also clearly stated at the international level by the WIPO Copyright and Performance and Phonograms Treaties of 1996.[19] The European Union has integrated the objective of dissemination of culture into the definition of copyright policy.

Consequently, the objective of free circulation of creative content online, which must be understood as an expression of the general objective of dissemination of knowledge and culture, needs to be taken into consideration in the definition of copyright policy.

It is now clear that, as regards the dissemination objective, there is a need for further copyright reform at the European level, which should address the central issue of copyright management and clearance.

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[18] In the United Kingdom the Statute of Anne (1710) stated that its purpose was to "encourage learning". The Constitution of the United States endorses a similar justification for copyright protection.

[19] The WIPO Copyright Treaty recognizes "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention". The WIPO Performances and Phonograms Treaty contains a similar provision ("recognising the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information").

To date, unfortunately, the majority of the problems associated with copyright management (mostly collective management) have been dealt with under competition law, with limited success. Based on such experience, it could reasonably be concluded that competition law does not constitute the appropriate tool for ensuring the desired circulation of content online, and especially when it runs counter to the desired effectiveness of established collective schemes, extended collective agreements, etc., which are necessary for development of the distribution of online content.[20]

To place greater emphasis on access, while keeping a high level of copyright protection, is perfectly compatible with the existing international instruments, provided that the actual technical solutions adopted do not conflict with minimum protection rules at the international level. Indeed, these leave quite broad possibilities for adjustments and reforms at the European level, including via the "three-step-test" for exceptions and limitations.[21]

At EU level a balance should be achieved between freedom of circulation of content and the protection of exclusive rights. The issue of rights management should be integrated in a broader policy of freedom of circulation, and addressed primarily into the context of copyright policy. This EU-approach of a broader policy would be perfectly in line with the requirements of international agreements.

3. Shortcomings of the current copyright policy

3.1 Stronger rights, but limited access

Over the last 20 years the process of European harmonization 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: seven Directives in the field of copyright, a general Directive on the enforcement of intellectual property rights, and other legislative instruments.[22]

To achieve harmonization and the free circulation objectives set by the EU, emphasis was placed from the outset on the implementation of a high level of protection.[23] This is shown in the Preamble of all relevant

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[20] In addition, the application of competition law is a source of great uncertainty as to what does or does not constitute a valid agreement in this domain.

[21] See the recent "Declaration" of the Max Planck Institute on the three-step-test in copyright law, available at http://www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm.

[22] Such as the Conditional Access Services Directive.

[23] In its Communication of 17 January 1991 "Follow-up to the Green Paper - Working programme of the Commission in the field of copyright and neighbouring rights" the Commission stresses the need to harmonize copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation. It also stresses that their protection ensures the maintenance and development of creativity in the interests of authors, cultural industries, consumers and society as a whole.

harmonization instruments.[24] In this process the incentive rationale behind copyright protection has been endorsed as the main justification for the reinforcement of rights.[25] This rationale is in line with the industrial and cultural objectives of the European Union.

However, as pointed out in the IVIR Study "The Recasting of Copyright and Related Rights for the Knowledge Economy",[26] not only was the question of access to protected works not really addressed, but it could be argued that the reinforcement of copyright may well have created new obstacles to the circulation of works on electronic networks.

While we fully support that high level of protection, in this process a notable weakness in the *acquis communautaire* became clear regarding the *circulation of, and access to*, works and other protected matter. ***What is missing is a complementary rights clearance regime*** in order to realize fully the free circulation objectives.

Despite the reference made in several Preambles to the public interest of dissemination of culture, which is part of the rationale of copyright protection in most copyright and authors' right systems, the legislation made no adequate provision for facilitating the circulation or exploitation of works. This is especially true in the online environment, where the exhaustion principle does not apply.[27]

For example, in relation to music, which has the highest degree of collective management and international reciprocal arrangements, the lack of a coherent approach concerns mainly on-demand rights associated with the performing rights licensed in radio and television programmes which are necessary for the on-demand distribution of these programmes online. Except in a few countries where broadcasters have been able to make separate arrangements, such on-demand use is currently impeded by a general reluctance by certain phonogram producers to mandate their collecting societies with on-demand rights that are suitable for broadcasters' daily needs. Moreover, certain developments - such as some music publishers' threats of withdrawal from CISAC member societies and the granting of Europe-wide online rights on an exclusive basis by some major music publishers to a single collecting society or to a new licensing body such as CELAS - run the risk of leading to a fragmentation of rights and/or repertoire.

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[24] Up to and including the Proposal for a Directive amending Directive 2006/116/EC on the term of protection of copyright and certain related rights of 16 August 2008, COM (2008) 464 final, Recital 4.

[25] It should be noted, however, that, in some respects, certain aspects of this upwards harmonization are also justified by the fact that it is always easier to reinforce rights than to deprive certain right owners of a level of protection acquired on their territory; this is especially true for the harmonization of the term of protection.

[26] Final report, November 2006, www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf, hereafter referred to as the "IVIR Study", page 22: "One might even go a step further and argue that the process of harmonization, 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."

[27] See Recital 29 of the 2001 Copyright Directive, *op.cit.*

For audiovisual works, the situation is more complex, as there does not exist a similar degree of collective management and international cooperation among the collecting societies (mainly because of the particular characteristics for the list of co-authors and the absence of, or differences in, initial entitlement and rights to remuneration of authors). Practices are reasonably well established regarding performing rights in each country (in most authors' rights countries through a combination of individual broadcast agreements with the producer and blanket licensing for the authors' remuneration). However, there are difficulties in relation to on-demand rights, as they are not always held by authors' societies (or are exercised in competition with individual management). This makes the clearance of rights very difficult, and particularly in the online environment. The same is true, although the impact is smaller, for artistic works.

The current impediments to free circulation are the consequences of a piecemeal approach to copyright legislation over the past 20 years. For example, the issue of exploitation and access on electronic networks was addressed only in relation to specific domains and issues, such as cable retransmission, the liability of intermediaries on electronic communications networks, certain copyright exemptions, and the use and licensing of music. As is shown by the table in Annexe 1, this had only limited impact.

This means that the focus should now turn to improving access. Better access to the rights which need to be cleared for the use of works will:

- match the requirements of users and consumers;
- foster the production and circulation of content to the advantage of all participants in the content industry;
- give authors and industry much broader means for making their content available to consumers, and, consequently,
- gradually raise their income.

Support for this view can be drawn from the functioning of the communications and network economies.[28]

To date, EU copyright policy has focussed on strong rights, whereas easy access has not been taken into account sufficiently. The sole binding instrument on rights clearance under European copyright law is the Satellite and Cable Directive. In order to realize the objectives of free circulation of, and access to, works and other protected matter, a rights clearance regime needs to be established taking account of new technology.

[28] The laws of network economies have become common knowledge; for a good overview see *Shapiro/Varian*, Information Rules, 1999, page 13 and *passim*.

3.2 The new EU agenda for access to content online

The situation clearly became anomalous, as the circulation of works on electronic communications networks developed, triggering new interest in the question of circulation and access at EU level as from 2005.

A significant move occurred within the framework of the i2010 strategy, presented by the European Commission in June 2005 as the new initiative for EU policy for the Information Society and media for the years up to 2010. Several initiatives relevant to intellectual property in general, and copyright in particular, have been taken in this context. With a view to supporting and encouraging the development of creative content online services in Europe, the Commission launched a public consultation on "Content Online in the Single Market" in July 2006, complemented by an independent study on "Interactive Content and Convergence". This process resulted in the Communication from the Commission on Creative Content Online in the Single Market of 3 January 2008.[29]

In the Communication, the Commission announced its intention of launching further action to support the development of cross-border delivery of online creative content services, and, in particular, the preparation of a Recommendation on Creative Content Online, and the creation of a specific discussion and cooperation platform, the "Content Online Platform".[30]

More recently, the Commission published a "Green Paper on Copyright in the Knowledge Economy", whose purpose was "to foster a debate on how knowledge for research, science and education can best be disseminated in the online environment",[31] by setting out a number of issues connected with the role of copyright in the knowledge economy.

However, despite the sheer number of initiatives, reports and consultations on this matter, it may be feared that some major problems affecting the online circulation of creative content could be overlooked when it comes to legislative action. The relative narrowing of focus and the selection of issues made in the latest pre-legislative documents suggest this likelihood.

For example, the Content Online Communication addresses the issues of definition of rights, collective administration, applicable law and enforcement, but ignores, among questions deemed to have "a limited impact on circulation of works on a large scale", important issues such as exceptions for the making-available of digitized works and orphan works.[32]

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[29] Communication on Creative Content Online in the Single Market, COM (2007) 836 final. Hereafter the Content Online Communication.

[30] Other initiatives include the Internal Market review and review of the consumer acquis, the (still outstanding) review of the Satellite and Cable Directive (93/83/EEC), the report on the application of the 2001 Copyright Directive (2001/29/EC), the implementation report on the Recommendation on online management of music rights (2005/737/EC) and the second implementation report on the Conditional Access Directive (98/84/EC).

[31] COM (2008) 466 final, page 3.

[32] The latter is covered by a previous Recommendation "encouraging the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan

Similarly, the Green Paper on Copyright in the Knowledge Economy is limited in scope, as it mainly addresses certain exceptions to copyright deemed most relevant for the dissemination of knowledge (and thereby contradicts the Content Online Communication on the scope of such exceptions).[33] Several important issues affecting the circulation of works online, such as the scope of exclusive rights (and the relationship between the rights of communication to the public, the making-available right, and the broadcasting right), copyright management and right clearance issues, private international law issues, or enforcement issues lie outside the scope of the Communication. Yet, from a practical perspective, these matters are vital if content is to circulate freely.

A further cause for concern is that such an *issue-specific* approach, not based on a general EU principle similar to the principle of the freedom of circulation of material goods in the offline environment, may lead to timid or limited reforms. A perfect example is provided by the formulation of certain questions raised in the Green Paper on Copyright in the Knowledge Economy. Questions in that document[34] seem to indicate a view that soft law (mainly of a non-binding nature) is the best that users and the industry can expect from the European legislator in these domains.

Finally, it is doubtful whether the primary recourse to instruments such as recommendations (as used, for example, regarding orphan works), or more generally soft law, is an adequate answer to the challenge of online dissemination of works, given the number of issues to be addressed and the structural obstacles to be removed. To quote the Commission, "abstaining from any legislative action does not seem to be an option anymore".[35] Given the structural and protection issues involved, "to rely on soft law, such as codes of conduct agreed upon by the market place, appears to be no appropriate option".[36] What is needed is a broader, more comprehensive approach.

Although it is clear that the European Union has now shifted its main concern in relation to copyright to the question of circulation and access in the online environment,[37] this process has only just started; the main policy and objectives for that new approach have yet to be developed.

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works". Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural content and digital preservation, 2006/585/EC, *Official Journal* L 236, page 28.

33 I.e. the exception for the benefit of libraries and archives, the exception allowing dissemination of works for teaching and research purposes, the exception for the benefit of people with a disability, and a possible exception for user-created content.

34 Such as "Should there be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions?" and "Should there be encouragement, guidelines or model licences for contractual arrangements between right holders and users on other aspects not covered by copyright exceptions?"

35 Communication of 16 April 2004 on the management of copyright and related rights in the internal market. COM (2004) 261 final, page 19.

36 *Ibid*.

37 The EC Commission's "Reflection Document" of October 2009 seems to confirm this shift of attention towards access and circulation.

Chapter 3

Towards a more balanced approach: "Strong rights, easy access"

1. Objectives for a new audiovisual copyright policy

Our fundamental approach is based on recognition of the principle articulated in Recital 22 of the 2001 Copyright Directive,[38] i.e. to *facilitate the broader circulation of, or access to, content online, while preserving a high level of protection for intellectual property rights*. This duality derives from two fundamental policies of the European Union: freedom of dissemination of culture (and its expression in the online environment) and protection of intellectual property. As shown in the previous Chapter, this intended equilibrium has not yet been achieved.

In the current copyright context, *ensuring a high level of protection for right holders* essentially means giving them the means to fight piracy, by clarifying the rules on the law applicable to infringement, and by making sure that those rules allow the sanctioning, under EU standards, of infringers established abroad, when their services are targeted at EU-based users.[39] It also means that right holders should receive *adequate remuneration* for the use of their works or other protected matter. From that approach, it follows that the existing rights as such should remain unaffected, and any reform should focus on the mechanisms for ***rights clearance***.

Most recent initiatives of the European legislator on the circulation of content online concern musical works. Although there may be technical justification for separating, at some stage, musical works from other subject-matter, owing to differences in protection and contractual and management practices, the implementation of a piecemeal approach to legislation in this domain would lead to difficulties, and would fail to deal with major obstacles to the circulation of works. The main reason is that the exploitation of copyright works is now closely interconnected. Legislation facilitating the circulation of musical works alone would do little to facilitate the widespread circulation of content online, if other subject-matter, sometimes inextricably combined with musical works (such as audiovisual works), were left outside its scope. It is thus necessary to address all major copyright and market issues in relation to all protected works and services.

On the other hand, a complete overhaul of EU copyright as such is not necessary; a limited reform ***addressing the audiovisual media sector could be sufficient***. Moreover, in line with the aim of maintaining "strong rights", the reform should aim to provide solutions which would ***not require a modification of the 2001 Copyright Directive***.

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[38] Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the Information Society, *Official Journal* L167, 22.06.2001.

[39] This would, of course, also include providing broadcasters with effective legal means to combat piracy of their signals in and outside Europe. However, the necessary update of the international neighbouring right of broadcasters is not part of this Paper.

Nevertheless, implementing the "Fifth Freedom" on the online environment requires identification of all obstacles to the free circulation of, or access to, content, so that adequate and compatible solutions can be devised. It also requires the objectives of the new copyright policy to be clearly described. From the foregoing, it is possible to identify the ***objectives and principles which need to guide the EU in defining and implementing a new copyright policy***.

(i) Removing existing barriers to the circulation of content online

In conformity with the fundamental principle of free circulation of content online, Member States should be allowed to safeguard a number of restrictions to such circulation only in cases justified by the protection of the fundamental object of copyright or related rights, and subject to respect for a principle of proportionality (i.e. causality, proportionality and the absence of less restrictive measures).

However, introducing a principle of exhaustion of rights to be applied to the online environment would go too far. In any event, it is unclear whether the provisions of the Treaty would justify such an extension.[40]

Legislative action is required, aimed at simplifying the rights clearance process, adopting a modernized concept of communication to the public. This concept should be the guiding principle for adopting simplified rights clearance mechanisms for online use (avoiding the need for separate rights clearance in each EU Member State).

(ii) Avoiding creating new restrictions on access to content online

This should be a major objective of the new policy, subject to the need to protect IP rights. It should generally not be possible for IP rights, including those which are not harmonized at EU level, to be exercised with a view to opposing audiovisual media services originating from other Member States. To maintain contractual freedom, however, holders of exclusive rights should remain free to license their rights only upon agreed conditions.

(iii) Technical and platform neutrality

The implementation of an approach which is neutral in technical terms and as regards platforms should be set as a general objective. In copyright terms this means adopting rights clearance systems in a technologically-neutral and platform-neutral way.

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[40] See, however, the remarks made in the IVIR Study: "Interestingly, ECJ's decision in Coditel I to have a contractual provision for a territorially divided right of communication to the public prevail over the freedom of services enshrined in the Treaty, was justified, *inter alia*, by the fact that television broadcasting in the EU was largely organized on the basis of legal broadcasting monopolies. See *Coditel I*, paragraph 15 *et seq*. Clearly, no such justification can be found for a territorial division of 'online' rights." Page 25, footnote 101.

(iv) Harmonizing and improving collective management of rights

Conflicts between collective and individual licensing should be avoided, through the extension of collective schemes, i.e. in terms of both legislative embodiment of "extended collective licensing" schemes and preferential use of collective licensing generally. In case of co-existence between collective and individual licensing of the same protected matter, some protection measures against individual claims should be guaranteed to the licensees under any collective scheme.

At the same time, the issue of collective licensing should be primarily addressed in the context of copyright policy, and not through the sole prism of competition law.

(v) Ensuring practical solutions for music rights clearance

It should be possible for rights to be cleared and paid for in the most appropriate, cost-effective and efficient way, and in particular for music as integrated parts of programmes delivered through audiovisual media services. The existing system of reciprocal agreements among music collecting societies should be preserved in order to safeguard multi-repertoire licences and should be extended to distribution of audiovisual media services on all platforms, whenever this is justified in economic and cultural terms, subject to the application of competition law and rules ensuring efficiency, fairness and transparency of collective management entities.

2. A new policy for all communication of audiovisual media

2.1 From broadcasting to audiovisual media

Traditionally, copyright has been designed for the distribution of goods in the form of physical media for protected content, such as books, CDs and DVDs. It has focussed on narrowly-defined, territorially-limited rights. In the future, however, new services will operate in an environment characterized more by immaterial communication than by the physical distribution of content.

With digitization, audiovisual media programmes are made available to the public via media platforms which enable various modes of access to the content transmitted via the networks. Convergence is erasing the borders between simultaneous broadcasting, simultaneous retransmission and communication of time-shifted and on-demand television programmes. Moreover, reception is no longer static but is becoming mobile. European legislation on copyright should, with reference to the definition of audiovisual media services contained in the Audiovisual Media Services Directive, apply the principle of technological neutrality. In the current context of convergence of networks, a more efficient approach to copyright is required.

We consider that the rights to broadcast and make available audiovisual media should be viewed in the broader framework of communication to the public of audiovisual media on a technologically-neutral basis.

Content transmitted by means of traditional broadcasting will, in the future, be accessible on multiple platforms. At the same time, the activities of broadcasting organizations traditionally characterized by the simultaneous and continuous nature of programme transmission will evolve towards permitting new ways of consuming programmes: time-shifted and at the public's individual request.

It must, however, be mentioned that the activities of transmitting time-shifted or on-demand audiovisual programmes are similar to broadcasting in the sense that they fall within the common concept of audiovisual media transmitted for the benefit of the general public. ***The communication of audiovisual media to the public, whether it be simultaneous or on request, should benefit from a consistent scheme for liberating and managing rights. This would mean adopting, with respect to copyright, a technologically-neutral approach to the activities related to audiovisual media and distinguishing them from e-Commerce related to the mere individual sale of online content.***

The Commission's Content Online Communication of 3 January 2008 envisages, in practical terms, various online content services, including online audiovisual media services (film, television, music and radio) and also other content services (online games, online publishing, educational content and user-generated content).[41]

Recently, the Audiovisual Media Services Directive defined precisely the providers of media services and linear and non-linear audiovisual media services, regardless of the type of electronic communications used. Recital 16 explains that the definition of an audiovisual media service should cover only "audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public".

Nevertheless, to date, the interpretation of the broadcasting right under copyright does not include all activities which may be developed under the concept of audiovisual media.[42] The broadcasting right in terms of *copyright* remains traditionally limited to linear, wireless media (terrestrial and satellite broadcasting) and to conventional cable distribution.

Furthermore, as the table of rights in Annexe 2 shows, the theoretical division of the various copyrights enables reference to be made, for the same use within the framework of an audiovisual media service, to several types of rights, such as the right to copy, broadcast and make available, which makes the situation uncertain and complex in terms of acquiring and managing rights for audiovisual media activities transmitted to the general public via the networks.

To ensure more consistent management of rights in the context of audiovisual media services, copyright legislation should deal with rights clearance with a view to the communication of audiovisual media to the public, on a technologically-neutral basis.

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41 COM (2007) 836 final, page 2.

42 The scope of the Audiovisual Media Services Directive is limited to purely audiovisual media services (either a television broadcast or an on-demand audiovisual media service (Article 1(a)) whereby programmes are provided for viewing. The scope of this White Paper is broader: it also covers audio-only media services (radio).

This approach should:

- ***cover the communication to the public of linear (simultaneously accessible) and non-linear (on-demand) audiovisual media services, irrespective of the type of electronic communications used;***

- ***cover the transmission of linear and non-linear audiovisual media services to all types of fixed and mobile receiver;***

- ***separate the activities linked to audiovisual media services from activities traditionally considered as being typical of e-Commerce such as the distribution of books and audio and audiovisual media retail sales online.***

2.2 The distinction between activities linked to media services and e-Commerce activities

2.2.1 Information society services and "retail-like" services

The fundamental difference between audiovisual media services and information society services lies in the fact that the purpose of linear and non-linear audiovisual media is to *communicate*, which makes them different from purely commercial transactions of goods and services. This autonomous function of communicating information, education and entertainment programmes, which characterizes audiovisual media, has a profound impact on the democratic and cultural development of European societies. European media law honours this distinction by adopting legislation specific to audiovisual media services, complementary to the legislation applicable to information society services. Copyright in Europe should develop in the same way in order to facilitate the distribution of audiovisual media in Europe in compliance with the fundamentals of copyright.

The e-Commerce Directive of 8 June 2000 defines information society services as being "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."[43] Recital 18 and Annexe V of the e-Commerce Directive set out in detail the activities considered characteristic of the information society.[44] The following are worthy of mention:

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[43] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services and, in particular, electronic commerce, in the Internal Market (Directive on electronic commerce). *Official Journal* L178, 17.7.2000.

[44] Annexe V refers to an "indicative list of services not covered by (the Directive) and names under No. 3 "services not supplied 'at the individual request of recipient of services'", such as "(a) television broadcasting services (including near-video on-demand services"), (b) radio broadcasting services; (c) (televised) teletext".

- services transmitted from point to point and without any editorial control by the person originating the transmission. This is true, for example, of on-demand video as an "electronic substitute" for the physical distribution of films;

- services providing advertising communication by e-mail;

- the online sale of goods;

- the services of technical service providers such as network access providers, the storage of information and the hosting of third-party content, provided that the provider exercises no control over the information transmitted, stored or hosted;

- services providing tools for finding, accessing and recovering data.

This list shows that information society services include mere technical telecommunications services and on-demand content services akin to an individual exchange of autonomous content between individuals via network facilities.[45]

The content-related information society services, therefore, consist of supplying autonomous content (i.e. without organizing the content on the basis of editorial choices). This may mean, for example, on-demand video services reproduced identically in a database. This autonomous content may be the subject of acquisitions, rentals or lending of individual works by individuals via online distribution.

This is comparable to the definition of (online) retail services under the European competition rules applicable to vertical agreements. Guidelines on vertical restraints define "retailers" as "distributors reselling goods to final consumers."[46] A "retail-like" service is thus characterized by 1) the resale 2) of material goods from a third party 3) acquired by the distributor. The mere acquisition of films on DVD and the online resale of these DVDs to the consumer is one possible illustration of such a retail transaction process.

2.2.2 Audiovisual media services and broadcast-like services

The Audiovisual Media Services Directive, on the other hand, defines a system specific to linear and non-linear audiovisual media services. Traditional broadcasting services have always been separated from the e-Commerce Directive. Since the introduction of the Audiovisual Media Services Directive, all audiovisual media services, whether linear (simultaneous) or non-linear (on-demand), have been subject to a specific system which is different from that applicable to "electronic commerce". The fundamental trait of audiovisual media services lies in the fact that they are transmitted under the editorial responsibility of a media services provider. The editorial responsibility that characterizes the activity of the media service provider consists of

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[45] One type of activity comes nearer to what audiovisual media services are considered to be: services including those which are not remunerated by those who receive them, such as those offering *online information* or commercial communications.

[46] See paragraph 28 of the Guidelines on Vertical Restraints, *Official Journal* C 291, 13.10.2000, pages 1 to 44.

"…The exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services."

For the sake of clarity, where audiovisual media services fulfil the criteria in the definition of information society services in Article 2 of the e-Commerce Directive, the rules of that Directive will apply in parallel to the rules of the Audiovisual Media Services Directive. In practice, this will be the case only for *non-linear* audiovisual services, as television broadcasting services fall outside the scope of the current definition of information society services. There are, nevertheless, a few specific rules in the Audiovisual Media Services Directive on content-related issues which, as special rules (*lex specialis*), should take precedence over the more general rules of the e-Commerce Directive. In particular, in all the areas where the Audiovisual Media Services Directive establishes harmonized rules for audiovisual media services, it will be the stronger country-of-origin principle of the Audiovisual Media Services Directive that will apply. This means that the country-of-origin principle has been strengthened, compared to the previous situation, so that the transfrontier provision of non-linear audiovisual media services is facilitated. This effect, which is the political intention, has been explicitly stated in Recitals 2, 7 and 10 of the Audiovisual Media Services Directive.

Recital 17 of the Audiovisual Media Services Directive explains 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". Given that copyright law does not distinguish between radio and television broadcasting, a similar notion for audio-only, radio-like services can be imagined.

In current EU law, a distinction can be made between economic activities which consist of communicating audiovisual media services under the editorial responsibility of a provider and those which consist solely of offering individual content for retail sale, rental or lending. The modernization of the copyright framework should take this distinction into account, and especially in relation to the acquisition and management of rights to works and other protected matter integrated into media services.

2.3 Broadcasting in copyright legislation

2.3.1 The broadcasting right in the Berne Convention

The Berne Convention defines the broadcasting right broadly and in an insufficiently precise manner. It uses the terms "broadcasting right" and "right of communication to the public".

The key element is that broadcasting involves the communication of works to the public and not the distribution of individual works. The Convention enables the legislation of signatory countries to determine the conditions for exercising public broadcasting and communication rights, provided that the author's moral rights and right to equitable remuneration are respected.

The Berne Convention allows room for a more precise definition of the right of communication to the public and the broadcasting right.

2.3.2 The right of communication to the public in the WIPO Copyright Treaty

Article 8 of the WIPO Copyright Treaty of 20 December 1996 redefines and, in part, complements the right of communication to the public. It sets out in detail two prerogatives for the author.

The first prerogative grants the author the exclusive right of authorizing communication to the public. This "umbrella" or generic right extends to any remote wireless or non-wireless communication of the work to the public.[47] It includes, in particular, the simultaneous streaming of programmes on the Internet and webcasting.[48] In this respect, Article 8 of the WIPO Treaty may be considered a mere declaration.[49] It should be specified that virtually on-demand video services, for which the time of transmission of the work is decided by the service provider, should be regarded as falling within the (linear) broadcasting right under the terms of the Berne Convention[50] and the right of communication to the public under the terms of Article 8 of the WIPO Treaty.[51]

The second prerogative entrusts the author with the exclusive right of authorizing the "…making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

Additional explanation is needed here. The history of the WIPO Copyright Treaty shows that the making-available right was conceived in relation to the distribution and rental of offline material goods. Accordingly, the making-available right may be interpreted as specifically covering the electronic distribution of individual content which should, in the future, substitute, albeit partially, the physical trade of individual content (books, CDs, DVDs, etc.). [52]

However, the instigation of this right also allowed an indication to be given that successive, and no longer simultaneous, remote broadcasting of content continued to be covered by the right of communication to the public. Consequently, it was agreed that the signatory States would be free to implement the making-available right in their national system, either in the form of a communication right or in the form of a distribution right, provided that the spirit of the Treaty was respected.[53]

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47 Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8 paragraph 11.

48 Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8 paragraph 20, page 109.

49 It is argued that linear broadcasting via streaming technology is already covered by the traditional broadcasting right; Schack, *Rechtsprobleme der Online-Übermittlung*, GRUR 2007, pages 639 and 641.

50 European Court of Justice, 2 June 2005, C89/04 Mediakabel.

51 Schack, *Rechtsprobleme der Online-Übermittlung*, GRUR 2007 pages 639 and 641 (broadcasting right); Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8 paragraph 20, page 110, differentiating in accordance with the level of choice given to the individual user. The more choice is left to the user, the more the model will fall within the making-available right.

52 Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8, paragraph 16.

53 Von Lewinski, *International Copyright Law and Policy*, 2008, at 17.72.

It is accepted that the specific reach of the making-available right is that of the sale and rental of individual copies of works to individuals in electronic format, as a substitute on the Internet (online) for the (offline) physical trade of goods.

Nevertheless, there is a lack of clarity regarding certain increasingly common activities among broadcasting organizations such as "podcasting" and the transmission of media service programmes to stationary or mobile receivers at the recipient's individual demand, insofar as they may not be included entirely in the broadcasting right in the traditional sense and may be regarded as "making available".

In fact, as audiovisual media activities they are similar to broadcasting and not to the electronic trade of individual content, for which protection of the making-available right was initially designed.

De facto, activities related to linear and non-linear audiovisual media services and those related solely to the electronic trade of individual content intended for retail sale or rental involve different economic and cultural scenarios.

The concept of media services in line with the Audiovisual Media Services Directive should thus be taken into consideration in European copyright legislation, and in any event regarding the acquisition and management of the rights necessary for the activities of providers of audiovisual media services via networks.

2.3.3 The broadcasting right in the Satellite and Cable Directive

The Satellite and Cable Directive regulates the acquisition of rights for broadcasting or communication to the public by satellite and retransmission by cable.[54] In the Directive, retransmission by cable is narrowly defined in technological terms. This approach entails uncertainties in respect of the application of the provisions of the Directive on the clearing of rights, for example, in the event of streaming of programmes by satellite using Internet protocol or retransmission by wire with ADSL and VDSL technology.

The Satellite and Cable Directive does not preclude extending the provisions related to the simultaneous retransmission of broadcasts on a technologically-neutral basis. Updating the Directive to include the notions of communication of audiovisual media and simultaneous retransmission of audiovisual media services, irrespective of the network used, would enhance consistency and legal security.

2.3.4 The right of communication to the public in the 2001 Copyright Directive

Article 3(1) of the 2001 Copyright Directive grants authors and holders of related rights the exclusive right to authorize or prohibit any communication to the public of their works and other protected matter by wire

[54] For background information on the 1993 Satellite and Cable Directive, see, for example, Rumphorst, The EC Directive on Satellite and Cable, *Diffusion* (EBU), Autumn 1993, page 30 *et seq.*; Dreier, Europäisches Gemeinschaftsrecht, II. Abschnitt. Richtlinien des Europäischen Parlaments und des Rates, Nr. 3, in Möhring/Schulze/Ulmer/Zweigert, *Quellen des Urheberrechts*, Band 6.

or wireless means, including making available, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

The text of the Directive does not specifically define the right of communication to the public.[55] However, Recital 23 of the Directive indicates that this right should be understood in a broad sense, covering any communication to the public not present at the place where the communication originates. It includes broadcasting and making available.

It is clear that the 2001 Copyright Directive is compatible with a technologically-neutral approach to certain aspects of the law on copyright and related rights in connection with the provision of linear and non-linear audiovisual media services.

An analysis of international and European legislation on copyright shows that it allows the application of a consistent rights-clearance system related to both broadcasting (linear audiovisual media services) and on-demand audiovisual media services (non-linear audiovisual media services).

3. Communication to the public, broadcasting, making available: a consistent approach is necessary

3.1 Communication to the public of (audiovisual) media services as the basic concept

What should be retained from the previous overview of international and EU legislation on copyright?

Firstly, content is offered today via online and other platforms in various ways. Only some of these ways are considered broadcasting within the traditional rights pattern regulated in Article 11bis(1)(i) of the Berne Convention. Many of the methods of transmitting content today and in the future will require the availability of overlapping rights covering broadcasting, retransmission, on-demand and certain reproduction rights.

The definition of the public making-available right in the 2001 Copyright Directive does not take account of the fact that making content available to the public so that everyone may access it from a place and at a time individually chosen by them involves different activities depending on whether an on-demand service or a retail sale service of copies of works in electronic format is involved. Nor does that Directive indicate in an entirely clear fashion to what extent on-demand media services could figure in the making-available right or in a broadcasting right covering both linear or non-linear programme services (enhanced television services).[56]

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[55] European Court of Justice Case 306/05 - SGAE v. Rafael Hoteles, Rec.2006, page I-11519 No. 33; nor is it defined in the WIPO Copyright Treaty, see Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8 paragraph 11.

[56] See Article 1 lit. e and lit. g with Recitals 20, 26 and 30.

Different approaches can also be seen in various national legislations. In certain Member States - in Germany, Belgium and France, for example - the right of communication to the public is a general right covering all forms of communication to the public and differing solely by opposition to the right to distribute works and other protected matter in the form of material objects. Other Member States adopt a more specific approach, specifying different types of uses in separate legal categories.[57]

However, the definitions in the WIPO Copyright Treaty and the 2001 Copyright Directive leave room for a definition of "communication to the public" rights which would correspond to the wording used by the Audiovisual Media Services Directive, thus covering both traditional broadcasting and on-demand services.

In conclusion, the international and European copyright framework makes it possible to regulate some aspects of the copyright clearance regime by reference to the concept of communication to the public and the activity of audiovisual media services (linear and non-linear) as defined in the Audiovisual Media Services Directive. Such a pragmatic approach would solve the difficulty resulting from the overlapping of the broadcasting and the making-available rights involved in many of the methods of communicating audiovisual (which includes audio) media content, today and in the future, to the public.

3.2 The criteria that differentiate audiovisual media services

In our opinion, it would be appropriate to use the notions of media service and audiovisual media provider in the Audiovisual Media Services Directive as a model for developing a coherent set of rights clearance rules under audiovisual copyright law. This approach would enable a limited number of principles to be adopted at the European level in order to guarantee, in all Member States, a consistent system of acquisition and clearance of the rights applicable to the communication of media services to the public in linear or non-linear form.

The Audiovisual Media Services Directive distinguishes linear from non-linear use but provides that both uses are covered by the broad notion of *audiovisual media services* in a regulatory context, which means that these services are public communications and not individual commercial transactions.

A few specific criteria may be mentioned which could be used in copyright law to identify communication to the public of linear and non-linear audiovisual media services:

- linear and non-linear audiovisual media services are accessible as part of a linear and/or non-linear programme offering, and the public may have access to the entire linear and/or non-linear offering free of charge or by subscription. Common rules relating to the clearance of rights applicable to the communication of these services would, therefore, in principle, include pay-TV, to the extent that this activity falls within the scope of the Audiovisual Media Services Directive; on the other

[57] Such is the case in Austria, which has implemented the making-available right without linking it to a general communication right. Paragraph 18a of the Austrian Copyright Act: *Zurverfügungstellungsrecht*.

hand, such rules would not apply to "retail-like" services i.e. to operations through which the public would have access to separate content in exchange for direct or indirect payment for each item of content. In other words, audiovisual media communications (broadcasting and broadcast-like activities) are those which fall within the scope of the Audiovisual Media Services Directive, while "retail-like" activities are those which are ***not*** covered by the Directive;[58]

- linear and non-linear audiovisual media services are provided under the editorial responsibility of a media service provider. The definition of editorial responsibility exercised by a media service provider figuring in the Audiovisual Media Services Directive should be taken up. It follows that the notion of a media service implies a responsibility in the choice and organization of the programme offering in line with European media legislation and that of the Member States. Conversely, activities relating solely to e-Commerce consist merely of the distribution of content as it exists (without either selection or organization involving editorial choices);

- every media service programme, whether linear or non-linear, is generally composed of several works and other protected matter selected, assembled and organized by a media organization. It is not, therefore, akin to the separate transmission of one or more individual works by a third party that are accessible in an unchanged condition. The distinction is obvious, in this case, in comparison to the individual exchange of (copies of) works via networks.

Other indicators are theoretically conceivable. For example, knowledge of whether the non-linear media service programmes may be downloaded any time by the public. However, it seems to us that such technical considerations, which may easily be circumvented, are not decisive. After all, recordings of broadcasts for private and time-shifted use can already be made today.

It would therefore be desirable, in our opinion, for the concept of communication to the public of linear and non-linear media services - on the basis of which a clarification of the rights clearance and management system should be envisaged at European level - to cover only media service activities under the terms of the Audiovisual Media Services Directive. The notion should simply be extended to cover continuous audio media (linear) services and broadcast-like on-demand (non-linear) services.

This means, for example, that non-linear media services of the "catch-up television" type, consisting of time-shifted transmission of programmes also broadcast in linear form, and non-linear services that involve broadcasting programmes complementary to the broadcasting organization's linear offering, should be subject to a rights-clearance system similar to that of linear communication.

The chart below illustrates the distinction between broadcast and broadcast-like activities on the one hand, for which it seems appropriate for us to clarify the questions of rights clearance in Europe, and, on the other hand, retail-like services.

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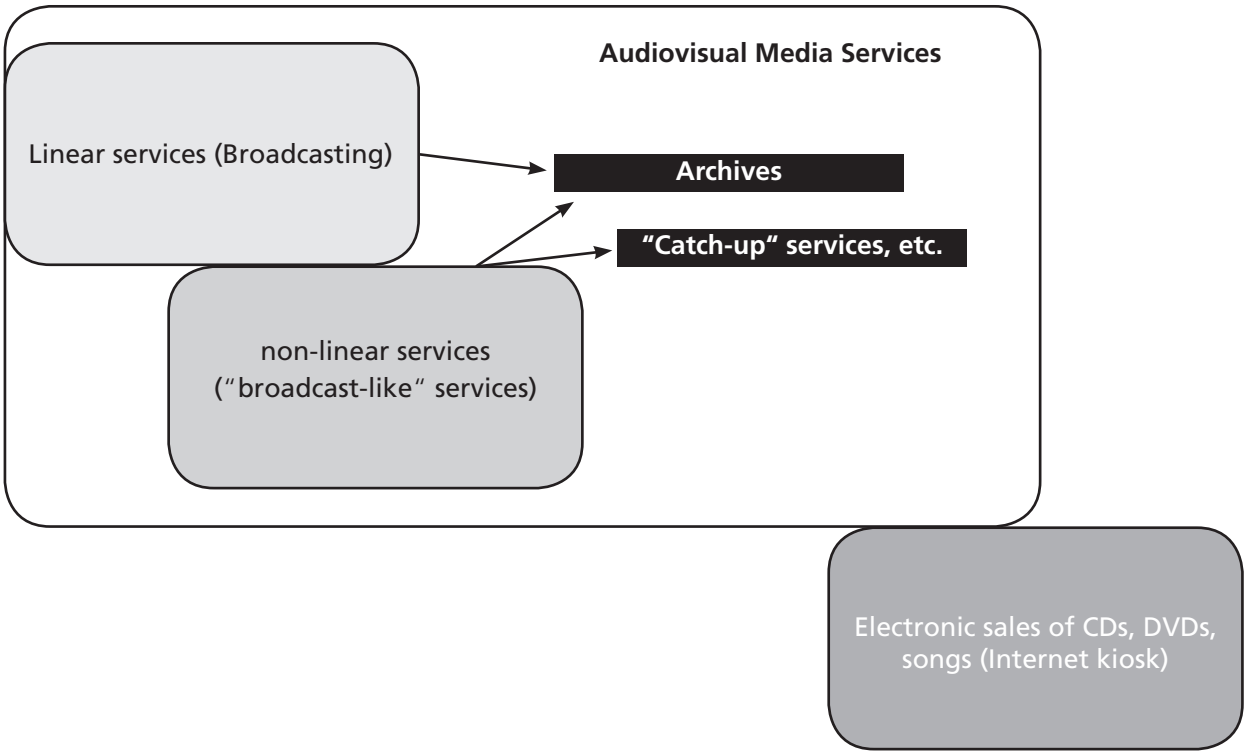
[58] An exception to this strict dividing-line must be made for audio-only, radio-like services, as the Audiovisual Media Services Directive covers only television and television-like services. Many radio programmes are offered online via podcasting and these would clearly be "broadcast-like" services. A typical example of a retail-like audio-only service would be the online sale of individual songs.

Communication to the public



Consequently, the main proposal for developing a new rights clearance policy for the audiovisual world is based on the following:

Introducing the concept of communication to the public of linear and non-linear audiovisual media services, referring to the definitions contained in the Audiovisual Media Services Directive (but including audio-only, radio-like services), would enable the system of rights clearance for content integrated into media programmes to be simplified on a consistent and technologically-neutral basis, and the public's access to European audiovisual media offerings to be improved.

Chapter 4

Proposals for modernizing the European framework for copyright relating to audiovisual media

Introduction

In the previous Chapter we based our policy on a ***sectoral approach***, i.e. those audiovisual media services which fall within the Audiovisual Media Services Directive (but including audio-only, radio-like services with similar characteristics). This means that for media services which are not covered by that Directive, and which are thus not "broadcast-like", the legal proposals below do not apply.[59]

This approach, combined with the policy objectives set out in the first part of Chapter 3, has consequences for the legal framework related to a number of rights clearance rules and practices, including collective licensing arrangements. Although the proposals set out hereunder would all fall within the heading of "rights clearance", some of them are clearly related to the current rules within the Satellite and Cable Directive, i.e.:

- the EU-wide online licensing concept (or the "country-of-origin" principle), and
- the clearance of retransmission rights for any platform.

Added to these points should be the issue of avoiding separate rights for the same activity (or "incidental reproduction").

The other proposals deal with collective licensing in general or with respect to collective licensing of, or for the purpose of, specific subject-matter, i.e.:

- the general need for "extended collective licensing";
- the simplification of music licensing for audiovisual media service providers;
- the use of collective licences for unlocking broadcasters' archives, and
- the supervision of collecting societies.

There may be a variety of options for incorporating such new framework. For example, a new "Audiovisual Media Copyright Directive" could be envisaged to cover all these proposals; it is also possible to have all collective licensing matters grouped together and covered by a separate framework on collective licensing. For the sake of the overview, the proposals are divided below into two groups, i.e. those based on rights clearance principles already established by the Satellite and Cable Directive and those for which a new European framework would need to be created.

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[59] Of course, it may well be that valid arguments could be provided for stating that at least some of the proposals below should be applicable to such services too, but this falls outside the scope of this Paper.

1. A coherent legal framework under the Satellite and Cable Directive

1.1 The legal system applicable to the initial communication of audiovisual media on all networks (so-called "country-of-origin")

1.1.1 The national territoriality principle

Copyright law is based on the national territoriality principle. Consequently, every act of communication to the public and making available online requires a new authorization on the part of the right holder.

This requirement of obtaining a new authorization for every act of communication to the public applies only in the case of *separate* acts of communication. With respect to the *same* online communication of a work or other protected matter from a country within the European Union, the right to authorize this communication within the EU is subject only to the national law of the Member State where this communication originates.

The current system of harmonization by means of Directives does not have an impact on the territorial reach of national legislations. This means that broadcasting rights will remain national rights. A supranational broadcasting right would require a European copyright regulation, but this is not on the cards. Even if it were, EU authorities would not be entitled to prejudge the national property rights system of Member States. Consequently, 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.

On the other hand, it needs to be realized that the mere existence of 27 national copyright regimes in the EU is not, *of itself*, an obstacle to cross-border media services; this would be the case only if audiovisual media services providers were always required to clear the rights in each different Member State for a single act of communication of a media service across border in the EU.

That is why for media communication services the "country-of-origin" principle was established, so as to avoid the cumulative application of different national laws to one single act of communication across borders, and to apply only the law of one national country, i.e. the law of that country *where the copyright relevant act of communication takes place or to which the media service provider is most closely linked*. It is obvious that such a solution to the territoriality principle is far more desirable than the theoretical suggestion of extending the exhaustion principle to all online communications.

Currently, private international law provisions are not harmonized by the WIPO Copyright Treaties. The Berne Convention is sometimes considered to contain rules in this field, but those rules, such as Article 5 of the Convention, cover only the treatment of foreigners.

At the European level, the Rome II Regulation[60] defined a general conflict rule in relation to the violation of intellectual property rights involving several Member States but without reaching clear conclusions. The Rome I Regulation[61] provides for conflict rules in matters of licence contracts. There are gaps in these regulations in relation to the time at which the act of communication to the public occurs and the rights which must be licensed to avoid any infringement.

1.1.2 The issue: Application of the law of the country of origin of the media service

In the field of the media, since the Television without Frontiers Directive of 3 October 1989,[62] the application of several national laws to television broadcasts by a broadcasting organization based in one Member State of the Union has no longer been accepted. In applying the Directive, each Member State is required to ensure compliance with its national law and the rules of the Directive by the broadcasting organizations which come under its jurisdiction as a result of being based in that Member State. Member States may not restrict or prevent a television broadcast originating from a broadcasting organization based in another Member State (unless the protection of minors is seriously compromised in a programme, and provided that the proportionality requirement of the restrictive measure is complied with).

The Audiovisual Media Services Directive, which transformed the Television without Frontiers Directive into a Directive on audiovisual media services, confirmed the application of a single national law to audiovisual media programme services, whether linear or non-linear (on-demand), i.e. the law of the country in which the media service provider is based. The Directive, however, does not deal with copyright. Consequently, there is a clear need for a complementary regulation on the copyright issue. In the absence of such a regulation, uncertainty prevails 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.

The Satellite and Cable Directive provides a workable mechanism for rights clearance with respect to a cross-border broadcast in the event of communication to the public by satellite of broadcasts originating in a EU Member State. It stipulates that the act of communicating by satellite occurs solely in the Member State in which the programme-carrying signals are introduced, under the control and responsibility of the broadcasting organization, in an uninterrupted chain of communication leading to the satellite and returning to Earth. It should be noted that the Directive *only* obliges the national legislations of the Member States

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60 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *Official Journal* L 199, page 40, having taken effect as of 11 January 2009.

61 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, *Official Journal* L 177, page 6, to be applied as of 17 December 2009.

62 Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (Television without Frontiers), *Official Journal* L 298, page 23, as amended by Directive 97/36/EC of the European Parliament and the Council of 30 June 1997, *Official Journal* L 202, page 60.

to accept this definition of an act of communication by satellite, in terms of copyright, for broadcasts made within the European Union. It is not, therefore, a rule of private international law.

This mechanism, in conclusion, stipulates that any licensing of rights in the case of a satellite communication is governed solely by the law of the Member State in which the communication of the same programme-carrying signal originates. It thus authorizes the implementation of a *"one-stop shop"* for rights acquisition, since satellite communication rights may only be cleared in the country of origin. The value of broadcasting rights must naturally take account of all satellite broadcasting parameters, such as the actual audience, the potential audience and the language version, as indicated in Recital 17 of the Directive.

1.1.3 The proposed solution

The solution adopted for EU-wide licensing for satellite broadcasting should be extended to communication to the public of audio and audiovisual media services via all electronic communications networks, including online. Such a technologically-neutral rule would be fully compatible with the 2001 Copyright Directive.

The significance of this proposal is sufficient to justify exploring the possible advantages and disadvantages in more detail:

- Single act of communication to be covered by a single licence

The transmission of *one and the same signal* should only require a single licence even if the broadcast overlaps the borders of one country, as has been the case almost since terrestrial broadcasting commenced. The rule of application of a single national law to *one and the same* act of communication by satellite, i.e. that of the Member State in which this single transmission originates, confirms that a single law applies to a single signal, even if the geographical reach of the broadcast (the satellite "footprint") may easily cover more than 40 countries. This rule is entirely consistent with copyright law, which defines exploitation as the time at which the work is communicated and not that at which it is received.

The same treatment should thus be applied to an act of online communication to the public of audiovisual media services, whether linear or non-linear. As with satellite communication, the holders of rights to works and other protected matter would maintain the right to authorize or prohibit communication of the online media service and to determine the conditions thereof.

- No "race to the bottom"

It is worth noting that the Commission, in the context of the 2001 Copyright Directive, had tried to generalize 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 localizing 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. This argument would, however, be plausible only if application of the rule of the country of origin were to be introduced as a worldwide conflict of laws rule and incorporated into private international law. However, the proposal would not create a rule of private international law but would simply define the concept at the European level of an act of communication to the public of audiovisual media services originating in a Member State.

As is the case with the Satellite and Cable Directive, the rule simply defines, in the context of the economic rights of the author and the holders of related rights, an act of communication by satellite originating from inside the European Union. In this context, the risk of a possible "race to the bottom" is not valid because of the harmonization of copyright and related rights introduced by the 2001 Copyright Directive in Europe.[63] For the Commission, the country-of-origin rule of the service should be applied within the Union once national legislations on copyright have been harmonized in terms of the level of right holders' protection,[64] which is now the case for audiovisual media services.

- No need for "multi-territorial" licensing for audiovisual media services

One of the numerous advantages 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 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. 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 only.

- Maintaining contractual freedom

Some argue that the application of the "signal injection country" rule has not prevented licences from being granted with limited territorial reach. In its review of the Satellite and Cable Directive,[65] the Commission also 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 is 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.

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63 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 transmissions, this has not proved to be a realistic threat.

64 "If the Internal Market is to become reality the supplier of a service must not be left in doubt as to the law which applies to cross-border business. In determining what law is to apply there are two fundamental factors which must be taken into account: the protection of right holders must remain intact, and it must be possible to supply the service with maximum economic efficiency. This would suggest that the applicable law ought to be the law of the Member State from which the service originates. But if that were to be made the rule, the laws of the Member States would first have to be aligned very closely in order to avoid deflections of trade and loss of protection of right holders. The country-of-origin rule, which would take account of the different relays which might intervene in the transmission chain, could then be introduced once harmonisation had been achieved." See the Green Paper on Copyright and Related Rights in the Information Society, page 41. See also Recital 14 of the Satellite and Cable Directive.

65 COM 2002, 430 final, page 7.

The rule applicable to satellite broadcasting should be extended on a technologically-neutral basis to all communications to the public of online audiovisual media services, i.e. including making programmes available to the public as part of a non-linear audiovisual media service under the terms of the Audiovisual Media Services Directive (broadcast-like services).

1.2. Platform-neutral clearance of retransmission rights

1.2.1 The issue: Retransmission of broadcasts on any platform requires rights clearance

To promote the availability of European broadcasting services in all European Union countries, the Satellite and Cable Directive introduced a simplified system for acquiring rights country-by-country for the simultaneous, unchanged and complete retransmission by cable of programmes originating in Member States. The Directive aims to promote the broadcasting of foreign programmes in other countries and for this purpose gives greater legal security to cable retransmission companies with regard to the acquisition of rights.

The Directive's Recitals leave no room for doubt: retransmission by cable of programmes from other Member States is an act with implications in terms of copyright and related rights.[66] Put simply, by ensuring that the exclusive right of authors to license or prohibit retransmission of a broadcast by cable may be exercised only by a collecting society, the Directive acknowledges the need for a collective rights management system that takes account of the characteristics of the activity in question and *guarantees* that cable distributors may exercise it *lawfully* in respect of copyright.

Individually clearing rights in the case of cable retransmission, which includes the broadcasting of innumerable quantities of works and other protected matter, would, of course, be impossible. Introducing a mandatory collective system for the right to authorize cable retransmission of works and other protected matter therefore met the pressing demand of cable operators to benefit from a practicable rights-clearance system.[67]

The Satellite and Cable Directive excludes the mandatory collective management of the rights held by broadcasting organizations to their own programmes as 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, they can *only* reasonably clear *collectively*, via representative collecting societies.

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[66] See Recital 27: "Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted;"

[67] See Recital 10: "Whereas at present cable operators in particular cannot be sure that they have actually acquired all the programme rights [covered by such an agreement;]"

1.2.2 The proposed solution

The multiple new digital platforms currently available open up the choice of several means of simultaneous retransmission of programmes (terrestrially or by direct satellite) beyond borders to all citizens of the European Union, including those who do not have access to traditional cable services. Today, 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 (such as DTT), which operate according to exactly the same business model, are also active on this market.[68]

It can therefore be argued that 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.

Article 1(3) of the Satellite and Cable Directive already assimilated retransmission by ultra-short (wireless) waves to cross-border cable retransmission for the public reception of an initial broadcast from another Member State, which proves that the initial intention was indeed broadly to apply the simplified system for acquiring retransmission rights.

From a consumer point of view, new retransmission techniques serve to grant consumers access to different content services and may be used concurrently. This requires the economic operators who retransmit third-party broadcasts to subscribers to their content distribution service 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 would, therefore, justify extending the simplified system for obtaining cable retransmission rights contained in Articles 9 and 10 of the Satellite and Cable Directive 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 advertisement on the platform) for access to the respective programme service.

It is therefore legitimate to require that for the simultaneous, unchanged and unabridged retransmission of broadcasts originating in Member States over any platform, the same collective rights-acquisition method as applied to cable retransmission should be extended to the simultaneous, complete and unmodified retransmission of broadcasts by any economic operator which employs such distribution, on its own behalf, under the terms of Article 11bis (1), para. (2) of the Berne Convention, irrespective of the platform and the transmission method used.

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[68] Of course, in the near future there will also be radio or television channels specifically designed for distribution via the World Wide Web (e.g. "Web-TV"), but if this is done by the broadcasters direct it would not involve any retransmission activity by another organization.

For the sake of clarity, this would mean that the retransmission rights held by the broadcaster itself remain to be acquired from the relevant broadcaster, while the retransmission rights in the programmes which are not held by the broadcaster are to be cleared with the relevant collecting societies.

1.3 Common sense interpretation of the reproduction right for audiovisual media communications

1.3.1 The issue: Avoiding separate rights applying to the same communication

In international and EU law, the reproduction right applies to any form of reproduction including the making of audio and visual recordings.[69] The WIPO Copyright Treaty did not modify the definition of reproduction rights as detailed in the Berne Convention.

Article 2 of the 2001 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, 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 contained in Article 5(1) of the Directive indicates that a certain 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.[70]

It is certain that a broad definition of the reproduction right is an *essential* legal tool against *piracy*, irrespective of the form of unlawful usage. To this extent, a very broad definition of the exclusive reproduction right, as contained in Article 2 of the 2001 Copyright Directive, is certainly justified.

However, the situation is entirely different when a person is *authorized* by a contract (or by law)[71] to exercise rights of communication to the public for a specific use, as is the case when an audiovisual media provider has acquired the authorizations from right holders to communicate works and other protected matter to the public in a linear or non-linear media service.

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69 Article 9(1) and Article 9(3) of the Berne Convention.

70 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.

71 Recital 33 of the 2001 Copyright Directive defines a lawful use as follows: "A use should be considered lawful where it is authorized by the right holder or not restricted by law."

Under these conditions, it is obvious that the right of communication to the public granted to the audio and audiovisual media service provider should encompass reproductions to be made that are incidental and necessary to the legitimate and efficient use of the broadcasting licence granted.[72]

The difficulty lies in the fact that Article 5(1) of the 2001 Copyright Directive apparently exempts from the exclusive reproduction right only those reproductions made as part of a passive communication process and not reproductions which are incidental and necessary for an active act of communication to the public, i.e. reproductions made by service content providers insofar as strictly necessary to acts of communication of works and other protected matter licensed to them by the right holders.

It would be necessary, therefore, to exempt such reproductions or to define them as a limitation to the reproduction right, or to consider them included in the right of communication to the public granted to media service providers.

1.3.2 The proposed solution

The Berne Convention (Article 11bis (3), second sentence) and the WIPO Copyright Treaty allow limitations to the reproduction right as long as the conditions of the three-step-test in Article 10 of the WIPO Copyright Treaty are met. This does seem to be the case in respect of incidental reproductions necessary for a legitimate act of communication to the public by a media services provider.

As regards broadcasting organizations, Article 5(2)(d) of the 2001 Copyright Directive allows exceptions from the reproduction right for so-called "ephemeral recordings" of works and other protected matter made by broadcasting organizations by their own means and for their own ends. This limitation to the reproduction right may not be considered sufficient insofar as it covers only ephemeral copies of the programme made for its temporary conservation (at the time of production of the programme or after broadcasting for the purpose of a time-shifted broadcast) and not incidental reproductions necessary as part of the communication process by the online media service provider.

However, two separate economic rights cannot be associated with the same activity; nor should the risk of double compensation for the same activity be created. Certain national legislators have already provided for specific provisions to deal with technical incidental reproductions in respect of the right of communication to the public, including Denmark and Switzerland (see Annexe 3).

The solution should be a normative interpretation of the existing definitions of reproduction and public communication rights without reference to a technical process, as several authors of legal publications have suggested.[73]

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[72] A recent decision confirming that principle was taken by the District Court of Munich on 25 June 2009 in the MyVideo case. The Court held that, since the act of making available online could not be conducted technically without a reproduction, German copyright law did not allow a division of the two rights for online uses.

[73] See the IVIR Study, page 55; Hugenholtz/Koelman, *Copyright Aspects of Caching. Digital Intellectual Property Practice Economic Report*, Institute for Information Law, Amsterdam 30 September 1999; Legal Advisory Board, Reply to the Green Paper on Copyright in the Information Society, 20 November 1996, at 3.1, cited in Study on the Implementation and Effect in Member States' laws of Directive 2001/29/EC on the Harmonisation of Certain

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.

2. A new legal framework on collective licensing

2.1 The necessity of efficient rights licensing systems

2.1.1 The issue: Establish "one-stop-shop" rights clearance systems where needed

Applying the national law of a single Member State to any communication to the public of audiovisual media services originating within the European Union, whether linear or non-linear services, constitutes an initial clarification of the system of rights applicable to media activities. However, exploitation of the service depends, in practical terms, on the actual rights-clearance modes, which may vary in efficiency from case to case.

Granting individual licences on the basis of individual agreements between each holder of a copyright or related right on the one hand, and each user of the right concerned on the other, corresponds in principle to the logic of the copyright system, which is based on the exclusive right to authorize or prohibit the usage in question. It is also the approach most compliant with a market-driven economy which favours the free setting of prices for the intended use.

The requirement to obtain licences individually from each holder may, on the other hand, impair or prevent exploitation, and particularly if a right holder cannot be identified or if the process of individual identification and clearance of all the rights proves too complex, too long and too costly for certain users compared to the anticipated benefits of use, for example owing to the excessively high number of rights involved in a production. In such situations, collective rights-clearance solutions of the "one-stop-shop" type are necessary to ensure the distribution of the works to the public in compliance with copyright.

In international treaties and EU legislation, questions on rights licensing mainly relate to contractual freedom.[74] The free assignment of economic rights is implicitly stated in Articles 6bis and 14bis (2) (b) of the Berne Convention.

Aspects of Copyright and Related Rights in the Information Society. Final Report, Institute for Information Law Amsterdam, February 2007, page 23.

[74] The Communication on European Contract Law, 11 July 2001, COM (2001) 398 final, Annexe 1, page 38, states that licensing contracts and contractual relations concerning copyright and related rights have not been subject to overall harmonization within the EU.

At EU level, there are hardly any rules on copyright contracts and licences, whether for the granting of rights or the payment of equitable remuneration to authors in exchange for the transfer of rights. The 2001 Copyright Directive and the Recommendation of 24 August 2006 on the digitization and online accessibility of cultural material and digital conservation[75] tend to favour voluntary contractual solutions,[76] by way of individual or collective licences.[77]

On the other hand, *the need for collective licences to obtain copyright and related rights to works and other matter incorporated into radio and television programmes is clearly acknowledged*, and notably in Article 11bis (2) of the Berne Convention and Article 12 of the Rome Convention. European law provides for the mandatory collective management of cable retransmission rights to broadcasts in order to prevent right holders from individually blocking this broadcasting mode.

It is interesting to note that these provisions relate to works on which several authors and artists collaborate, such as films and audiovisual works,[78] or situations in which certain users should benefit from a practicable rights-clearance system based on the type of use.[79] In these hypotheses, contractual freedom is preserved as a principle, but the granting of licences is organized in such a way as to allow the efficient circulation of the contents and services in question. Ensuring, in this case, access to works and other protected matter on the basis of efficient rights-clearance mechanisms is thus acknowledged as a value of international and EU law.

2.1.2 The importance of collective licensing and statutory support

We do not consider it possible to establish an efficient one-stop-shop for rights clearance *entirely* on the basis of individual licences for activities linked to communication to the public of online audio and audiovisual media services. Instead, such a one-stop-shop requires the centralization of the management and licensing of the rights underpinned by regulation. Consequently, the collective licensing systems in force in the legislations of the Member States for copyright and related rights with respect to broadcasting should be extended so that they apply more broadly to communication of audiovisual media services, including the making available of programmes in non-linear media services.

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75 Commission Recommendation 2006/585/EC of 24 August 2006, *Official Journal* L 236, page 28.

76 See Point 6b of the Recommendation: "The Commission (…) hereby recommends that Member States: (…) 6. improve conditions for digitisation of, and online accessibility to, cultural material by (…) (b) establishing or promoting mechanisms, on a voluntary basis, to facilitate the use of works that are out of print or out of distribution, following consultation of interested parties, (…)." See also Recital 10 .

77 See Recitals 26 and 40 of the 2001 Copyright Directive: "(26) With regard to making available on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned. (…) (40) … specific contracts or licences should be promoted which, without creating imbalances, favour such establishments [*namely non-profit organizations such as libraries and archives*], and the disseminative purposes they serve."

78 See Article 2(5) of the Rental and Lending Directive which allows Member States to establish a legal presumption for the rental and lending right of authors in favour of the film producer.

79 This is the case with regard to the Satellite and Cable Directive, namely Article 3(2) (extension of collective agreement with regard to satellite broadcasting) and Article 9(1) (mandatory collective licensing of cable retransmission rights).

For example, it is currently very difficult to obtain licences in on-demand media services for musical recordings integrated into programmes, whereas collective management is traditionally well organized in the musical field, and numerous international reciprocity agreements apply between rights management companies in this field. Often the use of commercial records integrated into programme services accessible on demand is restricted by collecting societies representing the rights of producers of recordings to a degree that excessively limits the legitimate interests of the media service providers.[80]

In the audiovisual field, the use of authors' and artists' rights in online media services is even more complex as the level of collective management and international cooperation between the collecting companies representing the audiovisual sector is not comparable to the situation prevailing in the musical field.

All these factors substantially complicate the distribution of on-demand audiovisual media services in the online environment.

International treaties and EU law do not generally stipulate in which cases collective solutions are permitted, imposed or, on the contrary, prohibited. Article 3(2) of the Satellite and Cable Directive, however, acknowledges the validity of the extended collective agreements system, and Articles 8 and 9 impose the collective management of cable retransmission rights.

Recital 26 of the 2001 Copyright Directive also clearly indicates that collective solutions should be encouraged for the clearance of rights to music incorporated into broadcasting organization on-demand services, in the following terms:

> "With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned."

Although limited to sound recordings which form an integral part of radio or television productions available on-demand and online, this Recital can be interpreted as an example of the principle that collective solutions should be encouraged to promote the communication of audio and audiovisual media services when individual solutions prove ineffective for obtaining rights.

Yet, collective licensing may have to be given *statutory support* to solve rights clearance problems. The following example will serve to demonstrate that:

> In the case of cable retransmissions of broadcasts overspilling from other Member States, it became apparent in the early 1980s that collective rights management needed to be extended to all categories of works, because individual rights-clearance arrangements could not guarantee that public service broadcasters' national channels could be fully cleared for retransmissions in

[80] Admittedly, the international umbrella organization for the record industry, IFPI, announced in November 2008 that it had provided its collecting societies with a uniform "webcasting agreement" so as to allow users a one-stop-shop (see http://www.ifpi.org/content/section_news/20031111.html). However, in practical terms the conditions of the agreement are too restrictive for broadcasters' daily output and would result in an unacceptable administrative burden.

respect of all copyright works included in them. In 1983, in relation to cable retransmissions in Belgium of broadcasts from a number of other Member States, broadcasters and collecting societies successfully put in place a "one-stop-shop" licensing system for cable operators. This voluntary collective licensing structure was rapidly adopted across Europe and was reinforced ten years later by the Satellite and Cable Directive, and in particular by its two key provisions: that no copyright owner (other than a broadcaster) may enforce its rights against a cable operator except through a collecting society, and that a copyright owner who had not transferred the management of the cable retransmission right in his work to a collecting society was to be treated as having mandated the society which manages rights of the same category to manage his right.

The collective licensing arrangements described above had legislative underpinning.

2.1.3 The proposed solution: Adopting extended collective licensing (the Nordic model)

Collective licences are indispensable when a use requires, to be lawful, the clearance of a large number of categories of works and other protected matter represented by separate right holders.

In a *voluntary* system of collective licences, every right holder may, in principle, decide to opt for the collective licensing method or to manage its rights individually in totality or in part. Consequently, the mandate granted by the right holders to the collecting societies may be limited, in the case of media services, for example, to certain communication platforms and certain transmission modes.

The Nordic system of extended collective agreements is helpful insofar as the *lawfulness* of use is ensured for *all* the right holders within the category of rights managed by a *representative* collective organization, provided that the organization has signed an agreement with a licensee for a given use. Generally speaking, the Nordic system is based on the following fundamental points:

- the presence of a representative collecting organization. To be representative, a collecting organization must represent a critical mass of right holders based on representativeness criteria laid down by law;

- the existence of a freely-negotiated agreement between a representative rights management entity or collecting society and a user (or an association representing a category of users). The agreement must be concluded in relation to a type of use and, where applicable, rights categories defined by law (broadcasting and the retransmission of broadcast programmes are examples of uses for which extended collective agreements may be concluded);

- the extension by law of the effects of the agreement to right holders who are not members of the representative entity which is signatory to the agreement, but whose rights are within the category of rights managed by the entity. All national and foreign right holders, whether or not they are members of the signatory entity, are thus entitled to benefit from the agreement under the same conditions if they fall within the same category of rights;

- the user is authorized, on the basis of the contract and by law, to carry out the agreed exploitation without running the risk of contravening copyright or a related right;

- the system remains broadly voluntary insofar as the law acknowledges the right (for certain types of uses and under certain conditions) of right holders who are *not* members of the collecting society signatory to the agreement to oppose the agreed use (or to express a remuneration demand other than that provided for in the contract). In the event of opposition, the user may not use the works or other matter concerned.

The extended collective agreements system is widely used in Nordic countries, and particularly for the broadcasting and retransmission of programmes and communication to the public of broadcasters' archives.[81] (Further details on national solutions are provided in Annexe 3).

Extended collective licences offer the considerable benefit of legalizing certain types of uses by law for which the collective management of rights categories appears naturally necessary, while preserving the contractual and voluntary character of the system. This is clearly a way of exercising copyright and related rights and not a restriction of the right, as is confirmed by Recital 18 of the 2001 Copyright Directive. Moreover, this system offers sufficient guarantees in terms of the level of right holders' remuneration freely negotiated by a representative collecting society, i.e. a society with a large number of members, and also for right holders who are not members of the signatory collecting society.

Consequently, Member States should be obliged to adopt extended collective licences as an optional model for clearing rights for audio and audiovisual media services, including the making available of programmes in on-demand services. This means that under the national laws of all Member States, the possibility should exist to use extended collective licensing for situations where such a method is deemed necessary or useful.

[81] http://www.kopinor.no/en/copyright/copyright-act. Similar provisions can be found in the laws of other Nordic countries.

2.2 Music licensing for audiovisual media services

2.2.1 The issue: Licensing music rights via collective management

In a *mandatory* collective management system for copyright and related rights, the author's or right holder's exclusive right to authorize remains intact, as such. Consequently, mandatory collective licensing is markedly different from exceptions or limitations. Moreover, international treaties and the 2001 Copyright Directive consider the "exercise of rights" and "limitations to rights" to be different notions. Consequently, they cannot be interpreted as having the same meaning or practical effect.

However, under a mandatory collective licensing scheme right holders may exercise their rights only by way of one or more representative collecting societies. Recourse to this way of managing exclusive rights should therefore be envisaged only if obtaining individual licences proves ineffective owing to the characteristics of use, or impossible in practice, or in the event of failure of market mechanisms when these do not permit clearance of the pecuniary rights of authors and other right holders necessary for certain uses.

It is important to stress that mandatory collective management thus remains a way of exercising the *exclusive* right to authorize. In this system, exploitation is lawful only after a contract has been signed between the collecting society and the user. It is, therefore, the contract which authorizes exploitation and determines the conditions thereof, including the right holders' remuneration conditions.

Mandatory collective management of the exclusive right to authorize must, consequently, be clearly distinguished from the "legal licence" whereby, in law, a given use is lawful without the prior consent of the right holders but provided that the licensee pays them equitable remuneration.

The possibility of recourse to mandatory collective management is recognized in the Berne Convention on copyright in relation to the broadcasting right and the right of communication of broadcast content. Article 11bis (2) and (3) of the Berne Convention explicitly authorizes the contracting States to regulate the conditions under which these rights are exercised. This provision opens up the possibility of imposing obligations on the part of right holders to contract.[82]

This raises the question of *whether* ***rights to on-demand*** *use may be made subject to a mandatory collective licence*. The right to make works available to the public in such a way that everyone may access them from a place and at a time individually chosen by them was defined for the first time in Article 8 of the WIPO Copyright Treaty. That Article itself does not explicitly specify whether the contracting Member States may regulate the exercising of the making-available right. Nevertheless, the Agreed Statement on the Article explicitly refers to Article 11bis(2) of the Berne Convention, which expressly envisages that possibility, thereby showing that the latter remains unchanged.[83] When the provision of Article 11bis Berne Convention was introduced, the on-demand use may not have been explicitly included in the considerations. At the same time, however, time- and place-independent communication services offered via a "pull" technology were

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[82] Article 11bis (2) and 13 (1) of the Berne Convention. Guibault, *Copyright Limitations and Contracts*, The Hague, 2002, 2.1.2.2.3.

[83] The Agreed Statement to Art. 8 WCT reads (in part): "…It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2) (BC)".

not expressly excluded. Moreover, Article 8 of the WIPO Copyright Treaty merely provides for communication rights within the framework of the Berne Convention. Moreover, the WIPO Treaty for the Performers and Phonogram Producers accepts that neighbouring rights are less comprehensive than authors' rights and that this Treaty "shall leave intact and shall in no way affect the protection of copyright" (Article 1 subs. 2 WPPT).

It is clear, in our opinion, that the WIPO Copyright Treaty accepts the Berne Convention's approach and translates it into the system of making-available rights.

In conclusion, recourse to the mandatory collective licence is not incompatible with international copyright legislation in relation to the right to communicate works to the public which are integrated in programme services, including non-linear audio and audiovisual media services.

2.2.2 The proposed solution

A mandatory collective licence system should be envisaged only where rights cannot be managed practicably within the framework of individual rights assignments, given the exploitation characteristics, or when the free functioning of the market leads to massive non-use of rights. To give an example, the rights of producers to cinematographic and audiovisual works may always be managed within the framework of an individual contract between the producer and the media services company communicating the programme to the public. It is also the modality which best guarantees the parties' interests. In such an instance, no condition of collective management could naturally be imposed. In contrast, a cable distribution company which retransmits broadcast programmes simultaneously and without modification may not be able to clear all film producers' rights individually, which is why mandatory collective management is the best solution in this case, on the basis of the exploitation characteristics.

In the context of broadcast programmes, individual management of rights to music and musical recordings is not possible. Obtaining rights to music (and to musical recordings) as an integral part of audio and audiovisual media service programmes is practicable only on the basis of a "one-stop rights clearance shop" covering the worldwide musical repertoire. This observation is equally valid whether programmes are broadcast by a linear or non-linear media service. Access to the worldwide musical repertoire for any broadcasting company, including for its online non-linear media service programmes, is also a major objective for distributing culture and safeguarding cultural diversity in Europe.

In our opinion, given that the licensing of music rights to broadcasters already takes place on the basis of collective licensing (by musical authors and insofar, as the rights of record producers and performers to sound recordings are concerned, in almost all EU countries by legal licences), the collective agreements in place should include the rights to use such works and subject-matter in on-demand media services.

Moreover, given that music is incorporated in most programmes which belong to the broadcasters' archives, such a solution in this field is urgently needed, as otherwise it would run the risk of undermining any solution to be found for these archives on the national level (see point 2.3 below).

It must be emphasized that the suggested approach deals exclusively with the exercise of the making-available right for a particular type of service; the mandatory collective licensing mechanism should apply only, where needed, to non-linear uses of music which are broadcast-like,[84] and not to retail-like services such as online sales of individual songs.

Accordingly, *mandatory* collective management of the right to authorize the use of music and musical recordings as an integral part of programmes delivered via media services originating in Europe should be explicitly provided for 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 individually under conditions of sufficient legal security.

Licensing of music rights to audiovisual media service providers should continue to take place preferentially on a voluntary and collective basis. However, Member States should be obliged to submit non-linear broadcast-like services to mandatory collective regimes if the existing collective agreements cannot be extended to such use within a reasonably short period.

2.3 Collective licensing for broadcasters' archives

2.3.1 The issue: Finding the most appropriate licensing model

Broadcasters' archives house an abundance of treasures which will become accessible to the public only if the difficulties of clearing the relevant rights are overcome. Under the current copyright system, a broadcasting organization wishing to clear the broadcasting rights to works integrated into old programmes must comply with complex copyright and related rights rules. This problem is exacerbated by the fact that the old individual contracts authorized only broadcasting and not, of course, on-demand transmission of programmes incorporating works and other protected matter within the framework of non-linear media services, let alone the permanent downloading of online archives or podcasting and vodcasting for mobile reception.

Consequently, archive programmes cannot readily be made available to the public on modern platforms. The problem is a serious one, with millions of productions lying dormant in broadcasting organizations' audio and audiovisual archives as the administrative work involved in clearing the rights would be excessive. The riches contained in old programmes are thus under-used, and the public is deprived of content without any benefit accruing to the right holders concerned. Even worse, this situation encourages unlawful use, on social network platforms, for example.

[84] A provision for such mandatory collective licensing already exists, e.g. in Switzerland. See Annexe 3.

In most cases the principal interest of the initial right holder as a contributor to the archive production is financial, i.e. to profit from the re-use of his creation. The broadcaster's interest will be to make further use of a production without the risk of his business model collapsing.

The problem has arisen with *orphan works* too, i.e. works whose right holders are completely unknown. As part of the "i2010: Digital Libraries" project, the European Commission issued a Recommendation in which it called on Member States to facilitate the use of orphan works.[85]

The experience of the European radio and television industry and, in particular, that of broadcasters which started to produce radio and television programmes over half a century ago, shows that the re-use of old programmes on new platforms poses even more considerable rights-clearance problems than orphan works. These issues prove almost insurmountable. In most cases it is impossible for radio and television producers not only to identify but also to locate all individual contributors to a programme or their heirs, and then, if they are found, to reach an agreement with them. Such efforts simply cannot be envisaged given the enormous administrative work involved in clearing all the necessary rights; in most cases, the administrative costs (i.e. even without the renegotiated fees) *would be completely out of proportion* to any possible funding.

Ten years ago, the Committee of Ministers of the Council of Europe invited Member States to implement solutions for exploiting archive productions of public service broadcasters.[86] Recent initiatives have seen certain Member States try to find a solution to the problem of archives by proposing to introduce a right of use linked to a payment obligation. However, in this case use cannot be made or pursued if a right holder is opposed to it.[87] Obviously, exercising (in favour of right holders) the capacity to prohibit the use of a programme should be time-limited, as it would not be desirable to prohibit use of an archive programme which has been available for a long time without any dispute.

2.3.2 The proposed solution

Obtaining post-production rights from collecting societies would doubtless be a step in the right direction towards a solution. However, it needs to be realized that many right holders concerned may not have transferred their rights to such societies. Moreover, in reality such societies do not exist everywhere in Europe for each and every category of right holder concerned. This means that the Member States must provide for a *simplified legal mechanism* enabling broadcasters to exploit their own production archives, provided, of course, that the right holders affected by re-use are remunerated.

To this end, it would be necessary to award a *general mandate* to a recognized collecting society or to a recognized rights-negotiation organization, enabling it to authorize communication to the public, including

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85 Article 6(a) of the Recommendation 2006/585/EC *Official Journal* L236, page 28.

86 Declaration on the exploitation of protected radio and television productions held in the archives of broadcasting organizations, adopted on 9 September 1999 at the 678th meeting of the Ministers' Deputies, available at https://wcd.coe.int.

87 This is the case, for example, in Denmark. See Annexe 3.

making-available, of the rights included in the broadcasting organization's past productions. This mandate should apply only to the broadcaster's own or commissioned productions and not to those for which all the rights are held by an external producer.

An alternative solution lies in the application of the "extended collective licences" system to rights included in the archives of broadcasting organizations, a system which seems to work well in Nordic countries.[88]

An extended collective licence for the archives of broadcasting organizations could also be deemed to cover new uses when the existing licence from the right holder concerned already covered all essential exploitation rights which existed at the time of conclusion of the broadcasting contract. This is the case, for example, in Germany (see Annexe 3).

It is not necessary, therefore, for Member States to introduce *absolutely identical* solutions to resolve the difficulties in exploiting broadcasters' archives falling within their jurisdiction. Inevitably, the details of the solutions will vary from country to country.

Nevertheless, to facilitate the availability of broadcasting organizations' archives online and avoid distortions of competition among national situations, ***a European regulatory framework should provide for a binding obligation on Member States to ensure, for example, by means of extended collective licensing, that the broadcasters of every Member State are guaranteed the capacity to exploit their archives in their new online media services.***

2.4 Supervision of collecting societies

2.4.1 The issue: Improving the role of collecting societies

The advantage of collecting societies is that they are organizations which function as intermediaries between the right holder and the user. As fiduciaries with cultural and social obligations they are, in a sense, independent from individual interests. It is only through collecting societies that one-stop-shop licensing arrangements of the kind needed to facilitate the operation of audiovisual media services can be established.

While it is therefore vital to maintain and develop the system of collective licensing, it must be noted that the activities of collecting societies have also been challenged by users and right holders. In some countries, *users* have regretted the lack of transparency in certain collective management schemes, the length of the negotiation process sometimes necessary for obtaining rights, the pricing policy, and the lack of mechanisms for supervision, dispute resolution and access to ordinary courts with respect to licensing policies of collecting societies. Moreover, some *right holders* have criticized the level of administrative fees charged by collecting societies, as well as the lack of transparency in the remuneration schemes. Especially

[88] Articles 30a and 50 of the Danish Copyright Law are an example of this; see Annexe 3.

the large right holders have questioned the need for collecting societies, given the introduction of digital rights management systems.[89]

Mostly, however, there is a consensus between users and right holders that *one-stop-shopping agreements* entered into with single entities are helpful when access to rights is sought. If large packages of content-relevant rights have to be organized, bundled, licensed and administered, the sheer scale of the administrative task can make a project unviable, as explained in Chapter 1. Quick, efficient clearance needs a one-stop-shop, a universal counter, and not a plurality of counters. The one-stop-system is able to control and extend licences, to align the positions of the right holders and right users and to organize the payment streams.

2.4.2 The European regulation of collecting societies

So far, there is no acquis communautaire with regard to the existence and activities of collecting societies, except that the 2001 Copyright Directive and the 2004/48/EC (Enforcement of Rights) Directive[90] call for rules ensuring more transparency and efficiency in their activities. The existing Directives do, however, contain rules on the exercise of economic rights through collecting societies in the field of satellite and cable rights, and in respect of rental rights.

The term "collecting society" is used in Article 1(4) of the Satellite and Cable Directive. It is employed in a way which makes it possible to regard as collecting societies not only fiduciary but also commercial institutions, such as companies which are licence holders.

Neither international nor EU law, however, provides for a particular framework for the institution, activities and supervision of collecting societies.

There have been various attempts to prepare a EU framework for the regulation of collective management of rights and the role of collecting societies.

- In 2004, the European Parliament adopted a *Resolution*[91] concerning a desired EU framework for collective management societies in which it stated that the exercise and management of copyright and neighbouring rights have been discussed at EU level since 1995 and that collective management has been recognized and sanctioned as a valid form of rights management by the EU legislator since 1992. The Parliament recalled that collecting societies could ensure, even better than contract rules and the individual exercise of rights, that the author received adequate compensation for his contribution to the content.[92]

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[89] See COM (2004) 261 final, 3(3).

[90] Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, *Official Journal* L195, 2.06.2004

[91] European Parliament Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights 2002/2274 (INI) of 15 January 2004.

[92] This point has recently been stressed by the German Supreme Court, which pointed out that there are situations when a collectively-managed claim for remuneration safeguards the interests of an author even better than a fully exclusive right which is usually assigned to the benefit of a publisher in a buy-out-arrangement, See Bundesgerichtshof, Decision of 11/7/2002 - I ZR 255/00, 2002.

- Shortly afterwards, the Commission adopted its *2004 Communication on the Management of Copyright and Related Rights*. The Commission pointed out that collective management had become an economic, cultural and social necessity for the administration of certain rights, including in Accession Countries. It stressed that "efficiency, transparency and accountability of collecting societies are crucial for the functioning of the Internal Market as regards the cross-border marketing of goods and provision of services based on copyright and related rights". It called for a common framework with rules concerning the establishment and status of collecting societies, their accountability and functioning which should be subject to good governance, and internal and external control, including dispute settlement mechanisms. The Communication listed existing principles concerning a future EU framework with rules on establishment, relations between users and societies, relations between right holders and societies and the external control of collecting societies, as well as calling for harmonization of these diverging rules.[93]

- The *2005 Music Online Recommendation* took up these points, but only for the narrow field of distribution and making-available rights in online music distribution platforms. The Commission again called for efficiency and transparency in the licensing activities of the collecting societies[94] and made proposals for resolving the problems set out in the 2004 Communication. This Recommendation has been welcomed by major right holders who have wished to establish clearing systems under their own control. Such systems, however, may circumvent the necessary public control as long as no supervisory body is given oversight of their licensing activities. While a system of private collective licensing is feasible, it can lead to quasi-monopolistic private concentrations which require costly control by the competition authorities. Such authorities are, moreover, generally not as well equipped as specialist tribunals to determine reasonable licensing terms.

2.4.3 Competition law and collecting societies

Recently, the scope of collecting societies' strategies with respect to the (purportedly) systematic character of the territorial restrictions in their customer allocation system have been challenged by the Commission's decision in the CISAC case.[95] The system of reciprocal agreements is not questioned by the Commission, either in its recommendations on collective management or in the simulcasting and CISAC decisions. The Commission only criticizes discriminatory behaviour with respect to these mutual agreements, either because certain right holders or users are denied access to certain rights or because certain persons are rejected as members. This is seen as an issue for resolution under competition law and not copyright law.[96]

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93 COM (2004) 261 final, under 3.5.

94 See Recitals 10 to 14 of the Recommendation, *Official Journal* L 276, page 54.

95 Commission Decision of 16 July 2008, COMP/C2/38.698 - CISAC, published on 20 November 2008, No. 42, summarized in *Official Journal* C 323, page 12.

96 Licensing practices of collecting societies have come under competition authority scrutiny; see GVL v. Commission, European Court of Justice, 2 March 1983, Case 7/82, ECR [1983] 483 (Article 82); Commission Decision 2003/300/EC of 8 October 2002, Case No. COMP/C2/38.014 - IFPI Simulcasting (Article 81).

In the CISAC case the Commission accepted that individual management is not feasible where market features make individual management inefficient or impossible or where national law provides for compulsory collective management. The Commission did not question the existence or practice of collecting societies, but criticized certain clauses in the CISAC sample reciprocal contract for use between CISAC members which would make it possible to exclude a right holder from membership of more than one collecting society and which forbade collecting societies to license content to users outside their own national territory, thus safeguarding a territorial exclusivity for each collecting society. The Commission regarded this behaviour as promoting a fragmentation of markets. It expressed the hope that the opportunity for right holders and for users to select a collecting society of their choice, regardless of the Member State of the right holder, user and collecting society, would foster competition with respect to licensing.

However, the decision does not resolve the problem of territorially-restricted rights, which, as such, have not been disputed by the Commission. The fact that collecting societies are de facto monopolies does not, in principle, pose a problem for competition, given that copyright law itself creates a legal monopoly for the right holder. Moreover, competition law and theory accept monopolies when efficiency and consumer benefits are achieved only through concentration of market power.[97] In cases where strong vertical integration of right holders takes place, it may even be vital for the functioning of the licensing market to have strong partners at both ends of the bargaining process.

Moreover, competition law acknowledges that in situations of extraordinary market power *special control* is needed so that the market player does not impose unreasonable restrictions on its members or on interested users. This control may be exercised by anti-trust authorities or by special institutions, such as copyright tribunals which resolve conflicts in ad hoc situations, or through a specialized supervisory body. The third of these options, a supervisory body, has the additional advantage that it can safeguard efficiency and transparency as well as collecting societies' fulfilment of their cultural and social functions.

2.4.4 The proposed solution: A new legal framework

The proposals made in the present Chapter envisage an increase in the amount of rights clearance activity conducted through the medium of collecting societies. Accordingly, it is essential that ***an appropriate Europe-wide regulatory framework should be put in place in Member States to ensure that collecting societies undertaking these extended roles do so efficiently, transparently and under effective supervision as regards their relations with both right holders and users.***
Such a framework should be based on the following guiding principles:

a) Supervision beyond mere anti-trust control

Competition law has so far been the only supervisory instrument at EU level with respect to collecting societies. That instrument may be preferable to the extent that private and profit-oriented companies act as collecting societies. However, the various instruments cited above have noted that collecting societies act as trustees for right holders, whether the latter are the authors or the holders of related rights. This starting-

[97] This is one of the reasons why the Austrian Law has recently even provided for a legal monopoly for collecting societies. See the Austrian Federal Act for Collecting Societies of 13 January 2006, *Bundesgesetzblatt* (Federal Law Gazette) I No. 19 of 13 January 2006.

position calls for supervision which not only measures the competitive effects of the society's activity but should also adjudicate the degree to which the entity fulfils cultural and social tasks.

Consequently, it is preferable to have specialized supervision. That supervision may be introduced permanently as a permanent arbitration council or on an ad hoc basis as a mediator or arbitrator in cases where the parties cannot reach an agreement.[98]

It may also be permanent supervision carried out by a Copyright Office or by a department of other Offices competent to deal with intellectual property matters such as Patent or Trademark Offices.[99] The advantage of a supervisory board is that such a body is not only competent to handle disputes concerning licence schemes or individual terms thereof but is a one-stop addressee for users and right holders in all matters concerning the exercise of activities and administration through collecting societies.

b) Minimum obligations of collecting societies

To guarantee the fiduciary character of these entities, collecting societies have to be legally obliged to grant licences to, and accept rights from, all parties on non-discriminatory grounds, so that they are well prepared to be participants in a one-stop-bargaining system.

If collecting societies are to play that role, certain safeguards on a multi-national (European) level would have to be implemented:

- the duty to contract with every right holder interested in entrusting the society with the rights he holds and the duty to contract with every interested user;

- ensuring that the audiovisual media communication (linear and non-linear) rights needed for technically-neutral and platform-neutral usage are placed in the hands of the collecting society;

- guaranteeing that collecting societies are able to license rights necessary for the use of protected works and services heavily featured in audiovisual media productions and services, including downloads, as long as the work or protected service is an integrated part of the production and the communication of an audiovisual media programme;

- tariffs need to be transparent. Collecting societies should be obliged to provide information about the structure and the level of their tariffs in easily accessible ways, and ideally with online information. The tariff structure should be simple to understand and to apply. Websites make it easy to provide information on works and right holders, as well as on the person for whom the administration is being performed.

For the user it is vital to be able to negotiate the basis and level of remuneration with just one society, which should be empowered to act on behalf of other collecting societies in respect of the repertoires which they control. Mutual agreements between the societies are needed for this system, monitored as necessary by

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98 For example, a permanent Copyright Tribunal has been in existence in the United Kingdom since 1957.

99 See, by way of example, the German system.

the supervisory organization proposed above. The system should guarantee that the user can negotiate with the collecting society, which can be deemed a representative entity within the network of collecting societies and as a clearance organization within this network responsible for the acquisition and licensing of the right sought. To foster this system the preferred society should have the power and the obligation to guarantee to users that they are held harmless from claims by other societies.

c) Dispute-resolution mechanisms

Disputes over licences and licence schemes should be handled quickly and efficiently in the interests of collecting societies, right holders and users. This calls for special arbitration or dispute resolution with a specialized body of decision-makers. Recourse to the ordinary courts for a first instance decision is less desirable. The ordinary courts may be competent for appeals as long as the ordinary courts are equipped with specialized chambers for the issues in question.

A special problem is that collecting societies may be able to sue for infringement even in cases when the user has made an adequate offer for remuneration which has not been accepted. This problem can be solved by giving the user the opportunity to make a deposit for the remuneration offered and then to be equipped with the necessary right to a certain extent.

The specialized tribunals should be competent for all kinds of disputes concerning remuneration. In this way, the tribunal could build up exceptional expertise. However, it should also be competent for other matters where the granting of a licence is declined, to adjudicate whether or not the refusal is reasonable (discriminatory practices and imposition of restrictive conditions in licences). The tribunal should furthermore be competent to adjudicate on the level of administrative fees, the level of any social and cultural contributions which are part of the licence fee and other matters relating to the transparency of the collecting society.

List of Annexes

1. Table of EU initiatives on copyright-related matters

2. Rights matrix

3. Legal provisions referred to in Chapter 4

Annexe 1

Table of EU initiatives on copyright-related matters

Summary of the main provisions and initiatives at EU level specifically aimed at facilitating the circulation of and/or access to works on electronic communications networks (up to 2006)

(1) Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (**Satellite and Cable Directive**).[100]

Scope of relevant provisions:

a. Article 1(2)(b): a satellite broadcast will constitute communication to the public only in the country of origin (injection) of the signal, thus requiring clearance in this country only;
b. Article 9: Mandatory collective licensing of cable retransmission rights.

Effect/impact on the circulation of works in the Single Market:

a. The Directive does not prohibit territorial licensing *per se.* Consequently, as admitted by the Commission, a certain market fragmentation cannot be excluded; [101]
b. Scope limited to cross-border cable retransmission (cable distribution of broadcasts from another Member State).

(2) Directive 2000/31/EC of 8 June 2000 on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market (**e-Commerce Directive**).[102]

Scope of relevant provisions:

Articles 12 to 15: Limitation of liability of (certain) intermediary service providers on electronic communication networks.

Effect/impact on the circulation of works in the Single Market:

Enforcement of copyright infringement made more difficult in relation to online depository services and video-sharing services, claiming application of the regime designed for providers of hosting services.

[100] *Official Journal* L248, 6.10.1993.

[101] Even though territorial licensing has become more difficult under competition law rules (including IPTV). See the Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, 26 July 2002.

[102] *Official Journal* L178, 17.7.2000.

(3) Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the Information Society (**2001 Copyright Directive**).[103]

Scope of relevant provisions:
Article 5 (exemptions):
- mandatory (transient copies);
- non-mandatory: none specifically designed to facilitate the online circulation of works.

Effect/impact on the circulation of works in the Single Market:
Apart from the exemption for transient copies, no exceptions specifically designed to facilitate the online circulation of works.
Closed list hinders introduction of further exceptions at national level.

(4) Commission Communication of 16 April 2004 on the management of copyright and related rights in the internal market.[104]

Scope of relevant provisions:
Confirms the need for complementary action on aspects of collective management, proposes a legislative instrument on certain aspects of collective management and good governance of the collecting societies.

Effect/impact on the circulation of works in the Single Market:
Mainly collective management issues.
No legislative instrument adopted.

(5) Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (**Music Online Recommendation**).[105]

Scope of relevant provisions:
Aims to facilitate the granting of EU-wide licences for certain online use of musical works, by requiring collective rights management societies to allow right holders to withdraw their online rights and grant them to a single management entity.

Effect/impact on the circulation of works in the Single Market:
Scope restricted to musical works, phonograms, performances.
Not compulsory.

(6) European Charter for the Development and the Take-up of Film Online of 23 May 2006 (**Film Online Charter**).[106]

Scope of relevant provisions:
Identifies commendable practices for making film content available online via legitimate services and in a consumer-friendly way.

Effect/impact on the circulation of works in the Single Market:
Has not been implemented.

[103] *Official Journal* L167, 22.06.2001

[104] COM (2004) 261 final.

[105] Official Journal L276, 21.10.2005 and Corrigendum, Official Journal L284, 27.10.2005.

[106] http://ec.europa.eu/avpolicy/docs/other_actions/film_online_en.pdf

Annexe 2

Rights matrix

Traditional broadcasting (analogue and digital)

Means of distribution	Characteristics	Exclusive rights affected
Wireless distribution over the air (terrestrial transmission)	– Transmission to a public not individually addressed or addressable (indefinite number of potential and actual users) – simultaneous reception by members of the public – transmission at a time determined solely by the person responsible for the transmission – no user-interactivity – full editorial and programming control by the broadcaster	Broadcasting Right, Article 11bis (1) (i) of the Berne Convention
Wireless distribution: satellite	as before and: – unitary act by introducing signals by, or under the control of, a broadcasting organization	– Article 11bis(1) (i) of the Berne Convention – Article 2 of the Satellite and Cable Directive
Wired distribution: cable	as before and: – retransmission of an original broadcast	– Article 11bis(1) (i) of the Berne Convention for retransmission: – Article 11bis(1) (ii) of the Berne Convention – Article 8 of the Satellite and Cable Directive

Simulcasting (or: digital broadcasting) **Webcasting** (Mere web-radio, web-television or Internet television without simultaneous traditional broadcasting)

Means of distribution	Characteristics	Exclusive rights affected
IP-based networks, and modems, e.g. ISDN, DSL, ADSL, VDSL, WiFi	– multicast streaming (live-/ real-time-streaming) – addressed to an indefinite (but potentially definable) public – usually no interactivity granted	– disputed whether traditional broadcasting right applies, Article 11bis(1) (i) Berne Convention (comparable to classical point-to-multipoint broadcasting even if using an IP-network) or whether – communication to the public rights (Article 8, 1st part of the WIPO Copyright Treaty and Article 3 (1) 1st part of the 2001 Copyright Directive) for a broadcasting use applies

Internet Protocol television (IPTV) (Enhanced Webcasting)

Means of distribution	Characteristics	Exclusive rights affected
Usually cable networks, often enhanced standards such as ADSL/VDSL – wireless techniques (satellite, DVB-T/DTT/TDT) technically available – mobile platforms technically available (DVB-H)	– single or multiple programme transport streams sourced by one network operator – operator owns or directly controls the "final mile" to the consumer's premises – service comparable to Internet television, but high-quality and provider-guaranteed bit-rates; programme bouquets available – time-deferred uses possible – return channel capability	– for retransmission of originally broadcast programmes retransmission rights required (cable or satellite) – for time-deferred uses (either cable or satellite) making-available rights required – as regards time-deferred uses, temporary reproduction rights required (Article 2a of the 2001 Copyright Directive);[107] but exempted by Article 5 (1) of that Directive

[107] Reproduction rights are needed because the streaming technology will create a temporary data memory unit in the computer of the user in order to allow the provision of a constant and uninterrupted stream of data.

Near-video-on-demand

Means of distribution	Characteristics	Exclusive rights affected
Usually cable networks; IP-based networks and satellite transmission available (e.g. IPTV)	– multicast streaming technology – push-services – addressed to a pre-defined and (when IP-based technology is used) identifiable public – streams may be repeatedly communicated at a very high repetition rate. While it is still push-technology, recipients may think that they are "pulling" the content	Disputed whether comparable to repeated broadcasting and retransmission or to podcasting

On-demand- **podcasting services**, catch-up services

Means of distribution	Characteristics	Exclusive rights affected
IP-based networks (cable/ satellite with high bandwidth - ISDN, DSL, ADSL, VDSL, WiFI networks)	– unicast streaming (usually time-deferred) – availability from a place and at a time chosen by the recipient ("pull services") – streaming services with fast-forward and fast-backward movement possible	– not (clearly) covered by Article 11bis (1) (i) of the Berne convention – making-available rights (Article 8, 2nd part of the WIPO Copyright Treaty and Article 3(1) 2nd part of the 2001 Copyright Directive) – reproduction rights (Article 2a of the 2001 Copyright Directive)[108] – possibly distribution rights (Article 4 of the 2001 Copyright Directive)[109]

[108] Reproduction rights are needed when the recipient is allowed temporarily or permanently to store the content offered by downloading it to the ROM, RAM or hard disk of his computer system. Some or all of the storage may be exempt from copyright protection if the storage is executed for purely private purposes. Article 5 (2) (b) of the 2001 Copyright Directive leaves it to the Member States to allow such private use reproductions.

[109] Distribution rights will be needed if the content is delivered individually (not publicly) to a certain customer in the form of a file with permanently stored content (i.e. by e-mail-attachment). Furthermore, the WIPO Copyright Treaty does not necessarily provide for a signatory State to transform the making-available right by way of making it part of the right of communication to the public. A signatory state may also choose the distribution right; see Senftleben in Dreier/ Hugenholtz, *Concise European Copyright Law*, 2006, WIPO Copyright Treaty, Article 8 paragraph 5.

Mobile services

(Web-to-go, Broadcasting-to go, "Cellphone-TV")

Means of distribution	Characteristics	Exclusive rights affected
IP-based networks, wireless networks	– transmission of programming signals to a cell-phone or to a similar mobile receiver terminal	Depending on the character of the service as linear or non-linear, as a push or pull service, the following rights are required – broadcasting right, Article 11bis (1) (i) of the Berne convention[110] – communication to the public rights, Article 8 1st part of the WIPO Copyright Treaty/Article 3(1) 1st part of the 2001 Copyright Directive – making available rights (Article 8, 2nd part of the WIPO Copyright Treaty and Article 3 (1) 2nd part of the 2001 Copyright Directive) – reproduction rights (Article 2 of the 2001 Copyright Directive)[111] – possibly distribution rights (Article 4 of the 2001 Copyright Directive)

[110] Reinbothe/von Lewinski, *The WIPO Treaties 1996*, Article 8 WIPO Copyright Treaty paragraph 16 *et seq*.

[111] Reproduction rights are needed when the recipient is allowed temporarily or permanently to store the content offered by downloading it to the ROM, RAM or hard disk of his computer system. Some or all of the storage may be exempt from Copyright Protection if the storage is executed for purely private purposes. Article 5 (2) (b) of the 2001 Copyright Directive leaves it to the Member States to allow such private use reproductions.

Time-shift television / Radio services (chase play) - Start-over services

Means of distribution	Characteristics	Exclusive rights affected
IP-based networks	– recording of television or radio programming to a storage medium which allows reception at a time chosen by the viewer (time-shift television); the service may be offered by a provider which is different from the broadcaster or by the broadcaster – (re)starting a programme at a time individually chosen by the consumer; often part of an IPTV service with a return channel (start-over service)	disputed whether additional reproduction rights or making-available rights are needed to offer this service

Annexe 3

Legal provisions referred to in Chapter 4

Extended collective licensing (the Nordic model)

Sections 13b-14, 16a, 17b and 32 of the Norwegian Copyright Act[112] have provisions for various fields of application. Section 32 shows how the system works in the broadcasting sector:

> "The Norwegian Broadcasting Corporation and others who are licensed to operate a broadcasting organization have the right to use issued works in their collections in connection with
> a) new broadcasts, or
> b) transmission in such a way that the individual can choose the time and place of access to the work if the conditions for an extended collective licence pursuant to section 36 first paragraph are fulfilled.
>
> This paragraph applies only to works that were broadcasted prior to 1 January 1997 and that are part of the broadcasting organization's own productions. The paragraph does not apply if the author has prohibited such use of the work or there is otherwise special reason to believe that he is opposed to such use."

Section 36(1) reads:

> "When there is an agreement with an organization referred to in section 38a which allows such use of a work as is specified in sections 13b, 14, 16a, 17b, 30, 32 and 34, a user who is covered by the agreement shall, in respect of right holders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies. The provision shall only apply to use in accordance with the terms of the agreement. The provision shall not apply in relation to the rights that broadcasting organizations hold in their own broadcasts."

Section 38a reads:

> "Agreements intended to have an effect as specified in section 36, first paragraph, shall be entered into by an organization which in the field represents a substantial part of the authors of the works used in Norway, and which is approved by the Ministry. For use in certain specified fields, the King may decide that the organization which is approved shall be a joint organization for the right holders concerned."

[112] http://www.kopinor.no/en/copyright/copyright-act.

Mandatory collective rights management

Mandatory collecting society mechanisms have been implemented in the Satellite and Cable Directive with respect to cable retransmissions, in Article 9:

> "(1) Member States shall ensure that the right of copyright owners and holders or [sic] related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.
>
> (2) Where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the right holder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A right holder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the right holders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.
>
> (3) A Member State may provide that, when a right holder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive."

Article 10 of that Directive reads as follows:

> "Exercise of the cable retransmission right by broadcasting organizations
> Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights."

"Country of initial transmission" rule

Article 1(2) of the Satellite and Cable Directive reads:

> "For the purpose of this Directive, 'communication to the public by satellite' means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth;
>
> the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth."

Interpretation of the reproduction right in case of incidental use

(i) Denmark

A provision to permit the exercise of the transmission of a work with all necessary reproductions can be found in the Danish Copyright Act.

"31.- (1) Broadcasters may for the purpose of their broadcasts record works on tape, film, or any other device that can reproduce them provided they have the right to broadcast the works in question. The right to make such works available to the public is subject to rules otherwise in force.
(…)

66.- (1) Sound recordings may not be copied without the consent of the producer or made available to the public until 50 years have elapsed after the end of the year in which the recording was made. (…)

(2) The provisions of (…) Sections (…) 31 (…) shall apply correspondingly to sound recordings. (..)"[113]

(ii) France

A similar provision can be found in France. Article L. 214-1 of the French Intellectual Property Code reads:

"Where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose

… 2. its broadcasting or the simultaneous and integral cable distribution of such broadcast, as well as the reproduction of such phonogram strictly reserved for those purposes, carried out for or on behalf of an audiovisual communications enterprise with a view to inclusion in the soundtrack of its own programmes broadcast on its own channel and/or on any channels of audiovisual communications enterprises which pay equitable remuneration. (…)"[114]

(iii) Switzerland

Another solution was recently adopted in Switzerland.[115] Article 22c (new) on making-available of musical works broadcast (non-official translation of the German text) reads:

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[113] See also Danish Supreme Court, 5 November 2002, Case No. 98/2001 (2nd division), IFPI Danmark v. Danmarks Radio, deciding that it followed on from section 66(2), read jointly with section 31(1), that radio and television organizations are permitted to record sound recordings for the purpose of their broadcasting, whether on tape, film or other media capable of reproducing such recordings, as long as they are entitled to broadcast the sound recordings in question.

[114] Non-official translation of Article L. 214-1 of the French CPI as modified by Article 5 of Loi no. 2006-961 of 1 August 2006 "*relative au droit d'auteur et aux droits voisins dans la société de l'information*".

[115] No. 1 of the Federal Law of 5 October 2007, enacted as of 1 July 2008, *Amtliche Sammlung* 2008, S. 2421.

"1. The making-available right, in relation with the broadcasting of radio or television transmissions, of non-theatrical musical works contained in such transmissions can be exercised only by an approved management society if

a. the majority of the transmission has been produced by the broadcasters themselves or at their request;
b. the broadcast is devoted to a non-musical theme which dominates the musical content;
c. this theme was announced before the broadcast in the customary manner, and if
d. the making-available does not harm the sale of musical recordings, including the on-line offer by third parties.

2. In these conditions the reproduction right for the purposes of making-available can be exercised only by an approved collecting society."

This solution concerns the mandatory collective management of certain rights. For the purposes of incidental uses it is a technologically-neutral solution in that reproductions necessary for the making available of broadcast programmes are declared part of the respective main rights.

National solutions for archives: extension of existing licences by legal rules

(i) Denmark

Paragraph 30a of the Danish Copyright Act[116] reads:

"**30a**. -

(1) Works which have been made public and are a part of Danmarks Radio's or TV 2's own productions can, by the mentioned broadcasters, be repeated and made available in such a way that members of the public may access them from a place and at a time individually chosen by them, cf. the second division of Section 2(4)(i), provided that the requirements regarding extended collective licence according to Section 50 have been met. The provision of the first sentence shall apply correspondingly to the making of copies which are necessary for that use. The provisions of the first and second sentences shall apply exclusively to works which are a part of productions broadcast before 1 January 1998."

(2) The author may issue a prohibition to the broadcaster against the use of the work pursuant to subsection (1).

The provision for such extended collective licensing, §50, states:

"**50**. -

(1) Extended collective licence according to sections 13 and 14, section 16(2), section 17(5), section 23(2) and sections 30, 30 a and 35 may be invoked by users who have made an agreement on the exploitation of works in question with an organization comprising a substantial number of authors of a certain type of works which are used in Denmark. The extended collective licence gives the user right to exploit other works of the same nature although the authors of those works are not represented by the organisation.

[116] Translation by the Danish Ministry of Culture.

(2) The extended collective licence gives the user the right only to exploit the works of the unrepresented authors in the manner and on the terms that follow from the agreement made with the organization and from the provisions mentioned in subsection (1).

(3) Rightholder organizations who make agreements of the nature mentioned in subsection (1) shall be approved by the Minister for Culture. Only one organization can be approved for each type of works. The Minister may decide that an approved organization in certain fields shall be a joint organization comprising several organizations which meet the conditions of subsection (1)."

(ii) Germany

An extension of existing copyright licences has recently been carried out in Germany with regard to archived material. Paragraph 137 l (1) of the Copyright Act as amended in 2007[117] extends existing licence contracts containing a transfer of all known economic rights to those rights covering new uses, such as on-demand use, digitization and use in electronic databases. The extension takes place only if the right holder does not contradict the extension within one year of the enactment (1 January 2008). If the extension takes place, the right holder may claim adequate compensation from the moment when the licensee makes first use of the work in the new and originally unlicensed form (paragraph 137 l (5) of the Copyright Act). This claim can be enforced only by a collecting society. The solution is geared to securing the necessary rights for the licensee in an easy, efficient way without depriving the right holder of his economic claim.

[117] As published in *Bundesgesetzblatt* (Federal Law Gazette) 2007 volume I, page 2513.

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