EBU

OPERATING EUROVISION AND EURORADIO

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PUBLIC CONSULTATION ON THE REVIEW OF THE EU COPYRIGHT *ACQUIS*

EXECUTIVE SUMMARY

I. EBU CALLS FOR IMPROVEMENT OF THE LICENSING PROCESS FOR MULTI-PLATFORM AND CROSS-BORDER USE

Online media services offered by EU-based organisations need a robust legal framework that provides ***legal certainty*** for multi-platform and cross-border use of protected works and related subject matter and that ***facilitates rights clearance*** for such services. The focus of the EU copyright review should not be on changing the basic structure of the framework itself, but on ***streamlining the process*** of rights clearance.

If this is not feasible for all online media services, then at the very least these objectives should be applied to ***broadcast-related online services***.[1]

The EBU has key proposals that would effectively help streamline the licensing process, thereby ensuring that audience needs are met, while reducing the dead-weight administrative burden of rights clearance and releasing funds for investment in new content and services.

A. Clarification of the "making available" right

The Commission should clarify the relevant place of the act of making available for all online media services, or as a minimum for broadcast-related online services.

The most suitable solution is to take the "***injection rule***" contained in the Sat-Cab Directive which clarifies the place where the communication (by satellite) takes place, as a model and adapt it to cover other EU-based media services, or at least broadcast-related online services. This would safeguard the legal and contractual conditions that have helped cross-border services to flourish in Europe.

The extended injection rule would also foster cross-border ***portable access*** to EU-based media services, whilst providing *de facto* cross-border effect to ***exceptions and limitations*** in line with current, common sense practices (as based on the application of domestic laws).

B. Retransmission over non-cable platforms

The Commission should extend the special rights clearance system of the Sat-Cab Directive for the licensing of simultaneous ***cable*** retransmission of broadcasts ***to other third party platforms*** where such simultaneous retransmission take place under similar circumstances.

[1] "Media services" hereafter mean all audiovisual media services subject to the AVMS Directive as well as "radio-like" (audio-only) services offered by EU-based organisations. "Broadcast-related" media services are those online media services that are provided by and under the control and responsibility of a broadcaster and which have a clear relationship with the broadcaster's linear broadcast services.

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This specific licensing system for cable retransmission is applied all over Europe. Equality of treatment, legal certainty and compliance with copyright principles justify a ***technologically neutral application*** of this system to similar cases of programme retransmission over closed platforms. This system is already applied in several Member States and would notably concern IPTV, mobile telephony and terrestrial or satellite platforms ("bouquets").

C. Broadcasters' on-demand services on third-party platforms

New media platform operators also wish to be licensed for the ***non-linear*** use of broadcasters' programming. Therefore, the Commission should facilitate the licensing process where a broadcaster can offer its ***on-demand services*** which are ***clearly related*** to its linear programme services to such third party platforms, for example through clearance of the underlying rights via the system of "extended collective licensing" (ECL), which includes appropriate safeguards through the ability to "opt-out" that preserves the contractual freedom of right-holders.

Through the ECL system, a broadcaster can grant its own rights individually, whilst the underlying on-demand rights (i.e. the remaining or residual rights in the programme that are not held by the broadcaster itself) are cleared through a voluntarily agreed collective licensing scheme. For this proposal to be effective, it requires the ECL scheme to be available in the Member States from where the third-party platform operates. In countries where this system has been implemented, the concept has proved to be successful, with right holders receiving new remuneration.

However, some EBU Members felt that at least insofar as the third-party re-use concerns broadcasters' ***catch-up*** *services*, the EU framework should allow for a mandatory collective licensing system for the underlying rights, similar as exists for the simultaneous cable retransmission of foreign channels (see B above), because those services involve exactly the same programmes as previously broadcast.

D. Need for protection of content and signal integrity

The EU should ***extend the broadcaster's neighbouring right*** to protect its signals against commercial overlays and screen modifications or other parasitic business models by third parties. This protection is important for the credibility and reputation of the media service provider, the trust which individual end-users place in particular EU media services, and ultimately the freedom of information of citizens and the protection of the rights of others.

E. Broadcasters' archives

In order for Public Service Media (PSM) to make their archive productions available online within their public service remit, a national legislative solution is needed (in countries where it does not yet exist). As solutions based on ***extended collective licensing*** have proved to be useful in unlocking archives, the EU should foster, through a general "framework provision", the adoption of ECL into national law by individual Member States (thus, not introducing an "EU-wide ECL"). The cross-border effect of such national solutions results from the EBU proposal (under A) to clarify the place where the act of making available takes place.

II. EXCEPTIONS, LIMITATIONS AND OTHER ISSUES

Incidental reproductions: If the reproduction right is ***only of an ancillary nature*** towards another right governing one and the same economic activity, such as broadcasting or on-demand use, that activity should subject to one licence only; a reproduction that is merely necessary to prepare the core activity should have no independent relevance.

Flexibility of limitations and exceptions: EBU Members in several Member States feel that serious thought should be given to adapting existing exceptions or limitations on the national level where such need would exist with respect to specifically identified cases. However, EBU Members in other countries felt that no such need would exist on their territory. In any event, EBU Members do not favour the creation of an US-like "fair use" clause, as such an open-ended clause would arguably cause too much legal uncertainty.

Copying for private use: The private copying exception was never intended to cover large-scale copying and long-term storage (with the help of new technologies), allegedly on behalf of individuals, but ***primarily for commercial purposes.*** Such practice undermines the continued broadcasters' investment in original and high quality programming and conflicts with their own non-linear services. The EBU would therefore welcome a clarification that the exception cannot be misused by commercial entities.

Hyperlinking: The EBU welcomes the ***outcome*** of the recent judgment by the European Court in the *Svensson* case that a mere hyperlink to predominantly text-based online publications is not a communication to the public under Article 3(1) of the 2001 Copyright (InfoSoc) Directive. However, as the matter of ***embedding* or *framing*** (in particular of audio or video streams provided by another website) involves an *economic exploitation* which is markedly different from mere hyperlinking, the EBU should like to reserve its position on such types of communication pending the forthcoming judgment in the *Bestwater* case.

Identifiers: The EBU opposes a *mandatory* implementation of standard identifiers. Any adoption of identifiers should come in response to a business need, following a cost-benefit analysis. This can also serve as an incentive to innovation.

Term of protection*:* The 2011 Term Extension Directive remains an inappropriate measure. There should be no further increase in the term of protection.

Text/data mining: Merely exploring texts and data to discover new insights, patterns and trends should be regarded as ***temporary copying*** and not subject to the reproduction right.

User-Generated-Content (UGC): The EBU sees no need at present for a legislative change by introducing an exception specifically targeting UGC. Proposals for the introduction of a new, general exception for so-called "transformative use" seem to be excessive and could easily lead to abuse.

Enforcement*:* For civil law cases concerning IPR infringements, model rules for *fast track proceedings* should be established. Model rules should also exist for small claims proceedings.

INTRODUCTION

A. KEY POLICY OBJECTIVES[2]

The EBU shares the Commission's view that the consultation should focus on the new means of distributing content, i.e. **on new platforms (and) regardless of geographical borders.** As citizens today expect to have access to content anytime, anywhere, the Commission raises the crucial question of why it is not possible to access many online content services from anywhere in Europe? This question clearly involves also access to content **via mobile networks and portable devices.**

The EBU also agrees with the Commission that the copyright rules should "support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and **promote cultural diversity**", and that it is important to "**facilitate licensing**, while ensuring a high level protection of intellectual property rights." (emphasis added).

Obviously, these aims will have consequences in particular for the issues of **territoriality and fragmentation** of the EU copyright market, which are the core of the questionnaire.

Therefore, as today's media convergence has far-reaching implications, the European copyright framework must be appropriate and adapted in order to be "fit for purpose" in the new media environment.

At the same time, focussing on media services implies that these issues cannot be treated in isolation, but must be closely related to the overall policy of European media regulation which pursues the same Single Market aims. The Television without Frontiers (TwF) Directive was designed in 1989 to provide a common framework for all EU-based broadcasting organisations so that the availability of broadcast services in Member States other than where the service originated was not unduly hindered by differences in national media regulation. The adoption of this Directive was later accompanied by the introduction of certain copyright rules in the Satellite and Cable (Sat-Cab) Directive of 1993 in order to establish, for the benefit of EU-based media service providers, **legal certainty** for satellite broadcasting services and **facilitating rights clearance** for the cable retransmission of foreign radio or television channels.

The European Court has stressed that these rules were necessary to create "a single programme production and distribution market" in the EU[3] and thus to ensure, via new and appropriate copyright rules, that the aims of the TwF Directive were not made obsolete.[4]

The same situation exists today. The new Audiovisual Media Services (AVMS) Directive (2007) enlarged the scope of the TwF Directive to include ***"TV-like" online services***

[2] The EBU reply takes account of the recent legal ***Study on the Application of the InfoSoc Directive*** as published by the law firm de Wolf & Partners on 18 December 2013 (hereafter called "the Legal Study"), but does not comment on the study unless specifically stated.
[3] CJEU, 4 October 2011, *Premier League v. QC Leisure*, Joined Cases C‑403/08 and C‑429/08 at nr. 121.
[4] See also Recital 12 Sat-Cab Directive: "*Whereas the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC must, therefore, be supplemented with reference to copyright."*

provided by EU media service providers, while maintaining the "country-of-establishment" principle as well as the Single Market objectives of the TwF for new services. Consequently, the principles of the Sat-Cab Directive should also be extended - by the most appropriate legislative measure - so as to cover these new services and to facilitate licensing in order to support the consumer-friendly availability of EU media services[5] on all new platforms and across (EU) borders.[6]

The focus of the EU copyright review should therefore not be on changing the basic structure of the legal framework itself, but on **streamlining the process of rights clearance**.

B. EUROPEAN (PUBLIC SERVICE) BROADCASTERS' TASKS AND CHALLENGES

EBU Members have a mission to offer quality content to their audiences in a multiplatform environment and they must respond to this constantly evolving consumer demand. Public Service Media (PSM) have therefore strengthened their online presence over the past years, and most PSM offer both catch-up and live streaming of radio and television programming on their own websites as well as related online-only content. In parallel, PSM also offer mobile services: many have set up special websites offering content tailored to mobile phones, as well as branded smart phone applications. As the penetration of smart phones and tablets grows, interest in applications with broadcasters' programming, on-demand or live, is rising.

In its reply to the European Commission's **Green Paper on Convergence** ("Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values"), the EBU stressed (*inter alia)* that ***sustained investment in original content will be meaningless without additional steps to ensure wide and easy access to such content for all audiences, across the growing range of distribution platforms*** *(see the Executive Summary of the EBU reply to that Green Paper, attached hereto as an Annexe)*. Reaping the full benefits of media convergence also implies that the best possible combination of broadcast and broadband technologies is made. Reaching all audiences with diverse content lies at the heart of the model of public service media. The easily available media content from PSM also supports the continued availability of culturally- and linguistically-diverse content. EBU Members therefore strongly believe in content distribution models which enable as many citizens as possible to access a plurality of media content.

Consequently, in order to offer consumers easy access to broadcasters' online services on whatever type of device, broadcasters' access to new platforms and services should not be hampered by copyright management issues. Broadcasters' task of providing new audio and audiovisual programming on a daily basis involves an incomparably ***high intensity of rights management***, and this task is already reflected in existing copyright rules. The complex framework of rights clearance for broadcasters' online services needs to be made coherent with those other rules.

[5] "Media services" hereafter mean all audiovisual media services subject to the AVMS Directive as well as "radio-like" audio-only services offered by EU-based organisations.
[6] A recent resolution by the European Parliament of 4 July 2013 on "Connected TV" (available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2013-0329&language=EN&ring=A7-2013-0212) raised the issue of the availability and accessibility of content in a media-converging world.

In this context, it is also important to highlight that, on top of the various cultural and social aspects of the EU media market, the variety of European broadcasters' contractual practices need to be taken into account. This is of crucial importance as broadcasters' programming not only involve multiple underlying rights (including those not managed by the broadcaster itself), but also because the media eco-system depends on appropriate economic rewards for the re-use of broadcasters' programmes. Broadcasters license their programmes to other media providers across many territories. Such revenue is reinvested in new PSM content which helps to create a virtuous circle that benefits both audiences and the European creative sector. This mixed ecology of public service content in Europe needs continuous support, as otherwise incentives for creating original programme content are weakened and the underlying right-holders are deprived of potential remuneration. These specific aspects of European media services have been duly respected by the Sat-Cab Directive and need to be maintained.

For these reasons, any barriers for ***EU-operated media services,*** including obstacles due to copyright, should be avoided or at least minimised. The aim of a truly Single Market for programming from broadcasters in the EU will never be realised if hybrid TV systems, mobile and tablet devices ("portable content") do not provide EU citizens with easy access to such programming and to the *related* online services.[7] Similarly, pursuing a merely *technical EU-wide interoperability* of hybrid TV sets and other new media devices would be meaningless if, for reasons of cumbersome rights clearances, those devices cannot show both the programmes and the related online services.

Moreover, in cases where content cannot be offered legally, it will be offered through piracy. This result is clearly not satisfactory, in particular as a recent study came to the conclusion that 80% of European end-users would be prepared to pay for lawful and affordable content.[8]

Therefore, after almost ten years of enquiries and consultations related to Content Online, "doing nothing" is not an option: ***Rights clearance for the multiplatform and cross-border distribution of EU programmes and related online services by EU-based media service providers must be made easier.***

Broadcasters provide both content and services; in the five largest EU markets, PSM invest over 10 billion Euros in content every year and on average two-thirds of PSM programming consists of own or commissioned productions. For this reason, facilitating licensing is not simply about the broadcasting sector alone, it is also essential to the ***competitiveness of the entire EU audiovisual industry,*** for economic ***growth and employment,*** and, ultimately, for ***maintaining consumers' respect for copyright*** by offering easy and affordable access to content of European origin.

[7] "Broadcast-related" media services are those online media services that are provided by and under the control and responsibility of a broadcaster and which have a clear relationship with the broadcaster's linear broadcast services.
[8] See *European citizens and intellectual property: perception, awareness and behaviour*, published by the Office of the Harmonisation in the Internal Market, November 2013, page 56.

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REPLY TO SELECTED QUESTIONS

2. Have you faced problems when seeking to provide online services across borders in the EU?

Yes, there is a lack of legal certainty and technological neutrality for effective licensing. There are three areas that create legal obstacles for cross-border media services:

A. The general lack of legal certainty for (1) (all) online media communications, and (2) in particular for broadcasters' services;

B. The limitation of the special licensing regime for the simultaneous retransmission of broadcasts to cable platforms only, and

C. The need for streamlining the licensing process for the re-use of PSM's on-demand services on third-party platforms.

A. Lack of legal certainty for online media communications

1) General comments

The Commission mentions that the territoriality principle of copyright is being interpreted in the sense that it would "require authorisation in each national territory in which content is communicated to the public". This interpretation implies that wherever (in the world) an online service is accessible, possibly the copyright laws of each of those territories would be applicable to that service. This threat of ubiquitous liability illustrates the core of the problem: for online media services, there is ***no legal certainty*** in assessing which country's law should be relevant for applying copyright. No online media service provider would be able to determine with sufficient certainty which (different) laws would apply to its online service.

Given the complexity of copyright in the EU, most media service providers residing in the EU would be inclined to base their rights clearance administration mainly on the copyright law they know best, *i.e.* their domestic law. In fact, it can be presumed that for the majority of websites this is the standard practice today.

A truly borderless Single Market for copyright protected content would arguably require a **full harmonisation** of copyright through a Regulation that would create one, unitary, EU-wide copyright title. However, such a drastic move would not only conflict with right-holders' practices but could also go beyond the interests of many, perhaps even most, copyright users who seek flexibility as to which rights they wish to obtain and for which audiences.

In the same way that flexibility is offered to European providers of cable and satellite broadcast services by the Sat-Cab Directive (which did not alter the substantive law), enhancing legal certainty for EU online media services will help to streamline the rights

clearance process. This, in turn, will help the European online market to flourish whilst increasing the competitiveness of the European audiovisual sector.

A stricter application of the territoriality principle in the EU would be counter-productive, as that would imply that all 28 national copyright laws, including for example provisions relating to collective rights management, should be taken into account, *cumulatively*, with respect to *any* type of online communication of a copyright protected work. If that assumption were true worldwide, then millions of unintentional copyright infringements would take place on a daily basis. Ultimately, this would render copyright practically unenforceable.

Moreover, such a strict territoriality approach would re-introduce borders in the EU that had previously been abolished by the Sat-Cab Directive. After all, if the work is embedded in a radio or TV programme of a satellite broadcasting service which can be received throughout the whole EU, the relevant act of communication to the public takes place in one country only. A strict territoriality approach is will therefore not promote EU media services.

2) The specificity of broadcasters' programming services

The legal difficulties referred to above are particularly cumbersome and costly for broadcasters' programming services. In order to clear the necessary rights, broadcasters conclude individual agreements (e.g. with film producers), collective agreements (e.g. concerning the embedded/underlying rights, such as music) as well as a mixture of both. A single, 30-minute episode of a TV-series can easily involve up to a hundred contributions.[9] For the many forms of material that broadcasters include in their programming, the daily and intensive rights clearance by the broadcaster is always based on ***the domestic copyright law of the broadcaster's residence***. Domestic law is also the reference for legal assessments as to whether a certain use would meet the conditions of an exception or limitation (e.g. a quotation or a news report).

The usual overspill of broadcasts into neighbouring countries is not relevant for the question of applicable law, since mere reception of a broadcast is not a copyright relevant act. The same should apply to the mere reception of an on-demand service. As broadcasters must use the same approach towards rights clearance for their online programming services, this renders the newly introduced concept of "multi-territorial licensing" generally ill-equipped for broadcasters' services in cases where these are merely accessible.[10]

Example:

Broadcasters create news reports. The broadcast and online use of any 10-minutes' news report is often produced on the basis of several exceptions, such as ephemeral recordings, use of a work in connection with the reporting of a current event, a political speech, a work located in a public place, quotations, and the incidental inclusion of a work visible in a private house. These exceptions can all be subject to different conditions in each Member State. Moreover, legal assessments under copyright regarding news reports must be taken within an extremely narrow time frame, sometimes "on the

[9] See the examples of the EBU reply to the Green Paper on the online distribution of audiovisual works in the EU, at http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/ebu-uer_en.pdf.
[10] This was also recognised by the recent Collective Rights Management Directive, see below under Question 4 (A.2). This would of course not exclude that in cases where a broadcaster wishes to provide a truly pan-European service addressing the general public of all countries involved it may consider obtaining such type of licence.

spot". Therefore, in daily practice the exception for news reports can be problematic, notably in cases where the work itself is the event, and in particular when the interpretation of this exception under national law is (too) restrictive. As national broadcasters produce and transmit multiple news programmes throughout the whole day, it would be practically impossible to do so if the broadcaster could not rely on the (sole) applicability of its domestic copyright law. This is valid both for broadcasters' linear as for their non-linear services.

With respect to satellite broadcasting, the aim of the Sat-Cab Directive was not to change this legal situation for broadcasting services but merely to confirm the rights clearance practice by providing legal certainly for (another) form of cross-border availability of radio and TV services. It is indisputable that this Directive has proved to be an effective measure for facilitating satellite broadcasting without having negative effects for the right-holders concerned: The satellite injection rule enabled numerous unencrypted satellite broadcasts in Europe to proliferate and has been helpful in increasing the availability of broadcasts across borders.[11] It also allowed those broadcasters who wanted and could afford to provide a truly cross-border service to do so.

However, a broadcaster that wishes to use the same programmes on online platforms or other new forms of cross-border use ***cannot benefit from such legal certainty*** in determining which law is relevant for applying copyright. This situation must be remedied.

Example:

Between Finland and Sweden, there is a small group of islands called Åland, which for a long time was part of Sweden, but since 1917 officially belongs to Finland. Nevertheless, it has an autonomous status, and Swedish is still its official language. This explains the popularity of SVT's broadcast programmes which are freely accessible in Åland via simultaneous retransmission over local cable and IPTV, both based on the cable retransmission regime of the Sat-Cab Directive, i.e. with the authorisation of SVT for the broadcasters' own and acquired rights and the Finnish collecting society (Kopiosto) for other rightholders. However, since there is no legislative certainty under the current EU copyright rules with respect to SVT's own online services, the population in Åland does not have full access to SVT's online catch-up services (provided through "SVT Play"). As those catch-up services include the same programmes received in Åland via the abovementioned retransmission scheme, this discrepancy is impossible to justify for the Åland citizens.

B. Simultaneous retransmission of broadcasts is facilitated only for cable platforms

One of the most urgent licensing issues needing a legislative solution is the ***simultaneous*** retransmission of broadcasters' programmes via third-party platforms ***other than cable,*** *i.e.* through subscription-based or registration-based online platforms (so-called "closed network" systems), such as IPTV or mobile network services. While the Sat-Cab Directive of 1993 introduced, with the aim of stimulating cross-border media services, an efficient

[11] In the 28 EU countries plus Turkey, there are more than 4,500 TV channels broadcast over satellite. In the *Premier League* case (see Fn. 3), the Advocate-General stressed that if the Sat-Cab Directive had not clarified the injection rule for satellite broadcasting, such services would have been practically impossible.

collective rights clearance system for the simultaneous cable retransmission of broadcasts, it was never adapted to cater for similar Internet-based services.

In the absence of a technologically neutral application of the cable rights clearance provisions, the retransmission of linear programmes on the Internet-based services would need to be done via individual rights clearances which is particularly complex, and in practical terms even impossible, if this would not be complemented by collective licensing. As a result, there is no level playing field between different third-party platforms which often have a very similar business model, such as cable and IPTV.

Examples:

The Sat-Cab Directive is implemented differently across Europe. While in some countries simultaneous retransmission of broadcast programmes on other-than-cable third-party platforms is legally assimilated to cable retransmission (e.g. Belgium, Sweden, Denmark, and in contractual practices also in the Netherlands), this is not the case in other Member States, such as in Germany and Poland.

In Germany, regarding the simultaneous retransmission of broadcast programmes via the Internet to (domestic) subscribers, a Hamburg court decided (on 8 April 2009) that the cable retransmission licensing system under the German copyright law did not allow a technologically neutral interpretation, because the law remains subject to a decision by the German legislator. This means that the collective licensing part of that system is not applicable, rendering the individual licensing part obsolete. German broadcasters like ARD and ZDF are thus facing legal challenges in granting permission for their services to be retransmitted over IPTV, mobile and "TV-to-go" networks.

In Poland, out of a total of 13,7 million households, there are 4,6 million users of cable and over 6 million of users of digital satellite platforms (over 60% of all pay-TV). Under competition law, in particular in major merger cases, these services are treated as substitutes and thus belonging to the same relevant market. Under Articles 41-46 of the Polish Broadcasting Act, a technologically neutral regime applies to all operators of retransmission services. However, under the Polish Copyright Act, the simplified rights clearance system based on collective management of retransmission rights applies only to cable operators.

C. Re-use of PSM's on-demand services is not possible without collective licences

Broadcasters increasingly offer on-demand services which are clearly related to their linear programmes (e.g. catch-up TV) and have become part of the regular offering of broadcasters. This on-demand consumption of broadcast programmes is quickly becoming a standard feature of audiovisual media services. These services can be offered by the broadcaster itself, but are increasingly demanded by **third parties** so that they can be included in commercial (subscription- or advertising- based) offers to consumers in that third party's territory (which may be different from that of the broadcaster).

Unfortunately, effective rights management solutions for these services to be licensed to third party platforms are ***not available***. Without some form of collective licensing of the underlying rights of the programme concerned, a broadcaster's on-demand services cannot be included in a third-party's (often subscription-based) Internet, mobile or hybrid services.

Examples:

In Germany, there is a clear demand from platform operators to offer broadcasters' non-linear services ("Mediatheken") complete and unchanged alongside their linear programmes. However, in practice broadcasters like ARD or ZDF or transnational broadcasters like ARTE cannot grant the rights to their services with the necessary legal safeguards against so-called "outsiders" if the underlying programme rights are not dealt with collectively.

Similarly, France Télévisions can only offer a very limited part of its on-demand offer (via its catch-up platform www.pluzz.fr) for use outside France.

4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?

In this context, the EBU would like to reiterate and further explain its proposals for reducing the fragmentation of, or territorial limitations to, media services in the EU where this is related to complex licensing processes.[12] In sum, the EBU proposes that the Commission should:

A. clarify **the act of the making available right** (or more precisely the country where the relevant act of such communication takes place) for EU media services;[13] this should be done at least (i.e. as a minimum) for broadcast-related online services;

B. extend the special rights clearance system for the licensing of simultaneous ***cable*** retransmission of broadcasts, by applying it in a **technologically neutral manner to other platforms** where such retransmission takes place under similar circumstances, and

C. promote the **availability of broadcasters' on-demand services**, which are clearly related to their linear programmes, **on third party platforms**, for example via the system of "extended collective licensing", with the appropriate safeguards to preserve the contractual freedom of right-holders.

D. create advantages of promoting the **"portability"** of media content, by implementing the aforementioned EBU proposals.

See also the replies to **Questions 6, 7, 8 & 9**

[12] Some of these proposals were already developed in the 2010 EBU White Paper on Copyright, which is available at http://www3.ebu.ch/cms/en/policies/initiatives/copyright.
[13] For recent support for the proposal to apply the "satellite injection rule" to online services, see the Lisbon Council Policy Brief of 30.5.2013, by Prof. Hargreaves/Prof. Hugenholtz, available at http://gallery.mailchimp.com/e11b949d8350120e252700029/files/LisbonCouncil_policybrief_FIN2_web.pdf.

A. Clarifying the act of the making available right for EU media services

1) New rule resulting in the law of the country-of-establishment of the media service provider

As explained above, it makes practical sense to take the satellite rule contained in the Sat-Cab Directive as a basic model, and adapt it to cover all EU-based media services. After all, the satellite rule was specifically intended to eradicate legal uncertainty and avoid the cumulative application of several national laws to one single broadcasting act receivable all over Europe. Extending the rule to EU-based media services would clarify the place where such communications takes place and provide the same level of legal certainty.

The practical result hereof should be that the law applicable to the licence given to the media service provider for its online media services should be ***the law of the country in which the media service provider is established.*** For media service providers as defined in Article 1(a) AVMS Directive, this would obviously be the country of establishment ***under the criteria of Article 2(3) AVMS Directive***. This clarification would confer a truly cross-border effect to the licence for the use of all works and other protected subject-matter as integral parts of the online media service.[14]

2) A policy decision to distinguishing between "broadcast-related" and other online services?

While the EBU would have no objection for its proposed solution to cover all online services, as a minimum (as will be explained below) it should cover "broadcast-related" online media services. Within the plethora of online media services, should policy makers see the need for a more targeted extension of the satellite injection rule, the EBU would consider there to be a reasonable case for distinguishing "broadcast-related" online services - which are those online media services that are provided by and under the control and responsibility of a broadcaster and characterised by the fact that there is a clear relationship between the broadcaster's linear (analogue or digital) service and its on-demand service - from other online content services which are *retail-like* and mostly provided by *Internet-only* operators.

There are obvious reasons for treating broadcast-related on-line services differently from "retail-like" on-demand services:

- *It is* ***essential for broadcasters to clear broadcasting rights together with the online rights*** for both their linear programmes and broadcast-related online services. Broadcasters have a uniquely huge administrative task in clearing rights. This is reflected in several legal provisions of international and EU copyright law. These tasks are cumbersome and costly - not only for their broadcast use but also for their online services. By exempting the collective licensing of online music rights to broadcasters from the multi-territorial licensing regime, the Commission has recognised that fragmentation of rights clearance would be detrimental to the broadcasting sector and therefore broadcasters can continue to clear both broadcast and online rights with the same collecting society. In its *CISAC* decision, by acknowledging that national broadcasters have shown their interest in maintaining the

[14] The same result should apply in practice to "radio-like" media services by EU-based operators (i.e. where the musical works are *integral parts* of the online media service).

possibility of one-stop-shop blanket licensing, the European Court implicitly confirms that approach.[15]

- ***Recent case law of the European Court:*** In the *Premier League* case the Court held the freedom of broadcast services as a higher ranking principle than the possibility of granting exclusive licences per territory.[16] This decision not only recalls the commitment to create a Single Market for broadcast programmes but also justifies the need to apply a ***separate licensing framework*** to broadcast and (radio- or) TV-like media services, i.e. different from the licensing of media services which are not covered by the TwF (now AVMS) Directive. This is an absolutely critical point which did not obtain sufficient attention in the Legal Study.

- As a result of European case law, ***the principle of territoriality with respect to the right of "communication to the public"*** can be maintained only if it is applied in ways that would facilitate, rather than hinder, the free flow of media services in the EU.

Furthermore, it should not be overlooked that broadcasters are AVMS providers and thus characterised by their exercise of ***editorial responsibility*** over the selection and the organisation of their programmes and services, and they assume full *legal and editorial liability* for everything communicated by them. As AVMS providers, broadcasters are also subject to many other obligations, including for the production or distribution of European works. By contrast, providers of retail-like services are often online-only operators which assert that their activity is limited to the "mere provision of a technical platform", without assuming full editorial responsibility for the content made available thereon, and in that way falling outside the AVMS regime (and its obligations).

(3) Safeguards against "delocalisation"

The Legal Study suggests that for on-demand services ***in general*** the country-of-origin concept includes a risk of "location shopping", i.e. the on-demand service provider could seek to create the closest connection of its services with a pre-selected Member State or even outside the EU; and such location-shopping could, in theory, negatively affect the possibilities for right holders to obtain fair remuneration. This point requires several comments. While it is justified to deem the location of the *server,* from which the online service is technically offered, as largely irrelevant - especially with the rise of "cloud"-based storage services - for broadcast-related services it would seem far-fetched to assume that such delocalisation would take place, for the following reasons:

- The right of communication to the public is harmonised EU-wide. Therefore, it is doubtful whether the risk of delocalisation is really substantial for on-demand services provided by any type of media entity. (The Legal Study did not make a differentiation between media entities.)

[15] CJEU, *CISAC v European Commission*, Case T-442/08. See Art. 32 of the Directive on collective rights management, 2012/0180(COD).
[16] See Footnote 3.

- In practice, the country of residence of *media entities* is rarely (if at all) chosen for reasons of copyright law. Various forms of taxes, enterprise culture, local competition, language, conditions of the local labour market, safety, government economic incentives, etcetera, are far more compelling considerations for media entities to select an EU-based residence;

- The satellite rule includes the principle, as stated in Recital 17 of the Sat-Cab Directive, that **actual and potential audience** in other Member States need to be taken into account for the **level of remuneration.** Evidence of targeting the general population of a foreign, rather than the domestic, country (mere accessibility is not enough) could be considered relevant for determining the level of remuneration. This principle would clearly reduce the possibly negative effects of any delocalisation.

With particular respect to broadcasters' services, the argument of delocalisation is not new and proved overestimated. Such a concern was raised when the satellite injection rule was enacted, but ***evidence of a broadcaster moving its location to another country purely for copyright reasons is non-existent***. All EU-based media service providers (except for Internet-only providers not subject to the AVMS Directive) are already subject to anti-circumvention rules in the Sat-Cab Directive (both radio and television broadcasters) and the AVMS Directive. If it were deemed appropriate to apply the satellite injection rule **solely** to broadcast-related online services, there is no need for an additional set of attachment rules which would make it more complicated than necessary.

Nevertheless, right-holders entitlement to appropriate remuneration is a fundamental principle under copyright law. Therefore, ***if the satellite rule were to apply to <u>all</u> online*** (and not only to broadcast-related) ***media services***, the EBU feels that it would be desirable, with a view to safeguard this principle, to accompany an adapted form of the injection rule, a rule that is based on the place of establishment, by anti-location-shopping rules.[17] (The EBU would be pleased to offer technical input on a possible legislative approach.)

(4) Other questions of the enquiry related to the "applicable law/country-of-origin"

The EBU's favoured solution for the clarification of cross-border communications as described above is far more suitable than the introduction an EU Copyright Title (see Question 78), for the following reasons:

- the notion of country-of-establishment is a concept **most naturally linked with the Single Market;** several Directives with Internal Market objectives use this notion, and the European Court in the *Premier League* case showed (by allowing territorial licences to be subject to the overriding principle of the freedom of services) that the objectives of copyright law may be different, but they are not irreconcilable;

- it leaves right holders' **exclusive rights intact** - subject to other EU principles under competition law and the freedom of services;

[17] The Legal Study, p. 145, mentions that the criterion of establishment is less easy to apply to *natural persons* acting without direct economic objectives. In those cases, his/her "centre of activities" may be seen as the better criterion to determine where the communication takes place. In the EBU view, this criterion should also remain subject to the rules necessary to prevent "location shopping".

- it solves the **cross-border effect of exceptions and limitations** (see Questions 26 and 27) in line with current, common sense practice, and

- it renders Question 22 on **"mandatory"** limitations or exceptions largely **obsolete**, because the exceptions and limitations would be applied in accordance with the national law only and thus already have *de facto* EU-wide effect. Moreover, to make an exception mandatory is likely to result in a more limited interpretation.

Example:

A broadcaster intends to transmit a documentary on a recently deceased well-known actor, which includes a few clips from his most notorious films. The clips were carefully edited so as to meet the conditions for the exception for quotations under the copyright law of the broadcaster's country of residence. The documentary further includes music-synchronised footage that was produced for the news report on the actor's death but which was ultimately not broadcast. Highlights of the documentary are also to be made available on the broadcaster's (publicly accessible) website. If the broadcaster had to clear the rights in accordance with the copyright laws in all countries where the broadcast or website would be accessible, then the documentary would have been of a lower quality (as either the clips would probably never have been produced or would have to be cut out, and the non-broadcast footage could not have been used).

The same applies for a broadcaster's reliance on other exceptions, as the criteria for these are not identical in domestic legislations or are interpreted differently by national courts.

B. Simultaneous retransmission of broadcasters' programmes on non-cable platforms

The EBU proposes that *simultaneous, unchanged and unabridged retransmission of broadcasts* originating in Member States should follow the same licensing regime as is applied to the retransmission of broadcasts via cable (Articles 9 and 10 of the Sat-Cab Directive), *irrespective of the retransmission method* used. In the countries mentioned above where this is applied under the national legislation (see under Question 2), it has proved to function without any problems.

(1) Legal background

The Sat-Cab Directive applies a "dual" (partly individual, partly collective) licensing system for simultaneous, unchanged and unabridged retransmission of broadcast programmes by cable operators. The cable operator is responsible for clearing the retransmission rights with the originating broadcaster, on the one hand, and with the collecting societies for the remaining rights (the "programme-underlying" rights such as the producers rights and those of the many actors, singers, musicians, scriptwriters, in each of the broadcasters programmes), on the other hand. For the latter, the Directive introduces mandatory collective licensing for the rights to authorise cable retransmission of works and other protected material integrated into broadcast programmes, since individual licences from every holder in each individual part of the programme retransmitted would be impossible to obtain.

Equally important is the fact that the Directive explicitly exempts from mandatory collective management the exercise of the rights ***held by broadcasting organisations to their own***

programmes (acquired rights and neighbouring rights), because these rights can be obtained ***individually*** by cable operators directly from the limited number of broadcasters whose services it wishes to retransmit. This is markedly different from the other rights embedded in the programmes which are far too numerous; so, it is reasonable that cable operators clear these underlying rights *collectively*, via representative collecting societies.

Whereas the Sat-Cab Directive deals only with the cross-border situation, i.e. the licensing of retransmission rights with respect to *foreign* broadcasts, the same licensing system applies in practice to cable retransmission of programmes at the national level in EU countries.

The European Court recently issued an important judgment on broadcasters' ***contractual freedom to control the retransmission*** of their programmes by third parties. In the *TV Catchup* case, where an Internet operator provided "live streaming" of various UK terrestrial and satellite broadcast channels without authorisation, the Court decided that for the simultaneous retransmission of broadcast programmes over the Internet to be a communication to the public (under Article 3 of the InfoSoc Directive), it is not necessary that the third party's retransmission service be of a profit-making nature or compete with the original broadcast.[18] In other words, under EU law, ***Internet retransmissions of broadcast programmes are subject to prior permission by all holders of exclusive rights with respect to those programmes***. Of course, this does not exclude that, whilst the rights held by the broadcasting organisation itself (acquired rights and related rights) remain exclusive, the national law can make the *exercise of the programme-underlying rights* subject to the same collective licensing system that applies to cable retransmission of programmes.

This specific rights clearance system for simultaneous, complete and unchanged cable retransmission, as introduced by the Sat-Cab Directive, is a huge success. It promoted the availability of European broadcasting services in all EU countries[19] by providing cable retransmission companies with greater legal security and facilitated the clearance of rights for their use. It is an obvious example of a legislative measure creating a single distribution market for broadcast programmes. In the recitals of the Sat-Cab Directive, it is mentioned that simultaneous retransmission via "microwave systems" would be assimilated to cable retransmission, which gives a clear indication that a technologically neutral application of the licensing system is possible.

In sum, the proposed solution would mean that the retransmission rights held by the broadcasters themselves (i.e. their own neighbouring rights and the rights they have acquired from other right-holders) remain to be cleared by the platform operator individually with the broadcasters concerned, whereas the retransmission rights in the contributions to the programmes which are not held by the broadcasters are to be cleared with the relevant collecting societies.

[18] CJEU, *ITV a.o. v. TVCatchup Ltd,* Case C-607/11.
[19] Cable television is available in almost all European countries apart from Greece and Italy which are satellite-dominated markets. Cable television is still customarily supplied by small, local companies, which explains why there are a large number of cable operators in Europe. There exist, for instance, more than 600 operators in Bulgaria, Poland and Romania. (Source: European Audiovisual Observatory.)

(2) Benefits for the Single Market in adopting the proposed solution

- The Sat-Cab Directive pre-dates the development of similar services by digital satellite bouquets or other new media. Cable operators are no longer the only players on the broadcast retransmission market. Digital satellite operators (as illustrated by the *Airfield* case of the European Court)[20] and providers of DSL, IPTV and mobile telephone networks and other digital platforms *operating according to exactly the same business model* (i.e. via subscription or registration which is offered to domestic citizens only) are also active in this market. The EBU solution would create a level playing-field between those operators and cable operators, and rights clearance for retransmission over other platforms than cable (both for multiplatform use at the national level and cross-border situations) would enjoy the same legal certainty as cable operators.

- This solution allows consumers to benefit from a wider offer of broadcast services over a larger variety of platforms, whilst promoting fair competition between platforms. Failing to adopt the proposed solution would lead to market distortions, since cable operators can clear rights with respect to programmes more easily than other operators of "closed" subscription or registration-based platforms. Such a different treatment cannot be justified from a competition law perspective.

- The reasoning behind the cable retransmission licensing system is determined not by the technical characteristics but by the *commercial nature* of the retransmission activity made available by the third-party operator (i.e. only to paying subscribers - directly via subscription or indirectly through added advertising). This was clarified by the European Court in the *Airfield* case.

- Making the cable licensing system technologically neutral leaves all right-holders involved in programme retransmissions over new platforms, including those with exclusive retransmission rights, in the same position as with respect to cable retransmission.

In a recent report,[21] the EP Committee on Culture and Education stressed the importance of technology-neutral rights clearance systems in order to facilitate media services being made available on third-party platforms and calls on the Commission "*to enforce the principle of technology neutrality consistently and, where appropriate, to review European copyright law accordingly.*"

Equality of treatment, legal security and compliance with basic copyright principles would justify a technologically neutral application of the specific system for obtaining cable retransmission rights to similar cases of programme retransmission over closed platforms. This would notably concern 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

[20] CJEU *Airfield and Canal Digitaal v Sabam* and *Airfield v Agicoa*, Joined cases C-431/09 and C-432/09.
[21] Report of 28 January 2014), EP Committee on Culture and Education on "Preparing for a Fully Converged Audiovisual World (2013/2180(INI)), Nos. 50-53.

the distribution platform operator (separately or through the acceptance of advertising on the platform) for access to its retransmission service. Thereby, such other platform operators would benefit from the same dual licensing regime for their programme retransmission activities as cable operators.

C. Licensing of on-demand programmes of broadcasters to third parties

The EBU believes that there are strong arguments for extending the described "dual" individual-collective licensing system for the underlying rights not only for simultaneous (linear) retransmission on other platforms but also to the use by distribution platforms of broadcasters' on-demand offers which are clearly related to their linear offer (the latter makes them different from traditional, "stand-alone" video-on-demand offers). An effective collective rights clearance system for the underlying rights would remedy the current situation.

Such request for effective rights clearance systems is explicitly made in the aforementioned Resolution of the European Parliament on Connected TV.[22]

An attractive solution on this particular issue can be provided through the system of so-called "***extended collective licensing" (ECL), as recognised in Art. 9(2) of the Sat-Cab Directive*** (and implemented in several Member States). In such cases the collective licensing of the underlying on-demand programme rights (i.e. those not held by the broadcaster itself) is not mandatory, but cleared via a voluntarily agreed collective licensing scheme, with the exception of those right-holders who decide to "opt-out" from that agreement. Thereby, the contractual freedom of all the right-holders involved in the (on-demand) re-use of the broadcasters' programmes is not affected.

For all clarity, this would mean that the retransmission and on-demand rights held by the broadcaster itself would need to be cleared individually from the relevant broadcaster, as in the situation of cable retransmission, while the retransmission and on-demand rights in the other right-holders' contributions to the programmes and which are not held by the broadcaster are to be cleared with the relevant collecting societies.

It is of crucial importance that with the opt-out possibility of the ECL system, the principle of contractual freedom remains intact and individual right-holders can freely decide whether or not to opt-out, and when they do opt-out, to decide on whatever licence to their content they may wish to engage in. In Member States where the ECL system has been applied for several decades, it appears that opt-outs hardly ever occur, which demonstrates the system's success. For example, in the Nordic countries where this licensing system is available, it allowed the development of subscription-based online services which provide both linear and non-linear (e.g. catch-up) access to programmes from both domestic and foreign broadcasters.

It must be noted that this solution requires that the ECL is indeed available in the copyright law of the Member State which prefers to apply this system. The EU framework should

[22] 2012/2300(INI), available at http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0212&language=EN.

therefore foster that availability. This is not the same as an "EU-wide ECL", as its application would be limited to national licensing situations. However, similar as the ECL solution for satellite broadcasting under Art. 9(2) of the Sat-Cab Directive in combination with the satellite rule, the licensing process would ***result*** in providing consumers of domestic subscription services with on-demand access to both national and foreign broadcasters' programmes, and thereby have cross-border effect.

Given that the ECL system allows for opt-outs by non-represented right-holders, it must be stressed that there is no (legal) guarantee that it will function to the full satisfaction of all parties concerned; in particular, an opt-out may result in a "black-out" of a certain production which could deprive the other right-holders in that production from the expected revenue. To avoid this risk, it should be possible for those Member States which do not avail of the ECL system in their law, to apply a *mandatory collective* licensing system (*i.e.* for the *underlying* rights) as exists for the simultaneous cable retransmission of foreign channels (see B above), instead of the ECL.

Alternatively, some EBU Members feel that such a mandatory collective licensing system for the underlying rights should be possible **at least** for broadcasters' ***catch-up services***, because those services involve exactly the same programmes as previously broadcast. In that case, in order to stimulate local access to foreign on-demand programme services, the EU framework should allow Member States to opt for such mandatory licensing system (for the underlying rights) to be put in place in their national law.

D. Advantages of the EBU proposals for promoting "portability" of media content

The concept of ***cross-border portability*** (*i.e.* a citizen accessing his/her usual subscription while temporarily in another Member State for work or holiday) must be distinguished from general cross-border access to services offered by foreign operators (*i.e.* a citizen being able to use from his/her home in a Member State certain services offered in another Member State, on an ongoing basis). Demand for such portability is clearly increasing. However, if such portability were subject to a strict territoriality principle, it would unnecessarily complicate the rights clearance process.

Media subscription services *provided by third parties*, for example by digital cable, IPTV or other mobile, telecom or broadband operators, often include broadcasters' programmes as well. The subscription operator may wish to offer its customers (general) ***portable access*** to its services, and perhaps even include such access in a cross-border (or rather "temporary take-along") context. The average subscriber paying for media content to be delivered to his portable device would reasonably expect this content to be accessible from any location where that particular device could be used by him (via an Internet connection). The act of retransmission or making available of a broadcast programme by a third-party subscription operator takes place in accordance with the copyright law of the Member State *in which the relevant communication is made*. In the case of subscription services this is normally the country where the subscription is actually offered to consumers.

If cross-border portable access to one's own media subscription was made subject to the law of each country where the particular subscriber happens to be travelling, this would require

the subscription service operator to clear all rights separately for each potential country (worldwide) that any subscriber might wish to visit. Obviously, this would make it impossible for the subscription operator to offer such services in a legitimate way. Therefore, in order to avoid that a subscriber, who is temporarily in a foreign country, is prevented from accessing its own subscription, there should not be another (copyright relevant) communication.

However, the situation is different for subscription services that include portable (and permanent) access to *foreign* broadcasters' services. That situation would be similar to the domestic cable distribution of foreign channels. Consequently, for allowing a subscription operator to offer foreign programmes (also) on portable devices, permission from the foreign broadcaster alone would not be sufficient, because the subscription operator would also need the clearance of all the other rights in the programmes (i.e. those that are not held by the broadcaster). As explained above, in the current EU framework, the ***rights clearance for those underlying rights*** is facilitated only with respect to *simultaneous* retransmission of programmes by *cable,* but not for other uses of broadcast programmes by third-party platforms. Consequently, in order to foster portable subscription services (including access to programmes from EU broadcasters of other Member States) throughout the EU, the EBU proposed solutions for the clearance of those underlying rights (see above under B and C) should be taken up.

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

Yes, see below and also the replies to **Questions 2 and 4.**

In the same way that the satellite injection rule functions in the Sat-Cab Directive, the **contractual freedom between media service providers and content right-holders needs to be maintained**, subject to European competition rules and the freedom of services.

The proposed extension of the satellite rule to EU-based online media services should allow contractual freedom between media service providers and right-holders (such as film producers) to continue, because it should remain possible for media providers, if they so wish, to obtain rights for services with a more limited territorial reach. This may simply be the *result of economic considerations* by the licensing parties concerned.

In accordance with EU law and principles, including the freedom of media services within the EU, the continuation of this contractual flexibility **including when applied to online media services** is particularly important for broadcasters and right-holders, as it provides a **substantial advantage for finding adequate licensing solutions,** while underpinning the financing of content production, over a more strict territoriality principle.

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

Yes, protection of broadcasters' ***content and signal integrity*** requires further measures.

In its *reply to the EU Green Paper on Convergence* (and Internet-connected TV), the EBU raised the need to **protect the signal and content integrity against commercial overlays and other parasitic business models across platforms** so as to safeguard the European audiovisual production value chain.

For the media, but also for citizens, it is fundamental to ensure that the audiovisual content delivered to the final customer is identical to the content which is made available under the media service provider's editorial responsibility. Therefore, content and signal integrity must be safeguarded against any modification to the quality, format or display of the signal. In other words, no intermediary or third party should be allowed to interfere with the content or signal, without the authorisation of the media service provider in question.

This is not only a media law issue, but also a copyright concern in the sense that under the current EU copyright framework, broadcasters do not have any such protection, whereas protection under unfair competition laws would be unsuitable (as these laws have not been harmonised EU-wide) and insufficient (as these "rights" are not exclusive).

The most suitable solution is the **extension of the broadcaster's neighbouring right** to protect its signals, on whatever platform, against unauthorised alteration or other use by third parties.

Today, broadcasters already provide various signals across multiple platforms. These signals are mainly linear or on-demand transmissions, but some could also be real-time streams, similar to other types of simulcasts (e.g. "***red-button services***"). Apart from regular (linear) broadcasts, other examples are the following:

1. simulcasts of regular broadcasts
2. catch-up of regular broadcasts
3. pre-transmission of regular broadcasts (pre-broadcast signals)
4. online signals including parts of regular broadcasts, either as highlights or previews;
5. online extensions of regular broadcasts (e.g. a football match or an Olympic Games' event taking place in parallel with the live broadcast of another match or Games' event, or news footage that was too long for use in the news programme);
6. signals with other related programming (e.g. interviews or additional documentary material, supplementing a regular programme), but which is not broadcast in a linear manner, and
7. signals with other online-only material.

This multi-platform use of broadcasters' services, which simply derives from today's audiences' demands, explains that the legal protection of broadcasters' signal and content integrity against commercial overlays by third parties and other parasitic business models across platforms has become an important and urgent issue of media convergence. Content and signal integrity needs to be ensured not only for (primary) TV screens, but also for the "red-button" services which are made visible via the same screen and for second screens, which are synchronised with the TV picture.

This protection is important, in all Member States, for the credibility and reputation of the media service provider, for the trust which individual users place in particular media services, and ultimately for the freedom of information of citizens and the protection of the rights of others. Therefore, this concern applies not only in the context of "Internet-connected TV's", but to all situations where third party platform operators could interfere with a broadcaster's signal, including in a cross-border context.

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

No, see above the replies to **Questions 2, 4 and 6.**

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

Yes, see below and also the replies to **Questions 2, 4 and 6.**

For the reasons set out above in the reply to Questions, 2, 4 and 6, EBU Members strongly support the need for a clarification of the act of communication as part of the "making available" right in line with the satellite injection rule, resulting in a country-of-establishment concept.

The main concern of the "targeting" approach which the Commission mentions in relation to Questions 8 and 9 on the making available-right - and which is also analysed by the Legal Study - is that ***it does not provide EU-based media services with the necessary legal certainty and it complicates, rather than facilitates, the rights clearance process***.

Which criteria will determine whether a territory has been "targeted"? For example, if an on-demand media service is offered in the English, German or Swedish language, what would be the conclusion as to the intended audiences? The mere fact that some Member States share a common language (often only partly) cannot be sufficient to conclude on targeting both territories. And what about targeting mainly the domestic audience and a very small minority of another country, e.g. ex-patriates? At which percentage (of the total population of a country) would the targeted audience become legally relevant, and which authority should be entitled to determine that percentage? Also, what would be the effect of legal disclaimers

on the relevant websites? These are just a few examples of the many possible uncertainties which could all be made subject to lengthy court proceedings. This means that the targeting approach has substantial disadvantages for creating an unhindered flow of European media services.[23]

For the avoidance of doubt, the EBU does not exclude applying the targeting approach (by default) to ***non-EU based*** online service providers, as these are not subject to any obligations or anti-circumvention safeguards under the EU media regulation. Similarly, as explained above, an adapted version of the satellite injection approach resulting in a country-of-establishment rule does not exclude taking account of targeting elements ***as a corrective factor*** for determining fair remuneration.

10. Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?

Yes. The separate exercise of the reproduction right for an activity that is subordinate to the main act of communication raises a conflict with the authorisation for the main act.

The reproduction right is a different and, in principle, separate right from any act of communication to the public. However, it becomes problematic if this right can be exercised independently from the communication right involved and with respect to forms of exploitation which are economically one and the same. In such cases there is a risk of ***discrepancy between the conditions*** that were set (or have been agreed) for the two rights concerned and that of ***double payment*** for the same use. Such a risk exists especially if the rights are in different hands. Separate exercise can thereby frustrate the economic activity for which permission had been obtained.

Examples:

In a case before the Munich courts (*MyVideo Broadband vs. CELAS*), the judges held that, in general, the making available of copyright protected works online required both the making available right and the reproduction right, because an on-demand use was technically not feasible without a reproduction. German copyright law did not allow a splitting of making available rights and reproduction rights for online uses. As a consequence, the music publisher could not have validly transferred only mechanical reproduction rights for online uses to CELAS while the making available rights were still managed by GEMA.

In some Member States, independent production companies that are commissioned by a broadcaster to produce TV programmes are required to obtain, for the use of music in such productions, not only licences for synchronisation/reproduction rights from a collecting society, but also so-called master rights from a record company, despite the fact that the broadcaster already has an agreement with the

[23] Variations of the targeting approach are the "exploitation" approach and the concept of the "most closely connected" country which is used in private international law ("conflicts of law"). However, they bear the same disadvantages - according to the legal Study, op.cit., p. 181, "the exploitation approach does not solve the bottlenecks found in the current state of the law with regard to the licensing process for cross-border transactions".

local collecting society for the communication to the public of the same music used in the TV programmes in question.

In the EBU view, in cases where the reproduction right is **only of an ancillary nature** towards the main economic (communication) activity which requires authorisation, the right should generally be subject to a "normative interpretation". This means that in cases where the authorisation (by licence or by law) purports to allow one and the same economic activity, such as broadcasting or on-demand use, it should be subject to only one right (and one licence), and any reproduction that is merely necessary to prepare the core activity should not have a separate or independent nature.

This is also the case where authorisation for the communication act would be provided by law (possibly subject to remuneration): If the right-holder were entitled to an equitable remuneration for a certain type of usage, then asserting the exclusive reproduction right over that particular use that was already authorised would seem to be exercising a right beyond the so-called "specific subject matter" of copyright.

This normative interpretation would not abolish or devalue the reproduction right as such. Even where the rights are in different hands, it would merely force the relevant right-holder(s) to agree among themselves on their respective shares from the communication licence fee.

The EBU position is shared by academic research[24] and, to a certain extent, by the European Court's *Premier League* decision (that allowed a broader application of Art. 5(1) InfoSoc Directive). At the same time, this position provides an answer to another question, namely **Question 12** (no separate "web-page viewing" right).

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

The EBU has taken note of the recent judgment by the European Court in the *Svensson* case that a mere hyperlink is not a communication to the public under Article 3(1) of the 2001 Copyright (InfoSoc) Directive. As this judgment refers exclusively to hyperlinks to predominantly text-based online publications, and not any other types of communications, the EBU welcomes the ***outcome*** of the decision.

The EBU also welcomes the Court's reasoning that, where a hyperlink is used to provide unauthorized access to content which is behind an access control mechanism (including e.g. a pay-wall), then such hyperlink would amount to a ***circumvention of a technological means of protection*** by communicating the said content to a public that was not originally authorized to access it. This example clarifies that, regarding this question No. 11, there may

[24] See the Lisbon Council Policy Brief of 30 May 2013, by Prof. Hargreaves and Prof. Hugenholtz, at http://gallery.mailchimp.com/e11b949d8350120e252700029/files/LisbonCouncil_policybrief_FIN2_web.pdf:
"*Given that the right of making available was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced*."

well be circumstances under which the provision of a hyperlink leading to a work or other subject matter protected under copyright should be subject to the authorisation of the right-holder.

Moreover, with respect to ***other types of communications***, the EBU feels that there is a crucial distinction to be made. This follows on from the Court's decision in the *TVCatchup* case, where the type of communication clearly involved an ***economic form of exploitation***.

This view is based on the fact that Article 3(1) InfoSoc Directive implements Article 8 of the 1996 WIPO Copyright Treaty (WCT), together with the Agreed Statement, into EU law. The Agreed Statement (which is reflected in Recital 27 of the InfoSoc Directive) clarifies that economic forms of exploitation, different from the mere provision of physical facilities, should fall under the scope of communications that are relevant under Art. 8 WCT, and thus under Art. 3(1) InfoSoc Directive. This is in line with the copyright principle that rightholders should be able to receive an equitable share of the proceeds arising from the economic exploitation of their works or other protected subject matter.

Consequently, Internet-based communications that differ from "mere" hyperlinks as in the *Svensson* case itself should not fall outside the scope of Art. 3 InfoSoc Directive, *whether or not* there is a "new public". For example, neither Art. 8 WCT nor Articles 11, 11*bis* and 11*ter* of the Berne Convention, to which Art. 8 WCT refers, require a "new public" as a *decisive condition* for the application of those provisions. This also explains the Court's decision in the *TVCatchup* case where the question of a "new public" was not held as relevant.

The EBU feels that the matter of ***embedding* or *framing*** (in particular of audio or video streams provided by another website) is markedly different from mere hyperlinking. Forms of economic exploitation which have similar characteristics should be treated as technologically neutral (as set out elsewhere in the EBU reply), and thus differently from mere hyperlinking as in the *Svensson* case. Therefore, regarding such other types of communications, the EBU should like to reserve its position, pending the forthcoming judgment in the *Bestwater* case.

12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user's computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?

No. See the reply to **Question 10.**

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

There should be no *mandatory* use of identifiers.

The EBU is opposed to a *mandatory* implementation of standard identifiers. EBU Members have expressed the desire for freedom to decide whether or not to use such identifiers.

While the EBU agrees that the use of audiovisual work identifiers can be helpful in the process of rights clearance, distribution for online availability, and discoverability of European works, the EBU and Members have expressed concerns with respect to the need for interoperability between existing identifiers to be implemented and the fact that evaluations of the costs and benefits of existing identifiers need to be undertaken. Therefore, PSM should remain free to decide whether or not to adopt a given identifier. In addition, a market-led approach to identifiers is more suitable as it can be an incentive to innovation.

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

No. The 2011 Term Extension Directive remains an inappropriate measure. Also, there should be no further increase in the terms of protection.

The EBU stands by its highly critical assessment of the Term Extension Directive: extending the term of protection of the exclusive right of phonogram producers stifles innovation and hinders legal online offers.[25] The EBU would oppose any further extension in scope (*e.g.* to performers and producers in the audiovisual sector, cf. Article 3.2 of the Directive).

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

No. By clarifying the act of making available in accordance with the satellite injection rule, exceptions and limitations would have *de facto* cross-border effect, and thus there is no need to make any of them mandatory. See the replies to **Questions 2 and 4** above.

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

EBU Members in various Member States feel that serious thought should be given to adapting *existing* exceptions or limitations under their applicable national law where such need for more flexibility would exist with respect to *specific* cases. However, EBU Members in other countries are of the view that concerning the exceptions or limitations under the law in their territory no such need for more flexibility existed.

[25] See http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/Position%20Papers/EBU-Position-EN_Extending%20Term%20Protection%2024.11.2008.pdf)

Examples:

Regarding the following exceptions or limitations, EBU Members in various Member States have raised the need for more flexibility as to their scope of application under their national law:

"***Ephemeral reproductions***": Some EBU Members find that the national exception implemented under Art. 5(2)(d) of the Infosoc Directive should clearly also cover broadcasters' online or on-demand services, as currently it is unclear whether this clause can apply to those services, even though the wording is not limited to broadcasting *per se*. The rationale for this provision is exactly the same for all broadcasters' services, as it is intended to exempt activities of only a preparatory nature from the need for a separate licensing arrangement.

Quotations: Some EBU Members find that the national exception implemented under Art 5(3)(d) of the Infosoc Directive, concerning *quotations for purposes such as criticism or review* needs to be clarified so that quotations can also apply to the digital environment. If a photo or paintings etc. cannot be used in a critical presentation in digital form, such as a broadcaster's internet news service (while it would be permitted to be used in analogue newspapers), in the digital age this restriction has negative effects on the possibilities to report on topics of general interest in a democratic society.

Educational use: Some EBU Members find that the conditions of their national exception for educational use should be clarified, as they are currently too vague, which hinders EBU Members in licensing their own content for non-commercial use in domestic and other Member States' schools.

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

Generally, EBU Members do not favour the creation of an US-like "fair use" clause, as such an open-ended clause would arguably cause too much legal uncertainty.

On the other hand, compared to the situation in 2001, the analogue world is in the process of being bypassed by the digital environment. Therefore, for those Member States where EBU Members have expressed the need for more flexibility, a general solution for the above could be provided by a certain **clarification,** or where necessary, a **modification** of the InfoSoc Directive, to support those individual Member States where the aforementioned need exists to update at least some of their national exceptions and limitations with respect to the online world.

However, for the sake of clarity, in countries where EBU Members have expressed the view that added flexibility is not needed, such clarification or modification should allow those Member States to maintain the *status quo* under their law.

41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?

Yes, a special mechanism for the specific issue of public broadcasters' archives needs to exist in each Member State.

PSM wishing to make their archive productions available online face a huge administrative burden due to issues with the process of rights clearance. These archives have been built up by broadcasters over several decades for the purpose of producing audio and audiovisual programmes within their public service remit. To reduce the administrative burden for making those archives available online, a legislative solution is needed at the national level.[26]

In order to take account of national (individual or collective) licensing practices, at the EU level, a framework provision would be sufficient to promote the adoption of such national solutions. Furthermore, this solution is needed only in countries where it does not already exist. This approach is fully compliant with the principle of subsidiarity.

While the need for a solution to the PSM's archive problem is generally recognised, any solution would need to reduce the administrative burden for PSM and to allow them to open up their archives to online uses. This does not mean that there should be a *one-size-fits-all* legislative solution. Specific legal provisions on the re-use of broadcasters' archives already exist in various countries. Member States should be able to provide appropriate solutions taking into account the characteristics of national copyright practices. Any solution should recognise the specificities of PSM archives (large amount and complexity of rights), should apply to the full variety of content in PSM archives and should cover any type of re-use, including excerpts.

Collective licensing solutions are particularly suitable for the large scale clearance of rights wherever individual licensing would not be feasible or would be disproportionate considering the massive number of rightholders involved. Solutions based on "extended collective licensing" have proven to be very useful in unlocking archives. The EU should foster legal provision in national laws - in accordance with national legal mechanisms and collective licensing traditions - that enables ECL to be used for finding appropriate national solutions.

53(a): Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?

Yes, there is legal uncertainty as to which types of use (of text and data) would be subject to prior authorisation from the right holder.

[26] During the *Licences for Europe* stakeholder dialogue, the EBU and its Members have repeatedly stressed the need for a solution for its specific archive problem in the Audiovisual-Heritage Working Group, see in particular the presentation on 14 June 2013, entitled "Unlocking Public Service Broadcasters' Archives", see http://ec.europa.eu/licences-for-europe-dialogue/en/content/wg3-presentations-5th-meeting-14-june.

54: If there are problems, how would they best be solved?

This issue affects public service broadcasters indirectly as journalists and researchers working for broadcasters explore vast amounts of existing texts and data, in order to obtain new insights, patterns and trends which information will then be broadcast.

Copyright should not be an obstacle for such use. This can be solved at least partly through a recalibration of the reproduction right (see Question 10 above), as in the context of text and data mining it should be clarified also that mere ***temporary copies*** are not subject to the reproduction right.

58(a)**: **Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?

58(c): Have you experienced problems resulting from the way the users are using pre-existing works or other subject-matter to disseminate new content on the Internet, including across borders?

61: If there are problems, how would they best be solved?

Yes, public service broadcasters have experience with UGC both as ***users*** for content shared by their audiences as well as ***right holders*** when others have re-used their productions for UGC. The challenge in both cases is how to assess whether the actual use is covered by an exception, and if not, how the necessary rights can be cleared.

It is difficult to give a clear definition of UGC, as it covers many different types of media and creative works, increasing the risk of abuse or unintended consequences. It may be helpful at least to distinguish two categories of UGC:

(1) works created entirely by users (not using pre-existing copyright protected material); and

(2) works created by users from pre-existing works.

With regard to the first category, many of these UGC works will be protected by copyright. When broadcasters are users of such UGC content, they will ensure, via their "terms of use", that the person sharing the UGC has given the necessary authorisations.

The Commission is focusing on the second category of UGC, i.e. based on pre-existing protected material. Copyright issues will arise when such UGC is based - in part or in full - on others' works without authorisation, be it for commercial or non-commercial purposes, and where the use does not fall within an exception and limitation. Most relevant exceptions are those for quotations or criticism, comments, parody, news reporting, researchor educational

activities. As with any other use of a protected work, if no exception can be invoked, the UGC "maker" must obtain *permission* from the right-holders to create and distribute the UGC.

The EBU sees no urgent need at present for a legislative change through the introduction of an exception specifically targeting UGC. Proposals for the introduction of a new, general exception for so-called "transformative use" seem to be excessive and could easily lead to abuse.

The Commission should take into account the whole value chain in considering this issue, i.e. there are not only end-users and rights holders, but also commercial websites that benefit financially from hosting UGC (whether or not there is revenue-sharing with the UGC creator). Also, special licensing solutions are being developed to address UGC using pre-existing works between the rights holders and hosting websites, which also simplifies the situation for end-users.

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

Yes. The EBU would welcome a clarification that the exception was not intended to cover commercial copying on behalf of individuals. See also the proposal to protect content and signal integrity under **Question 7** above.

The following remarks need to be read together with the overall concern regarding new technologies or the appearance of new devices which are used to exploit broadcasters' programming in ways that run counter to the broadcasters' (and other programme right-holders') legitimate interests.

The questionnaire itself refers to an "*on-going discussion as to the application or not of levies to certain types of cloud-based services such as personal lockers or personal video recorders*". The levy system is not the main concern for broadcasters.

PSM supports the possibility for individual members of the public to make private recordings of free-to-view broadcasts for their own personal use. This should also allow for copying of content by an individual person to another medium or device (also owned by that individual) for his/her own personal use. However, this private use is markedly different from the situation where an increasing number of telecom, IPTV or Internet operators offer a service, against payment (usually a combination of advertisements and monthly fees), which allows subscribers to "record" a television broadcast and watch the recording of the broadcast at their convenience (including use of the pause and fast-forward functions). The copy of the broadcast is not located in the subscriber's own TV set or but is only on the operator's server (or its outsourced "cloud" servers) or on the hard-drive of the set-top box controlled by the operator. The operators offering these services claim that the functionality they offer is covered by the exception for private copying (Art.5.2(b) of the 2001 InfoSoc Directive).

The operator present their services as if they are mere "technical facilitator". However, there is no doubt that by giving subscribers access to *copies* of the broadcaster's programmes

stored on their server, a *reproduction* is made. Moreover, the reproduction is made on behalf of the consumer in return for direct or indirect payment. Given increasing storage capacity, such services can record whole channels or genres based on a programme that the consumer has previously selected to record, and store these for an unlimited period. It therefore becomes a parallel on-demand service, in direct conflict with broadcasters' catch-up services made available to their audiences, but without a licensing agreement. As this seriously undermines the continued investment in original broadcast productions, it is essential that the private copying exception does not allow such commercial practices.

Owing to the technical complexity, courts are struggling with the correct legal qualification of these services. For a better understanding of how the system works, courts often revert to analogies, e.g. with photocopying shops, photocopiers in libraries or the video recorder which existed before the advent of the Internet. However, it should not be possible for commercial operators to rely on this exception, because it is clearly aimed at reproductions made *by a natural person* for private use and for ends that are *neither directly or indirectly commercial*.

While broadcasters currently face problems with service providers offering cloud-based or similarly automatic mass-recording solutions, the issue should be addressed in a technology-neutral manner: *Any* misuse for commercial purposes of the exception should always be prohibited, irrespective of the technology used. Future technical developments should not allow third parties' parasitic exploitation for clear commercial purposes to fall under this exception. Operators wishing to legally offer such a service can easily seek the prior authorisation from the broadcasters concerned, via appropriate licensing tools.

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

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

Yes, a particular focus on infringements with a commercial purpose is needed.

The EBU would like to refer to its response to a number of key questions in the EU consultation on civil enforcement of IPR: public consultation on the efficiency of proceedings and accessibility of measures (March 2013)[27] as well as its response to the consultation on procedures for notifying and acting on illegal content hosted by online intermediaries (September 2012). [28]

[27] The EBU response is available here: http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/Position%20Papers/EBU-Position-EN%20reply%20to%20consultation%2023.3.2013.pdf

[28] The EBU response is available here http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/Position%20Papers/EBU-Position-EN_Consultation%20on%20NA%20Procedures%20-%20EBU%20Response.pdf.

The EBU agrees that it would be useful to establish, at the EU level, model rules for fast track proceedings for civil law cases concerning infringements of IPRs, including community trademarks and community designs. The same goes for specific model rules for small claims proceedings for civil law cases concerning infringements of IPRs, including community trademarks and community designs.

In cases *of commercial scale infringements or notorious* infringers, there should be particular consequences (e.g. suspension of the infringer's/alleged infringer's account) resulting from a notification mechanism.

The availability of effective notice and take-down mechanisms is of crucial importance for public service broadcasters. The EBU finds that notice and action procedures currently lack the necessary level of effectiveness. Different hosting service providers use different systems of notification of illegal content. This creates a variety of procedures to be fulfilled to protect content on these services.

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

No, see below and the replies to **Questions 2, 4 and 6** above.

The rights clearance model that the EBU proposes for EU-based media services (or at least for broadcasters' online broadcast-related services), based on an adapted version of the satellite injection rule, is *the least intrusive solution* to a practical issue, and is therefore infinitely preferable to a complete overhaul of EU copyright law, as would be required by the abolishing of territoriality in the EU or the introduction of a new EU "Copyright Title".

For enforcement, however, thoughts should be given as to how a decision in a given Member State on the infringement of an IP right can take into account the **damages** (from the same infringement) that may have occurred in other Member States. Guidance given so far by the European Court of Justice in the *Pinckney* case[29] on how to interpret the Brussels I regulation is unhelpful as it suggests that the damages will only relate to the harm created in that particular Member State. A less ambiguous rule on the competence of courts to assess the full extent of the damages (wherever occurred) would be welcomed.

Annexe

[29] CJEU Case C-170/12 - *Peter Pinckney v KDG Mediatech AG*, 3 October 2013.