



EUROPEAN BROADCASTING UNION

Legal Department

UNION EUROPEENNE DE RADIO-TELEVISION

Département juridique

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**INITIAL EBU COMMENTS ON
THE COMMISSION STAFF WORKING DOCUMENT,
ANNEXE TO THE COMMUNICATION FROM THE COMMISSION ON
"I2010 DIGITAL LIBRARIES"**

SUMMARY

The EBU fully supports the reasoning which underlies the EC Commission's initiative, i.e. the desire to find appropriate ways of ensuring that European citizens will have access to their cultural heritage. In the following comments it is assumed that broadcasters' archives are to be included in this initiative. In that case, for EBU broadcasters the most relevant questions on the on-line consultation relate to:

- legislative measures to facilitate the digitization and subsequent *accessibility of copyrighted material*, while respecting the legitimate interests of rightholders;
- legal mechanisms to facilitate *wider use* of material for which it is impossible or difficult to determine the rightholders ("orphan works"), and
- the risks of national *legal deposit* schemes leading to a multiplication of tasks.

On these points the EBU wishes to stress that:

- ❖ the present obstacles to the *use* of broadcasters' archives cannot be resolved by merely fostering agreements. There is a clear need for a European approach through a *simplified legal mechanism* under copyright law (subject to payment of equitable remuneration, as appropriate), so as to guarantee that broadcasters in all Member States have equal possibilities to use their archives;
- ❖ various options for such solutions exist (in full conformity with European and international laws), such as, in particular, the *mandatory extension* of collective agreements in combination with a specific "framework clause" in the national copyright law;
- ❖ if any *deposit scheme* for the preservation of broadcast productions were regarded as necessary, the approach of the Council of Europe's Protocol for the Protection of Television Productions (2001) should be taken as a starting-point, by recognizing the *specificity* of radio and television productions (as being significantly different from other archives), and appointing the broadcasters as the official archive bodies for their own productions;

- ❖ given the immense volume of past radio and television productions (going far beyond the European film heritage), the most appropriate framework for any such deposit scheme for broadcast material would need to be *voluntary*, linked to significant *financial support* schemes.
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MORE DETAILED COMMENTS

Overall, the EBU welcomes the initiative by the Commission to take action to facilitate on-line and cross-border access for the general public to the archive material of publicly-accessible institutions, such as libraries and museums. Although the above-mentioned Communication makes only a few references to *audiovisual* material, the impression exists that the Commission also intends to integrate broadcasters' archives into this initiative. (For example, the Communication explicitly mentions the "Presto" project on broadcast archive preservation technology.) Reference is, moreover, made to the Council of Europe's Convention on the protection of the audiovisual heritage, which includes the Convention's Protocol dealing specifically with the preservation of television productions.

If this very worthwhile objective of protecting of the European cultural heritage is to be achieved, a large number of practical and regulatory issues raised by the initiative will need to be resolved. However, many of the considerations which arise in this context are already set out in the EBU Comments on the EC Commission's Staff Working Paper of 2001 "on certain legal aspects relating to cinematographic and other audiovisual works (SEC(2001) 619)".¹ The main issues from the broadcasters' perspective are set out below.

1. Framework to facilitate the accessibility and use of broadcasters' archives

a) Need for a European approach to overcome legal and practical obstacles

The issue of copyright (and other rights) ownership in radio and television productions is highly complex. It follows on from national copyright law and, in particular, contracts based thereon which the broadcast producer has concluded with the various authors, performing artists and other owners of original rights. With the exception of pre-existing musical works and commercial phonograms, the standard procedure in daily television operations is *direct individual* contractual arrangements with programme contributors. This means that the mere identification of rightholders for more recent and, in particular, for new television productions is not an issue.

However, with a view to exploiting their *older* productions stored in their archives, and particularly for *non-linear* media services the broadcasters would first have to re-negotiate certain rights with individual contributors who could claim today that the rights which they assigned at the time did not cover newly-invented uses such as on-demand use via the Internet. The experience of the European broadcasting sector, and especially broadcasters which started producing radio and television programmes half a century ago, is that the issue of "orphan works" is only one of the obstacles. In most cases, it is virtually impossible for television producers *not only to identify* but also to trace and *negotiate successfully* with *all individual programme contributors* or their heirs.

¹ The full text of these comments is available at the EBU website, under "Position Papers" (2001); see http://www.ebu.ch/CMSimages/en/leg_cinema_audiovisual_works_tcm6-4420.pdf.

Even assuming successful identification of all the rightholders, the huge administrative effort involved in *clearing* all the necessary rights would in most cases be *out of all proportion* to the expected benefits and, hence, would be economically prohibitive. For example, even where a given use may be understood as permitted under old contracts, a fixed remuneration previously agreed for re-use in relation to the whole national audience (when the population had the "choice" between a single channel and the off-switch) would normally be far too high when related to the fragmented audience shared by the many programme channels which exist today.

It should be realized that one of these obstacles, the *identification* of rightholders, cannot simply be removed by the databases of collecting societies. As direct individual contractual arrangements are the norm for producing broadcasts, the usual position is that most rightholders (other than in music) have not transferred their rights to any collecting society. Only the television producer will hold a record of who has participated in, or contributed to, its own production.

As regards *post-production rights clearance* (of material other than music), cooperation with collecting societies is one possible avenue which has been envisaged. However, it cannot just be a question of a contractual agreement between broadcasters and collecting societies, especially when the rightholders in question have not transferred their rights to such societies. In reality, such societies do not exist everywhere in Europe for each and every category of rightholder concerned. Finally, even where they do exist, they do not necessarily have a mandate to authorize all the new types of use in question.

What, therefore, should be done to overcome the present obstacles to the use of these archives, on the respective national territories and within Europe? It would already add significant value and support to the distribution and circulation of such productions if individual Member States were to provide for a *simplified legal mechanism* which allowed broadcasters to exploit their own archive productions (subject, naturally, to payment of equitable remuneration, as appropriate, to rightholders who contributed to the production). However, to prevent competitive distortion a need exists for a *European regulatory framework* so as to guarantee that broadcasters from all Member States have equal possibilities to exploit their own archive productions.

The bottom line to be kept in mind is that where rights clearance is not possible, or not worth the effort, it is not only the public that will suffer (by not being able to enjoy access to its audiovisual heritage); the rightholders will suffer too, since *no* rightholder will receive any remuneration if even a *single one* of them (out of a potentially large number of contributors to the production) cannot be identified, or refuses to enter into an agreement.

b) *Different options within regulatory framework*

If a "collecting societies solution" were considered to be the most appropriate, despite the serious above-mentioned shortcomings, this could be achieved solely through a special legislative measure stipulating that specific rights (to be defined) in archive productions (to be defined) can be administered only by collecting societies or similar representative rights negotiation bodies, except where the producer already holds such rights in the first place (an example of such a measure being Article 30a of the Danish Copyright Act).²

An alternative might be the *mandatory extension of collective agreements*, a regulatory mechanism which appears to have been producing positive results, especially in the Nordic countries. Needless to say, any such framework would have to be accompanied by strict *transparency* obligations for collecting societies, regarding, for instance, the "repertoire" which they represent (i.e. the category and the number of rightholders) and the nature of the rights held.

2. Concerning the possible "deposit" of broadcast productions

Safeguarding, restoring and holding available audiovisual material for cultural, educational or research purposes are costly activities. Consequently, a *conditio sine qua non* for any regulatory (or co-regulatory) intervention to improve the preservation of the audiovisual heritage in the EU Member States is the allocation of *adequate public funding* to the organizations which are responsible for such tasks.

Moreover, it needs to be recognized that in view of the huge quantity of radio and television productions and the ephemeral nature of a large number thereof, it would be impossible to include *all* such productions in any preservation project. Even if only a selection of such productions were to be preserved, it would be a difficult task to define *objective criteria* for such a selection. This means that, for practical and definitional reasons, it would be inappropriate to make radio or television productions part of any *mandatory* deposit scheme.

These and other aspects (such as the obligations of countries under international treaties on the protection of copyright and related rights) have been acknowledged by the Council of Europe's Convention for the Protection of the Audiovisual Heritage, including the Protocol for the Protection of Television Productions (adopted in September 2001). Accordingly, this instrument adopts a *different approach* for television productions as opposed to cinematographic productions. The main points in the Television Protocol may be summarized as follows:

² Available at <http://www.kum.dk/sw4550.asp> (English translation by the Danish Ministry of Culture).

- Only each national legislator can properly identify what belongs to its own cultural and audiovisual heritage. Moreover, in view of the enormous quantity and variety of television productions, it is obligatory only for a *selection* to be made for the purposes of the Protocol.
- Broadcasting organizations can be designated as the archive bodies for their own productions. Such a designation seems logical since national archive bodies which have to carry out the tasks which they have been assigned need to have the necessary facilities and financial means. Additionally, to allocate such means and possibly reduce the related costs effectively, the most appropriate measure is to designate the broadcasters themselves as official archive bodies for their own productions, because they already possess the specific skill and expertise for such activities. The Protocol explicitly requires the Contracting States to "examine ways of ensuring that archive or deposit bodies have the necessary technical and financial resources" to carry out their work.
- Preservation of a selected television production by an archive body other than the broadcaster which has been responsible for that production should not prejudice the normal exploitation of the production or the legitimate interests of the television producer as owner of copyright (or neighbouring rights) in that production.

Consequently, if regulatory intervention for the preservation and public accessibility of radio or television productions is regarded as necessary, the most appropriate framework for any deposit scheme would need to be on a *voluntary* basis, linked to significant financial support mechanisms as necessary incentives for broadcasters' or producers' active participation.
