August 24, 2017

Proposal for a Regulation on certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes

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As organisations working across the audiovisual, music and video games sectors in Europe, we are writing to you in the context of the proposal for a Regulation on certain online transmissions of broadcasting organisations and retransmission of television and radio programmes (the "Proposed Regulation" below). We would like to bring to your attention recent proposed amendments **that would require the mandatory collective exercise of retransmission rights in audiovisual and music content on the open internet (the "Proposed Amendments" below)**. The Proposed Amendments relate to Articles 1b, 3 and 4 of the Proposed Regulation.

Films and audiovisual works, sound recordings, and video games unite the creative and financial contributions of many different right holders. For films and audiovisual works, the centralization of the exclusive rights of the different right holders with the producer operates by law and/or contract. This centralization of exclusive rights is fundamental – together with contractual and commercial freedom to license the exclusive rights – to raising the necessary funding to create, finance, market and distribute films and audiovisual content in all distribution channels across Europe. Similarly, the freedom to license their rights in works and recordings is vital for the music right holders to be able to invest in new music and new business models.

Collective rights management licensing solutions already exist in the marketplace and are used on a voluntary basis when right owners consider it as the best option. We believe that whether or not to deploy collective licensing should be right owners' choice as any other solution would diminish the value of exclusive rights. Articles 1b and 3 of the Proposed Regulation go far beyond this notion and would have a tremendous negative impact on the audiovisual and music industries and particularly on SMEs.

In our view, the Proposed Amendments amount to usurping exclusive rights and territorial licensing by extending the mandatory collective licensing regime to the cross-border retransmission of TV and radio programmes via the open internet, mobile networks or any similar networks. **We therefore urge you to oppose the Proposed Amendments and affirm the integrity of exclusive rights and contractual freedom as prerequisites for the effective functioning and economic sustainability of Europe's audiovisual, music and video games sectors.**

Our opposition to the Proposed Amendments is consistent with our general opposition to the envisaged application of the "**country of origin" principle to certain ancillary online TV-services such as catch-up, simulcast or previews in the Proposed Regulation** (Articles 1(a), 2 and 5) which would have a destructive effect on the entire value chain for creative content and copyright works by effectively removing the ability of right holders to grant effective territorial exclusivity. Such licenses are the basis upon which the film and television industry in Europe finances and distributes audiovisual content in response to consumer demand. Territorial exclusivity permits sustainable returns on the large investments necessary to develop and produce film and AV content as well as for their optimal marketing and distribution. This in turn guarantees diversity of content and services offered. As concerns the music industry, it has successfully developed licensing models to enable cross-border services on the back of the current territorial copyright system. Apart from removing incentives to develop and invest in local distribution and marketing, changing the operation of the copyright system would severely disrupt the markets and endanger the positive development of the European digital music market.

The core economic model of retransmission platforms is to aggregate TV and radio channels into packages (basic, premium, thematic, etc.) which are sold to consumers. These packages are distributed to subscribers typically against payment. This "distribution" is in fact a *simultaneous, unaltered and unabridged*

retransmission of the initial transmissions of the channels comprising the package. Historically, this activity was the principal business model of cable operators. In 1993, the Satellite and Cable ("**SatCab**") Directive introduced a system of mandatory collective licensing of retransmission rights to facilitate the clearance of the rights in the content carried in channels from other Member States. At the time, the intention was to assist those cable operators making large investments in infrastructure and thus to stimulate growth in a nascent industry.

However, by proposing to extend the SatCab Directive's cable retransmission regime (Articles 1b and 3 of the Proposed Regulation) to other retransmission technologies than IPTV and satellite, the Proposed Amendments fail to recognize the fact that the open internet is an entirely different technological proposition, one which permits and enables licensing on a negotiated, individual basis. Expanding that regime for some technologies (mobile and similar networks, extension to the open internet) will do damage to the audiovisual, music and video games sectors: it will take away the ability of publishers, producers and distributors to negotiate individually terms and prices truly reflective of the economic value of the works and recordings. The resultant decline in revenues will affect the sectors' capability to finance the development and production of new content and will discourage new investment in the sectors, with attendant loss of competitiveness and sustainability.

The Proposed Regulation clearly provides that the mandatory collective licensing regime **does not** extend to retransmission over an internet access service, as defined in Regulation 2015/2120. The relevant recitals provide that this regime applies to all retransmissions through closed networks comparable to cable retransmission but explicitly and rightfully excludes broadcasts via the open internet. In particular, Recital 12 of the Proposed Regulation recalls that the open internet is excluded for the following three reasons:

(i) these services have different legal, commercial and economic features;

(ii) they are not linked to any particular infrastructure; and,

(iii) the ability to ensure a controlled environment on the open internet cannot be guaranteed.

This approach was chosen to ensure respect for international copyright norms and in light of the role of the internet as the future main distribution channel for creative content. Ensuring that right owners can freely and fairly exercise their rights in the online environment is essential for future financing of content and the development of new business models - hence the need to preserve individual exercise of exclusive rights.

In its own impact assessment, the European Commission fully recognises the fundamental difference between open internet services and IPTV [1]:

> "*OTT retransmission services are by their very nature not firmly linked to a particular territory, and their ability to ensure a controlled environment is limited if compared e.g. to cable or IPTV (which are normally limited to national or regional territories). Also, content delivered over the open Internet can be more easily intercepted than content delivered over "closed" networks such as IPTV. Finally, as such services are not linked to any particular infrastructure, their number can potentially be very high".*

In view of these fundamental differences, **the Proposed Amendments to extend the mandatory collective licensing regime to retransmission via the open internet – even if limited to subscription services – would severely undermine the exercise of exclusive rights and territorial licensing** by removing the ability of right holders to license content appropriately to raise financing to develop and produce content as well as to meet market demands. As a result, the continued financing and production in the audiovisual and music sectors is imperiled as well as distributors' ability to develop an audience for specific content and pursue the optimal distribution across various platforms and technologies.

Indeed, the Commission's impact assessment assessed the option of extending the regime to OTT services "*as long as they are provided to a defined number of users (subscribers, registered users)*". However, the impact

[1] See Commission Impact Assessment, p. 49.

assessment effectively **dismisses this option due to the risk of negatively impacting consumer choice, the increased chance of signal theft, the devaluation of the value of content and the potential harm to cultural diversity**.[2] The mandatory collective rights management regime is simply not a workable means to secure the revenue necessary to finance creative content and copyright works for the European market or indeed to recoup investments in development, production, marketing and distribution. Moreover, the risk of undermining territoriality would be much greater, and the Proposed Regulation is not necessary to ensure the availability of audiovisual and music works online. Market solutions for direct licensing have developed that allow right holders to license the relevant rights to distribute their works over the internet or through other online means. This approach is far more conducive to the production and optimal distribution of new works. It is of overarching importance to preserve the freedom to agree on terms of use, including on territorial exclusivity in the exercise of exclusive rights. This also involves the ability to tailor license fees for a variety of reasons such as the type of distribution and content concerned as well as production, marketing and distribution costs that need to be recovered.

The same principles argue against the imposition of any mandatory collective rights management or extended collective licensing schemes to on-demand services such as NPVR and restart TV. These services rely on the exclusive rights of communication to the public, including making available, and reproduction, which are already licensed directly to (and by) broadcasters and platforms on a daily basis across the EU. **Furthermore, subjecting on-demand services to mandatory collective rights management would violate international norms (Berne, TRIPs and the WIPO Copyright Treaty).** For similar considerations, mobile or similar networks should also be excluded from the definition of "closed networks".

Finally, we recall the importance of Article 4 of the Proposed Regulation (Exercise of the rights in retransmission by broadcasting organisations). By exempting broadcasting organisations from the obligation to exercise their own or their acquired rights by way of the mandatory collective licensing regime, the Proposed Regulation is consistent with a key principle established in the SatCab Directive (Article 10). This provision creates flexibility for right owners by allowing them to license their retransmission rights up front to broadcasters. At the same time, it enables broadcasters to retain control over the distribution of their programme services, which is essential for the strategic development of the creative content industries in Europe. Broadcasters play a critical role in the financing of new audiovisual content, (re)investing almost half of their revenue into original content. **There should be no modification to Article 4.**

In conclusion, we respectfully urge you to adopt the following position on the retransmission regime:

1. **No extension to the open internet and no inclusion of on-demand functionalities: unjustified from a consumer, economic and legal standpoint and international norms (Recital 12, Article 1(b), Article 3).**
2. **"Mobile or similar networks" to be removed from the scope of the Proposed Regulation (Recital 13, Article 1(b)).**
3. **No modification to Article 4 (inapplicability of Article 3 to broadcasting organisations in respect to own transmissions).**

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[2] The Impact assessment finds that *"the impact of such cases would be much greater given the cross-border nature of OTT services, their potential big scale (as they are not linked to any particular infrastructure), the fact that they have a more limited ability to ensure that consumers from other territories will not be able to access the service and the fact that OTT services are more prone to illegal interception. This could reduce the value of exclusive distribution deals based on different windows of exploitation and undermine the territory-by-territory distribution strategies. […] Rightholders may become reluctant to license their content for the free window, since such content could be retransmitted online in other MS through mandatory collective management"*
"(…) the risk of overlap between different windows of exploitation mentioned above may result in less premium content being available through free-to-air TV"
"The possible impact in terms of licensing of premium content to free-to-air broadcasters may nevertheless negatively affect the access to cultural diversity and in turn have a negative effect regarding addressing social and cultural needs of EU citizens."

List of Signatories

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