



Cable Europe Comments on the Commission's Reflection Document on "Creative Content in a European Digital Single Market: Challenges for the Future"

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Executive Summary

The European cable TV industry currently provides broadband, telephony and digital TV to approximately 73 million customers. Cable Europe represents Europe's leading cable TV operators and their national trade associations. The aim of Cable Europe is to promote and defend the industry's public policy positions and business interests at both European and international level, and to foster co-operation among its members.

Cable Europe welcomes the Commission's consultation on its Reflection Document 'Creative Content in a European Digital Single Market: Challenges for the Future'. We support the Commission's approach to this debate and take a positive view the opportunity to comment on the Commission's proposals included in this document.

We would particularly like to applaud the title chosen for the Reflection Document "Creative Content in a European **Digital** Single Market". Indeed, as per previous comments made by Cable Europe, it is essential to acknowledge that the challenges and problems faced today and in the future concern not only the activities on the Internet (IP technology) but all platform activities engaged in offering content services across national borders¹, such as television services offered over cable networks based on DVB technology. We would therefore wish to **underscore the importance of a technology neutral approach by regulation.**

Cable operators offer a variety of digital services to their subscribers, the depth and breadth of which vary across countries. In general, European cable operators offer:

- o Digital TV & radio;
- o Interactive Digital TV (iDTV): On demand TV, On demand movies downloads, Games, ringtones, photo albums, music, Live sports, TV guides;

¹ All cable services, even if not international or Internet services, can be available to subscribers across borders by using a sling box. Moreover, in line with recital 14 of the Satellite and Cable Directive (SATCAB), the communication of linear audiovisual media services via cable forms part of an uninterrupted chain of communication to the public, which is initiated by the broadcaster.

- Broadband Internet services via personal computers (PC):
 - Streaming linear broadcast channels similar/substitutive to analogue and digital TV services;
 - TV on demand (PCTV), and on demand movies: These products are online rental services offered by the cable operators including films, series, music concerts, radio- and television programs.

This paper provides Cable Europe's comments on the interesting proposals made by the Commission in its reflection document to allow for an easier and more efficient rights clearance structure for commercial users to obtain rights for diverse EU content and offer it on all digital networks.

The current European copyright framework is characterised by a high degree of inefficiency and partially impedes the EU from achieving overarching goals including the further development of the internal market, competition and fast digitisation.

In the current system Cable operators are subject to high transaction efforts and opportunity costs as a result of uncertainties caused by copyright regulations pertaining to the clearance of cable distribution rights. Therefore **an improved, more effective, more efficient, and more consistent transparent rights management and clearance system for both musical and audiovisual works across Europe is needed.**

A policy to promote the establishment of an internal market for audiovisual media services needs to go hand in hand with a common copyright regime and common rights clearance practices.

The EU should help to install a new, more efficient copyright clearance system which would help all market players to streamline their transaction and management costs. Key to this new system is further transparency and competition between collecting rights management organisations (CRMOs) which should increase the efficiency of the system and help to drive a Digital Single Market forward. However, it is also key to avoid the accumulation of market power with only two to three large CRMOs in Europe. It is also important to indicate that Cable Europe is not against the collective management of rights, but that it is essential (from the point of view of legal certainty) to ensure that, in situations where rights are managed collectively, the management organisations can represent all the owners of the rights managed collectively (and not only the rights owners who have to be a member of the management organisation at a certain time).

The European Commission should consider a new holistic Clearance Directive providing a new technology neutral system for the clearance of all types of rights including:

- The clearance of all kinds of service content exploitation forms, i.e. fixed, mobile, online, Cable, DTT and other innovative platforms;

- Combined with the clearance on both the horizontal level, i.e. multiterritory, and the vertical level, i.e. the best positioned actor in the value chain to clear at once all exploitation forms;
- Transparent licence reporting and monetary flows on the part of collecting societies;
- Competition among collecting societies in Europe or, in the absence thereof, strict *ex ante* control based on the model provided by the regulatory framework for electronic communications;
- A more market-oriented pricing process for Europe.

The Refection Document

1. Simplify the cross-border management of rights for online uses such as online music services and video services

Cable Europe members distribute radio and television programmes by analogue and digital means, provide video on demand services and offer broadband internet access and voice telephony. Cable operators are therefore confronted with the clearance of a number of rights for **both music and audiovisual works**. We therefore endorse the proposal of the Commission which wishes to look at both these services but as mentioned already above **we urge the Commission not to only unlock online services but adopt a technology neutral approach for all the digital services**.

2. Creation of a streamlined pan-European and/or multi-territory licensing process for music

To reach this goal, the Commission is suggesting two options:

- 1) *Aggregating the right of reproduction with the digital performance right*: Cable Europe considers that the idea of having a unitary licence could be a good approach provided the two following conditions are met. Firstly, the scope should be extended to cover not only 'the interactive online dissemination of music' but **any dissemination of music and also any audiovisual work**. Secondly, such a solution should also provide **the possibility to clear the only right needed**, the digital performance right in the case of cable distribution.
- 2) As many rights can be involved in a particular musical work or sound recording, the Commission is suggesting the possibility of a *one-stop-shop of rights integrated into a single licence*. This is the solution that has been chosen for the cable retransmission right in the Satellite and Cable Directive of 1993 (SatCab). To avoid many different individual negotiations with rightsholders and 'black-outs' in retransmitted programmes, a solution of mandatory collective management has been found. **This solution has facilitated the clearance of cable retransmission right in some cases but has lead to much**

inefficiency in others. This is why Cable Europe believes that this system should no longer be unique and greater flexibility should be introduced in the Directive allowing users to choose their preferred option (see section 'collective rights management').

3. Establishing an online database to better identify ownership or co-ownership of rights

Cable Europe considers that establishing an online database to better identify ownership or co-ownership of rights in musical compositions, audiovisual works and books would be a very helpful mechanism to help **legal certainty** of copyright clearance and provide more **transparency** as to which rights must be cleared and with whom. However, the question remains regarding who will bear the costs of establishing such a database, how we ensure it is comprehensive enough to be useful and who bears the liability of any mistakes included in the online database. To avoid the latter problem, only copyrights registered by rightsholders themselves on the database would be eligible for rights clearance.

4. Freely accessible ownership and licence information on a world repertoire

As per our comments on Section 3, any system that could help transparency on which rights must be cleared and with who before the distribution of a musical or audiovisual work is welcome.

5. Collective rights management – footprint licensing as enshrined in the Satellite and Cable Directive

Cable Europe considers a valuable approach to look at the Cable and Satellite Directive, its lessons and weaknesses.

The Reflection Document acknowledges the considerable modernisation of the Television without Frontiers Directive in 2007. However, the SatCab Directive was less successful in receiving equal consideration. Originally, however, these rules seemed so important that they were envisaged to be part of the 'Television without Frontiers' Directive. For years the SatCab Directive seconded the TVwF Directive's contribution to reducing barriers to cross-border television. It has its roots in the Green Paper on Television without Frontiers that was published by the Commission in 1984². But still it remains unchanged 16 years after its adoption when the economics and underlying distribution technologies have changed fundamentally!

We understand that there are many reasons why Community legislation has not always been able to catch up with technological developments and convergence. However, Community law principles of proportionality and non-discrimination require that the Commission takes legal action in order to stem discriminatory effects of unbalanced legal instruments. It is up to the

² European Commission, "Television without Frontiers", Green Paper, COM (84) 300 final, Brussels, 14 June 1984

Commission in its role of guardian of the above-mentioned Community law principles to take the proper actions and to show the way to member states. One cannot expect cable to drive broadband penetration in Europe and at the same time not provide for a level playing field for this industry.

A critical issue with today's generic system is the inconsistent application of the SatCab Directive to different distribution technologies. While satellite TV/direct-to-home, terrestrial TV and mobile TV are deemed direct communication to the public – for which all copyrights are cleared between CRMOs/producers and broadcasters-, cable TV- and internet-based IP TV are deemed secondary communication to the public and hence re-transmission – which require separate copyrights clearance. The activity of simulcasting of radio and television programmes over the Internet is also unclear³. The regulatory differentiation between distribution platforms stems from the traditional analogue TV world in which satellite operators did not have a direct customer relationship. In today's world, this differentiation is no longer valid. Common practice (in particular with original commercial channels) is to send encrypted signals via satellite to cable head ends – inducing only one communication to the public. Technology changes of directly fed-in TV signals from the broadcasters to cable operators' playout centers further alter the traditional system. Moreover, business models of cable, DTH, DTT and DSL platform operators are converging, with satellite, terrestrial and mobile players all competing directly for audience and establishing own, consumer-centric businesses based on digital distribution technology. In this converged, increasingly technology-neutral market environment it appears questionable whether the cable specific retransmission regime is still up to date.

In the recent case BUMA and STEMRA vs Chellomedia, 19 June 2009, the Supreme Court of the Netherlands ruled that the transmission via satellite of encrypted TV programmes receivable only by cable head stations are not deemed a new communication to the public (retransmission). As a consequence, cable transmission of such signals will be deemed an act of primary communication to the public not subject to the Directive's rules on cable retransmission. For the same reason, if programme-carrying signals are injected directly into cable networks as it occurred in the Netherlands (Norma vs NL Kabel, District Court of the Hague, 28 January 2009), no cable retransmission occurs.

Further to these decisions, all the stakeholders involved in the audiovisual distribution in the Netherlands (except collecting societies) are currently getting around the table to find the most appropriate clearance system to answer these developments.

Professor Hugenholtz observed⁴ that: *"Convergence is occurring at all levels: analogue television services are 'going digital'; radio and television*

³ Prof. P. Bernt Hugenholtz, "SatCab Revisited: the Past, Present and Future of the Satellite and Cable Directive", *European Audiovisual Observatory Iris plus 2009-8 'Convergence, Copyrights and Transfrontier Television*, p.13

⁴ Prof. P. Bernt Hugenholtz, "SatCab Revisited: the Past, Present and Future of the Satellite and Cable Directive", *European Audiovisual Observatory Iris plus 2009-8 'Convergence, Copyrights and Transfrontier Television*, p.7-19

programmes are being 'simulcast' over the Internet; cable operators are reinventing themselves as providers of broadband video services and converting television signals into digital files using the Internet Protocol. The future of the cable retransmission provisions of the Directive looks especially bleak now that traditional over-the-air broadcasting is gradually disappearing, particularly in countries with high cable penetration where programme-carrying signals are injected directly into cable networks...As such, the Satcab regime will probably fade away, as contractual practice, technological measures, media convergence and the 'horizontal' rules of EU copyright law gradually supersede it."

For the reasons explained above, **we applaud the Commission's proposal to extend the scope of the SatCab Directive** to online delivery of audiovisual content, paralleling the scope of the new Audiovisual Media Services Directive. **But the exercise should be pushed further** to avoid locking of other exploitation forms (mobile, fixed, cable, DTT etc) and fading away of the Directive's application. The revision of the Directive should take place and be conducted on a **technology neutral basis for both the Broadcasting and the Retransmission activities.**

Furthermore, Cable Europe believes that **the system of collective management of rights should be recognized as having the same weight as 'all rights included packages' (ARI) provided by broadcasters who wish to do so to cable operators**, as this would increase the overall efficiency of the rights clearance system. Broadcasters should indeed be able to offer these cleared packages legally, as intended by art.10 of the SATCAB Directive.

This proposed new holistic approach to copyright clearing would then create a "one-stop-shop" for clearance of all content exploitation forms (fixed, mobile, online, cable, DTT, etc) both on the horizontal (i.e. multi-territory) and vertical (i.e. one negotiation partner only) level.

Finally, the Commission rightly questions how a new collective rights management system could be reconciled with the CISAC case.

Cable Europe considers that the CISAC antitrust decision is a first step in the right direction as it highlights how right holders, commercial users and consumers would benefit from more inter-territorial competition amongst CRMOs within the EU. This type of competition is not only positive for online commerce over the Internet, but also for more geographically focused business models such as that represented by cable. However, the European Commission itself seems to suggest in the Reflection Document that competition law might not bring about the desired level of competition. In fact, Cable Europe believes that CRMOS are so strongly entrenched within their territorial monopolies that competition law by itself will not be able to force them to implement a system which provides users with a multi-territory license for any geographic area of exploitation⁵. In other words, the specific

⁵ *The Performing Rights Society Limited v Vereniging BUMA*, 148418/KG ZA 08-410, LJN: BE8765, Rechtbank Haarlem: On 19 July 2008 Buma announced that it had issued a pan-

market failures identified in the relevant markets identified in the CISAC case are unlikely to be properly addressed by competition law.

Taking the above into account, we believe that the CISAC case suggests the need of an alternative approach that ensures a full harmonized *ex ante* control of the collecting societies. This might adopt the form of either an EU regulation or a Framework Directive harmonizing the regulatory approaches implemented in different members States. By contrast with the CISAC case, which, as rightly underlined by the Reflection Document, only covers music, this new legislative approach should cover all types of audiovisual rights. **The longer-term objective should be to radically streamline the copy-rights regime for greater consistency across borders and competitiveness.** As suggested by President Barroso's European Digital Agenda and EU 2020 strategy, a well-functioning, transparent, harmonised and flexible market-based licensing regime is a critical element in the development of a dynamic and successful new media and content sector and to achieving a vibrant European Digital Single Market. We therefore believe that **further action is needed to provide a thriving Digital Single Market**, as proposed by the Reflection Document and Cable Europe comments.

6. An EU Copyright Law

The Lisbon Reform Treaty could give the possibility to the European Parliament and the Council to adopt a Community Copyright Regulation to replace the existing directives and partially pre-empt the national laws of Copyright on the Member States.

As proclaimed by the 2006 IViR report: "the potential advantages of a Community copyright are undeniable. A Community Copyright Regulation (or 'European Copyright Law') would immediately establish a truly unified legal framework. A Community copyright would have instant Community-wide effect, thereby **creating a single market for copyrights and related rights, both online and offline.** A Community copyright would **enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction costs.** Unification by regulation could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely permits limitations. A regulation would give rights and limitations equal status, and could restore the necessary 'delicate balance', provided it were the product of a transparent legislative process wherein all interests concerned are fairly represented⁶". The same report also

European licence to online music provider Beatport and claimed that it was for worldwide repertoire, including that controlled by PRS. However, the Court ruled on 21 August 2008 that Buma was not authorised to include PRS repertoire in any multi-territory licence, anywhere outside the Netherlands; LG Mannheim Beschluß vom 25.8.2008, 7 O 224/08 Kart: On 25 August 2008, Mannheim Regional Court granted under the request of GEMA an interim injunction against the download provider beatport as well as Buma/Stemra. The injunction prohibits beatport from making specific musical works from GEMA's repertoire available to the public over the Internet in the territory of the Federal Republic of Germany without having previously obtained the consent of GEMA.

⁶ IViR, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006

claims that European-wide market failures, such as those referred to in this submission, cannot be properly addressed by a patchwork of harmonized national legislation, but by a truly European Regulation.

Cable Europe considers a Community Copyright Regulation as an attractive solution as it would solve the territoriality issue, the questions related to the online dissemination of content but also disparities of the offline world in order to achieve a thriving Single Market. Moreover, it could also be used to harmonise the rules of collective management. We agree with the following IviR assessment: "as regards collective rights management, in the absence of a general directive no true 'acquis' can be reported here⁷". **Cable Europe would certainly support an EU Copyright Regulation that would bring the SatCab Directive, the Copyright Directive and the Music Online Recommendation to a technology, services and rights neutral approach system.**

Unfortunately, the long political process it will involve would give rights holders and other interested parties a forum to strengthen copyright in a way that makes distribution of legal content even more complex and costly.

In any case, even in the absence of an EU Copyright Regulation, Cable Europe considers that some legislative harmonization at the European level is necessary. As suggested before, this could adopt the form of a **European Framework Directive** such as there exists for the electronic communications markets. The Communication "Copyright in the Knowledge Economy" was an important step in that direction, but harmonizing national laws in a number of important aspects demands a more vigorous approach⁸.

⁷ IviR, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, 2006

⁸ For example, within the audiovisual field we are concerned about the outburst of new remuneration rights for performers in some jurisdictions that leads to fragmentation of the single market and erodes the role of the audiovisual producers as a central clearing figure. Such is the case in Spain, where the Copyright Law envisages a wide range of remuneration rights (in addition to the traditional communication and broadcasting rights) on behalf of the CMOs which do not exist at international or EU level. This extended "catalogue" includes a right to remunerate: 1.) audiovisual authors for all kind of communication to the public (art. 90.3 and 90.4); 2.) performers for the communication to the public of audiovisual works, including the making available to the public (art.108.5); 3.) performers for the making available to the public of phonograms (art.108.3); and 4.) audiovisual producers for the retransmission of audiovisual works (art. 122.2).

Another case in point stems from the German Copyright Act, which paragraph 20 b(2) states that, contrary to art. 10 of the SatCab Directive, "if the right holder has granted the right of cable retransmission to a broadcaster or a producer of sound storage mediums or film, the cable operator shall nevertheless pay equitable remuneration for the cable retransmission to the author. The claim to remuneration may not be waived. It may be assigned in advance only to a collecting society and asserted only by such society".

7. Community title option for rightsholders, in parallel to national copyrights title

This option considers superimposing the Community title option to a national copyrights title. Cable Europe believes this solution would be very difficult to use in practice. **The only thing it will bring is more confusion in the market and it would do little to solve the problem of territoriality.**

8. Alternative forms of remuneration

The Reflection Document proposes two different alternative forms of remuneration to solve problems related to mass reproductions and dissemination of copyright protected works:

- 1) *Compensation fee paid by ISPs for unauthorized file sharing and reproductions by their subscribers:* Firstly, offering access to a high speed communications network is not a relevant act under copyright law. Traditionally, levies have been introduced to compensate for uncontrollable but legal forms of uses. They are tied to the actual use. People who make paper copies on a copying machine pay a levy on every copy they make. The 'compensation fee' discussed in the Reflection Paper would fundamentally depart from that traditional reasoning. Any subscriber of an ISP would have to pay such a 'compensation fee' which would result in the creation of a fund of which nobody knows who is actually entitled to a share and to which part. It becomes completely non transparent and might lead to a risk that interests of small creators are ignored. Whilst such a solution might have the "charme" of its simplicity, it factually also penalises the majority of users who engage in legal activities. In any case, this solution would go against the mere conduit principle enshrined in the e-Commerce Directive.

Secondly, this solution would amount to the imposition of a levy on broadband providers for infringements carried out by their end users that ISPs cannot easily measure without significant expense and certain question marks over accuracy, since content is easily encrypted.

Furthermore, we have real doubts as to whether such a solution would be really helpful for the respect of copyrighted works. Might it not rather open the floodgates to what rightsholders always complain about? Would an 'online piracy flat tax' make illegal usages legal ones at least from a societal point of view?

Moreover, policies to combat IPR infringement should not penalise those involved in the legitimate distribution, creation or consumption of content and should not be implemented in a way that it is detrimental to general public support for copyright. Key to counteracting piracy is the further increasing the offer of broadly and easily available secure and price-worthy legitimate content meeting today's' consumer demand. Likewise, relevant industry stakeholders should continue to work cooperatively on reasonable efforts to reduce

illegal distribution of online content. Advertising campaigns or sponsoring events provide additional tools to promote the distribution of legal content online. Awareness campaigns could highlight the importance of intellectual property as an economic good and object of cultural value.

- 2) *Online Subscription fee, "all you can eat" model:* This is an approach that is increasingly negotiated between ISPs and music labels. This can be a valuable approach as long as it is reached on a commercial basis, and covers all rights needed for the exploitation forms. Unfortunately it is too often very difficult to obtain the agreement of rightsholders because of their high bargaining power.

In any case, **Cable Europe believes that these possibilities will only solve part of the problems and that the longer-objective of achieving greater consistency and competitiveness in copyright collective management will not be solved.**

9. Release windows question

Release windows go some way to help explain the piracy issue. If the release windows question could be addressed, piracy would likely drop considerably. Windows based on exploitation models and business cases (cinema exhibition, followed by pay TV, on demand, free to air broadcasting etc.) could, however, continue to be justified. **Cable Europe encourages the Commission to put an end to the territoriality of release windows and that this system's exploitation is revised.**

The Reflection Document finally suggests other proposals in order to protect consumers and rightsholders, and, on the one hand facilitate consumers' access to content through digital networks anywhere at any time, and, on the other ensure appropriate remuneration for rightsholders and culture diversity:

10. Extended collective management system

The Extended collective management system appears to be a positive solution so as to reduce number of negotiations and transactions. This will also increase legal certainty for users. But this system should not try to resolve only the problems of the orphan works and of making available right, as suggested by the Reflection Document. Cable Europe believes that the system of extended collective management system **should be allowed for all types of rights, in order to achieve a 'one stop shop' of rights and should not be the unique clearance mechanism used.** As explained above, **the possibility should be left open to broadcasters and or producers who want to do so to provide a 'all-rights included' products to all platform operators (DTT, satellite, mobile, cable, telco, internet provider...).** **However, we fear that this system might reinforce the position of CRMOs and therefore consider that it cannot be put in place without important rules of governance and transparency of CRMOs in**

order to avoid an abuse of dominant position of the unique CRMO responsible for providing the extended collective licence.

11. Governance and transparency of CRMOs

As explained above, a better functioning of the Internal Market in collective rights management can only be achieved if there is greater common ground which includes the establishment and status of collecting societies; their functioning and accountability subject to rules of good governance; as well as their internal and external control, including dispute settlement mechanisms. **Defining general conditions for these features through a Community framework instrument would be more than welcome.**

Cable Europe believes that such conditions could be based on the *ex ante* rules systems established for the e-communications providers⁹.

12. Collaboration with ISPs

As explained above, **Cable Europe's members value industry talks to find appropriate agreements, new business models that can provide commercial benefits to all parties.** In that view, one party should not block the agreement to achieve its own benefit only and it has to be a win-win solution that will provide the possibility for consumers to enjoy a great digital experience. Lastly, we consider that these industry talks are most effective if they are held **at national level.**

13. Financial incentives

Financial incentives as foreseen by the EU MEDIA programme are very interesting subsidies systems for audiovisual works. However, Cable Europe would stand **against any measures targeting the e-communications services sector as a financial resource for other sectors.** Sector specific levies and fees should neither distort the market nor impede consumers from connecting.

⁹ Art. 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)