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Legal Aspects of Video on Demand

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Legal Aspects of Video on Demand

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Legal Aspects of Video on Demand

"The term 'video on demand' (for which we shall use the acronym VoD) covers a wide range of technologies, all of which allow the selection and rental – or remote purchase in dematerialised form – of video content for immediate or later viewing on various types of device (computer, television, telephone, portable player) for a limited or unlimited period.

*VoD services are growing rapidly, in line with the rise of digital transmission in Europe."**

Whenever a "new" audiovisual service becomes established, questions are inevitably asked about what legal norms govern it and whether those norms take sufficient account of all legitimate needs and interests. As far as video-on-demand (VoD) is concerned, it is clear that the "Television without Frontiers" Directive (89/552/EEC, last amended by Directive 97/36/EC) does not apply. This follows from the principle of sector-specific regulation, which until now has clearly distinguished between television and on-demand audiovisual media services. However, the Audiovisual Media Services Directive (2007/65/EC), which was adopted on 11 December 2007, will fill the regulatory vacuum in which on-demand services have been left by the "Television without Frontiers" Directive. The new media-specific legal framework adopts a technology-neutral approach, which subjects all audiovisual media services to a common set of core rules (particularly concerning advertising). The EU legislator hopes that the new rules will avoid distortions of competition, improve legal certainty, help complete the internal market and facilitate the emergence of a single information area (Recital 7 of the new Directive).

These rules are supplemented by provisions that are not media-specific but concern VoD as well as other audiovisual media services. These particularly include media-related provisions of copyright law, consumer protection law, competition law, criminal law and in addition of course, the right to freedom of information, which is usually enshrined in national constitutions.

Along with the difficulties of extracting from these different texts the rules that apply to on-demand services such as VoD – a task which is surely not insurmountable – the real challenge is actually to apply these provisions and, where the results of this process are unsatisfactory, to adapt the legal framework accordingly. VoD services are technically very complex, can be offered on a global scale and are carried by numerous different players, both established and recent. The number of different types of VoD service is also increasing on a daily basis. Analysis of "VoD law", i.e. all provisions applicable to all VoD services, is not only important, but absolutely imperative for the further development of this booming market.

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* Video on Demand in Europe, a report edited by *NPA Conseil* for the *Direction du développement des médias* (DDM - France) and the European Audiovisual Observatory, 2007, p. 11.

Providers of VoD services particularly need information on copyright law, since the material they offer is generally (at the very least) protected by copyright. What rights need to be protected, how and in which geographical areas this can be achieved, what is the role of exploitation windows for the different media, who are the potential negotiating parties, do contractual standards already exist, etc. – all these questions are crucial for possible business partners, including film producers and VoD providers.

In addition, however, the legal framework must be considered particularly in terms of the relationships between competitors. This concerns not just competition between different services (e.g. television and VoD) which use the same content, but also competition between VoD providers for the various geographical markets. As it was for P2P technology, the music industry is at the forefront of the development of on-demand services and has already experimented with various business models and contractual solutions. Some of them have since been "legally dissected". EC competition law has played an important role in this process, along with the aforementioned copyright provisions. Although there are technical and legal differences between music download and VoD services, they also have a great deal in common. It is therefore important to ask whether the experiences of the music industry may be useful to the film sector. Even where this is not the case, however, relevant information concerning the music industry can facilitate a better understanding of the legal issues that have to be overcome for VoD services.

Another aspect that definitely needs examining is the relationship between the VoD industry and its customers. As consumers, recipients of VoD services will benefit in future from the advertising provisions of the Audiovisual Media Services Directive. They are already protected in some ways by EC law, including the provisions on consumer information contained in the E-Commerce Directive (2000/31/EC). However, the most fascinating and perhaps most difficult question relating to VoD customers is largely new territory. It concerns their dual role as consumers and producers – VoD services such as MySpace or YouTube enable them to be both at the same time. How does the law deal with this combination of roles or "prosumers"? Is it necessary to completely review various rules that oblige service providers to protect service recipients?

These and many other **issues were the subject of a workshop** organised in June 2007 by the European Audiovisual Observatory ("Observatory") and its two partner institutions, the Institute of European Media Law (EMR) and the Institute for Information Law (IViR). The workshop served as a material-gathering exercise for the enclosed publication, *IRIS Special: Legal Aspects of Video on Demand*. This IRIS Special also supplements the economic data and analysis provided by the Observatory in early 2007 in its extensive publication "Video on Demand in Europe", which is quoted at the beginning of this editorial.

The close links between economic and legal aspects of VoD have not only led to the Observatory publishing two reports that complement each other well; the interaction between these aspects also formed the basis of the selection and organisation of the themes of this IRIS Special. This is apparent in the EMR's **workshop report**, which follows the order of the workshop programme. The report begins with a description of the different business models and their respective interpretations of the term "VoD". On the one hand, it describes traditional business models in which on-demand services offer a wide selection of popular cinema and TV films at times to suit the user. On the other hand, video portals, which tend to take the form of film-sharing sites, also play an important role. The legal framework provided by EC law is then described, before the author discusses individual issues connected with copyright, competition and (in its broadest sense) consumer law, as outlined above and covered in detail in various presentations at the workshop and in this IRIS Special.

As far as possible, national regulations in France, the United Kingdom and Germany were given particular emphasis at the workshop. This choice reflected the economic importance of the VoD sector in those countries and provided an opportunity to mention various approaches and practical experiences. Accordingly, the **contributions of various participants** which follow the workshop report mainly focus on these three countries. Most of the articles are the written versions of presentations given at the workshop. One article written after the workshop explains the position of public service broadcasters, while another was added by the Observatory in order to include some important court rulings and copyright-related developments in France.

Many VoD experts have been involved in the production of this IRIS Special as workshop participants, hosts, organisers and, particularly, authors. We are grateful to Dr Caroline Cichon (Bird & Bird, Munich), Olivier Cottet-Puinel (SACD), Mark Cranwell (ATVOD Board Member/BT Retail Legal), Dr Natali Helberger (IViR), Dr Pascal Kamina Ph.D. (lawyer, Paris), Philippe Kern (KEA European Affairs), Dr Michael Kühn (ProSiebenSat.1 Media AG), Cornelia Kutterer (BEUC), Nicola Lamprecht-Weißenborn (EMR), Dr André Lange (European Audiovisual Observatory), Tilman Makatsch (T-Mobile/T-Home), Gerald Miersch (EU Commission, DG Competition), Bertrand Moullier (Narval Media), Jonathan Porter (Ofcom), Lorenzo Pupillo (Telecom Italia), Alexander Scheuer (EMR), Sebastian Schweda (EMR), Ted Shapiro (MPA), Erik Valgaeren (Law Firm Stibbe, Brussels), Prof. Dr Nico van Eijk (IViR), Dr Stefan Ventroni (Poll Strasser Ventroni Feyock law office, Munich), Neil Watson (British Film Council), Gregor Wichert (ZDF) and our colleagues Francisco Cabrera and Michelle Ganter, who were involved in the workshop and in this IRIS Special in many different ways.

We would particularly like to thank the Senate Chancellery in Berlin, especially Dr Dietrich Reupke and Andreas Kumpert. They invited us to hold the workshop during the German EU Presidency at Berlin's city hall and thus provided a pleasant and stimulating venue for the debates on which this IRIS Special is based.

Strasbourg, December 2007

Wolfgang Closs
Executive Director

Susanne Nikoltchev
Head of the Legal Information Department

IRIS Special:

Legal Aspects of Video on Demand

CONTENTS

The Legal Bonds between Business Partners, Competitors and Users

Report on the joint workshop of the EAO, EMR and IViR, Berlin, 15 June 2007

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The workshop "*Video on Demand: The Legal Bonds between Business Partners, Competitors and Users*", organised by the European Audiovisual Observatory (EAO) in cooperation with the Institute of European Media Law (EMR) and the Institute for Information Law (IViR), was held in Berlin on 15 June 2007. The aim of the workshop was to examine in detail essential legal issues relating to *Video-on-Demand* (VoD) services. The debates focused on issues of copyright law, competition law and consumer protection, particularly the contractual mechanisms used by the VoD industry in different countries such as France, the United Kingdom and Germany.

The content and structure of the workshop were based on the relationships between individual members of the value chain in an effort to paint as full a picture as possible of the relevant practical issues in the VoD market, as well as the legal background. The introductory session was designed to define VoD as a market phenomenon and business model[1] and to locate it within the relevant Community law framework. The second part of the workshop looked at the essential relationships between the players in the VoD market. Firstly, the legal relationships between potential business partners were considered, with a particular focus on copyright law.[2] Competition between market players was then discussed. Based on the experiences of the music industry,[3] the participants examined whether the competition situation in that sector could be transferred to the film industry.[4] Finally, the role and legal position of content users were considered, particularly the new role of the user as producer[5] and the experiences of the British VoD market. Each block of talks was followed by a discussion in which participants were able to examine the subject-matter in greater depth.

This workshop report summarises the key content of each talk as well as providing an overview of additional information and opinions that were shared during the respective discussions on the individual themes.

Presentation No. 1

In the first presentation, the speaker introduced the parameters for various business models for the provision of VoD services. It was interesting to discover that, between 2005 and the following year alone, the number of VoD services available in the 24 European countries studied had more than doubled to a total of 142. The French market had the widest selection, with 27 VoD services. The main advantages and disadvantages of the different VoD platforms – Internet, IPTV, cable, satellite and digital terrestrial – were explained. A study of the percentage shares of the different platforms showed

1) See the general contribution of *André Lange*, p. 23, on the one hand and the specific remarks concerning YouTube by *Eric Valgaeren*, p. 29, on the other.
2) See the contributions of *Stefan Ventroni*, p. 46, and *Caroline Cichon*, p. 51.
3) See the contribution of *Philippe Kern*, p. 65.
4) See the contribution of *Bertrand Moullier*, p. 71.
5) See the contribution of *Natali Helberger*, p. 77.

that roughly 90% of VoD services in Europe were based on Internet Protocol (IP). Two-thirds of these were transmitted via the open Internet, while one-third were offered as IPTV services. Providers came from a whole range of sectors: by far the most common VoD providers were telecommunications companies and Internet service providers, followed by broadcasting companies and large aggregators.[6] Their competitors included cable firms, film companies, commercial retailers in the media sector and even copyright and/or performing rights collecting societies. The speaker also mentioned the various strategies of different types of content providers (US film industry, national film groups, independent producers and broadcasters).

The speaker explained that various economic models existed. Firstly, there was traditional rental, whereby the customer paid to view either a single programme or a package of programmes for a period of one to two days. This model was similar to that of the traditional video library. However, the most common model was known as "subscription video-on-demand" (SVOD). Here, customers bought the right to view as many programmes as they liked during the subscription period. Under the so-called "download-to-own" model, however, the customer acquired ownership of the downloaded copy of the film. The customer was either limited to watching the copy downloaded onto the computer or could pay more for a version that could also be burned onto DVD. The fourth and final model was known as "free video-on-demand" (FVOD), which was financed through advertising and allowed viewers to watch films free of charge.

The speaker concluded with an urgent appeal for more transparency in the VoD sector. He could understand why, in view of the fierce competition in this relatively young market, providers had thus far been reluctant to publish figures such as the number of home page visitors, downloads or turnover. However, in the long term, users would need more information in order to make a free choice between different providers and economic models.

Presentation No. 2

The second talk dealt with the particular characteristics of the YouTube model.[7] According to the speaker, the main advantage of this service for its users was that it was free to use. Anyone who did not want to upload their own content could still use the site without registering or providing any personal data. Contrary to popular belief, the YouTube website did not contain only user-generated clips, but also professionally produced content. Users could assess the quality of each video via a rating system and offer support to other users who were looking for particular types of content. It was estimated that the website cost around USD 1 million per month to run, although revenue was thought to exceed this many times over.

The talk focused in particular on complaints from rightsholders concerning alleged copyright infringements resulting from unauthorised publication on the YouTube website. The speaker explained that, under YouTube policy, content that was prohibited under US copyright law could not be uploaded. Even so, users had uploaded copyrighted content such as TV shows, advertising or music videos. Unless it was informed by the rightsholder itself, YouTube only found out about such infringements through a "self-monitoring" mechanism whereby users brought the infringement to the attention of the company, which then removed the unauthorised content.[8] Google, which bought YouTube in October 2006, had so far constantly defended this policy by referring to the US Digital Millennium Copyright Act (DMCA),[9] particularly the "safe harbor" principle enshrined therein.[10] Under this provision, a company could not be held liable if, after being notified, it immediately removed content that had been uploaded onto its website by a third party in contravention of copyright law.

6) Aggregators are service providers who combine available content within a new service in order to appeal to new target groups.
7) Founded in 2005, the YouTube company runs an online video portal on which users can watch and upload home-made video clips, see http://www.youtube.com/t/about (as at 21 October 2007).
8) Even in regard to the removal of extreme right-wing material, which has recently attracted a lot of attention due to an increase in this type of material on YouTube, the company relies heavily on this "self-cleansing mechanism". However, accounts used repeatedly to upload illegal content onto the YouTube website can be closed down by YouTube staff. See: "Youtube: Nazis raus!" of 29 August 2007 at http://www.stern.de/wirtschaft/unternehmen/unternehmen/596475.html?q=youtube (as at 21 October 2007).
9) See Section 512(c) DMCA. The complete text of the DMCA is available at: http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.ENR: (as at 21 October 2007).
10) According to Section 512 c) (1) DMCA, the "safe harbor" rule applies if the service provider (A) does not have actual knowledge that the material or an activity using the material is infringing and is not aware of circumstances from which infringing activity is apparent, (B) does not receive a financial benefit directly attributable to the infringing activity (according to the speaker, YouTube only runs advertisements on search result pages and pages that display properly licensed content) and (C) upon notification of a claimed infringement, immediately removes, or disables access to, the material concerned.

The speaker explained how this interpretation of the law had been disputed in various legal cases. The respective plaintiffs – Viacom et al,[11] the English Football Association Premier League Ltd. and the independent music publisher Bourne Co.,[12] the French Football League (*Ligue de Football Professionnel* – LFP), the French Tennis Federation (*Fédération Française de Tennis* – FFT) and Cherry Lane Music Publishing Co. Inc.[13] – had all argued that YouTube did not solely provide the storage space for the user, but also processed the uploaded content. For example, videos could be found using a search engine and the HTML code used to integrate video content was provided by YouTube, albeit at the user's request. The plaintiffs all agreed that YouTube had the power to monitor content and could therefore take action whenever copyright infringements were committed, even if it was not notified of the infringement by a third party.

In this connection, the speaker pointed out that the search engine mentioned in the complaints only searched through the key words provided by the uploader. It could therefore be much more difficult to find copyrighted material if the user entered misleading/irrelevant words that had nothing to do with the actual content or its owner. Videos marked "private" when they were uploaded were also not covered by the search engine. The speaker then described a tool that could be used to identify videos with copyrighted content independently of the search engine: so-called acoustic fingerprints could be used to identify the content of a video from the shape of its soundwaves. They worked even if the binary data was different from that of the original, so that its identity as a copyrighted work could normally only be established on being viewed, or if the sound quality had been considerably reduced. YouTube had stated that, in future, it would use this kind of filter system on the basis of agreements with producers of high-value content in order to detect copyrighted material.[14]

The speaker also referred to the liability rules set out in Articles 12 to 14 of the E-Commerce Directive, which was applicable in the EU.[15] According to these provisions, a service provider could not, in principle, be liable when it acted as a mere conduit or cache of copyrighted material or provided storage space (hosting) on which such content could be stored, since it had no general obligation to monitor illegal activities or content. Hosting providers nonetheless had to expeditiously remove or disable access to such material as soon as they became aware of the illegal activity or information or were notified thereof.[16] However, the speaker noted that there were enormous differences in the way Member States implemented the Directive and that the courts' application of the relevant provisions was inconsistent.[17] For example, there was considerable debate over whether search engines were covered by Article 14 of the E-Commerce Directive. Some Member States had explicitly included search engines in their national implementing legislation, while others had not. He hoped that the forthcoming review of the Directive would help to create legal certainty in this area.

Finally, the speaker mentioned some cases in which certain countries had blocked access to the YouTube website because of different types of questionable content. He thought that such intervention could harm the freedoms of expression and speech. The website was also used by politicians who published videos on YouTube in order to make their political views accessible to a wider audience. For example, candidates for the 2008 US presidential election had put their promotional videos on YouTube for debate.[18] This new type of use could lead to questions over how access for politicians and interested

11) http://finanzen.sueddeutsche.de/aktien/news_news?page=2&secu=269125&show_list=0&dpa_news_id=538636. The complaint is available at: http://online.wsj.com/public/resources/documents/ViacomYouTubeComplaint3-12-07.pdf (as at 21 October 2007).
12) The complaint is available at: http://www.youtubeclassaction.com/courtdox/2007-05-04YTComplaint.pdf (as at 21 October 2007).
13) The French sports federations joined the claim by the Football Association Premier League Ltd. and Bourne Co. against YouTube, Inc., YouTube, LLC and Google, Inc. on 6 June 2007, together with Cherry Lane Music Publishing Co., Inc., a music publishing company independent of the lead plaintiffs; see http://www.youtubeclassaction.com/2007.06.06CherryFFTLFPSupportPressRelease.pdf (as at 21 October 2007) and http://www.youtubeclassaction.com/2007.06.06FrenchPressRelease.pdf (as at 21 October 2007).
14) On 15 October 2007, Google Inc. presented its "YouTube Video Identification" filter technology to the public. It can be used to prevent copyrighted videos from being made available on YouTube. The system is based on cooperation with nine media companies, including Walt Disney Co. and Time Warner Inc.. They provide YouTube with the relevant data concerning protected content. As soon as a user illegally uploads the content, YouTube informs the media company concerned. The company can then either prevent or allow the uploading of the material. If it allows it, it receives a share of the income that YouTube generates by running advertisements on the page from which the content is made available, for example. See http://www.youtube.com/t/video_id_about (as at 17 October 2007).
15) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("E-Commerce Directive"). The Directive is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_178/l_17820000717en00010016.pdf (as at 21 October 2007).
16) See Art. 14 para. 1 E-Commerce Directive.
17) See the rulings of the *Tribunal de Grande Instance de Paris* concerning *DailyMotion* and *MySpace* mentioned in the contributions of *Eric Valgaeren* (p. 29) and Observatory (p. 89).
18) See http://www.youtube.com/youchoose (as at 21 October 2007).

citizens to the YouTube platform should be regulated in the interests of the freedoms of speech and information.

Much of the subsequent discussion centred on recent complaints against YouTube. One participant mentioned the problem that YouTube, on the one hand, claimed that it was only acting as a hosting provider in the sense of Art. 14 of the E-Commerce Directive, while on the other hand, through its Terms of Use, it concluded a licensing agreement with users who wanted to upload a video. The aim of this agreement was to make YouTube the exclusive rightsholder.[19] The problem of these contradictory positions was also acknowledged by other participants, who thought that the matter needed legal clarification. A main reason was thought to be the strongly American background (*safe harbor rule*[20]) against which the YouTube business model had been developed. The participants also discussed in more detail the question of how platform operators should deal with user-generated content that infringed the copyright of third parties. According to one participant, a valid licensing agreement was often concluded between the platform operator and the user who made the material available to the platform. However, it was made clear that it was unlawful to further exploit obviously copyrighted content that had been placed on the platform, such as by allowing it to be broadcast by a broadcaster in cooperation with the platform.

The speaker mentioned cases in which content providers had tried to identify users of peer-to-peer networks ("P2P") – both uploaders and downloaders – in connection with the unauthorised distribution of copyrighted material. It was true that these networks were not set up in exactly the same way as YouTube. However, it had been ruled in a series of judgments concerning the sharing of liability between Google and the users of its search engine that the search engine operator merely provided the platform, while it was the user himself who played the video by clicking on a corresponding thumbnail.[21] [22] On the other hand, it would be interesting to see how YouTube would counter the argument that the company was so dependent on its own business model that it could not possibly claim that it was merely providing the platform.[23]

Following the first speaker's concluding remarks, the lack of transparency among VoD providers was discussed. Some participants thought it might be the result of the companies' need to avoid giving away too much information to their competitors in a young market. Competing service providers would otherwise be able to obtain information about business models and confidential company data directly from the number of users. Data protection issues were also mentioned in regard to customer data. On the other hand, however, one participant pointed out that transparency was particularly important where user-generated content was concerned, since all partners had to depend on each other. In particular, rightsholders needed to know which of their films were being made available so that they could claim public funding when they were successful. It was also important to ask how a provider could prove its market position if no figures were available.

Presentation No. 3

The third presentation concerned the application of competition rules in the media sector. The speaker referred to a number of previous cases linked to the territoriality of intellectual property rights, collective licensing and the centralised marketing of sports rights.

Price variation from one territory to another was the subject of the "iTunes case". Under agreements with the major record companies, Apple charged more for music files on the British iTunes website than

19) Section 6 para. C sentence 1 of the Terms of Use states that uploaders retain all ownership rights to their user submissions. However, under Section 6 para. C sentence 2, YouTube is granted a worldwide, non-exclusive, royalty-free, sublicensable and transferable licence to use, reproduce, distribute, prepare derivative works of, display and perform the user submissions. The YouTube Terms of Use are available at: http://www.youtube.com/t/terms (as at 21 October 2007).

20) See above.

21) A so-called "thumbnail" is a miniature image which functions as a scaled down preview version of a larger image. It is used to speed up access to the larger image. Thumbnails are often linked to the original full-sized image via a hyperlink.

22) For images, see Perfect 10 vs. Google, Inc. et al., available at: http://www.cacd.uscourts.gov/CACD/RecentPubOp.nsf/bb61c530eab0911c882567cf005ac6f9/3fdcaed8913a22018825711c005055a5/$FILE/CV04-9484AHM.pdf (as at 21 October 2007). For the illustration of artistic works using "thumbnails", see ruling of *LG Erfurt* (Erfurt District Court), 15 March 2007, case no. 3 O 1108/05, ZUM 2007, 566 (vol. 7). No right to compensation for use of a photo in "thumbnail" form in an image search engine, ruling of *LG Bielefeld* (Bielefeld District Court), 8 November 2005, case no. 20 S 49/05, ZUM 2006, 652.

23) The plaintiffs' claim in the case Premier League et al. vs. YouTube and Google concerned numerous deliberate measures taken by YouTube which facilitated copyright infringements, meaning that its service went far beyond the mere "storage" of data. For example, YouTube gave its users the HTML code needed to integrate videos published on YouTube in other websites.

in the Eurozone. UK-based customers were prevented from accessing the continental iTunes service insofar as their credit cards were used to check where they lived. In a Statement of Objections,[24] the European Commission wrote that such market segmentation restricted the customer's choice of where to buy music and violated Art. 81 of the EC Treaty. However, it was also stressed that the Statement of Objections only represented a preliminary ruling on the case. Before a final decision, the companies concerned would be given the opportunity to defend themselves.[25]

The "CISAC case"[26] also concerned territorial restrictions. This anti-cartel procedure concerned the de facto monopoly held by collecting societies in their national territories, which had been protected by reciprocal representation agreements[27] between the CISAC members. Under the agreements, authors were obliged to transfer their rights solely to their own national collecting society (so-called membership clause). At the same time, commercial users could only obtain licences from their national collecting society and only for their domestic territory (so-called exclusivity clause). The Commission considered that the resulting territorial restrictions might infringe the prohibition on restrictive business practices set out in Art. 81 of the EC Treaty. Unlike nationally or regionally limited situations such as discotheques, sales via the global Internet or satellites did not require users to be physically present in order to use the copyrighted content. The situation should therefore be treated completely differently where Internet or satellite sales were concerned. Where it was not necessary to be present in order to use the rights, territorial restrictions could not be justified. On the basis of this interpretation, the Commission had published a market test and announced that it would examine the exclusivity clause. Comments could be submitted until 9 July 2007. According to the Commission, the collecting societies should be given the opportunity, under certain conditions, to grant licences covering the whole of the EU. An EU-wide licensing process could therefore take the form of either direct licensing for individual works or pan-European licensing of the whole repertoire of the other collecting companies within the EU (multi-repertoire licensing). It was unclear whether the Commission preferred either of the two options.

Finally, the speaker mentioned three Commission decisions relating to the joint marketing of sports rights. For matches in the German football *Bundesliga* from the 2005/06 season, separate licence packages had been sold for coverage via television, mobile television and the Internet.[28] In contrast, licences to broadcast matches in the English Premier League had been granted in a technology-neutral way.[29] The Commission had granted an exemption for the UEFA Champions League in 2003 in accordance with Art. 81 para. 3 of the EC Treaty.[30] The speaker described some of the ways in which sports federations could ensure that agreements on joint selling of sports rights did not infringe EC competition law.

The ensuing discussion focused particularly on the transferability of the iTunes case to the video sector. The participants considered whether the Statement of Objections would have been similar if iTunes had offered videos rather than music files. There were considerable differences between the film and music markets, not only in terms of business models, but also with regard to the applicable copyright law and funding systems – particularly for national film productions in the EU Member States. One such difference concerned the various exploitation windows that were commonly applied to film productions in the EU. One participant said that, in contrast to the film industry, there was very little interest in controlling different national territories in the music sector. As an example, he referred to

24) See European Commission press release of 3 April 2007 on the so-called "Statement of Objections", MEMO/07/126, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/07/126 (as at 21 October 2007).
25) According to press reports, Apple and the four major record companies – SonyBMG, EMI, Universal and Warner – met the European Commission on 19 September 2007 to defend their position; see http://www.reuters.com/article/marketsNews/idUKL1935665520070919?rpc=44 (as at 21 October 2007).
26) See European Commission press release of 7 February 2006, MEMO/06/63, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/63 (as at 21 October 2007). CISAC stands for International Confederation of Societies of Authors and Composers.
27) The European Commission Recommendation of 18 May 2005 on the management of online music rights defines, in No. 1 i), reciprocal representation agreements as "any bilateral agreement between collective rights managers whereby one collective rights manager grants to the other the right to represent its repertoire in the territory of the other." The Recommendation is available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_276/l_27620051021en00540057.pdf (as at 21 October 2007).
28) See also the European Commission's press release of 19 January 2005, IP/05/62, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/62 (as at 21 October 2007).
29) These rights were also nonetheless sold through an open bidding procedure. See also the European Commission's press release of 22 March 2006, IP/06/356, http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/356 (as at 21 October 2007).
30) See the European Commission's press release of 24 July 2003, MEMO/03/156, http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/03/156 (as at 21 October 2007).

the ECJ's Coditel decision,[31] which was very specifically geared to the film industry and was not directly transferable to conditions in the music industry. It was also pointed out that the Commission's Statement of Objections in the iTunes case was only a provisional assessment and that discussion of whether it could be transferred to the film industry was therefore purely speculative. On the other hand, some similarities with the iTunes case were mentioned: for example, one participant referred to VoD services, such as the one provided by BSkyB, which could only be accessed by citizens of the country concerned who had a bank account in that country and could produce an electricity bill or similar document. In these cases also, attempts were being made to guarantee territorial exclusivity by erecting certain barriers.

Another participant mentioned an alleged inconsistency in the Commission's competition policy: whereas in the 2005 Recommendation[32] it had been very critical of reciprocal representation agreements and suggested that collecting societies should be able to compete for rightsholders through the granting of pan-European licences (so-called "one-stop shop"), in the CISAC case it had clearly accepted that both systems could coexist. However, in further debate of this issue, it was stressed that the Commission was not responsible for issuing competition regulations, but merely examined the markets for competition infringements and, incidentally, acted in a neutral manner (with regard to possible business models). It was therefore presumed that the Commission would not question the existence of the collecting societies as long as territorial restrictions were lifted.

One participant thought that, just as in the iTunes case, there was evidence to suggest that the Commission was looking at two different markets: firstly, the international music market, which mainly involved the Anglo-American repertoire and moved easily from country to country and where a pan-European licence was sensible; and secondly, the national music market, which was less likely to move into other countries. Another participant disagreed, claiming that this opinion was not reflected in the market definition. The iTunes case did not just concern "international music". This was available from any website and users were not disadvantaged in this area. With regard to the international music market, there was only a price difference between the United Kingdom and the rest of Europe. However, there were real choice restrictions in regional music markets. For example, users of the Belgian iTunes website could not obtain some Dutch songs which were only available via the Dutch website. Regional music markets were not even defined along national borders, but language regions. However, on the whole he did not see the need for these similar forms of music to be treated differently. Another workshop participant referred to the Commission's impact assessment on the Recommendation on online music services.[33] In the assessment, the Commission had noted that the third option (which was subsequently selected)[34] included the possibility that consumer prices might rise if, as was the case with major film successes ("blockbusters"), there was only one licensor which held its own rights and was not required to pass them on to special collecting societies. This led to the danger that another monopoly could be created. However, it was also suggested that this scenario did not correspond with the current situation. First of all, the right of ownership should be considered an exclusive right. If the market were to move towards the third option, the strength of individual market players would need to be borne in mind. Collecting societies with a strong repertoire would, of course, hold a strong market position. It was therefore worth considering the extent to which, in view of their repertoires, there would be competition between collecting societies if direct licensing were introduced. In principle, however, it was up to those who exploited these rights to choose. The Commission's role was currently limited to observing the market.

Presentation No. 4

The fourth presentation concerned copyright clearance, the role of copyright societies and dealing with so-called "orphan works".

The speaker explained that various licensing models were used by content providers. However, all licence agreements had one thing in common: they had to define specifically and fully the extent to

31) Court of Justice of the European Communities, judgment of 13 July 1980, Coditel S.A. and others v. Ciné Vog Films SA and others, case 62/79, European Court reports 1980, p. 881, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61979J0062:EN:HTML (as at 21 October 2007).
32) See above.
33) See above.
34) In the impact assessment of October 2005, the Commission had mentioned three options: do nothing (Option 1), eliminate territorial restrictions and customer allocation provisions in existing reciprocal representation agreements (Option 2), or give rightsholders the additional choice of appointing a collective rights manager for the online use of their musical works across the entire EU ("EU-wide direct licensing", Option 3). The report is available at: http://ec.europa.eu/internal_market/copyright/docs/management/sec_2005_1254_en.pdf (as at 21 October 2007).

which the licensee could use the content. As far as VoD services were concerned, the main problem was linked to the different meanings assigned to the term "video-on-demand". The Independent Film and Television Alliance (IFTA)[35] had therefore tried to come up with a standard definition of VoD. According to the speaker, the distinction between streaming and downloading played an important role here. It was also necessary to categorise the different ways in which received content could be used – permanent use, limited use, one-off use or subscriber use. Whereas all forms of use were conceivable with downloaded content, permanent use was inevitably excluded where streaming was involved.

The speaker then described the differences between film copyright clearance in the USA and Germany. The main difference was that copyright clearance for German productions only covered exploitation in Germany, whereas US productions were cleared for exploitation on the global market. In addition, the rights to exploit the music in films were always treated separately in Germany, since they were managed by the society for musical performing and mechanical reproduction rights (GEMA).[36] In the USA, however, separate management of these rights was only one possible alternative. Equally, a distribution agreement might include all the music rights for a film. One participant pointed out that the situation was even more complex where joint productions involving several different countries were concerned.

According to the speaker, the pan-European acquisition of music exploitation rights in connection with VoD services was now a major problem. Such a system for EU-wide granting of rights already existed in other fields, such as licences for the production of phonograms, which were granted in Germany by the *Gesellschaft zur Verwertung von Leistungsschutzrechten* (performing rights society – GVL).[37] He therefore could not understand why this could not also apply to copyright for musical works.

Finally, the speaker referred to the use of orphan works, an issue that had so far mainly been debated overseas. Orphan works were works whose rightsholders were difficult to identify or contact. This problem mainly concerned older works. In Europe, the debate had only recently started. A Commission group of experts had been looking into the matter. In Germany there were no rules on the subject, so the use of orphan works was entirely at the user's own risk. However, Canada had a system whereby the rights were managed by a licensing body on behalf of the copyright owners.[38]

One workshop participant claimed (although his view was strongly disputed) that there were no orphan works in France. Other participants thought the same was true in some areas of the film and television markets. Orphan works were certainly much less common there. Sometimes it was hard to find a copyright owner because ownership could change hands over time.[39] The participant added that, to his knowledge, the problem mainly affected documentary films and similar productions.

Responding to a comment from another participant, who was surprised that the IFTA definition of VoD did not mention IPTV technology, the speaker said that there was a clause on pay-per-view in which video-on-demand was defined. However, this clause was in fact not particularly specific in terms of distribution methods. In his opinion, the IFTA definition concentrated too much on distribution via the Internet. However, VoD was not restricted either to the Internet or to cable, but could be offered via all transmission methods. Nevertheless, the narrow perspective of the IFTA document was a common error in descriptions of the possible uses of on-demand services.

Presentation No. 5

This presentation dealt with the necessary scope of licences for content provision via VoD services and the importance of so-called "media windows".

35) http://www.ifta-online.org
36) http://www.gema.de
37) http://www.gvl.de
38) See Francisco Javier Cabrera Blàzquez, In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works, IRIS *plus* 2002-8, and Stef van Gompel, Audiovisual Archives and the Inability to Clear Rights in Orphan Works, IRIS *plus* 2007-4.
39) Under German copyright law, a copyright owner can only change if the original author dies and his copyright is passed down to his heirs in accordance with the universal succession principle (Section 1922 para. 1 of the German Civil Code in connection with Art. 28 of the German Copyright Act - *UrhG*), or if the copyright is transferred in execution of a testamentary disposition or to joint heirs as part of the settlement of an estate. Any transfer of copyright during the author's lifetime, however, is prohibited (Art. 29 para. 1 *UrhG*). An author can, however, grant an exploitation right (non-exclusive or exclusive) to a third party (Art. 31 *UrhG*), allowing them to use the work in any manner or in a particular manner, depending on the agreement.

The speaker said that, particularly where new services were concerned, it was often difficult to know beforehand what rights needed to be acquired for content use. She emphasised that the term "video-on-demand" was not currently defined by law or case-law. The classification of some forms, such as streaming – which did not necessarily have to be "live" – or "near-video-on-demand" services,[40] was unclear. Under German copyright law, any doubts concerning which uses were covered by a licence were interpreted to the licensee's disadvantage. According to this principle, laid down in Art. 31 para. 5 of the *Urhebergesetz* (Copyright Act – *UrhG*),[41] in cases of doubt a licence was deemed to comprise only its narrowest possible meaning that still met its contractual purpose. The use of the vague term "VoD" in licensing agreements was therefore inadvisable. Instead, the rights covered by an agreement should be described as specifically as possible.

Another source of difficulty was a provision of the German Copyright Act, under which licences could not be granted for new, as yet unknown types of use.[42] In order to determine when content use via VoD became "known", not only technical but also economic aspects needed to be considered.

The relevant exploitation rights in German copyright law were described. Whereas the speaker thought that download services were unanimously considered to be a form of making content available to the public in the sense of Art. 19a *UrhG*, classifying streaming had proved to be controversial. Simulcasting, a form of streaming, was recognised as cable transmission (Art. 20b *UrhG*) and live webcasting was considered to be broadcasting (Art. 20 *UrhG*). However, streaming-on-demand was hard to classify. Depending on whether the content represented individual or mass communication, it was generally classified as either making content available to the public or broadcasting.[43]

Finally, the speaker mentioned the importance of "windows" for the exploitation of content through various forms of exploitation (cinema, DVD, interactive multimedia services, etc.), also known in Germany as "*Sperrfristen*" (blocking periods). Here also, the problem of classifying VoD was relevant both to the rules on exploitation contained in the German *Filmförderungsgesetz* (Film Support Act) and individual exploitation agreements. ProSiebenSat1, for example, sometimes showed films via the VoD platform Maxdome before they were broadcast on television.[44]

The subsequent discussion also focused on the classification of video-on-demand in German copyright law. One participant clearly disagreed with the speaker. He thought VoD services should not be considered as broadcasting, since the latter was a linear service. Instead, he thought that VoD services fell within the scope of Art. 19a *UrhG*, where the user could choose when and where to watch the programme. It was debatable how broadcasting differed from other media services and what obligations they were under. The speaker agreed that the traditional method of offering individual works "on-demand" fulfilled the criteria of Art. 19a *UrhG*. However, the same did not apply to the relatively recent phenomenon whereby whole TV shows were delivered not as individual productions, but as longer segments of predetermined material with varying content. She did not think that such programmes had been considered when the definition was drawn up. She compared this kind of programme with radio programmes made up of numerous different pieces of music, the order of which was unknown to the listener. In such cases, she did not think it made any difference whether the user heard the programme on the radio or via "streaming on demand". However, she admitted that others might disagree on this point.

One participant thought that video-on-demand was actually a form of making content available to the public in the sense of Art. 3 para. 2 of the Copyright Directive.[45] He agreed with the speaker's view

40) Near-video-on-demand is a technique similar to VoD. The user cannot choose precisely when to view the video. Rather, the film is shown at regular, predetermined start times.

41) The full text of the Copyright Act is available in German at http://bundesrecht.juris.de/urhg/index.html (as at 21 October 2007).

42) On 31 August 2007, the *Bundesrat* (upper house of the German parliament) approved the draft Second Act on Copyright in the Information Society, paving the way for the forthcoming reform of the rules governing unknown types of use. Under the new rules, it will, in principle, be possible to grant exploitation rights for unknown types of use. However, the author will have a three-month "objection period", starting on the date on which the other party "sends a statement of its intention to commence the new form of use to the author at his or her last known address". The text of the decision is available at: http://www.bundesrat.de/cln_050/SharedDocs/Drucksachen/2007/0501-600/582-07,templateId=raw,property=publicationFile.pdf/582-07.pdf (as at 21 October 2007).

43) In a ruling of 21 February 2007, case no. 308 O 791/06, the *Landgericht Hamburg* (Hamburg District Court) had no hesitation in recognising it as making content available to the public in the sense of Art. 19a *UrhG*. In the case concerned, the defendant had enabled subscribers to its service to download music by a group of musicians at any time (streaming-on-demand) without specifically acquiring the necessary exploitation rights from the rightsholder. See *Kommunikation und Recht 2007*, pp. 484 f.

44) http://www.maxdome.de/

45) The full text of the Directive is available at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_167/l_16720010622en00100019.pdf (as at 21 October 2007).

that this was the case as long as there was some interactive aspect to the service concerned. If VoD was to be clearly classified under the terms of Art. 3 para. 2 of the Copyright Directive, this would have important consequences for a host of other provisions. For example, the Directive stated that there was no exhaustion of rights where online services were concerned.[46] He also referred to Art. 6 para. 4 subpara. 4 of the Directive, which came into play where claims for exceptions linked to the right of reproduction were concerned.[47] The speaker agreed and stressed that the crucial factor was the user's influence over the content offered. This depended firstly on the available selection of content and secondly on how much the user knew about what he would be receiving when he started the transmission process. However, the type of transmission technology used was less relevant.

Another participant discussed the search for a pragmatic way of guaranteeing copyright in a new society with international business models. The situation of collecting societies was very complicated, not only in the music sector, but also in relation to various other types of content, some of which were relevant to journalistic activities, for example. He wondered whether something practical could be done to give these organisations greater credibility. He also thought that the current harmonisation process was flawed. In this regard, he mentioned what sometimes were enormous differences in the way different countries implemented directives aimed at the definition of common standards. Even small discrepancies could become extremely important for international business models such as those of YouTube and Google if they concerned the actual workability of a particular model. Another participant agreed that a better solution was necessary, preferring a single Copyright Ordinance to a Copyright Directive that could be implemented in 27 different ways. However, in view of the lack of consensus among the Member States, he doubted whether this was feasible in the foreseeable future.

Another participant pointed out that, in the Commission's view, following the adoption of the proposed new Audiovisual Media Services Directive (AVMSD)[48] the country of origin principle now applied to media windows. He stressed the importance of this rule for the development of an international market. He also referred to the granting of collective licences, which was not a problem in itself; some difficulties were certainly avoidable. In his view, the granting of collective licences was beneficial to users. If there was a demand for them, they would not be withdrawn. It was therefore only a question of creating a more efficient system in a new market. Such an adjustment would not be easy, since 97% of collective licences were still being granted in accordance with the traditional model, in which users tended to apply for licences at national level. Only recently had international players begun to show an interest in international licences. It would take time to adapt to these new players. The most important thing was to find the most efficient mechanism. Both the reciprocal representation agreement system and the idea of a pan-European "one-stop shop" had pros and cons. However, he was sure that the Commission was capable of finding the right solution.

Presentation No. 6

The first talk of the afternoon session dealt with the crucial relationships between competitors in the music rights exploitation market.

The speaker began by summarising the historical development of the business model for music exploitation via the Internet. In the early days, the music industry had wanted to control Internet music distribution. However, its efforts – PressPlay and MusicNet were mentioned as examples – had failed. An illegal file-swapping market had then developed because it was much easier for users to "steal" music over the Internet than to buy it because of a lack of legal sources. Finally, the hardware technology company Apple, with its iTunes system, had achieved a dominant position in the music download market, as a result of which the music industry had suffered a revenue loss of almost 25% over the past five years as well as losing control over distribution. The speaker urged the film industry to learn lessons from this in its own field.

The large record companies in particular were now changing into licensing businesses for the rights they owned because this line of business was expected to be more profitable in future than simple

46) See Art. 3 para. 3 of the Copyright Directive.
47) Art. 6 para. 4 subpara. 4 of the Copyright Directive provides that Member States need not take measures in respect of claims for certain exceptions or limitations in relation to the right of reproduction for online services. The right of reproduction is the right of the author and owners of related rights to authorise or prohibit reproduction of their works (e.g. the intellectual work of an author, phonograms of a musician's performances, film material of a film producer) (see Art. 2 of the Copyright Directive).
48) The AVMSD was finally adopted on 11 December 2007 as Directive 2007/65/EC. The text is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_332/l_33220071218en00270045.pdf

phonogram production. As a result, their relationship with artists had changed completely. This had led to the question of what role was left for collecting societies to play in the licensing business. The speaker thought that the answer had to be for collecting societies to sell all their remaining rights to major users such as Apple, MTV or Google on an exclusive basis. With a combined market share of between 20 and 25%, they had as much bargaining power as the major record companies. In a similar way, European film producers would need to act collectively to access the VoD market.

It was also the responsibility of the European business community and rightsholders to make it easier to obtain a licence. Only then would their content make it onto VoD platforms. It was also important for them to obtain a suitable share of the revenue. Although a 50:50 split between producers and telecommunications operators, which was often the case in Europe, might appear sensible at the present time, it could turn out to be totally unacceptable in five or 10 years' time. It was therefore important to work together.

Three existing initiatives in Europe looking at a collective approach to VoD were described. The Danish "VOD Company", in which 15 producers had joined forces in order to negotiate collectively with telecom operators and broadcasters in Denmark; Universciné France,[49] a French VoD platform for independent film producers, founded by 32 producers; and EGEDA[50] (*Entidad de Gestión de Derechos de los Productores Audiovisuales*), a Spanish collecting society for the sale of film and TV producers' rights which had created its own VoD platform.

The speaker mentioned the search for a Europe-wide approach to the introduction of collective exploitation of rights in the VoD sector. He pointed out that, under the current practice of financing films through the pre-sale of the rights, distributors were likely to exert considerable pressure in order to buy the VoD rights. They would probably only invest in the production if they could acquire the rights. He warned European film-makers against following the Hollywood model, since this served other interests. For the European film industry, Internet access was an important tool for breaking into the worldwide distribution market. The right approach to this issue was therefore absolutely vital. Finally, the state support on which the European film industry depended heavily needed to be reorganised so that there were no unnecessary obstacles to the development of online distribution.

Some background information on events in the music industry during the collapse of PressPlay and MusicNet was then provided. A major record label had feared that an Internet service might harm its own offline business (CD sales) and upset retailers and traditional exploitation chains. The same argument was now being expressed by film studios, who did not want to offend cinema owners. This situation could be described as a classic case of the "*innovator's dilemma*", to coin the title of an American management book. Under this scenario, active, powerful market players tried to protect their sources of income by blocking a threatening innovation. In many cases, however, this did not work because new technology, as long as it offered added value to the user, would always somehow carve its own path. It was also often the case that all the business passed to a new, external player, as had happened in the music sector with Apple's iTunes. Incidentally, record companies would often complain that their income from sales via iTunes was still not enough to compensate for the drop in sales of traditional phonograms. Although this was true, users' feedback suggested that iTunes could still not be considered the ideal online shop. It was therefore unclear how the market situation would develop in terms of more user-friendly online music stores. The same applied to films.

The speaker admitted that the content industry was sometimes treated too harshly by people who complained that the switch to a new technology was taking too long. For the companies involved, the change was revolutionary, since they had originally been based on a completely different business model. And yet they did not receive any help in terms of relevant regulation; in fact, only the information and communications technology sectors were being supported. The regulator had chosen its stance by deciding that the free distribution of content – particularly music, but increasingly films as well – was possible and that P2P networks promoted the introduction of the broadband market. In the end, the content owners would pay for this. The question of liability would be raised again in debates over the E-Commerce Directive and the telecoms package and in the end a compromise might be found.

Meanwhile, the failure of the planned recommendation on the reform of copyright levies[51] was mentioned as a graphic example of the opposite situation in which rightsholders had lobbied more

49) http://www.universcine.com
50) http://www.egeda.es
51) For the latest details concerning the consultation, see http://ec.europa.eu/internal_market/copyright/levy_reform/index_de.htm (as at 21 October 2007).

successfully in the debate on the abolition of private copying taxes. If this had not been the case, such a recommendation would now be in place. The speaker replied that the debate on the private copying tax illustrated perfectly the difficult fight put up by rightsholders. In this case, the Commission had offered to abolish the tax, which was worth EUR 570 million to the music and film sector. In return, it had promised, for a certain period of time, to support the music and film industry in the debate over possible proposals from the hardware industry designed to restrict pirate copies being made via the Internet. However, it had not specified what this support would actually look like.

One participant noted that the 50:50 split did not apply to all download content. The strategy of forming a conglomerate of smaller production firms in order to achieve a 50% share between them was interesting and such a share might even be paid in the music industry. In the film industry, however, two factors needed to be taken into account: firstly, a film could hardly be compared with pieces of music which normally had a relatively short lifespan, since production costs were higher and life cycles longer; and secondly, the popularity of films varied tremendously. A blockbuster with a production budget of USD 200 million could bring in more revenue than a low-budget production costing USD 1 million. He therefore did not think that a 50:50 split was fair in the film sector. However, he could not come up with a distribution model that would be suitable in all cases. The speaker replied that he also did not think a 50:50 split was appropriate. In the music industry, a ratio of 70:30 in favour of the rightsholders was common.

Another participant thought that the speaker's advice to the European film industry that it should work harder to develop its own VoD exploitation model was problematic. On the one hand, the previous income distribution model for independent European (mainly English-language) films, financed through the sale of rights before the exploitation stage, no longer existed. VoD was not suitable for pre-financing. At the same time, there was an alarming price difference between "on-demand" video downloads and traditional DVDs: surveys in the US market had shown that the cost of downloading a video using the "download to rent" VoD option was only around 20-25% of the purchase price of the corresponding DVD (approx. USD 15 to USD 20).[52]

The speaker also thought that this was a problem for the music industry. However, he thought the main problem in the VoD sector was the pre-sale of rights. The VoD sector represented a new branch of industry that no longer recognised the sale of distribution rights. In order to close this gap, it might be necessary to change the regulatory and public aid mechanism. On the other hand, if it was accepted in principle that video-on-demand was replacing DVD, it was vital to find another way of reaping financial benefits from sales. Splitting the revenue equally between rightsholders and distribution companies was perhaps the wrong approach, even if this was the proportion the distribution companies were currently offering rightsholders. The distribution companies were hoping for a 70:30 split in their favour because they thought that they had been cheated in the negotiations for the DVD market. In the music sector, the whole market was being stirred up, which was why those responsible – particularly the big players - were so cautious. He thought that developments in the film sector should be closely monitored and support given to those involved. The music industry had not been given such support and had had to make decisions based on the market situation. The authorities responsible for public film aid and regulation therefore now had an important role to play. However, one participant warned that regulatory and support bodies might send out the wrong signals to the market if an independent film were produced first and then simply approved without consultation with stakeholders.

As the debate continued, BSkyB was mentioned as an example of an established market player holding a dominant position in the British market. The problem here was not that these companies tried to stop certain developments, but that they were venturing into new fields. The main barrier to sustainable growth in the independent British film industry in the 1990s had probably been the lack of a competitive pay-TV market. Independent producers had been unable to sell films to Sky because Sky had decided not to buy them. The producers had therefore been unable to protect themselves against the risk by receiving a "guarantee" from the pay-TV industry. Regardless of whether this was a market or a competition problem, a competitive pay-TV market was extremely important for a successful independent film industry in Europe. Reference was made to Ofcom's current investigation of the British pay-TV market.[53] This was bound to have consequences for the VoD sector.

52) With the "download to rent" option, the customer is only entitled to view the video for a limited period of time (similar to DVD rental).

53) See http://www.ofcom.org.uk/media/news/2007/03/nr_20070320 (as at 21 October 2007). Ofcom is the independent regulatory and competition body of the United Kingdom communications industry.

Concerning the theme of network neutrality, one participant wondered whether enough attention was being paid in the online distribution industry to the fact that prioritisation of content could once again put smaller independent European film-makers at least at a disadvantage. However, the speaker thought that this was something that the market should regulate. All companies, regardless of size, should be able to cope with the development of the market.

Presentation No. 7

The following talk concerned the transferability of the collective licensing model from the music industry to the film sector. The speaker began by describing the essential characteristics of the film industry and how it differed from the music industry. The cost of producing a film was incomparably higher than that of producing a song. For that reason, "patchwork" financing models had developed, particularly in the independent film industry. In contrast to the global sale of music rights, capital was raised from a range of different sources. Numerous sources of income were possible, particularly through the territorial licensing of rights to a work in individual countries. Even Hollywood was selling some rights to distribution companies on a territorial basis and spreading the production among several studios in order to cover rising costs. In Europe, the phenomenon was known as "co-production", where copyright and exploitation rights were not centrally owned, but shared among the producers involved.

It was emphasised that the cost of releasing a film could vary enormously from one country or language region to another, because each language version created different costs. This was the reason for the different pricing structures which had already been mentioned in relation to the iTunes case. The market was further fragmented by different release periods. The speaker described the relatively recent "day-and-date" approach, which provided two possible ways of improving the coordination of film release patterns: on the one hand, it was possible to release a film across all platforms – cinema, cable, DVD, etc. – at the same time without worrying about exploitation windows. This had been the case with Steven Soderbergh's film "Bubble", for example.[54] Another approach to "day-and-date" was to release a film in all countries on the same day. However, this only worked if the film concerned was so important that it could beat any other new releases that week anywhere in the world. This could probably only be achieved by major Hollywood blockbusters.

The speaker agreed with the previous speaker's view that independent film producers could achieve a stronger negotiating position in the VoD market if they joined forces. Since this was an immature market and the opportunity cost was high compared to non-exclusive licensing, it was also important to avoid exclusive deals where possible. However, the speaker thought that this was significantly hampered by the influence of analogue free-to-air broadcasters and pay-TV platforms. These companies were responsible for financing many TV and cinema films, which gave them significant bargaining power. Through exclusive licensing, they were able to prevent their competitors from exploiting VoD rights for films. Although production companies could join forces at the point of distribution of their works, negotiations on the financing of their production costs were carried out individually. Even at that stage, however, the large media companies could successfully apply pressure.

Two examples of existing business models for collective marketing of VoD rights were presented. The first was the French model of Universciné, which was similar to an agricultural cooperative. Universciné not only collected the films of all its members and sold the exploitation rights to VoD providers, but also operated its own platform, by which films from its archive were distributed. The second example, the 4oD VoD platform operated by British TV broadcaster Channel 4, was a model in which the VoD provider had an exclusive licence for a one-month period to show a film on its platform via VoD. At the end of the month, both parties decided whether the VoD platform could retain exclusivity for a further five months. If such an agreement was not reached, the film could not be marketed via VoD by any other platform during that period. After the six months, all VoD rights reverted back to the producers.

Finally, the speaker reiterated that pure size, as the previous speaker had suggested, might not be enough for the independent film industry, although it would be made stronger by its players working together. Given the current immaturity of the market, it did not make economic sense for producers

54) According to press reports, the Hollywood studio Warner Bros. wants to test this model with a series of major productions in the Netherlands, Belgium and Scandinavia. Under its "day-and-date VoD" concept, films including "Harry Potter and the Deathly Hallows" will be released on VoD at the same time as they become available on DVD in the respective national markets, see http://www.broadbandtvnews.com/today/?p=1905 (as at 21 October 2007).

to grant exclusive rights. However, the threat of granting exclusivity to a competitor could give them the necessary bargaining power to have a real influence on the distribution of revenue.

The ensuing discussion first tackled the subject of restricted licensing. As the speaker again explained, established market players in France, particularly the major aggregators, were only entitled to the primary exploitation rights for their services under the current market regulations. After that, the rights reverted back to the content provider, who could then either sell them again to the same TV broadcaster or offer them to other platforms. However, this rule only applied to films that were considered as independent productions. Other rights could be obtained, but in such cases the film was not considered an independent production. One participant referred to the very detailed regulations on exploitation windows in France, which were not always set down in law, but were sometimes contained in "interprofessional agreements" and were then given the government's blessing. According to the speaker, the purpose of these regulations was to support alternative distribution platforms, in order to prevent monopolies and break up oligopolies.

Regarding the situation in the United Kingdom, it was explained that certain reservations about investing in content were evident while, on the other hand, efforts were being made to expand networks. However, access to content was also necessary. Broadcasters who invested heavily in their own content demanded protection in the form of exclusive rights in return. They feared that their own business models could be undermined by free exploitation for VoD. The regulatory body responsible for media and telecommunication supported this position by giving broadcasters control over the primary broadcast. Incidentally, a so-called "*use it or lose it*" philosophy applied: if they wanted to, TV broadcasters could also exploit the content as VoD. However, if they did not do so within a relatively short time period following the first showing, they had to transfer the rights back to the producer. So far, VoD exploitation had not occurred because it had been blocked by the argument over who owned the relevant rights. However, the all-embracing objective was to get productions onto the market in the interests of the consumer. In the United Kingdom at least, there was still no model for achieving this. However, various solutions were being tested and producers had become acutely aware of the need for a risk-sharing agreement. It was pointed out that the obligation to transfer the rights back to the producer was not a recently introduced regulatory provision, but had existed for a long time. Under the Communications Act,[55] the public service broadcasters were obliged to lay down in a "Code of Practice" the principles applicable to the commissioning of independent producers.[56] The detailed financial arrangements were then laid down in separate "terms of trade". In practice, however, the details had first been negotiated in order to make clear the terms of the agreement. Only now was a principle-based approach beginning to take shape. The regulatory body did not provide any of the detailed provisions contained in the terms of trade, but merely laid down structural rules to define the negotiation procedure.

The participants again considered the transferability of the iTunes situation to the video sector. The speaker stressed that he thought there was a difference in terms of the production costs in the film industry being much higher than those in the music business. A sum of between EUR 3.5 and 5 million had been estimated. Unless existing own or third-party capital was invested – which was certainly not advisable – these costs were often covered by the advance sale of the rights to the film concerned. This was the best way of staying in business.

In addition, unlike in the music industry, it was very rare for all global copyright and exploitation rights over a film to be held by a single company. From the very outset, this led to the question of how the rights could be exploited. One participant suggested that the price differences for music, which were relevant in the iTunes case, were the result of the collecting societies in individual EU Member States granting the rights to an identical product originally only in their own territory under independently negotiated conditions. However, this situation no longer existed because the worldwide rights to music were almost always owned by a single group of companies, which in principle could agree standard conditions. Nevertheless, this was not happening because the record companies were still arguing that they could not grant Europe-wide licences and were trying to exploit the rights in individual territories through their national collecting societies. However, the situation was different in the film industry, where exploiting bodies were active in different countries and legally independent of producers.

55) See Art. 285(1) CA. The full text of the Communications Act 2003 is available at: http://www.opsi.gov.uk/acts/acts2003/pdf/ukpga_20030021_en.pdf (as at 21 October 2007).
56) See http://rsw.beck.de/rsw/shop/default.asp?sessionid=CCD440A71A7C4F6DA61A460A13285007&docid=98982&highlight=EMR+Code+of+Practice (as at 21 October 2007).

Film production could usually only be financed through the sale of these rights, unless – as one participant noted – a new European model emerged. At present, however, there were no such alternatives in the market.

Nevertheless, another participant thought that this situation could also turn out to be an opportunity. Producers were complaining more and more that they were no longer able to access the broadcasting market because broadcasters were not buying films any more. This could provide an incentive for withholding the VoD rights for future sources of income. Every year, Europe contributed EUR 2 billion to support the film industry; this money could be useful for the transition to a new financing model. The original speaker was sceptical about this idea. Collective rights exploitation did not work with pre-financing of films. If this type of negotiation actually took place with established market players, the producer normally would be acting alone at that early stage of the process.

The main problem was thought to be how copyright could be exploited. A corresponding business model needed to be developed. If Apple was now dealing with Hollywood, as had just been reported, who in Europe could play the part of Hollywood? Apple needed to be given easy access to European films, since Apple itself would not be making much effort in that direction. Another participant said that, as far as copyright was concerned, negotiations with Apple were very simple: the rights for French films, for example, had already been clarified with all VoD services and the situation would be no different in negotiations with European film services. There were no problems with the authors, with whom agreements were concluded, but rather with the producers[57] and financing. Of course, the situation also depended on whether negotiations were with the majors or with independent producers.

The discussion also touched on the theme of exclusive licensing. With regard to the question of why rights in the VoD sector were usually sold on a non-exclusive basis, it was pointed out that exclusivity was extremely important for live sports broadcasts in particular. However, the participants were not sure whether the suspicion expressed by one participant, i.e. that there were currently no live sports broadcasting rights in the VoD sector, was a reason for the rarity of exclusive rights in VoD, or whether this was due to particular characteristics of on-demand services which made exclusive rights unnecessary. One participant said that non-exclusive exploitation best suited the interests of independent film producers as it enabled them to grant licences to the maximum number of platforms. Major VoD providers such as Canal+ or BSkyB, however, would probably insist on exclusivity.

Another participant mentioned the similarity between the pay-TV market, particularly the film pay-per-view services offered by American cable operators, and VoD services. The former usually obtained their content from the studios on a non-exclusive basis so they could then sell it via their own service. It was stressed that the VoD market was still immature and therefore it did not make economic sense to get caught up in exclusive deals. Licensors were determined not to cooperate with the wrong market player.

According to another participant, larger content providers would also normally sell their VoD rights to European distributors on a non-exclusive basis.[58] However, there might be cases where exploitation rights were granted exclusively for a limited period of time. For example, the producer of a successful film might, in some circumstances, earn more by selling an exclusive licence. However, some participants thought that exclusivity would probably become more common as the market matured, since it was important for competitors to offer the user some form of advantage.

Regarding network neutrality, which some people thought was necessary, one participant referred to the two types of "customer" of network operators, who dealt with content providers as well as users. Particularly in relation to the broadband networks that were to be upgraded to so-called Next Generation Networks (NGNs), it was unclear who should pay for investments in the network through which access to content was made possible. The participant thought that data transfer was useful for both types of "customer" and that both should therefore help pay for the improvements. The possibility of content-based data transfer controls in NGNs meant that content providers could be forced to invest in the access network. Incidentally, however, access to the network should be guaranteed on a non-discriminatory basis for anyone who made such a financial investment.[59] However, it remained unclear whether this concept was compatible with the need for network neutrality.

57) Here, "authors" means the creators of intellectual works, while "producers" are those who make the (physical) film recording.
58) It was announced in August 2007, for example, that Disney International Television intended to sell more than 170 films from the repertoire of Walt Disney Pictures and Touchstone Pictures to French pay-TV and VoD provider Canal+ on a non-exclusive basis.
59) Technically, an NGN operator could grant exclusive access to one provider and exclude its competitors.

Presentation No. 8

The third presentation of the afternoon looked at the role of the user in the world of VoD. As the speaker explained, users of VoD services – especially those like Shoobidoo,[60] YouTube, Google or the Dutch P2P community Tribler,[61] which enabled them to upload their own user-generated content – were much more closely involved in the content distribution process than those of traditional broadcasting. They could even become the producers themselves. The speaker used the term "prosumer" to describe them, a combination between the words "producer" and "consumer".

These so-called "prosumers" could be subject to different areas of law. As long as they were simply using VoD services, i.e. downloading third-party content, they would undoubtedly be protected by general consumer protection law and indirectly by the sector-specific proposed Audiovisual Media Services Directive. Although the Directive only regulated the supply end of the market, it was expected that the production of content compliant with the Directive would result in improvements to consumer protection standards. Meanwhile, general consumer protection law was currently being assessed in a Green Paper. Particular attention was being paid here to the specific role of the media consumer who took content from the Internet. In general, EC consumer protection law focused on providing the best possible information for consumers (such as on the basis of the Unfair Commercial Practices Directive) and prohibiting unfair terms in consumer contracts. As an example, a clause in the users' terms and conditions of the iTunes music platform was mentioned, under which downloaded content could only be used in iTunes playing devices. It was unclear whether this clause was unfair and whether it would be in relation to a VoD service.[62]

However, if the user published self-produced material via a platform, thus acting as a "prosumer", it was also unclear what legal provisions were applicable to this content. It was stressed that the sector-specific regulations of the AVMSD[63] did not apply to non-commercial content.[64] VoD services with user-generated content therefore benefited from "regulatory holidays". Part of the reason for this was the notion that a lower level of protection was expected for services that were not similar to television. In addition, compared to broadcasting, these services were thought to have less influence on the formation of public opinion. However, the speaker thought that this was not necessarily the case in view of the average of around 4.2 million YouTube visitors.

Turning to the question of whether general consumer protection law might apply to user-generated content, the speaker referred to the problem of unfair terms in agreements between users and VoD service providers. A court, for example, might consider that a clause transferring all rights to self-produced content without appropriate compensation was unfair, especially if the content was also used commercially. In regard to how users, in view of the problems that even commercial rightsholders had in protecting their rights, could take action against unfair terms, the speaker referred to the possibility of exerting public pressure. In this way, platform operators could be forced to amend their unfair terms and conditions. She gave the example of the digital rights management (DRM) system used by SonyBMG with some music CDs, which had generated mass protests among users.[65] A single case like this could cause enormous difficulty for the whole VoD industry. YouTube, for example, was therefore considering introducing a payment system for user-generated content with commercial value.

The talk was followed by a lively debate over what a user of platforms such as YouTube should receive in return for uploading self-produced content. Some people thought that the commercial value of such videos was often very low. Such content should not therefore be rewarded financially, but simply with access to the platform. This service being provided by the platform operator was valuable for the user, whose main objective was to find fame and attract attention.

60) http://www.shoobidoo.nl
61) http://www.tribler.org
62) See http://rsw.beck.de/rsw/shop/default.asp?sessionid=CCD440A71A7C4F6DA61A460A13285007&docid=218054&highlight=EMR+itunes and http://rsw.beck.de/rsw/shop/default.asp?sessionid=CCD440A71A7C4F6DA61A460A13285007&docid=213386&highlight=EMR+itunes (as at 21 October 2007).
63) See above.
64) See Recital 13 of the Audiovisual Media Services Directive (final version).
65) SonyBMG's DRM system XCP ("Extended Copy Protection") secretly installed on CD purchasers' computers - rather like a Trojan - a so-called "rootkit", which was meant to prevent unauthorised copying of the CD. After this was revealed, the outraged reactions of users forced the company to release a tool with which the "rootkit" could be removed. The programme is available from http://cp.sonybmg.com/xcp/english/home.html (as at 21 October 2007).

Others disagreed vehemently. As well as videos showing a cat lying in the grass or scenes with a similar lack of information and market value, there was also some extremely valuable user-generated content that was used commercially. An example was the recent Red Hot Chili Peppers Contest,[66] a competition in which the rock group of the same name had challenged users to contribute their own film, which the band would then use in the video for their new song, "Charlie". To counter the argument that users knew in such cases what they were uploading and what it was going to be used for (thanks to the terms and conditions), reference was made to general consumer protection law. Such a statement was based on the assumption that all terms and conditions were valid on the grounds that the user knew what he was getting involved in simply by reading them.

One participant thought that this represented the greatest risk for YouTube. Should it turn out that its terms and conditions were null and void, the company would be infringing the copyright of all users and would be fully liable. It would therefore be better if the conditions of use were made more precise. Another participant agreed, referring to the Unfair Terms in Consumer Contracts Directive, under which more or less every standard set of terms and conditions on the Internet was potentially invalid because hardly any were comprehensible for the average user.

On the other hand, it was claimed that invalid terms and conditions did not mean that YouTube did not hold any licence at all. If it was found to be invalid, the comprehensive licence provided for in the terms and conditions would merely be replaced by one which would still allow YouTube to use the content. Although users would be able to demand that their content be removed at any time, they would not be able to claim damages. If they uploaded a video onto the platform in the knowledge that everyone could see it, they were consenting to its publication. This did not mean they were entitled to a fee. Under German law, for example, this could result from the detailed interpretation of a contract, which was referred to if general terms and conditions were invalid and if legislation did not contain any suitable rule to fill the gap.[67] In copyright in particular, this result arose from the principle of purpose,[68] under which the purpose for granting the licence was decisive. However, the implicitly granted licence was limited to non-commercial use.

One participant admitted that this argument could, on the surface, also be brought to bear against commercial service providers such as those in the music industry, since they also placed content on the Internet in the knowledge that anyone could copy and distribute it. However, the difference was that users who made their videos available by uploading them onto YouTube were, in a way, "infringing" their own copyright. Another participant disagreed, saying that it was not at all uncommon for professional artists to make their work – paintings, for example – available free of charge in order for it to be distributed further – by broadcasters, for example. Although in doing so they had agreed to their picture being displayed, they continued to claim other rights over their work.

According to one participant's closing remark on this subject, in the YouTube case it appeared that copyright lawyers had completely underestimated the legal obstacles which, under consumer protection law, could hinder the extensive transfer of exploitation rights through contractual terms and conditions. The challenge now was to bring general terms and conditions into line with these provisions. There were no comparable cases that could point the way ahead.

Another participant considered this problem from a different perspective. He wondered how the introduction of payments for user-generated content would affect the classification of VoD services in the proposed new AVMSD. If such a fee were paid to anyone who made a self-produced video available to other members via a platform such as YouTube, this could be considered as a commercial service in the sense of Articles 49 and 50 of the EC Treaty. This in turn would raise questions about the responsibility and liability of the uploader. Under the Audiovisual Media Services Directive, the user would certainly be liable. If the user uploaded different sorts of content on a regular basis, there would be every reason to consider him a service provider. It would also need to be decided who was liable for the content: the uploader/service provider or the platform operator? The situation was similar to that of a talkshow, in which personality rights were infringed, hate speech was expressed or things were said which violated rules on the protection of minors. In such cases, courts had discussed the responsi-

66) See http://www.youtube.com/group/RHCPcontest (as at 21 October 2007).

67) In these cases (and only these; if a legal rule exists, it must be applied in accordance with Art. 306 para. 2 *BGB* ("*Bürgerliches Gesetzbuch*" = German Civil Code)), according to established precedents, the invalid clause is replaced by the rule which the parties would have agreed to if the interests of both sides had been properly weighed up if they had been aware of the invalidity of the clause; see Collection of decisions of the *Bundesgerichtshof* (Federal Supreme Court) in civil cases (*BGHZ*) vol. 90, pp. 69 ff.

68) See Art. 31 para. 5 *UrhG*.

bility of the TV broadcaster, particularly for the repeated showing of problematic programmes.[69] Different regulations also needed to be adopted for Internet video platforms. It was conceivable, for example, to hold the platform operator less liable if hate speech were expressed by a politician than if it were expressed by someone else. In such cases, liability could be determined in certain circumstances in accordance with Article 14 of the E-Commerce Directive.

Another possibility was to consider the YouTube model as non-commercial. Platform operators such as YouTube or MySpace had managed to find a very cheap way of producing content. Their business was dependent on users' willingness to make their own content available. This should be treated as a non-commercial activity within the meaning of Recital 16 of the Audiovisual Media Services Directive (latest version, formerly Recital 13).

Some people also thought that conditions of liability should be made dependent on the degree of editorial control exercised by the platform operator. One participant described the case of the online service provider AOL. A German court had held AOL liable for MIDI music files that its members had uploaded onto AOL servers in breach of copyright law, even though the company had neither controlled nor been able to control these files.[70] However, this case had occurred before the E-Commerce Directive, which now covers such situations, had been transposed into German law.

As for whether a person who uploaded content onto a video platform was protected by consumer protection law, copyright law or both, the speaker explained that everyone who produced their own content was also a user. Even though he was not acting as a user and producer at exactly the same moment, he still remained a user. However, this dual role had not been considered by either copyright or consumer protection law. Under current law, there was therefore no properly thought-out answer to this question.

Presentation No. 9

The final presentation dealt with the situation of the VoD market in the United Kingdom, looking in particular at the example of the British Telecom's VoD service, BT Vision.[71] The speaker explained that BT Vision was a package through which the user could receive numerous media services all at once. Via a "V-Box", the television set was connected to a TV aerial offering 40 digital terrestrial "Freeview" channels as well as encrypted access to sports programmes from the digital TV provider Setanta Sports. At the same time, the user could access the BT Vision VoD service through a connection to a router, known as the "BT Home Hub". Meanwhile, a PC connected wirelessly to the "BT Home Hub" could access the Internet.

According to the speaker, the list of content providers with which BT Vision cooperated as part of its VoD service comprised 40 to 50 companies, including the major studios such as Disney, Universal, Warner Brothers and MGM, some independent producers and broadcasters such as HBO, MTV and the BBC. This enabled it to offer a total of between 1,500 and 2,000 hours of VoD content. Since the market was still relatively immature, BT Vision often signed short-term contracts so that it did not become tied down to agreements that quickly became out-of-date. The company was in competition with other VoD services in the United Kingdom, such as BSkyB, Tiscali TV, Virgin Media, 4oD and BBC Worldwide. Internet services such as YouTube and Joost were also considered to be competitors.

The speaker then referred to the regulation of the market, which was mainly the responsibility of the self-regulatory body ATVOD.[72] In 2003, interactive services had been expressly omitted from the scope of the Communications Act on the grounds that the developing VoD market needed little or no

69) See the judgment of the European Court of Human Rights (ECHR) in the case Lionarakis v. Greece, 5 July 2007, application no. 1131/05, available via the ECHR website (http://www.echr.coe.int/echr/), and the comments on the judgment by Dirk Voorhof in IRIS 2007-9, p.2. Nikitas Lionarakis, presenter and coordinator of a radio programme broadcast live by the Greek broadcaster ERT, had been ordered by national courts to pay damages for insulting and defamatory comments made by a guest on the programme. The ECHR decided that the ruling violated the right to freedom of expression enshrined in Art. 10 of the European Convention on Human Rights. It stated, *inter alia*, that the presenter could not be held liable for such comments to the same degree as the person who had made the remarks, especially since the programme had been shown live and its format was to invite the participants to engage in a free exchange of opinions. Also, journalists should not be required to distance themselves systematically and formally from the content of a statement that might defame or harm a third party, as this was not reconcilable with the press's role of providing information.

70) *Landgericht München I* (Munich District Court I), ruling of 30 March 2000, case no. 7 O 3625/98, see http://www.jurpc.de/rechtspr/20000073.htm (as at 21 October 2007).

71) http://www.btvision.bt.com

72) http://www.atvod.org.uk . ATVOD stands for *Association for Television on Demand*.

state regulation. At a secondary level, the market was governed by legal provisions such as the Distance Marketing Directive, the Copyright Act, gambling legislation, the Broadcasting Code and regulation by Ofcom and the Advertising Standards Authority (ASA). The aim of self-regulation through ATVOD was to bring all British VoD providers under the same roof. In practice, however, there was still disagreement over who should be classified as a VoD provider.

ATVOD was also responsible for monitoring content – particularly in terms of the protection of children, young people and the interests of users in general. For this purpose, ATVOD had adopted a Code of Practice,[73] which contained the general principles, as well as Practice Statements[74] derived from the Code. These had initially been based on the existing, functioning rules of the Broadcasting Code and only included special provisions in relation to matters specific to on-demand services. One such aspect was the constant availability of content through VoD. It was therefore impossible to protect children and young people by making unsuitable content only available in the evenings. This problem had been solved by the introduction of a double PIN protection system. At the point of purchase, the user had to type in a personal identification number. For content that would probably have had to be shown in the evening in order to protect minors under the terms of the *Broadcasting Code,* a second PIN number had to be entered at the time when the programme was to be viewed.

The speaker explained what action users could take under the ATVOD Code of Practice if they found that their VoD service provider had infringed the ATVOD rules, such as those on the protection of minors or other groups. They could begin by complaining directly to the provider itself. In BT Vision's case, many complainants were then referred to the content provider (e.g. BBC or Channel 4), since the content concerned was usually shown in cinemas or on television before being included in the VoD service. If the customer was still unhappy, BT Vision would look into the complaint. If BT Vision was also unable to sort the problem out, the user could turn to ATVOD as a last resort. The matter would then be resolved by ATVOD, with any decision by the ATVOD Board of Directors binding on its members.

The speaker was disappointed with the reform of the regulations governing audiovisual media services contained in the new EC Directive. He thought that the system of industry self-regulation had proved successful and that outside regulation was unnecessary. However, he thought it was now important, in the medium term, to move from the self-regulatory system to one of co-regulation. This could be achieved, for example, if ATVOD became a body with legislative powers, controlled by Ofcom.

He was looking forward to Ofcom's proposed investigation of the British pay-TV market. He was expecting it to answer a series of questions which were vital for the VoD market, including in relation to the "warehousing" of rights, carried out in order to safeguard companies' own market power, or the exclusivity of sports and other high-value TV rights. VoD providers were often prevented from using content by this kind of agreement.

One participant added that, to his knowledge, after lengthy discussions with United Kingdom representatives, the Commission had shown a tendency towards accepting ATVOD as a co-regulatory body. However, the more open wording of Art. 3 para. 7 AVMSD, in which self-regulatory systems were also mentioned, could also be understood as a response to the hugely diverse forms of non-state regulation found in the Member States.

The speaker was asked to explain in more detail how the user protection system worked. He said that not every programme needed to be reclassified by ATVOD. Programmes that had already been shown on television had already been given a rating, which was normally adopted. The same applied to cinema films. Depending on its classification and the protection level required, which could be decided by the individual user, a programme might only be accessible after a PIN was typed in. The required protection level could be set when installing the set-top box. The protection system could also be switched off completely.

Asked by a participant, the speaker confessed that he did not think ATVOD was able to define and implement a joint transparency standard common to all VoD service providers covering business data such as the number of providers, users and revenue levels. The Minister responsible had demanded that anyone offering VoD services in the United Kingdom should be a member of the organisation. However, this had not yet been achieved. For example, neither Sky with its on-demand service Sky Movies nor

73) The *Code of Practice* of 9 June 2004 is available at: http://www.atvod.org.uk/docs/atvod_code_of_practice.pdf (as at 21 October 2007).
74) The seven *Practice Statements* are available at: http://www.atvod.org.uk/docs/atvod_practice_statement.pdf (as at 21 October 2007).

Channel 5 had applied for ATVOD membership. The Audiovisual Media Services Directive was a crossroads. ATVOD could not currently play a leading role in the standard-setting process.

Regarding revenue distribution, the speaker thought that the 70:30 split used by the Apple model was a market anomaly, since Apple's main area of business in this market was the sale of millions of iPods (the corresponding hardware) rather than individual songs. This was not the case with traditional telecommunications companies and other VoD providers, which gave away their set-top boxes and therefore bore costs of around GBP 200. This split could not therefore be seen as a general benchmark for revenue distribution. However, the speaker supported the idea of bringing together independent film producers, who made up around 25% of the film market, in order to give them a stronger bargaining position. At the same time, he countered suggestions that telecommunications companies were earning money by extending their broadband structures on the back of rightsholders, insofar as they were promoting illegal P2P networks. British Telecom, for example, was investing GBP 16 billion in its network for the 21st century.

Asked about the revenue distribution arrangements that British Telecom had agreed with content owners, the speaker explained that a certain percentage of revenue had been agreed in many cases, sometimes in addition to a minimum guaranteed sum for the content provider. In some cases, however, only a one-off payment had been agreed, with no sharing of revenue. It was ultimately a matter of negotiation, where the decisive question was always how desperately the content was wanted and how much people were willing to pay for it. Regarding the minimum guarantee that first had to be earned through the company's own income, various deals had been concluded. In some agreements, content providers were paid a certain percentage of the final sale price of the film for every individual download. However, service providers always needed to ensure that transmission costs, which were particularly high for peak-time downloads, were covered. Combinations of these different models were also possible; the percentages also varied. However, no content owner had been offered a percentage of the revenue generated from broadband subscriptions, since BT Vision was considered an independent service, totally separate from the broadband business. In this way, a convenient "middle ground" had been found between the comprehensive service offered by BSkyB for cable customers with a minimum 12-month subscription and monthly fees of GBP 30 to 50 on the one hand and analogue TV and digital "Freeview" (DVB-T) on the other. As well as "Freeview", BT Vision offered VoD services without the need for a subscription.

The participants also discussed which of VoD users' interests were protected by ATVOD. According to the speaker, the concise Code of Practice,[75] which contained the basic principles, was mainly backed up by Practice Statements,[76] which had developed over time from experiences with the operation of VoD services. The clearest distinguishing feature between a VoD service and a linear broadcast programme was the PIN-based system for the protection of minors and protection from harmful content in general. In principle, ATVOD felt obliged to deal with everything that had anything to do with VoD. However, after a lengthy discussion, it had been decided that complaints about providers' poor customer service were not within ATVOD's area of jurisdiction, but were covered by other areas of consumer protection law.

So far, no complaints of this nature had been received. It had initially been thought that this was because there were no problems. However, there were various other possible explanations. Maybe users simply did not know that ATVOD existed. Also, the VoD market was very small: BT Vision had only 13,000 subscribers, Tiscali TV (formerly HomeChoice) 4,000. Finally, most of the content had already been broadcast on TV, so any problems would have emerged then.

Users' complaints about the new system of digital rights management were also not dealt with by ATVOD. The Code of Practice did not mention any advertising restrictions, since this whole issue was covered by secondary legislation. Problematic content broadcast via DVB-T was dealt with by the ASA. BT Vision's VoD service currently did not show any advertising, while BBC International was subject to similar rules in its licensing agreements.

Finally, the speaker reiterated that the Code of Practice – like the Broadcasting Code – only contained general principles for protection against harmful content.

75) See above.
76) See above.

Conclusion

The workshop held on 15 June 2007 covered numerous different aspects of video-on-demand. It became clear that a lot of questions had yet to be answered conclusively, beginning with the actual definition of the term "video-on-demand" itself. Despite the efforts of organisations such as IFTA, a clear, universal distinction from other video services had not yet been made. It was queried, for example, whether the "streaming" of video content could be considered as VoD or whether it constituted a form of broadcasting. A clear definition was needed, partly in order to determine the extent to which licences must be acquired for the use of video content. Generally speaking, there remained a considerable need for clarification in the area of copyright. Decisions on rightsholders' complaints against the major VoD platforms such as YouTube, which were accused of publishing copyrighted material, were therefore awaited with great anticipation.

The European Commission's decisions on the music industry (see the CISAC case and the Commission's statements concerning iTunes) and their transferability to the video sector also provided some interesting debate. In general, it was clear that lessons needed to be learned from the music industry's experiences with online marketing of its works. This firstly concerned the choice of business model, which could help prevent the market from wandering into the realms of illegality. Secondly, it was necessary to clarify how rights could be exploited in the VoD market, which was still young. Due to the current immaturity of the market, warnings against long-term contracts and exclusive licensing had been issued in various quarters. However, the extent to which exclusivity might become a realistic option in the future remained unclear. Similarly, there was no obvious answer to the question of how independent film producers could ensure that they were not cheated in negotiations with platform operators. It was proposed that they should increase their bargaining power by working together. However, some doubted that this would be enough.

Discussion also focused on the legal status of users who published their own content, known as "prosumers". Firstly, it needed to be decided for what uses platform operators could acquire licences from users and what payment they should offer in return. Secondly, it was important to decide who was ultimately responsible for such content and who was liable for unlawful content, either under the Audiovisual Media Services Directive or under other provisions. Finally, even after adoption of the Directive, there remained the need for discussion about how to structure the regulatory mechanism for audiovisual media services which did not fall under the scope of the Directive.

Parameters for Business Models[1]

André Lange
European Audiovisual Observatory

1. More than 150 Services Operational in Europe

In May 2007, the European Audiovisual Observatory and the *Direction du développement des médias* of the French government published a report on the development of VoD in Europe. The scope of the report is limited to services providing content chosen by the providers of services and excludes services providing User Generated Content.[2] At the end of 2006, 142 pay services (excluding services devoted exclusively to music and services comprising solely programmes for adults) were operational in the 24 countries studied. If one adds to this the number of free access services, those which were set up at the beginning of 2007, and those which exist in countries not covered by the study, the number of services currently operational in Europe may reach more than 150. France, the Netherlands and the United Kingdom stand out as leaders in terms of the number of services on offer. Most of the services in Europe (94) can be accessed via the Internet and can therefore be viewed on a computer screen. Transmission using the broadband network, usually as part of an offer for the distribution of television channels in IPTV mode, constitutes the second most frequently used mode of distribution (47 services). In this case the programmes can be viewed on a television screen. As digital broadcasting by satellite and by terrestrial network does not permit a return path, offers of video-on-demand are possible by storing the programmes on the user's digital recorder (PVR). The number of services of this type is still limited in Europe, but they are offered by two of the main digital television content aggregators (BSkyB's Sky Anytime service in the United Kingdom and Ireland, and Premiere's Direkt Premiere + in Germany and Austria).

1) This paper is based on the report "Video on Demand in Europe", edited by NPA Conseil for the European Audiovisual Observatory and the Direction du développement des médias (France). The study was published by the Observatory in May 2007. The study analyses the various technical methods used for video on demand, the various economic models applied, the debate on regulation, and the place of video on demand in the cinematographic and audiovisual industry. A detailed analysis of about 150 services operational in 24 countries is provided. For further information, see http://www.obs.coe.int/oea_publ/market/vod.html

2) The concept of "User Generated Content" would warrant further discussion. On the one hand, it seems absurd to exclude such services from the commercial sphere only because users provide the content. One may consider that operators of these services are exactly in the same market as publishers of other media financed by advertising: their real product is audience, a product that they can sell to advertisers or marketers. The originality of user generated content lies in the (low) costs for generating audience: the costs are mainly covered by the users and not by the service providers. But, on the other hand, as the case brought by Viacom against YouTube has indicated, the concept of user generated content may also be misleading because in a large number of cases, users just publish material of which they are neither the authors nor the copyright owners.

Table: Number of services per country and breakdown by broadcasting networks (end of 2006)
(Not including free services, video clip services or services for adults.)

		Total number of services [3]	Internet	IPTV	Cable	Satellite	Terrestrial digital television
>10 services	**France**	20	15	8			
	Netherlands	19	17	2			
	United Kingdom	13	6	3	3	1	1
	Germany	12	9	3		2	
5-10 services	**Belgium**	10	3	5	5		
	Sweden	8	6	5			
	Italy	8	5	3			
	Norway	7	6	2			
	Spain	6	2	3	1		
	Ireland	5	5			1	
	Denmark	7	4	2	1		
	Austria	5	3	1		1	
1-4 services	**Finland**	4	6	1			
	Switzerland	3	2	1			
	Poland	3	1	1		1	
	Hungary	4	2	2			
	Portugal	2		1	1		
	Estonia	2	1	1			
	Cyprus	2		2			
	Slovakia	1	1				
	Iceland	1	0	1			
No service	**Turkey**	0					
	Slovenia	0					
	G.D. Luxembourg	0					
Total [4]		**142**	**94**	**47**	**11**	**6**	**1**

Source: NPA Conseil / European Audiovisual Observatory

3) A service may be available of a number of different networks, but is only counted once in the total.
4) A service may be available in a number of different countries; in this case, it is counted more than once in the total.

2. The Respective Advantages and Disadvantages of the Platforms

Each of the different platforms has advantages and disadvantages for the launching of VoD services. Delivery through Internet has the clear advantage of allowing B to C models. This means that small players have the possibility of offering their programmes, at a minor cost, to the general public while avoiding any dependence on distributors. Internet also allows the service provider to enrich the VoD service with editorial complements and the possibilities of customized marketing following the model of the websites of retailers of cultural products (such as the classical "if you like this film, you will also like…"). If the provider holds international rights, distribution over the Internet makes it also possible to offer worldwide services or, at least, services accessible in various countries.

The great weakness of VoD through Internet, however, remains the fact that it is still more convenient and user friendly to watch films or audiovisual programmes on a TV set than on a PC screen. Of course, small sections of the public (in particular young people) are already familiar with using the PC as a TV screen. They might even be able to transfer the moving picture from the PC to the TV set, but the majority of the public will continue to favour the TV screen for a long time. Delivery through IPTV, cable, satellite or digital television have, in this regard, a clear advantage. However, satellite and digital terrestrial television do not allow the provision of large catalogues because the absence of a return path makes it necessary to store the programmes on the PVR.

Therefore IPTV and cable appear as the probable winners in the process of implementing VoD but they have their own problem of capacity: they risk saturation of the network capacity for IPTV and relatively high costs of digitization for the existing cable networks. Both IPTV and cable VoD services will provide an advantage to important distributors or packagers of thematic channels, to the detriment of providers of smaller catalogues.

Table: Overview of advantages and disadvantages

	PLUS	MINUS
Internet	- B to C model - Editorial possibilities, search functions - Customized marketing - Allows niche strategies - Allows international strategies - Allows larger catalogues	- Viewing on PC screen - Breaks in the quality of service - Slow to download - Risks of piracy - Services not accessible on MAC
IPTV	- Viewing on TV set - Existing basis of subscribers (differs according to country)	- Capacity limits of telephone networks (leading to the long-term necessity of building fibre-to-the-home networks [FTTH]) - EPG rather slow and not user friendly - Access more difficult for independent producers and with regard to niche programmes - Smaller catalogues than for Internet based services
Cable	- Viewing on TV set - Existing base of subscribers (differs according to country)	- Cost of digitization of networks - Access more difficult for independent producers and with regard to niche programmes - Reduced catalogues
Satellite and DTT	- Viewing on TV set - Existing base of subscribers (different according to countries)	- No return path - Needs storage on PVR - Access more difficult for independent producers and with regard to niche programmes - Reduced catalogues

3. The Players

Three types of players are particularly active in the video-on-demand market:

- *The editors of television channels* generally supply catch-up TV services, which make it possible to watch a programme after it has been broadcast on television. Many broadcasters, however, take advantage of their position in the rights market and offer films also.
- *Content aggregators* are companies that have the ability to constitute catalogues of rights for works likely to be distributed via VoD. This category may also include video editors, societies for the collective management of copyright (such as the SGAE and the EGEDA in Spain), bodies or companies that manage archives (the Institut national de l'audiovisuel in France, the Norwegian Film Institute, British Pathe, etc.) and commercial retail companies (chains such as FNAC and Virgin, companies specialising in DVD rental such as Lovefilm, Glowria, etc). Some companies have been set up specifically with the aim of becoming content aggregators. In the Netherlands, no fewer than nine services are organised on the basis of the catalogue put together by the aggregator ODMedia.
- *Telecom operators* (incumbent operators, Internet access providers, cable operators) are newcomers on the market for the distribution of content. They are the most active of the players, and are innovative in terms of diversity of offer (particularly by using cross-media partnerships).

Less importantly, a number of production companies or associations of producers also edit services. The main cinematographic groups in Europe have not yet announced their own services, in contrast to the situation in the United States where the Hollywood majors are at the origin of the Movielink service. One should nevertheless note the involvement of the Svensk Filmindustri group in the SF-Anytime service which can be accessed in the various Scandinavian countries. In Europe, the American majors are collaborating with the main national VoD services, mainly on the basis of non-exclusive agreements, although Warner has joined forces with Arveto (Bertelsmann group) to launch the Film2Home service in German-speaking countries.

Table: Comparison of the advantages and disadvantages of the various market positions

	PLUS	MINUS
Telcos, ISPs, Cable	- Financial capacities - Technological expertise - Triple play offers - Management of subscriptions and tracking of demand	- No great experience in the field of rights - Necessity of accessing leading catalogues - Necessity of working with aggregators
Broadcasters	- Financial capacities - Good position on the rights market - Experience in audience measurement, pay-TV, DVD market - Brand - Catch-up formulas, archives	- Lesser financial capacities than telcos - Dependent on distributors (delivery) - Negotiations with producers - Competition rules
Retailers	- Knowledge of consumers' practices - Brand	- Lesser financial capacities than telcos - Difficult access to IPTV delivery - Competition with their own "brick and mortar" services [5]
Aggregators	- Experience in rights management - Possible pan-European strategies - Niche catalogues	- Lesser financial capacities than telcos - Difficult access to IPTV delivery

5) A "brick and mortar service"[Here the quotation marks include the word "service"; in the main text they do not, Either version is fine, but it would be better to be consistent] is a traditional "street-side" business that deals with its customers face to face in an office or store that the business owns or rents. Web-based businesses usually have lower costs and greater flexibility than brick-and-mortar operations See *http://www.investopedia.com/terms/b/brickandmortar.asp*

4. Three Types of Economic Models Emerge

4.1. Rental

There are several arrangements for rental:
- payment for each individual programme separately (the rental charge is paid, at prices that, in general, range from EUR 1.50 to EUR 6.00 for each item), The programme rented can, in most cases, be viewed for a limited period of time ranging between 24 and 48 hours.
- the payment by pack for a group of programmes (for example various episodes of a TV series)
- the payment of a pass, allowing an unlimited number of viewings of the programmes included in the offer (a formula adapted in particular for children's programmes)
- the subscription formula, allowing the user to view a certain number of programmes during the subscription period (often called SVoD - Subscription VoD). In this case, the payment is valid for a set of programmes that are available for unlimited viewing during a given period of time.

4.2. Purchase

Payment here is also made for each item separately, at a price that is generally fixed between EUR 5 and EUR 15. The programme can be viewed and stored on a PC; it cannot usually be transferred to a DVD player connected to a television set (because of the types of encryption used). A "purchase to burn" option that allows the downloaded programme to be burned onto a DVD (sometimes in a limited number of copies) may also be available, in which case prices range between EUR 15 and EUR 20.

4.3. VoD free of charge (also called FoD - "free on demand")

FoD is most frequently used for viewing audiovisual programmes as catch-up TV (i.e. programmes offered by VoD services for a limited amount of time after broadcasting by the television channel).

There are two types of FoD – programmes without any charge that are financed by advertising (mostly television series and fiction), and programmes shared for free. The latter type is used either for promotional purposes, or for testing the potential of a free model in order to have a better basis for subsequent negotiations with advertisers.

Although, historically, separate payment for each individual item has been the main method for making content available on demand, there are now several marketing schemes available in order to keep up with current developments – the constitution of packs, subscription offers (SVoD – "Subscription VoD"), passes giving entitlement to unlimited viewing of all or part of an available catalogue, and third-party financing (whether cross-subsidies between different products offered by one operator or contributions from advertising).

YouTube and User Generated Content Platform – New Kids on the Block ?

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This paper explores some issues relating to the universally known video-sharing site, YouTube and similar user generated content sites. Part I reviews succinctly the service and the background of YouTube. Part II examines the business model. Part III discusses some copyright issues, more particularly in light of the Viacom lawsuit. Part IV identifies some further issues concerning the freedoms of speech and expression and privacy information on YouTube.

1. General Description of YouTube

1.1. The Service

(1) YouTube, Inc. ("YouTube") is a very popular Internet video-sharing service, where users can *watch*, *upload* (in several common file formats) and *share* video clips (the so-called "YouTube Community").[1] The site is completely free and is easy to use.

Videos can be rated, and the average rating and the number of times a video has been watched are both published. Related videos, determined by title and tags (a tag is a keyword associated with a piece of information for purposes of keyword-based classification and search for information) appear onscreen to the right of a given video.

Also, users may actively take part on it by creating groups and quick video lists for later viewing, flagging videos as inappropriate, etc.[2] Registered users can agree to be traced (under their registered username only) while watching a given video so other users can experience in real time which other users are watching the same video.

(2) Unregistered users can watch most videos on the site, while registered users are able to upload an unlimited number of videos, but in both cases provided they comply with YouTube's terms of service.[3] YouTube's policy is that users may upload videos only with the permission of the copyright holders and of the persons depicted. Also, users may not upload a video if it contains or has links to illegal content or would constitute a criminal offence, such as pornography or hate speech. Moreover, some videos are available only to users of age 18 or over.

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1) "D. O'Brien and B. Fitzgerald, "Digital copyright law in a YouTube world", *Internet Law Bulletin* 9, 2006 (pp. 71-74), available at http://eprints.qut.edu.au

2) YouTube, *Broadcast Yourself*, www.youtube.com

3) Terms of use are available at http://www.youtube.com/t/terms

Every uploader grants YouTube a license to distribute and modify the uploaded material for any purpose, as long as the uploader has not deleted the material from the site.

About 100 million clips are viewed on YouTube each day and approximately 65,000 new videos are uploaded every 24 hours, making it one of the world's most popular websites.

(3) Web 2.0 "user-generated content" websites such as YouTube, Wikipedia, MySpace[4] or Dailymotion[5] differ from the traditional online service providers (the so-called Web 1.0) in two main respects. First, the tremendous popularity of Web 2.0 "user-generated content" websites is closely tied to the wide variety of site content and the sharing of content. The traditional Internet service providers are involved rather in providing Internet connectivity and e-commerce sites. Second, "user-generated content" websites are not merely passive conduits but they also adopt a more proactive approach by encouraging their users to share creative content (both original, like the thousands of homemade video blogs created by teenagers with Webcams for instance, and copyrighted)[6].

1.2. The Company

(4) The company was launched early in 2005 by two former employees of Paypal (i.e. an e-commerce business allowing payments and money transfers to be made through Internet), Chad Hurley and Steve Chen. YouTube owes much of its early success to a user's uploading to the site a copyrighted video clip from a *Saturday Night Live* sketch, "Lazy Sunday". By the time NBC asked YouTube to remove the video clip, 5 million people had viewed it and YouTube became a *"viral phenomenon"*.[7]

(5) In October-November 2006, Google announced that it had reached a deal to acquire the company for USD 1.65 billion in Google stock[8]. Remarkably, Google set aside as much as USD 200 million in stock to contend with potential copyright infringement lawsuits.[9]

2. Revenue Model

(6) Even before being bought by Google, YouTube's business-model was advertisements, based on display ads, called impressions, and click-throughs. Thus, the more visitors YouTube attracts, the more revenue it receives from advertisers.[10]

However, YouTube's running costs are high, due especially to the bandwidth required. Therefore, commentators doubt whether the company, like other previous Internet start-ups, has a viable business model.[11]

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4) www.myspace.com
5) www.dailymotion.fr
6) L. Holson, "Hollywood Asks You Tube: friend or foe?", http://query.nytimes.com/gst/fullpage.html?res=9D0DEEDE1030F936A25752C0A9619C8B63, 15 January 2007: "No one knows exactly how much Hollywood-derived content is uploaded to the site without the studios' consent, but academics and media executives estimate it could be anywhere from 30 percent to 70 percent.". See also transformative derivatives such as a *mashup*, which is "a visual remix, commonly a video or website which remixes and combines content from a number of different sources to produce something new and creative", in D. O'Brien and B. Fitzgerald, "Mashups, remixes and copyright law", *Internet Law Bulletin* 9, 2006, available at http://eprints.qut.edu.au
7) T. Krazit, "Google makes video play with You Tube buy", 9 October 2006, http://www.news.com/Google+makes+video+play+with+YouTube+buy/2100-1030_3-6124094.html; A. Lomax, " NBC Changes YouTube's Channel", 21 February 2006, www.fool.com/investing/high-growth/2006/02/21/nbc-changes-youtubes-channel.aspx and I. Hardy, "The viral video online revolution", 26 May 2006, http://news.bbc.co.uk/2/hi/programmes/click_online/5020364.stm
8) D. Henninger, "It's Time to learn About YouTube", 13 October 2006, Wall Street Journal, available at www.realclearpolitics.com/articles/2006/10/its_time_to_learn_about_youtub.html
9) D. McCullagh and A. Broache, "YouTube may add to Google's copyright worries", 9 October 2006, http://www.news.com/YouTube+may+add+to+Googles+copyright+worries/2100-1030_3-6124149.html and G. Sandoval, "Universal sues MySpace for copyright violations", 17 November 2006, http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html
10) S. Gustin, "YouTube's Got a Fat Idea of Itself", www.nypost.com, 21 September 2006 and W. Davis, "Downloading a File of Copyright Woes: Google's buyout of YouTube shows federal law still lags behind technology", *ABA Journal, Mar. 2007*, www.abajournal.com/magazine/downloading_a_file_of_copyright_woes/
11) G. Sandoval, "Analysts don't like You Tube chances", 2 October 2006, http://www.news.com/Analysts+dont+like+YouTubes+chances/2100-1030_3-6121902.html, G. Sandoval, "Is You Tube a flash in the pan?", 29 June 2006, http://www.news.com/Is+YouTube+a+flash+in+the+pan/2100-1025_3-6089886.html and H. Green, "YouTube: Waiting For The Payoff: the video-sharing Web site is a runaway success - everywhere but on the bottom line", 18 September 2006, Business Week, available at http://www.businessweek.com/magazine/content/06_38/b4001074.htm?chan=tc&chan=technology_technology+index+page_more+of+today's+top+stories

(7) In August 2007, Google launched a new in-video advertising format. The ad product consists of animated bars that cover the bottom 20 percent of the video frame for a given clip, 15 seconds after the beginning of the video.[12]

3. Copyright Infringement[13]

3.1. Introduction: the US Perspective[14]

(8) Section 106 of the U.S. Copyright Act gives copyright owners certain exclusive rights including the right to: (1) reproduce, (2) distribute, (3) prepare derivative works, (4) publicly perform and (5) publicly display, copyrighted works.[15]

As already noted, YouTube's policy is to take down copyrighted material when alerted by the content owners:[16]

> "If you are a copyright owner or an agent thereof and believe that any User Submission or other content infringes upon your copyrights, you may submit a notification pursuant to the Digital Millennium Copyright Act ("DMCA") by providing our Copyright Agent with the following information in writing (see 17 U.S.C 512(c)(3) for further detail)".

However, YouTube has been (heavily) criticized for not being vigilant enough in following up on such notifications.

(9) Like other video websites, YouTube hosts plenty of copyrighted content that has been uploaded by YouTube users who pinched the contents from other sources, such as DVDs and other websites. Not surprisingly, owners of those rights want to retain control over their products and the revenues that might be generated, even if YouTube's terms of use (6.D) state that "In connection with User Submissions, you (i.e. any user of the YouTube service) further agree that you will not submit material that is copyrighted, protected by trade secret or otherwise subject to third party proprietary rights, including privacy and publicity rights, unless you are owner of such rights or have permission from their rightful owner to post the material and to grant YouTube all of the license rights granted herein".

(10) There are real fears over YouTube's future: if media groups are not tied into deals which allow YouTube to broadcast materials without breaching copyright, then the site could collapse, as happened to music file sharing Napster in 2001.[17] Meanwhile, YouTube has already forged licensing deals with media giants such as Universal Music Group, the BBC[18] and Warner Music Group, apparently in exchange for a share of advertising revenues.[19]

At the same time, authors point to fundamental differences between YouTube and the peer-to-peer music file swapping models: "YouTube's modus operandi is unlike failed examples of Internet innovations such as Napster or Grokster because it employs a different distribution model, is less accessible to infringement, and YouTube itself is more amiable to cooperation. In addition, unlike Napster and

12) M. Helft, "Google Aims to Make YouTube Profitable With Ads", www.nytimes.com, 22 August 2007; G. Sandoval, "YouTube tests 10-second ad format", http://www.news.com/YouTube-tests-viewer-friendly-ad-format/2100-1024_3-6203802.html, 21 August 2007 and G. Sterling, "YouTube Initiates Monetization Strategy with Transparent Videos Overlays", 21 August 2007, searchengineland.com/070821-203841.php

13) "Web 2.0: A Challenging Landscape for Copyright", http://www.foot-ansteys.co.uk/index.cfm/solicitors/News.Details/sectionzone_id/29/news_id/141

14) D. O'Brien, A. Fitzgerald and B. Fitzgerald, "Search engine liability for copyright infringement", May 2007, http://eprints.qut.edu.au/archive/00007883/01/7883.pdf

15) http://www.copyright.gov/title17/92chap1.html

16) Terms of use, available at http://www.youtube.com/t/terms

17) S. Schmidt, "What does YouTube know?", CASRIP newsletter, summer 2007, volume 14, issue 3, http://www.law.washington.edu/Casrip

18) BBC news, "BBC strikes Google-YouTube deal", 2 March 2007, news.bbc.co.uk/2/hi/business/6411017.stm and "YouTube should check copyright", 5 December 2006, news.bbc.co.uk/2/hi/technology/6209414.stm

19) G. Sandoval, "NBC strikes deal with You Tube", 27 June 2006, http://www.news.com/NBC+strikes+deal+with+YouTube/2100-1025_3-6088617.html; C. Lombardi, "You Tube cuts three content deals", 9 October 2006, http://www.news.com/YouTube+cuts+three+content+deals/2100-1030_3-6123914.html, C. Gaither and D. Chmielewski, "Google Bets Big on Videos: the $ 1,65 Billion Deal for Upstart YouTube Allows the Search Giant to Expand in a Hot Sector", 10 October 2006, *Los Angeles Times*, available at http://msl1.mit.edu/furdlog/docs/latimes/2006-10-10_latimes_google_youtube.pdf, and M. Larnitschnig and K. Delaney, "Media Titans Pressure YouTube Over Copyrights", 14 October 2006, available at http://online.wsj.com/public/article/SB116078549173392671-OSWZtBfenqTHGf9Y_19H1L8DaPU_20061021.html

Grokster, the advantages YouTube provides to copyright holders and the public far outweigh the disadvantages" [20]

These differences may prove to be quite relevant to the further legal battles that YouTube appears to be facing (see below).

3.2. U.S. Online Service Providers' Safe Harbors

(11) YouTube does not see itself as a content pirate. Actually, the company claims to act in compliance with the general "fair use" standards and the safe harbor provisions of section 512 of the US Digital Millennium Copyright Act (DMCA),[21] passed in 1998 by the US Congress in an attempt to strike the appropriate balance between the competing interests of content owners of copyrighted works, Internet service providers and end users.[22]

(12) Section 512 DMCA helps "service providers"[23] (conduit,[24] system caching,[25] system storage[26] and information location tools[27]) to avoid liability ("immunize") for acts of copyright infringement committed by third parties: it gives to "innocent" [28] service providers a "safe harbor" and restricts the availability of injunctive relief for direct, vicarious[29] and contributory[30] infringement.[31] [32]

20) M. Driscoll, "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 551, available at http://www.jmripl.com

21) The *Digital Millennium Copyright Act*: http://thomas.loc.gov/cgi-bin/query/z?c105:H.R.2281.enr: (the Library of Congress), See also http://www.westga.edu/~distance/ojdla/winter14/diotalevi14.html and the U.S. Copyright Office Summary, 1 December 1998 available at http://www.copyright.gov/legislation/dmca.pdf, and CRS (Center for Democracy & Technology) Report for Congress: Safe Harbor for Service Providers Under the Digital Millennium Copyright Act, CRS-1, (updated 9 January 2004), available at http://www.opencrs.cdt.org/getfile.php?rid=10647

22) M. Driscoll, "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 555, available at http://www.jmripl.com

23) A service provider is defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received", § 512 (k) (1) (A).

24) A service provider falls under the conduit safe harbor when its business entails "transmitting, routing or providing connections for (…) or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing or providing connections", § 512 (a); Courts interpret the term "service provider" very broadly: see e.g. Hendrickson v. Amazon.com, 298 F. Supp. 2d, (CF Cal. 2003), in M. Scott, "Safe Harbors under the Digital Millennium Copyright Act", *New York University School of Law*, 13 March 2006 (p. 140), available at http://www.law.nyu.edu/journals/legislation/articles/current_issue/NYL104.pdf

25) System caching is the "the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider", § 512 (b).

26) System storage is the "storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider (…)", § 512 (c).

27) An information location tool is involved in "referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link (…) ", § 512 (d), such as Google; See also C. Walker, "Applications of the DMCA Safe Harbor Provisions to Search Engines", (2004) 9 (2), *Virginia Journal of Law and Technology*, available at http://www.vjolt.net/vol9/issue1/v9i1_a02-Walker.pdf

28) C. Manekshaw, "Liability of ISPs: Immunity from Liability under the Digital Millennium Copyright Act and the Communications Decency Act", 13 March 2006, available at http://www.smu.edu/csr/articles/2005/Fall/SMC103.pdf (p. 114)

29) Under the doctrine of **vicarious liability**, third parties can be held liable where they have the right and ability to supervise the infringing activity and have a direct financial interest in the activities, see D. O'Brien, A. Fitzgerald and B. Fitzgerald, "Search engine liability for copyright infringement", May 2007, http://eprints.qut.edu.au/archive/00007883/01/7883.pdf

30) Under the doctrine of **contributory infringement**, third parties can be held liable for indirectly infringing copyright where they have knowledge of the infringing activity and either induce, cause or materially contribute to the infringing conduct of another, see again D. O'Brien, A. Fitzgerald and B. Fitzgerald, "Search engine liability for copyright infringement", May 2007, http://eprints.qut.edu.au/archive/00007883/01/7883.pdf (p. 3);

31) Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

32) It should also be noted that in Metro-Goldwyn-Mayer Studios Inc v. Grokster Ltd (545 US 913 (2005), the Supreme Court of the United States introduced an **additional** form of third party liability for copyright law, the **doctrine of inducement**. Under this doctrine, the Supreme Court held that: "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties", see at 8, Center for Democracy and Technology, "Interpreting Grokster: Limits on the Scope of Secondary Liability for Copyright Infringement", 2006 (June), *Stanford Technology Law Review*, 3, http://stlr.stanford.edu/STLR/Articles/06_STLR_3; decision and Court documents are available at http://en.wikisource.org/wiki/MGM_Studios%2C_Inc._v._Grokster%2C_Ltd. This case has been criticized as "an over expansion of power by courts to the detriment of Congress. It is viewed as a reversal of a long-held policy of deference to Congress on creating new forms of liability for copyright infringement", M. Driscoll, citing Lawrence Lessig, in "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 551, available at http://www.jmripl.com

The safe harbors for these various types of services are in fact separate and distinct from one another.[33]

However, the DMCA was not passed with sharing services in mind (blogs, p2p or video file).[34] Rather, at the time the DMCA was enacted, Internet usage was limited mostly to postings on bulletin boards, chat rooms, email and electronic commerce. In our view, one of the key issues in the legal debate surrounding YouTube and other "user generated content" or community initiatives will be precisely to see to what extent the various safe harbor regimes can and/or need to be extended to embrace these new types of services.

(13) The DMCA empowers courts to issue injunctions and award traditional damages including actual damages, lost profits, and attorneys' fees.[35] Where infringement has been committed willingly, the court may award statutory damages of USD 150,000 per infringement.[36]

(14) All service providers wishing to benefit from the safe harbors must meet three initial eligibility requirements, as set forth in section 512(i) DMCA.

First, a service provider must have "adopted and reasonably implemented [...] a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers."

Second, it must show that it "accommodates and does not interfere with standard technical measures." These are defined as technical measures that are adopted by a "broad consensus of copyright owners and service providers", are available on reasonable terms and do not impose "substantial costs on the service provider".[37]

Third, the service provider must "designate [...] an agent to receive notifications of claimed copyright infringement." [38]

Once these "initial eligibility requirements" are fulfilled, service providers must then look to the subsections applicable to their particular functions for additional requirements.

(15) The "system storage" safe harbor of §512 (c) DMCA seems to be the most analogous to video sharing websites such as the YouTube platform.

In order to be eligible for the safe harbor protection, a system storage activity must meet not only the three above-mentioned threshold requirements but also the following conditions:

(1) the provider must not have knowledge of the infringing activity;

(2) if the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity; and

(3) upon receiving proper notification of claimed infringement, the provider must expeditiously take down or block access to the material.

As YouTube appears to comply with the initial eligibility requirements, each of these additional conditions will be briefly reviewed hereunder with regard to it.

(16) **First**, the service provider must lack "actual knowledge" of the infringement. It must also ensure that the infringement was not "apparent".[39] Otherwise, it will be exposed to liability.

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33) §512 (l); *see also* Senate Judiciary Committee Report, 105-190: "the determination of whether a service provider qualifies for one liability limitation has no effect on the determination of whether it qualifies for a separate and distinct liability limitation under another subsection of 512.", available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

34) G. Sandoval, "Universal sues MySpace for copyright violations", 17 November 2006, http://news.com.com/Universal+sues+MySpace+for+copyright+violations/2100-1030_3-6136829.html: "the framers of the DMCA wrote the law before file-sharing or peer-to-peer technology emerged."

35) 17 U.S.C. §§ 502-5, available at http://www.copyright.gov/title17/92chap5.html#504

36) 17 U.S.C. § 504 (c) (2), available at http://www.copyright.gov/title17/92chap5.html#504

37) § 512 (i) (2) (A)-(C) and Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

38) § 512 (c) (2), available at http://www.copyright.gov/title17/92chap5.html#512

39) § 512 (c) (1) (A) (i).

Moreover, a service provider with actual or apparent knowledge of infringing activity taking place on its site may bear the burden to police its site.[40]

However, neither actual knowledge nor apparent knowledge are clearly defined in subsection 512(c)(1)(A) or anywhere else in section 512! It appears necessary, therefore, to look to any relevant case law to define these terms.

(17) Section 512(c)(3)(B)(i) may still be helpful in determining the meaning of "actual knowledge" because it is stipulated that a notification of claimed infringement that does not *substantially* comply with the requirements set forth in section 512(c)(3) may not be considered in determining whether a service provider has *actual knowledge.*[41]

In addition, the determination of whether a service provider has actual knowledge of specific infringement turns on the facts of each case. Courts have determined[42] that the actual knowledge standard is met based, for example, on internal documents discussing the infringing content and activity or tutorials provided by the service provider demonstrating how to infringe copyright.[43]

(18) In our opinion, it would be difficult to construe a case of actual knowledge against YouTube. Rather, we suspect that copyright holders will seek to mount a case based on *apparent* or *constructive knowledge* of infringing activity.

The legislative history of section 512(c)(1)(A)(ii) proposes a "red flag" test as a basis for apparent knowledge:

"(…) a service provider need *not* monitor its service or affirmatively seek facts indicating infringing activity (except to the extent consistent with a standard technical measure complying with subsection (h)), in order to claim this limitation on liability (or, indeed any other limitation provided by the legislation). However, if the service provider becomes aware of a 'red flag' from which infringing activity is apparent, it will lose the limitation of liability if it takes no action".[44]

(19) General knowledge that infringing activity may be taking place is however not sufficient to satisfy the apparent knowledge standard.[45] In *Corbis v. Amazon* for instance, Corbis sued Amazon for copyright infringement because vendors were selling posters of Corbis' copyrighted works on an Amazon "Marketplace" platform called "zShops."[46] But Corbis failed to produce sufficient evidence that Amazon had knowledge of the infringing activity.

40) This appears to be an acute issue in the *Viacom v. YouTube* lawsuit: see S. Schmidt, "What does YouTube know?", CASRIP newsletter, summer 2007, volume 14, issue 3, http://www.law.washington.edu/Casrip

41) However, "a defective notice provided to the designated agent may be considered in evaluating the service provider's knowledge or awareness of facts and circumstances, if (i) the complaining party has provided the requisite information concerning the identification of the copyrighted work, identification of the allegedly infringing material, and information sufficient for the service provider to contact the complaining party, and (ii) the service provider does not promptly attempt to contact the person making the notification or take other reasonable steps to assist in the receipt of notification that substantially complies with paragraph (3)(A). If the service provider subsequently receives a substantially compliant notice, the provisions of paragraph (1)(C) would then apply upon receipt of the notice*":* See Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

42) See S. Schmidt, "What does YouTube know?", CASRIP newsletter, summer 2007, volume 14, issue 3, http://www.law.washington.edu/Casrip and E. Brown, "51ste Anniversary Conference on developments in intellectual property law", The John Marshall Law School Center for Intellectual Property Law, 23 February 2007, available at http://www.internetcases.com/archives/2007/02/jmls/2007-02-23_JMLS_YouTube_Handout.pdf; also http://eric_goldman.tripod.com/resources/ospliabilitycases.htm

43) *See* A & M Records, Inc. v. Napster, Inc., Opinion Granting Preliminary Injunction, 114 F. Supp. 2d 896, 918 (N.D. Cal. 2000) *affirmed in part, reversed in part* by A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001), the latter available at www.altlaw.org

44) Senate Judiciary Committee Report, 105-190; available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

45) See Corbis, Inc. v. Amazon.com, 2004 WL 3092244 (W.D. Wash. 2004); ; http://eric_goldman.tripod.com/resources/ospliabilitycases.htm

46) P. Sayer, "Corbis sues Amazon, others over image sales", 2 July 2003, available at http://www.infoworld.com/article/03/07/02/HNcorb_1.html

(20)"General awareness that a particular type of item may be easily infringed" was not proof of knowledge.[47] By contrast, evidence showing that users openly discussed trafficking in copyrighted material in any service provider's systems is an example of a "red flag" of infringement.[48]

Apparent knowledge may also be imputed where a service provider turns a "blind eye" to infringing activities taking place on its site: "Willful blindness is knowledge, in copyright law."[49] In any event, whether a red flag exists or not is determined objectively, although subjective knowledge of the facts may be relevant:

"(…) in deciding whether those facts or circumstances constitute a 'red flag' – in other words, whether infringing activity would have been apparent to a reasonable person operating under the same or similar circumstances – an objective standard should be used".[50]

(21) **Second**, the service provider must not receive a financial benefit as a result of the infringement.[51] It has been recommended by the legislator that "courts should take a common-sense, fact-based approach, not [a] formalistic one" when determining whether a financial benefit resulted.[52] This could be an evolving issue, depending on the related facts and a more detailed analysis of the incomes.

YouTube now runs advertisements only on search result pages and pages that display properly licensed content. In those circumstances, YouTube may argue that it does not derive a direct financial benefit from the infringing content. But how will it play out in the courts if YouTube should make advertising dollars on the back of pirated material on YouTube?

(22) **Third**, a storage service provider, upon proper notice, must take measures to remove and block infringing material for safe harbor protection.[53]

(23) In the current case, everyone agrees that YouTube makes its best efforts to provide effective protection tools in order to help copyright owners find uploaded clips that may infringe their rights and prevent the reloading of copies of the clips after their removal from YouTube. Also, in contrast with Grokster and Napster, users may not copy copyrighted videos posted on the site for their own use.

(24) However, there is no legal obligation for the copyright holder to give written notice to the provider's designated agent before initiating litigation.[54] Hence, the copyright holder, to a large extent, controls the availability of the safe harbor protection by giving notice or not. Similarly, a provider is not required to remove infringing material even after receiving notice. Yet, the consequences for non-compliance are potentially very expensive as the provider loses the chance to qualify for safe harbor protection and is exposed to full infringement liability…

47) C. Manekshaw, "Liability of ISPs: Immunity from Liability under the Digital Millennium Copyright Act and the Communications Decency Act", 13 March 2006, available at http://www.smu.edu/csr/articles/2005/Fall/SMC103.pdf (p. 130)
48) *See* In re Aimster Copyright Litigation 252 F.Supp.2d 634, 650 (N.D.Ill.,2002), affirmed by In re Aimster Copyright, 334 F.3d 643 (7th Cir. 2003), as mentioned in http://homepages.law.asu.edu/~dkarjala/cyberlaw/InReAimster(9C6-30-03).htm
49) In re Aimster Copyright, 334 F.3d 643 (7th Cir. 2003), as mentioned in http://homepages.law.asu.edu/~dkarjala/cyberlaw/InReAimster(9C6-30-03).htm
50) Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)
51) Senate Judiciary Committee Report, 105-190 : "in general, a service provider conducting a legitimate business would not be considered to receive a financial benefit directly attributable to the infringing activity where the infringer makes the same kind of payment as non-infringing users of the provider's service"; available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)
52) Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)
53) § 512 (c) (1) (C).
54) Senate Judiciary Committee Report, 105-190: "For their part, copyright owners are not obligated to give notification of claimed infringement in order to enforce their rights", available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

3.3. Example of Infringement Complaints: [55] [56] [57] In re Viacom

(25) On March 13, 2007, Viacom, the owner of MTV, Nickelodeon and Comedy Central announced that it would sue YouTube in the U.S. District Court for the Southern District of New York accusing it of "massive intentional copyright infringement".[58] Viacom said it was seeking more than USD 1 billion in damages and an injunction prohibiting YouTube from committing further direct,[59] inducement, contributory and vicarious copyright infringement.[60]

(26) According to YouTube, the DMCA requires it to remove infringing content from its site only after it receives a takedown notice from a copyright owner. YouTube also states that it provides efficient tools to help copyright holders regarding content they want removed from the site. However, removing infringing material only after YouTube receives a notice does not sit well with copyright holders because as soon as they send notifications and YouTube removes the copyrighted video clips from its site, the same video clips are uploaded again within a matter of hours. So, they lose the ability to control the dissemination of their works. Also, they are unable to reach licensing deals for electronic distribution of their content when the same content is made available for free through YouTube.

Viacom and other content owners therefore asked for more preventive and protective measures from YouTube, such as the installation of filtering technology. They now allege that YouTube has not responded satisfactorily.

(27) It is not clear now how courts will deal with the Viacom case because various provisions of the DMCA have not been tested in court.[61] For example, section 512 does not explain whether the service provider's duty to remove or block access to infringing material also imposes a burden on a service provider to police its site for infringing material. Generally, as already explained, the DMCA does not impose an obligation on a service provider "to seek out copyright infringement" on its network or system[62]: "a service provider would have no obligation to seek out copyright infringement, but it would not qualify for the safe harbor if it had turned a blind eye to 'red flags' of obvious infringement".

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55) A first action was filed against YouTube in July 2006 by Robert Tur, a Californian photojournalist who alleges copyright infringement in his videos, such as the beating of Reginald Dennis in the 1992 Los Angeles riots, G. Sandoval, "You Tube sued over copyright infringement", 18 July 2006, http://www.news.com/YouTube+sued+over+copyright+infringement/2100-1030_3-6095736.html and T. Brown, "YouTube hit with lawsuit", 20 July 2006, *Oakland Tribune*, available at http://findarticles.com/p/articles/mi_qn4176/is_20060720/ai_n16674986. On 20 June 2007, the judge has denied cross-motions for summary judgment provided that Tur's motion (that YouTube is not eligible for protection under § 512 (c)) failed to present adequate evidence that YouTube has the right and ability to control the infringing activity. YouTube's motion was also denied because "there is insufficient evidence before the Court concerning the process undertaken by YouTube from the time a user submits a video clip to the point of display on the YouTube web site*"; J. Bickerton, "Court's DMCA interpretation everything for YouTube"*, 26 June 2007, available at http://www.uniquetracks.com/blog/intellectual-property/courts-dmca-interpretation-everything-for-youtube/

56) YouTube also faces a class action filed on 4 May 2007 by the English Football Association Premier League, and independent music publisher Bourne in the United States District Court of the Southern District of New York, with the support from the Association of European Professional Football Leagues, the Federation Française de Tennis, the France's national tennis organization and the organizer of the French Open, etc.: *see* Greg Sandoval, "Legal Troubles Mount for YouTube", 6 May 2007, http://news.com.com/2100-1030_3-6181753.html; and "NBC lines up against YouTube in copyright case", 6 May 2007, http://www.news.com/8301-10784_3-9716354-7.html, BBC News, "YouTube facing football lawsuit", 4 May 2007, news.bbc.co.uk/2/hi/business/6627135.stm; See also www.youtubeclassaction.com

57) The singer Prince has recently requested YouTube to remove some 2.000 videos from its site. If not, Prince has announced he will sue YouTube, 19 September 2007, www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/1003-Copyright-Infringement.htm

58) M. Helft and G. Fabrikant, "Viacom Sues Google over Video Clips on Its Sharing Web Site", *NewYork Times*, www.nytimes.com, 14 March 2007.

59) Related to the unauthorized *public performance*, to the unauthorized *public display* and to the unauthorized *reproduction* of the uploaded videos

60) *See* Complaint Viacom, International, *et al.* v. YouTube, LLC and Google, Inc., 2007 WL 775695 (S.D.N.Y. 2007) (No. 1:07CV02103) and opinions, available at http://www.viacom.com/NEWS/YouTube%20Litigation/default.aspx, and E. Mills, "Google denies Viacom copyright charges", 1 May 2007, http://news.zdnet.com/2100-9588_22-6180387.html

61) M. Driscoll, "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 551, available at http://www.jmripl.com and W. Davis, "Downloading a File of Copyright Woes: Google's buyout of YouTube shows federal law still lags behind technology", *ABA Journal,* March 2007, http://www.abajournal.com/magazine/downloading_a_file_of_copyright_woes/

62) Senate Judiciary Committee Report, 105-190, available at http://www.congress.gov/cgi-bin/cpquery/R?cp105:FLD010:@1(sr190)

In addition, the Supreme Court noted that "a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial non-infringing uses".[63]

These observations may well become part of the center of the debate in the cases brought against YouTube, as home videos still constitute a major part of the activity of YouTube.

3.4. The E-Commerce Directive

(28) The E-Commerce Directive was adopted on 8 June 2000 and published in the Official Journal of the European Communities on 17 July 2000.[64] The objective was to ensure that information society services benefit from the internal market principles of free movement of services and freedom of establishment. The Directive limits the liability of intermediary service providers where they act as mere conduits,[65] caches[66] or hosts[67] of information.[68] Also, there is no general obligation to monitor illegal content or illegal activities when providing their services.[69]

However, in order to avail itself of this defence, a hosting provider, such as YouTube, must take down the infringing content "*expeditiously*" once it has become aware of that content or upon being notified thereof.

In other words, if YouTube were aware of infringing material but did not remove it, it could be held liable for the copyright infringement, together with the uploader.[70]

(29) The relevance of the liability regime for "intermediaries" provided in the Directive for the new business models and services, including user-generated content platforms and information location tools, is still being debated. Yet, certain EU Member States, in implementing the limited liability regimes of the Directive for hosting, caching and mere conduit, have extended these regimes to new forms of intermediaries such as search engines although these were not explicitly mentioned in the Directive (Spain, Portugal, Austria and Liechtenstein).[71]

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63) *See* Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd, 04-480 (2005), p. 22; available at http://www.altlaw.org/v1/cases/176963. A device that has substantial non-infringing uses does not subject its creator to copyright infringement: Sony. Corp. of Am. v. Universal City Studios, Inc., 464 U.S. (1984), also known as the "Betamax case", available at http://en.wikisource.org/wiki/Sony_Corp._of_America_v._Universal_City_Studios%2C_Inc

64) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, available at http://eur-lex.europa.eu/en/index.htm

65) "Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network(…) the service provider is not liable for the information transmitted, on condition that the provider:
(a) does not initiate the transmission;
(b) does not select the receiver of the transmission; and
(c) does not select or modify the information contained in the transmission." Article 12.

66) "(…) the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request on condition that:
(a) the provider does not modify the information;
(b) the provider complies with conditions on access to the information;
(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognised and used by industry;
(d) the provider does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information; and
(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement." Article 13.

67) " (…) service is provided that consists of the storage of information provided by a recipient of the service (…) the service provider is not liable (…)on condition that:
(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.", Article 14.

68) Information location tools have not been expressly included.

69) Article 15.

70) S. Holmes and P. Ganley, "User-generated content and the law", Journal of Intellectual Property Law and Practice, 2007 (2), n° 5, pp. 338- 344.

71) European Commission, first report on the application of the Directive 2000/31/CE, COM (2003), 702 final, 21 November 2003, p.13 et seq.

(30) Recent cases in Europe confirm that there is a need for more clarity on the subject. In a judgment[72] dated 13 July 2007, the Tribunal de Grande Instance of Paris accepted the argument that DailyMotion was a hosting provider and not an editor (the advertising revenues made by it not being a sufficient basis therefore),[73] but at the same time ruled that DailyMotion could be held liable for copyright infringement.[74]

The Court in fact considered that the limitation of liability did not apply, since DailyMotion must have been *aware* that infringing activities were taking place. The Court therefore reasoned: "Considering that it cannot be seriously alleged that the purpose of the architecture and the technical means put in place by DailyMotion only aimed at allowing one and all to share amateur videos with friends or the community of surfers depending on the option chosen, while these in reality aimed at establishing a capability which could offer to such community access to any type of videos without distinction, leaving it up to the users to fill the site in such conditions that it was obvious that they would do so with protected works".[75] [76]

The Court therefore concluded that "the success of the enterprise necessarily supposes the dissemination of works known to the public, solely of a type to increase the audience and to correlatively ensure income from advertisements[…]. DailyMotion must be considered to have had knowledge at least of facts and circumstances leading it to think that illegal videos were put on line[…]"[77]

The Court also found that the infringing activities of the users on the platform were *"induced"* by DailyMotion itself: "Considering that it must be admitted that DailyMotion has not put in place any proper means to make access to the film "Merry Christmas" impossible, […], while it was supposed to proceed to an a priori verification."[78] [79]

This decision raises some interesting questions. First, the finding of "knowledge" as a basis for refusing the limitation of liability comes close to the section 512 test of the DMCA (see above). However, the Court finds no "actual knowledge" but applies a concept of "apparent" or "constructive" knowledge. When analyzing the basis of this "apparent" or "constructive" knowledge, it seems that the Court resorts to a very general level of knowledge, i.e. the fact that the success of the site can only be explained if one admits that there should be infringing content on it. While it is rather unlikely that this type of "knowledge" would in fact qualify as "apparent knowledge" under the DMCA, it is hard to see how it would qualify as "actual knowledge" required by Article 14 of the Directive with regard to hosting. Second, the Court, while admitting that the intermediaries have no general obligation to search for infringing activities, finds that DailyMotion "induced" users to present infringing content on the sites by not taking appropriate measures to further perform an a priori verification. It is unclear to us on what basis the Court can conclude that DailyMotion would be under an obligation "*de procéder à un contrôle a priori*."

(31) Also, the *President of the Tribunal de Grand Instance* of Paris held, in a summary order dated 22 June 2007[80] (so just weeks before the DailyMotion decision), that despite the fact that *MySpace* is a hosting provider, it also acts as a publisher (this time primarily because of the advertising revenues) and may therefore be held liable for copyright infringement on its site.

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72) A proceeding on the merits, as opposed to a summary procedure.
73) And not a publisher as asserted by the plaintiffs.
74) B. Splitz, Dailymotion: a 'hosting provider' liable for copyright infringement", 18 July 2007, available together with the judgment at http://www.juriscom.net/actu/visu.php?ID=949 and www.legalis.net; See also http://www.copyrightfrance.blogspot.com/
75) "*Attendu qu'il ne peut être sérieusement prétendu que la vocation de l'architecture et les moyens techniques mis en place par la société DailyMotion ne tendaient qu'à permettre à tout et à chacun de partager ses vidéos amateur avec ses amis ou la communauté des internautes selon l'option choisie, alors qu'ils visaient à démontrer une capacité à offrir à ladite communauté l'accès à tout type de vidéos sans distinction, tout en laissant le soin aux utilisateurs d'abonder le site dans des conditions telles qu'il était évident qu'ils le feraient avec des œuvres protégées par le droit d'auteur*".
76) Judgment, p. 6, para.4.
77) "*le succès de l'entreprise supposait nécessairement la diffusion d'œuvres connues du public, seules de nature à accroître l'audience et à assurer corrélativement des recettes publicitaires. …DailyMotion doit être considérée comme ayant connaissance à tout le moins de faits et de circonstances laissant à penser que des vidéos illicites sont mises en ligne*".
78) Idem, p.7 para.1.
79) "*Attendu que force est de constater que la société DailyMotion n'a mis en œuvre aucun moyen propre à rendre impossible l'accès au film "Joyeux Noël", … alors qu'il lui incombe de procéder à un contrôle à priori*".
80) B. Splitz, "'The Buttock' sues MySpace for copyright infringement", 11 July 2007, available at http://www.juriscom.net/actu/visu.php?ID=942 and www.legalis.net

(32) Reading these judgments, one cannot help but observe that the Courts (too) appear to be groping with the law. In fact, their reasonings appear to be "backwards", i.e. starting from a conviction that the platform provider should be held liable (which appears to be more definite if it derives revenues from the activity) and then crafting a "legal" reasoning to do so. This type of approach, combined with the lack of consistency in the decisions and the differences in the way the Directive has been implemented across the various EU Member States, does little to create legal certainty. At present, a further review of the E-Commerce Directive is being organized pursuant to Article 21 of the Directive. We do hope that this review will bring more clarity to the issue of the liability of the service providers. Ideally, we also hope this review may bring about a basis that could lead to a uniform code of conduct where a balance is struck between the interests of the various stakeholders, including the users, intermediaries/platform providers and copyright holders.

3.4. Use of Acoustic Fingerprints and "Claim your Content" Filtering System

(33) YouTube appears to be exploring further technical ways and means to allow for filtering and/or detection. In October 2006, YouTube announced that agreements were made with high-profile content creators to use anti-piracy software together with audio signature technology. According to YouTube, this technology could detect low-quality videos of copyrighted material and remove them from the site.[81] On 16 April 2007, Google's CEO announced that YouTube was close to finalizing a content filtering system that would prevent copyright content from being uploaded, a so-called "Claim your Content"[82] filter. It should be operational by the end of September or later in the autumn.[83]

(34) The introduction of such technologies into the service would of course be welcomed by the rights holders. The question nevertheless arises to what extent it is reasonable to also submit service providers to a general obligation to use such technologies and, what is even more onerous, bear the cost of them. A recent decision by the Brussels Court of First Instance in fact ruled that the Belgian ISP Scarlet had to resort to blocking illegal file-sharing on its network.[84] It gave the service provider six months to install, at its own expense, appropriate technology to prevent its customers from sharing pirated music and video files. In doing so, the Court even set aside the concerns of the court-appointed expert that there might be no "airtight" technological solutions available. The fact that the effect of such blocking measures would be over-inclusive or would involve a significant cost (calculated at EUR 0.5 per month per user), did not prevent the court from imposing the measure.

4. Right to Information, Freedoms of Expression and Speech

(35) YouTube has been blocked in several countries, such as Brazil,[85] Iran,[86] Morocco,[87] Thailand[88] and Turkey.[89]

Fears have arisen that the freedoms of expression and speech could consequently be in danger. Inappropriate regulatory interventions, such as these banning decisions, could threaten the way

81) A. Veiga, "Anti-piracy system could hurt YouTube", 12 October 2006, www.msnbc.msn.com/id/15240348/
82) G. Sandoval, "Schmidt says YouTube 'very close' to filtering system", April 16, 2007, http://www.news.com/Schmidt+says+YouTube+very+close+to+filtering+system/2100-1026_3-6176601.html; E. Mills, "Google denies Viacom copyright charges", 1 May 2007, http://news.zdnet.com/2100-9588_22-6180387.html; and E. Auchard, "Google sees video anti-piracy tools as priority", 22 February 2007, http://uk.reuters.com/article/technologyNews/idUKN2136690720070222
83) OUT-Law News, "YouTube says content will be filtered this year", 1 August 2007, www.out-law.com/page-8338
84) Sabam v. Scarlet, Brussels Court of First Instance, 29 June 2007, www.sabam.be
85) A legal injunction ordered that filters be put in place to prevent users in Brazil from accessing the website, "YouTube blocked after film insults Thai King", 5 April 2007, www.timesonline.co.uk/tol/incomingFeeds/article1615724.ece and BBC news, "Brazil model wins You Tube battle", 5 January 2007, news.bbc.co.uk/2/hi/americas/6233693.stm; and Reporters without Borders, 9 January 2007, www.rsf.org/article.php3?id_article=20342
86) In an attempt to impede "corrupting" foreign films and music, Reporters without Borders, 7 December 2006, www.rsf.org/article.php3?id_article=20016
87) On 25 May 2007 the state-owned Maroc Telecom blocked all access to YouTube, Reporters without Borders, 30 May 2007, http://www.rsf.org/article.php3?id_article=22322
88) For letting video insults Thai King, see "YouTube blocked after film insults Thai King", 5 April 2007, www.timesonline.co.uk/tol/incomingFeeds/article1615724.ece and "YouTube clip removed after Thai protest", technology.timesonline.co.uk/tol/news/tech_and_web/the_web/article1617749.ece
89) For letting videos insulting Turks and Ataturk, the founder of modern Turkey, see N. Hines, "YouTube banned in Turkey after video insults", 7 March 2007, www.timesonline.co.uk/tol/news/world/europe/article1483840.ece, BBC news, "Turkish courts ban You Tube access", 7 March 2007, news.bbc.co.uk/2/hi/europe/6427355.stm and Reporters without Borders, 20 September 2007, www.rsf.org/article.php3?id_article=23714

millions of people exchange information, news, entertainment and political and artistic expression. Many attack such a policy as being "censorship".[90]

(36) Many politicians make videos as a medium to get their opinions heard and put them on YouTube. Political candidates for the 2008 US Presidential election have been using YouTube as an outlet for advertising their candidacy. Voters can easily view candidates' statements and make their own videos supporting or criticizing presidential candidates especially in regard to Baack Obama and Hillary Clinton.[91]

This new dimension in the use of YouTube may lead to further issues such as the access, both for candidates and citizens, to such platforms in the exercise of their rights to free speech and information.

5. Conclusion

(37) While YouTube and similar social websites have increasingly become the subject of lawsuits arguing "massive" copyright infringements, some commentators consider rather that, unlike the *Grokster* and *Napster* cases,[92] YouTube and some of the other related platforms events have demonstrated a conscious effort to satisfy the notice-and- takedown procedures as well as to establish a termination policy for repeat infringers.[93]

Therefore, the YouTube model is "unique in that it provides benefits to copyright holders (e.g. sharing the advertising revenues) and society at large (e.g. an alternative forum compared to traditional methods of educating and influencing the public[94])"[95].

(38) In addition to the copyright theme, other important issues are due to arise in connection with user-generated content platforms such as privacy, discrimination and defamation, …. There is little doubt that the debate has just started [96] and that it will become more intense in the future. The new review of the E-Commerce Directive will hopefully shed more light on some of these issues.

90) See for instance the Declaration of Reporters without Borders, (e.g. "any law about the flow of information online must be anchored in the right to freedom of expression as defined in Article 19 of the Universal Declaration of Human Rights"), available at www.rsf.org/article.php3?id_article=14136

91) R. Lizza, "The YouTube election", 20 August 2006, http://www.nytimes.com/2006/08/20/weekinreview/20lizza.html?pagewanted=1&ei=5070&en=85390faf159305f2&ex=1190174400; "YouTube politics", 25 June 2007, http://www.economist.com/world/na/displaystory.cfm?story_id=9392751 and J. Keen, "Websites Win Candidates' Praise: Young People Pushed Them to Get Online", 17 October 2006, *USA Today*, available at http://www.usatoday.com/tech/news/2006-10-16-campaign-sites_x.htm

92) D. Wood, "The YouTube World Opens an Untamed Frontier for Copyright Law", 18 December 2006, Christian Science Monitor, available at http://www.csmonitor.com/2006/1218/p01s03-usju.html, See also under the section "Comparison with Past Models", in M. Driscoll, "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 560, available at http://www.jmripl.com

93) A *repeat infringer* is a user who has been notified of infringing activity more than twice and/or has had a submission removed from the site more than twice.

94) For example, the White House posted its anti-drugs videos on YouTube to broaden its exposure to younger audiences, BBC New, "YouTube used for war on drugs", 25 September 2006, http://news.bbc.co.uk/2/hi/americas/5378798.stm

95) M. Driscoll, "Will YouTube Sail into the DMCA's Safe Harbor or Sink for Internet Piracy?", The John Marshall Review of Intellectual Property Law (2007), p. 568, available at http://www.jmripl.com

96) R. Neff and K. Basin, "YouTube litigation: Google's tough DMCA tests", 22 August 2007, available at http://www.hollywoodreporter.com

Copyright Clearance and the Role of Copyright Societies

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1. The Definition of Video-on-Demand and its Importance for Licence Agreements

In practice, there is a vast variety of licence agreements for exploiting film works and they can be reached between the most varied parties. Film producers frequently sign contracts with distributors, who then sub-license the acquired rights to various licensees for exploitation. But it is also possible for film producers to conclude licence agreements with exploitation partners directly. Whichever option is chosen, these licence agreements all have one thing in common: they all have to define specifically the rights assigned. The question of how each single licensee is allowed to exploit a film, and where the line is drawn between admissible and prohibited usage, is of tremendous importance to the film business with its consecutive stages of exploitation (cinema, video, television, video-on-demand). This is true of video-on-demand in particular, which is creating growing competition for the traditional forms of exploitation, namely video (DVD) and television.

At the same time, the term "video-on-demand" (VoD) is nothing more than a coined phrase, and it is not used uniformly throughout the branch. Technicians often use it in a different meaning from business people, and business people differently again from lawyers. Anyone acting as a licensor, who grants VoD rights without defining precisely the types of usage permitted, runs the risk of the licensee subsequently exploiting the film in a way for which the licensor does not even hold the rights. Vice versa, a licensee acquiring VoD rights that are not specified in detail runs the risk of not actually acquiring the rights it really wanted. This is particularly the case whenever German copyright law applies, where the prevailing principal is that if in doubt, the author of the work remains entitled to all types of usage not explicitly assigned by contract.

For instance, as legal advisors, would any of you promise a telecommunications provider acquiring non-specific "VoD rights" in a film that it can put the film at the disposal of its customers for calling up any number of times within a 24-hour period via a set-top box? Or if an Internet platform has merely acquired a non-specific "VoD right", is it only allowed to make the film available to consumers via streaming, or may it provide a download as well? These questions show just how important it is to define precisely the term "VoD" in the agreement if disputes between the contractual partners are to be avoided.

This is of vital significance for another reason, too: depending on which specific uses are covered by the term "VoD" in an agreement, the licensee may possibly have to obtain more licences for the individual types of usage from other rights holders as well, in addition to the licence it has acquired from its original licensor. This applies for instance to music in a film. Depending on the actual form of usage, the rights may have to be acquired from a copyright society for example (such as GEMA in Germany), and/or from the music publisher.

Using an actual specimen agreement as an example, I should therefore like to show you first of all how "VoD" may be defined in a contract. In its "International Multiple Rights Distribution Agreement"

the IFTA,[1] for example, basically distinguishes between Internet Rights and PayPerView Rights as follows:

> *Internet Rights Definitions:*[2]
>
> *Internet Rights* means *Internet Downloading* or *Internet Streaming* exploitation of a Motion Picture. *Internet Rights* do not include any form of *PayPerView, Video, Pay TV or Free TV* exploitation of a Motion Picture.
> *Internet Downloading* means exploitation of a digital Motion Picture Copy by making it available on the World Wide Web portion of the Internet in a manner that allows its transmission to a Computer for making another exact digital copy of the Motion Picture Copy and retaining the new digital copy for use for more than a transient period of time after completion of the initial continuous period of transmission. *Internet Downloading* does not include any form of *Internet Streaming*.
> *Internet Streaming* means exploitation of a digital Motion Picture Copy by making it available on the World Wide Web portion of the Internet in a manner that allows continuous viewing of the Motion Picture Copy on a Computer in a substantially linear form substantially simultaneously with the transmission of such Motion Picture Copy over the Internet but which does not allow making another digital copy except for a transient period of time necessary to facilitate such viewing. *Internet Streaming* does not include any form of *Internet Downloading*.
> *Internet Streaming/Downloading* means exploitation of a digital Motion Picture Copy by making it available on the World Wide Web portion of the Internet for both *Internet Downloading* and *Internet Streaming* at substantially the same time.
>
> *PayPerView Rights Definitions:*[3]
>
> *PayPerView* means *NonResidential PayPerView*, *Residential PayPerView* and *Demand View* exploitation of a Motion Picture. *PayPerView* does not include any form of *Pay TV* or *Free TV*, nor any form of making the Picture available over the Internet.
> *Residential PayPerView* means the broadcast of a Motion Picture Copy by means of an encoded signal for television reception in homes or similar permanent living places where a charge is made to the viewer for the right to use a decoding device to view the broadcast of the Motion Picture at a time designated by the broadcaster for each viewing.
> *NonResidential PayPerView* means the broadcast of a Motion Picture Copy by means of an encoded signal for television reception in hotels or similar temporary living places where a charge is made to the viewer for the right to use a decoding device to view the broadcast of the Motion Picture at a time designated by the broadcaster for each viewing.
> *Demand View* means the transmission of a Motion Picture Copy by means of an encoded signal for television reception in homes and similar permanent living places where a charge is made to the viewer for the right to use a decoding device to view the Motion Picture at a time selected by the viewer for each viewing.

2. The Role of the Copyright Societies

Now let us have a look at the role the copyright societies play in clearing rights for films. Rights clearance in the film industry is generally done in two steps:

In the first step, the film producer acquires the rights needed for making and exploiting the film. To this end, he has to reach agreements with all the parties actively involved in creating the production (e.g. director, cameraman, actors) as well as with all the copyright owners whose works are going to be used in the film (e.g. the novelist whose book is to be filmed). Under these agreements, VoD rights are also usually granted.

In the second step, the film producer grants rights in the film he has produced to third parties for **distribution** or **exploitation**. When films are exploited in Germany (and in some other European countries, too), a fundamental difference applies regarding the collective granting of music rights by copyright societies, and this has to be taken into account in the wording of film license agreements:

1) Independent Film & Television Alliance
2) Section G of the IFTA "Schedule of Definitions"
3) Section B of the IFTA "Schedule of Definitions"

GEMA,[4] the copyright society responsible for music works in Germany, has exclusive rights assigned to itself by its members (namely composers, songwriters and music publishers), meaning that the composer, songwriter or music publisher itself can no longer independently grant these rights to exploiters. This also applies when film music is utilised in connection with the VoD exploitation of a film. In contrast with the USA for example, where composers, songwriters and music publishers merely use the copyright societies (e.g. Harry Fox Agency) as agents and may themselves still assign rights to exploiters, this cannot be done in Germany if the composer, songwriter or music publisher has commissioned GEMA to safeguard his VoD rights. It must be remembered here that GEMA is responsible for both the **mechanical rights**[5] and the **public performance rights** involved in VoD exploitation.

The following diagrams (2.1, 2.2 and 2.3 below) have to be seen in the light of this, as do the provisions on music rights in the IFTA Distribution Agreement (2.4 below).

The diagram in 2.1 shows the rights clearance process for a **German theatre movie**. If pre-existing music (e.g. from a published CD) is used in the film, the film producer must – in addition to the rights of the cinematographer, director and other creative people involved in the film production – acquire the (a) so called "master use rights"[6] in the music recording from the respective record label and (b) the so called "synch right" regarding the "underlying" musical work (composition and lyrics) contained in the recording from the author(s) or the author(s)' music publisher. The synch right is the right to combine a musical work with film pictures. Although the authors and publishers transfer the synch right to GEMA as part of their membership agreements the synch right can be withdrawn by them for individual film projects so that they may grant it to a film producer and negotiate the fee. In most cases the music publishers make use of this withdrawal right. Under German law the synch right must be distinguished from the rights to **exploit** the musical works within the produced film e.g. by way of public performance in theatres, broadcasting or the manufacturing and distribution of the film on DVDs. Due to the exclusive transfer of rights by the authors and publishers to GEMA as described above the theatres, TV-stations, video distributors and VoD-platforms can acquire the necessary exploitation rights in the music works only from GEMA. Whereas the film producer in the US may acquire all necessary exploitation rights for music used in a film directly from the author and/or music publisher and transfer them to the distributor or the exploiters (theatres, TV-stations, etc) (cf. diagram in 2.3) the latter cannot acquire these rights from the author or the music publisher in Germany.

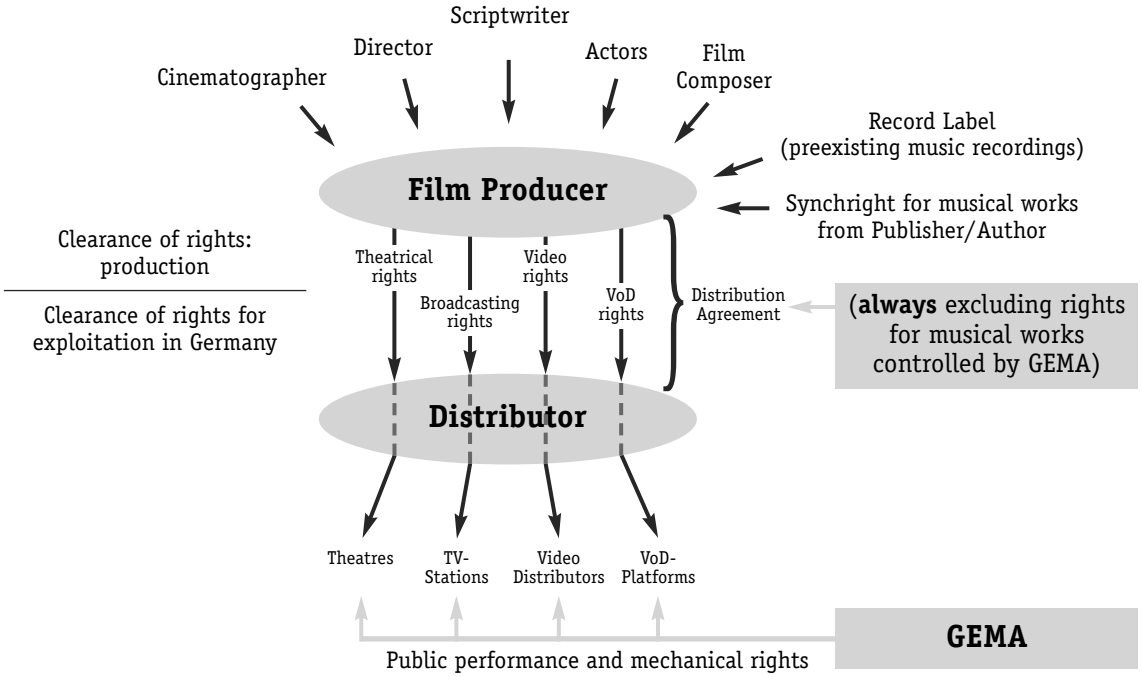
The diagram in 2.2 shows the rights clearance process for a **German TV-movie**. The difference from theatre films is that (a) the synch rights for the TV-stations own or commissioned productions as well as the rights for broadcasting and other exploitation are granted by GEMA (i.e. in this case the music publishers/authors may not withdraw the synch right from GEMA) and (b) the master use rights and broadcasting rights in the music recordings are granted by the *Gesellschaft zur Verwertung von Leistungsschutzrechten* (GVL) (i.e. not by the record labels). If these TV-productions are exploited on DVD or offered on VoD-platforms (secondary exploitation) it is unclear under German Law (and not yet decided by the German Supreme Court) whether such secondary exploitations require the authors/ music publishers' consent.

4) *Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* (Society for musical performing and mechanical reproduction rights – GEMA), see http://www.gema.de/engl/

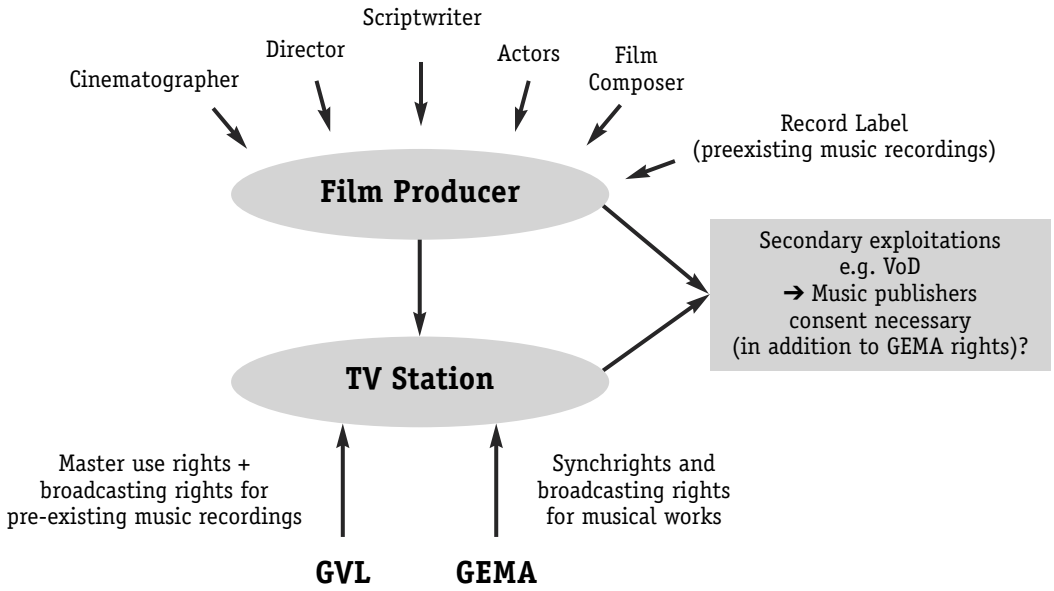
5) According to the WIPO Glossary, Mechanical Rights are "[G]enerally understood as being the author's right to reproduce literary, dramatic or musical works in the form of recordings (phonograms or audiovisual fixations), produced mechanically in the widest sense of the word, included electro-acoustic and electronic procedures. The mechanical rights in musical works with or without accompanying words are usually administered by authors' societies or other appropriate organizations. Some copyright laws provide for compulsory licenses to be granted to producers of phonograms of musical works and any words pertaining thereto".

6) "Master use rights are required for previously recorded material that you do not own or control. They can only be obtained from the owner of the master recording, usually a record company. It is recommended that you obtain the master use license from the owner prior to requesting a mechanical license." See http://www.worldwideocr.com/Rights_Mechanical_FAQ.asp For more information on Music Rights see "Music Rights Primer" at: http://stevegordonlaw.com/MusicPrimer.doc

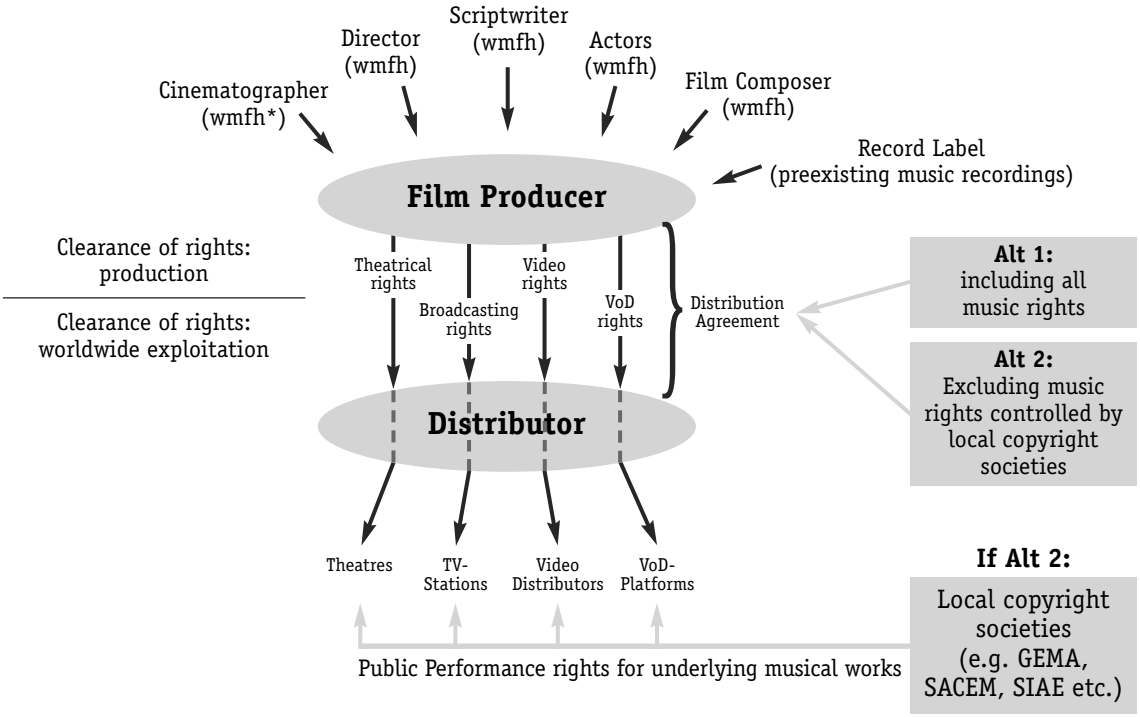
2.1 German Film Production (Cinema)



2.2 German Film Production (TV-Stations' own or commissioned productions)



2.3 US Film Production



2.4 IFTA-provision on music rights:

MUSIC[7]

1.2. **Synchronization**: Licensor represents and warrants to Distributor that Licensor controls all rights necessary to synchronize the music contained in the Picture on all Copies exploited by Distributor throughout the Territory for the Agreement Term. Licensor authorizes Distributor to exploit such synchronization rights without charge in conjunction with its exploitation of the Picture. Licensor will be solely responsible for paying all royalties or charges necessary to obtain and control such synchronization rights for the Agreement Term, and Licensor will hold Distributor harmless from any payments in this regard.

1.3. **Mechanical**: Licensor represents and warrants to Distributor that Licensor controls all rights necessary to make mechanical reproductions of the music contained in the Picture on all Copies exploited by Distributor throughout the Territory for the Agreement Term. Licensor authorizes Distributor to exploit such mechanical rights without charge in conjunction with its exploitation of the Picture. Licensor will be solely responsible for paying all royalties or charges necessary to obtain and control such mechanical rights for the Agreement Term, and Licensor will hold Distributor harmless from any payments in this regard, *provided that* if a mechanical or authors' rights society in the Territory refuses to honor the authorization obtained by Licensor in the country of origin of the Picture, then Distributor will be solely responsible for such royalties or charges.

1.4. **Performance**: Licensor represents and warrants to Distributor that the non-dramatic ("small") performing rights in each musical composition embodied in the Picture are: either (i) in the public domain in the Territory; or (ii) controlled by Licensor sufficient to allow Distributor to exploit the Licensed Rights without additional payment for such rights; or (iii) available by license from the local music performing rights society(ies) in the Territory affiliated with the International Confederation of Authors and Composers Societies (CISAC). With regard to music in category (iii), Distributor will be solely responsible for obtaining a license to exploit such performance rights from the local music performing rights society(ies).

*) wmfh = work made for hire

7) Clause 13 of the Standard Terms of the IFTA-International Multiple Rights Distribution Agreement

3. VoD and "orphan works"

I have also been asked to address briefly the problem of orphan works which may arise if old (film) material in particular is exploited on the Internet. An orphan work is a copyright work where it is either difficult or impossible to find and contact the copyright holder(s). Some countries - e.g. Canada – have created a compulsory licence scheme to solve this problem. It allows licences for the use of published works to be issued by the Copyright Board of Canada on behalf of unlocatable copyright owners. In Germany orphan works are not addressed in the Copyright Act and barely discussed as an issue at all. This might change in the near future as the European Commission is already looking into the problem. However, as long as the German Copyright Act does not provide exemptions for orphan works the risk of compensation for the unlicensed use of copyright works cannot be avoided other than by acquisition of licences from the copyright owner.[8]

8) For more information on orphan works see S. van Gompel, "Audiovisual Archives and the Inability to Clear Rights in Orphan Works", IRIS *plus* 2007-4, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2007.pdf.en and F.J. Cabrera Blázquez, "In search of lost rightsholders: Clearing video-on-demand rights for European audiovisual works", IRIS *plus* 2002-8, available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_2002.pdf.en

Licences and Media Windows

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1. Current Issues of Video on Demand Services

The buzzword "video on demand" (VoD) was already well known in the 1990s. General media and legal journals speculated that VoD would soon entirely replace physical home video and DVD and, thus, rapidly change the face of the media landscape.[1] However, the expected boom failed to appear. The technical infrastructure in potential customers' homes was not yet in high gear: broadband Internet access had yet to become widespread, data flat rates for surfing were not yet available so the download of an entire film was costly, and people's watching habits were not yet directed towards watching films anywhere other than in cinemas or in front of their home TV sets. Also, the burst of the DotCom bubble in 2000/2001 eventually ruined the vast majority of new technology startups including some concerned with the development of video-delivery-on-demand concepts.

By now, conditions have changed considerably. New services like Joost, Vudu and Zattoo, CinemaNow, Movielink and the paid-for download service of BitTorrent, to name just a few, have begun their offerings (mostly first in the U.S.) and gained their first users. However, most of these new services are still in beta phases and are directed at US customers only. Furthermore, all these services feature different user experiences (interface, navigation, necessary software etc.) so that each has to painstakingly grind out its own prospective user base and persuade users to bother to download, install and learn how to navigate ever newer software platforms. Also, virtual movie delivery is still at least as expensive as the physical acquisition or rental of a DVD. In many cases download-to-own-services are even more costly than the respective physical DVD.

A major problem for providers of such new services is the acquisition of all the necessary rights from rights owners by means of licence agreements – particularly (i) with regard to preexisting old works[2] and (ii) across country borders – the latter still even within the EU.[3] To avoid constraints, it is important for every VoD provider that any open questions regarding required rights and the feasibility of their clearance are resolved before the startup of the service.

1) See e.g. Wandtke-Bullinger/Manegold, UrhR, 2nd Edition, C.H.Beck, Munich, 2006, *vor* (before) §§ 88ff, 4.
2) See "long tail enemy #1" discussion: http://www.longtail.com/the_long_tail/2007/04/long_tail_enemy.html
3) With regard to music compare EU Commission Statement of Objections against territoriality within iTunes' music stores – "iTunes case"; and EU Commission Statement of Objections against reciprocal representation contracts with regard to the collective rights management of collecting societies – "CISAC case". See Poll, "*Grenzüberschreitende Lizenzierung von Musikwerken in Europa - Weiterführende Überlegungen*" ("Cross-border licensing of musical works in Europe – continuative considerations"), article in law journal "Multimedia und Recht" („Multimedia and Law"), MMR 2007, XXVII; von Einem, "*Auswirkungen der Empfehlung der EU-Kommission zur Rechtewahrnehmung auf das System der Gegenseitigkeitsverträge*" ("Impact of the recommendation of the EU Commission regarding collective rights management within the system of reciprocal representation contracts"), article in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 2006, 647.

2. Necessary Scope of Licences for Video on Demand

To decide what the requirements for effective licences comprising all necessary rights for video on demand services are, one must first get an idea of what video on demand actually is.

2.1. Video on Demand as a Type of Use?

The term "video on demand" is not defined by law nor has there been any consistent usage of it in case law. Even the entertainment industry itself does not use the term in a coherent manner.

2.1.1. Forms of Appearance

Without doubt, there are many forms of appearance that are – by some – called "video on demand". These sub-forms can be categorized by

- initiative of the data transfer (push, pull and mixed push/pull services),
- transmission type (streaming and download services),
- degree of user influence on content choice (on-demand, pre-programmed and mixed services – e.g. near video on demand or podcasts),
- hardware used (set top boxes, network VCRs, PCs, mobile devices),
- network infrastructure used (broadband/DSL Internet, telephone lines, TV cable, digital/analogue terrestrial and satellite broadcast waves, power lines),
- network technology used (Internet Protocol, P2P-Technology),
- and potentially by many other criteria as well.

So far, only a number of services have emerged as going-concerns that are mostly based on P2P network technology, use a PC or set top box as terminal device and offer on-demand as well as pre-programmed services both to download as well as in streaming format.

The wording "on demand" suggests that VoD somehow allows the user at least some minimal influence on when to watch what. Therefore, live-webcasting and simulcasting probably cannot be reasonably viewed as forms of VoD – even though such a use of the term by individual players in the industry cannot be excluded.

Since the distinction most commonly made is the one based on transmission type, i.e. streaming and download services, the underlying terms shall briefly be defined and the different forms of appearance explained here:

– **Streaming** is, by general understanding, defined as the digital transmission of content in a manner that renders the respective works simultaneously with their transmission, and that does not (intentionally) result in the creation of a residual or fixed copy. Streaming services are usually preferred by rights holders because they are perceived as allowing a less intense usage of the respective work and as being less susceptible to unauthorized use by end users (customers).

  Streaming can occur in the forms of live-streams and simulcasting where the data stream is transmitted only at one certain point in time: in case of **live-streams** (also called "live-webcasts"), the act of streaming happens simultaneously with the live production of the transmitted audio and video signals (comparable to live TV). In the case of **simulcasting**, the act of streaming happens simultaneously with the traditional (satellite/terrestrial) broadcasting of the same (live or pre-recorded) content. Streaming can also occur in the form of "**streaming-on-demand**" (e.g. streamed music offerings, traditional real audio streams etc.) where the streamed data are stored as a file on the website of the offering provider and can be started (as well as repeated) by end users at any time of their choice, but – except with illegal manipulations – not stored, saved or otherwise copied on their own hardware devices.

  A "hybrid" of these two principles is "**near video on demand**" (NVoD) where the streamed data are stored as a file on the website of the streaming service, but transmission cannot be started and/or repeated by end users at any time of their choice but rather starts at a number of predetermined fixed starting points which are, however, mostly relatively close to each other so that the end user has a real choice of "when to watch" such an offering without having to wait a significant time.

For VoD services with **pay-per-view** and **subscription** revenue models, usually data streaming models are used (e.g. Pro7Sat1's Maxdome[4]), but streams can, of course, also be offered to users **free of charge** (e.g. financed by advertisements or for promotional purposes).

– **Download** is, by general understanding, defined as the digital transmission of content in a manner that purposely creates a copy of not insubstantial duration on the end users' terminal device that enables the user to re-/access the respective content at any time of his / her choice.

The copies delivered by download-on-demand services are sometimes **time-limited** by use of DRM systems (digital rights management systems), for example to 24 hours after the download (e.g. in Germany "Download-Leihe" of T-Online Vision[5]), in "**download-to-rent**" models. There are also "**download-to-own**" models (charged services of these are also called "**digital sell through**") that allow users to download a "permanent copy" of a work – which is, however, (in the case of most non-pirate services) almost always also subject to DRM-restrictions of, e.g., the number or type of player devices that it can be used on (e.g. in Germany In2Movies[6]).

Also much discussed are **mixed push/pull services** where the provider pushes a pre-selection of content in form of time-limited copies onto a user's device (e.g. a set top box) from which the user can again choose what to watch within a certain time frame.

2.1.2. Usability of the Term "Video on Demand" for Licensing Purposes

The term "video on demand" only implies that the user chooses what to watch by sending a signal to the service provider and is then delivered some content. It does not imply any restrictions as to the channel of the transmission (Internet, telephone lines, TV cable, power cable, cellular air transmission, terrestrial and satellite broadcast waves …), the underlying business model (pay-per-view, subscriptions, pay-to-own, free of charge…) or the usage intensity (streaming, time-limited download, download-to-own …).

However, for licensing purposes, all these factors are highly relevant: the transmission technology and channels are relevant to securing that there is no overlap of licences which could result in severe difficulties between licensees and potential liability of the licensor (compare e.g. the DFL/Premiere/Arena Case[7] in Germany with regard to "IPTV" vs. "Broadcast-TV" rights). The underlying business model is relevant with regard to the applicable pricing schemes for the required licences (usually in the form of a revenue or profit share from sales or advertising revenue). The usage intensity is important with regard to the rights owners' still predominant security concerns. Moreover, depending on which types of use are licensed, different entities may have entitlement as licensors (collecting societies, distributors, producers …)

Also, German Copyright Law (which is applicable to the exploitation of works in Germany) stipulates that any doubts about the scope of a licence (especially with regard to the permitted types of use) are to be interpreted to the licensee's disadvantage in a way that the licence comprises only its narrowest possible meaning that still just meets the contractual purpose ("*Zweckübertragungsgrundsatz*").

This principle is set out in s. 31 para. 5 *Urhebergesetz* (German Copyright Law – UrhG) which provides:[8]

> "If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant."

4) www.maxdome.de
5) http://vod.t-online.de/c/64/09/68/6409688.html
6) http://www.in2movies.de/in2movies/
7) Arena/DFL distinguished between "Internet rights" and "broadcasting rights" whereas DTAG/Premiere argued that "Internet rights" also included any transmission of audiovisual signals via the "Internet Protocol (=IP-Protocol)" (IP-TV). Thus, a dispute about the rights to live transmission of soccer games via IP-Protocol arose, compare FAZ (20 April 2006); epd Medien Nr. 42 (24 April 2006), p. 12; FTD-Kompakt (31 May 2006), p. 5; Ory, "*Sind Broadcast-TV und IP-TV unterschiedliche Nutzungsarten?*" ("Are Broadcast-TV and IP-TV different types of use?"), article in law journal "Kommunikation und Recht" ("Communication and the Law"), KuR 2006, 303.
8) Editor's note: all quotes from the UrhG are based on the translation provided by the International Bureau of WIPO. They have been updated by the author in order to reflect the legislative changes that have since been introduced to the German original; particularly the *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern* ("Fortification of Authors' Contractual Positions Act") and the *Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft* ("Regulation of Copyright in the Information Society Act").

As a consequence, a licensee who did not most accurately specify her intended use of the respective work runs the risk of not having acquired the necessary rights because a court might later interpret the "contract purpose" differently from what she intended.

Consequently, for licensing purposes, "video on demand" is no more than just a buzzword that is not sufficiently defined and is even dangerous for both licensees and rights owners, taking into account the potential detrimental consequences of contractual equivocality.[9]

Regarding new contracts, it is therefore advisable for all concerned parties to define the granted exploitation rights and permitted types of use in detail in each licence and for any planned "video on demand" service individually to ensure that all and only the required rights are licensed. To this end, it is particularly advisable to specify the technical details of the intended functions (e.g. transmission initiative: push or pull, download or streaming service, time-limitations or other DRM-restrictions etc.) as well as to include all conceivable later extensions and/or enhancements of the service within the purpose of the contract.

Regarding existing licence contracts, it still remains important to critically assess whether the wording regarding the scope of the licence and the permitted types of use clearly allow VoD uses or not.[10] If not, it would be advisable to eliminate the residual risk of not having acquired the necessary rights by conducting an additional clearance process which might even have to go back to the original authors and producers of a film.

2.2. New Type of Use?

According to the country of protection doctrine, German Copyright Law is applicable to the rules for exploitation of works on German territory. Up to now, German Copyright Law prohibits the grant of exploitation rights for as yet unknown types of use (s. 31 para. 4 UrhG):

> "The grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect."[11]

Therefore, with regard to preexisting old works it is important to determine whether a presumed rights holder, e.g. a film producer, film distributor or record label, actually owns the exploitation rights that are required for the planned type of use (and therefore can license them at all) or whether they still rest with the original authors/creators of the work (which often necessitates a lengthier and much more complicated rights clearance process).

A "type of use", in the sense of this provision, is any tangible, technically and economically independent form of use of a work.[12] German legal literature relatively unanimously agrees upon "video on demand" being such a new type of use. This is remarkable, particularly since, as we heard, the term "VoD" is not sufficiently precise as to how the respective content is used. However, this assessment can be supported by remembering that all of the described forms of appearance of video on demand are new as compared to existing types of use.

The rationale for classifying all described forms of video on demand as new types of use is that all of them collectively open up new markets – as compared to traditional video rental and sell-trough, cinema and TV markets – by being digital distribution models that enable customers, without leaving their homes, to watch the films of their choice at any time they want.[13] When comparing VoD services with the previously existing forms of exploitation of audiovisual content (cinemas/theatres, pay-TV,

9) See Wandtke-Bullinger/Manegold (l.c.), *vor* (before) §§ 88 ff, 25 and 29 (phenotypical use of the term).
10) For a (rare) favorable decision for licensees compare *Oberlandesgericht* München (regional court of appeals of Munich) in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 1998, 365, where VoD was held to be contained in a grant of "audiovisual rights"; critical comment by Lauktien in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 1998, 369.
11) Editor's note: On 1 January 2008 the "Second Law on the Settlement of Copyright in the Information Society" will enter into force and then replace s. 31 para. 4 UrhG with a more flexible provision. According to the new s. 31a UrhG a general right of use will also cover unknown forms of use, provided that the rightsholder does not object within three months after having been notified of the envisaged use. His right to object also lapses if he agrees to an appropriate separate remuneration. The text of the law is available (in German) at: http://www.bmj.bund.de/files/-/2547/bgbl_urheberrecht.pdf , see also Nicola Lamprecht-Weißenborn, [DE] "Second Basket" of Copyright Reform Approved, in IRIS 2007-10: 9, available at http://merlin.obs.coe.int/iris/2007/10/article15.en.html
12) *Bundesgerichtshof* in law journal "Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), BGH GRUR 2005, 937, 939 – "*Der Zauberberg*" with further reference.
13) See Wandtke-Bullinger/Grunert (l.c.), § 31, 61-63 and 67 with further reference.

free-TV, rental video/DVD, sell-through video/DVD, ...) this seems persuasive – in contrast to other "new forms of use" that have been judicially deemed not to be "new types of use": For example, the *Bundesgerichtshof* (the German Federal Court of Justice) decided in another case that broadcasting a TV programme via cable and satellite was not a new type of use as compared to terrestrial broadcasting, but only a different technical channel.[14] Similarly, DVD as compared to VCR was not significantly different and therefore not a new type of use.[15]

Assuming that VoD is a new type of use, the question is when did it come to be no longer "unknown" in the sense of s. 31 para. 4 UrhG. The German Federal Court of Justice ruled in another case that in order to become a "known" type of use, the use must not only be technically known, but also known to be economically meaningful and substantially distinguishable from other uses.[16]

It is debated in German legal literature (as is always the case regarding new types of use) when this point in time did arrive. For Germany, some commentators pinpoint it at 1995, others at 1997, but in any case all agree that at the latest by 2000 (with the hype of digital technologies) "VoD uses" were known according to the meaning of the above provision.[17] However, it remains unclear whether what was then known as "VoD uses" covers all of the current forms of appearance of VoD (including, for example, P2P technology).

In any case, licence contracts concluded before 1995 cannot reasonably be construed as containing the necessary rights for offering a VoD service. Therefore, "VoD rights" to such films cannot simply be acquired from an international distributor. Rather, the VoD provider has to initiate an entirely new rights clearance process in order to avoid that – as a result of s. 31 para. 4 UrhG – residual rights remain with the authors/producers.

2.3. Relevant Exploitation Rights for Video on Demand

Copyright Law knows a number of uses that are defined as "exploitation rights". They, in turn, can comprise several types of use as well as be only a part of the necessary rights repertoire to conduct a certain use. For example, the exploitation right to "distribution" authorises the sale of hardcovers, paperbacks etc. and thus comprises several types of use, whereas the sale of a book in hardcover requires at least a licence covering the reproduction and distribution rights of the respective work, which are two different "exploitation rights".

If one compares video on demand uses with other types of use in order to (i) help interpret unclear licence wordings or (ii) to determine whether or not specific provisions apply to specific exploitation rights (e.g. the "principle of exhaustion" applies – only – to the distribution right), it is helpful to first ascertain which exploitation rights are affected by video on demand uses.

2.3.1. Potentially Relevant Exploitation Rights

With regard to German law, the most pertinent exploitation rights with regard to video on demand uses are sections 16, 17, 19a, 20, 20b and 44a of the UrhG:

> **S. 16 UrhG Right of Reproduction**
>
> (1) The right of reproduction is the right to make copies of the work by whatever method and in whatever quantity.
>
> (2) Reproduction of a work shall also be constituted by the fixation of the work on devices which permit the repeated communication of sequences of images or sounds (video or audio

14) *Bundesgerichtshof* in "Entscheidungssammlung des Bundesgerichtshof in Zivilsachen" ("Collection of Decisions of the Federal Court of Justice in Civil Cases"), BGH BGHZ 133, 281 – "*Klimbim*".

15) *Bundesgerichtshof* in law journal "Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), BGH GRUR 2005, 937 – "*Der Zauberberg*".

16) *Bundesgerichtshof* in law journal "Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), BGH GRUR 1986, 62,65 – GEMA-Vermutung I; in law journal "Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), BGH GRUR 1995, 212– *Videozweitauswertung* III; v. Gamm, "Urheber- und urhebervertragsrechtliche Probleme des 'digitalen Fernsehens'" ("Copyright and copyright contract related problems of 'digital-TV'"), article in law journal "Zeitschrift für Urheber- und Medienrecht" ("Journal for Copyright and Media Law"), ZUM 1994, 593 with further reference.

17) See Wandtke-Bullinger/Grunert (l.c.), § 31, 61-63 and 67 with further reference; Ernst, "Urheberrechtliche Probleme bei der Veranstaltung von On-demand-Diensten" („Copyright problems with the operation of on-demand-services"), article in law journal „Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), GRUR 1997, 592, 596.

recording mediums) whether by recording a communication of the work on a video or audio medium or by transferring the work from one medium to another.

S. 17 UrhG Distribution Right

(1) The distribution right is the right to offer to the public or to put into circulation the original work or copies thereof.

(2) If the original work or copies thereof have been put into circulation in the territory of the European Union or of another Contracting State of the Convention Concerning the European Economic Area through sale thereof with the consent of the holder of the distribution right, their further distribution shall be permissible with the exception of rental.

(3) In the meaning of the provisions of this Law, rental shall be the temporary making available for use for the purposes of directly or indirectly making profits. …

S. 19a UrhG Making Available Right/Right of Communication to the Public

The making available right/right of communication to the public is the right to communicate the work to the public, by wire or wirelessly, in a manner that it is accessible to members of the public from places and at times of their choice.

S. 20 UrhG Right of Broadcasting

The right of broadcasting is the right to make a work accessible to the public by broadcasting, such as radio or television transmission, or by wire or by other similar technical devices.

S. 20b UrhG Cable Retransmission

(1) The right to retransmit a transmitted work in the framework of simultaneous, unaltered and unabridged retransmission of a programme by a cable or microwave system (cable retransmission) may be exercised by a collecting society only. This shall not apply to rights that a broadcasting organization exercises in respect of its transmissions.

(2) If the author has granted the right of cable retransmission to a broadcasting organization or to the producer of an audio recording or a film, the broadcasting organization shall nevertheless pay reasonable remuneration for the cable retransmission. The claim to remuneration may not be waived. It may only be assigned in advance to a collecting society and shall only be exercisable by a collecting society. This provision shall not run counter to collective agreements or works agreements of broadcasting organizations if the author is thereby granted reasonable remuneration for each cable retransmission.

S. 44a UrhG Transitional Acts of Duplication

Permitted are transitional acts of duplication which are non-permanent or collateral and which represent an integral and material part of a technical process the sole purpose of which is to facilitate,

1. a transmission between third parties within a network through an intermediary or

2. a legitimate use of a copyrighted work or neighboring right, which are of no independent commercial relevance.

2.3.2. Classification of Different Video on Demand Uses regarding Exploitation Rights

2.3.2.1. Storing Material on the Server

The process of storing copyrighted video on demand material (films, TV productions, trailers etc.) on a webserver is a reproduction in the sense of the reproduction right (s. 16 of the German UrhG).[18]

18) See Wandtke-Bullinger/Heerma (l.c.), § 16, 10; Ernst, "Urheberrechtliche Probleme bei der Veranstaltung von On-demand-Diensten" ("Copyright problems with the operation of on-demand-services"), article in law journal "Gewerblicher Rechtsschutz und Urheberrecht" ("Industrial Property and Copyright Law"), GRUR 1997, 592.

2.3.2.2. Transmission Process

More difficult is the classification of the transmission process with regard to the exploitation rights.

2.3.2.2.1 Download Models

Regarding download models of video on demand, the content chosen by the customer is usually transmitted at the times and to the places of the user's choice. Therefore, by now, the download transmission of copyrighted content is more or less unanimously deemed to be a making available/communication to the public of this content (s. 19a of the German UrhG).[19] However, this classification may not fit push-services that store a copy of the transmitted material permanently on the user's PC or other terminal device hard disc because even if the transmission does not take place at the user's initiative but at the provider's, the transmission still takes place at the time and place of the user's choice.

2.3.2.2.1 Streaming Models

Regarding **streaming** models, legal literature still reflects ongoing disputes over the question of whether or not and/or in which form a transmission via streaming constitutes broadcasting (s. 20 of the German UrhG) or whether and when it is a making available/communication to the public (s. 19a of the German UrhG).[20]

Simulcasting can relatively easily be recognized as a cable retransmission (s. 20b of the German UrhG) because it is the (re-)transmission of a TV programme via the web which takes place simultaneously with its traditional broadcasting over the air/cable. Comparably, **Live-Webcasting** (live-streams) can also fairly straightforwardly be deemed broadcasting because its starting time is fixed and users typically do not know in advance any specifics of the content that will be transmitted (which is natural because it is being created at the time when transmitted).

By contrast, **streaming-on-demand** services are more difficult to classify. On the one hand, the users have an influence on when the transmission starts (so that they can watch the chosen content "from places and at times of their choice" which meets the definition of making available/communication to the public), on the other hand, in many cases the transmitted content consists of relatively long pre-programmed pieces of which the user lacks advance knowledge as to their composition or sequential arrangement of their elements. Therefore the user's experience resembles rather that with traditional broadcasting than with digital-sell-through.

The German Copyright Act (UrhG) does not contain any express definition of "broadcasting" (in the sense of its s. 20). That is because, at the time of its enactment, the term "broadcasting" comprised only a small variety of transmission forms (namely terrestrial radio and television transmission), and therefore seemed sufficiently clear. A definition was unnecessary.[21] However, this situation has changed a lot over the intervening years: technical and economical convergence have brought broadcasting and making available/communication to the public rights closer and closer.[22]

Nevertheless, the traditional construction of sections 19a and 20 of the UrhG leads to a definition of broadcasting (for the purposes of s. 20 UrhG) by reversing the logic of s. 19a. That is, broadcasting is determined to be a communication to the public at times not of the user's choice, but instead fixed by the broadcaster. This distinction between broadcasting, on the one hand, and making available/communicating to the public, on the other, is based on the traditional concept of a "synchronous public".[23] This was the common concept of publicity ("*gleichzeitige Öffentlichkeit*") before the arrival of the Internet and its new "individual-mass communication" possibilities that eventually led to the introduction of the making available/communicating to the public right in s. 19a of the UrhG. However, the (asynchronous) concept of the "public" of the making available/communicating to the public right in s. 19a of the UrhG is now deemed to be different from the "public" of broadcasting in s. 20.

19) See Wandtke-Bullinger/Bullinger (l.c.), § 19a, 25f.
20) See Wandtke-Bullinger/Bullinger (l.c.), § 19a, 19f.; Dreier-Schulze/Dreier, UrhG, 2.Edition, C.H.Beck, Munich, 2006, § 20, 16.
21) See Möhring-Nicolini/Kroitsch, UrhG, 2.Edition, Verlag Franz Vahlen, Munich, 2000, § 20, 11.
22) See Dreier-Schulze/Dreier (l.c.), UrhG, § 20, 13 ff.
23) See Wandtke-Bullinger/Erhardt (l.c.), § 20-20b, 9.

For the purposes of the definition of broadcasting in German media regulations, such as the rules on protection of minors, it is agreed that the decisive criterion for categorising a transmission as "broadcasting" is the "potential to shape public opinion"[24] rather than the question of who determines the starting point of the transmission. However, this concept of "broadcasting" in media regulation need not necessarily be the same as in copyright law. Given that the purpose of media regulations is to determine the applicability of public order concepts such as the protection of minors,[25] and is therefore different from that of copyright law, it is reasonable to assume that the same term could be used for different concepts.

The legislative intent in differentiating the making available right/right of communication to the public from the right of broadcasting was to distinguish acts of mass-communication – with their pre-programmed and pre-arranged use of elements – from those of interactive individual-communication – with their more intense exploitation of specific works. Both concepts draw not so much on the concept of synchrony vs. asynchrony but rather on the level of interactivity – or influence – that the user has on the content delivered.

Comparing this legislative intent with the new models of secondary exploitation of TV shows like Joost, one wonders whether it really marks a difference between broadcasting, on the one hand, and making available/communication to the public, on the other hand, when entire, unabridged pieces of TV programme are offered to users (after their initial broadcasting) for "on-demand" streaming (i.e. at times of their choice). If such offering takes place within a reasonable time-frame after the original broadcasting slot and the programme is offered with reference to that, it seems forced to let the character of the offering change from broadcasting to making available/communication to the public just because of the time shift. After all, its character as mass communication does not change.

A new, out-of-the-box approach could therefore suggest a distinction between broadcasting and making available/communication to the public based on the amount of interactivity that the user can exercise with regard to the desired content. If the user has reasonably immediate access to exactly the desired content,[26] one could categorize that content as being self-contained and interactively accessible by individual pull command. This could then militate in favour of a making available transmission rather than broadcasting, even if the provider determines the time of transmission – as in near video on demand scenarios. However, in cases of podcasts or Joost-like transmissions of entire bits of TV programme with many previously unknown elements such an approach would speak of broadcasting rather then making available/communication to the public. Also, the potential to shape public opinion is much greater with pre-programmed content that makes users watch or listen to whatever is presented to them without making a conscious choice.

However, it must be acknowledged that any distinction which relaxes the strict criterion of synchrony necessarily runs into problems with licence-restrictions relating to an admissible "number of broadcasting acts". In order to avoid that a "5-times-broadcasting" licence expires immediately upon the secondary exploitation of the programme in Joost, it would be necessary to deem all transmission acts within a reasonable time-frame after the original broadcasting slot (with reference to which they are offered) "one act of broadcasting".

Also, such an approach does not really address the demarcation issues that are a central point of criticism regarding the traditional classification of broadcasting vs. making available. It can become very difficult to decide what constitutes a self-contained work and what is "pre-programmed" content in the case of, for example, a long audiovisual "medley" composed of only a few elements.

In **near video on demand** schemes a user typically knows as much about the content of the desired item as in **streaming-on-demand**. Therefore, if the above-explained approach is applied, it would not matter that the starting points of the transmission cycles are fixed (as opposed to freely chosen by each user) as long as they are close enough to each other that the user does not have to wait too long

24) *Bundesverfassungsgericht* (German Federal Constitutional Court) in "Entscheidungssammlung des Bundesverfassungsgerichts" ("Collection of Decisions of the Federal Constitutional Court"), BVerfGE 90, 60, 87 – *Rundfunkgebühr* (= 8. *Rundfunkurteil*).

25) E.g. Verwaltungsgericht München (administration court of Munich) in law journal "Multimedia und Recht" ("Multimedia and the Law"), VG München, MMR 2003, 292 (in the context of contemplated prohibition of pornography, NVoD was deemed "Broadcasting") with comment by Palzer in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 2003, 295 (with reference to opposing opinions).

26) Also pointing at the importance of the user's choice of the content (not just of time and place): Lauktien, comment in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 1998, 369 ff with reference to the draft of the EC directive concerning copyright in the information society.

for the start of a transmission and, thus, has a reasonable choice over "what to watch now" at any given point in time.[27]

2.3.2.3. Creation of a Copy on the User's Terminal Device

It is also undisputed that the electronic file copy of a transmitted work on the user's terminal device, which is created in the course of a download, is a reproduction within the meaning of the reproduction right (s. 16 UrhG). By contrast, the merely temporary copy that is created in the user's RAM (or – if equally temporary – in a set top box) during a streaming transmission is only a Transitional Act of Duplication in the sense of s. 44a of the German UrhG.

3. Priority in the Exploitation Chain/Media Windows

"Media Windows" are provisions which stipulate that a certain time (window) must elapse between different types of exploitation of a work (e.g. from theatre release to DVD availability to airline rights, to interactive multimedia or games rights). Such provisions can be found in most international distribution agreements as well as in regulations. In a contractual context they are often also referred to as "holdbacks" or, in German, "*Sperrfristen*" (blocking periods).

3.1. Media Windows in Media Regulation

The prioritization of video on demand within the exploitation chain is important in the context of some media regulations because some of these attach significant consequences to the respective priority of each use.

As an example, the German *Filmförderungsgesetz* (the Federal Statute on Government Aid for Films – FFG) in its s. 30 determines that government subsidies for the production of films have to be repaid if certain legally defined blocking periods for different forms of exploitation are violated. To determine the applicability, for example, of these different blocking periods, the known forms of appearance of VoD have to be compared to the listed types of use to find similarities which argue for a specific priority ranking.

Depending on the specific type of VoD at issue and whether it is categorized as broadcasting or as making available/communication to the public, different blocking periods of the FFG could apply: either the one for "individual on demand services" (s. 30 par. 1 Nr. 2 FFG: 12 months after premiere) or the one for "Pay-TV" (s. 30 par. 1 Nr. 3 FFG: 18 months after premiere) could apply. This fits in well with the traditional positioning of all "on demand" uses after physical home video/DVD and before free-TV use. In other words, exploitation on an individual basis is allowed before a work is being made generally available and go-out uses take priority over stay-home consumption.

Consequently, in the context of the FFG any VoD service that is rated as making available/communication to the public can be regarded as a form of individual on demand service in the sense of s. 30 par. 1 Nr. 2 FFG. If such a service is offered commercially, the respective blocking period of 12 months after premiere applies. Concerning any paid for VoD service that could be deemed broadcasting (e.g. as a secondary exploitation of TV programmes) the comparison with pay-TV is more proximate so that the 18 months blocking period of s. 30 par. 1 Nr. 3 FFG for pay-TV applies.

Film producers, who collect government subsidies according to the FFG, have to respect these blocking periods in order to avoid serious financial disadvantages. Therefore, these rules concerning exploitation windows are also reflected in the distribution agreements for the respective state-subsidised films.

3.2. Media Windows in Distribution or other Exploitation Agreements

Also, international distribution agreements and specific exploitation agreements based on them know a wide variety of blocking periods for specific exploitation types, called "holdbacks". Traditionally, films have been released in respect of such sequences of discrete time frames or "windows" for various exploitation types. These windows pertain to theatrical release, pay-per-view, home video, cable channels, pay- and free-TV and many more.

27) Similar: Wandtke-Bullinger/Bullinger (l.c.), § 19a, 20; Dreier-Schulze/Dreier (l.c.), § 19a, 10.

The clear hierarchy in the sequence of uses within the exploitation chain established by these holdback clauses serves the purpose of securing unhindered exploitation of the respective work by the industry having the current turn, in order to avoid cross-industry arbitrage. In this hierarchy, video on demand uses are so far usually ranked after physical home video/DVD and before pay-TV.[28]

However, since the success of iTunes, even film studios have in the meanwhile warmed to the idea of a "digital sell-through" of their products (i.e. the sale of a permanent copy that can be downloaded).[29] To promote this new exploitation thread, copyright holders seem willing, to a certain extent, to experiment with the traditional hierarchy of the exploitation chain.[30] For example, with regard to the use of VoD services for "secondary exploitation" of TV shows, Maxdome[31] offers a number of TV series even one week before they are broadcast on television for the first time. The movie "Bubble"[32] by pioneer director Steven Soderbergh[33] is another example. It was Hollywood's first "universal release", released simultaneously in cinemas, on home video and through pay television.

The impact of such modified exploitation windows has yet to be ascertained. But ultimately this little "trend" of showing flexibility as to the priority of new types of exploitation seems to signal that copyright holders are looking to increase turnover rather than to merely secure it.

4. Per Country vs. European-wide Licensing

In the international copyright business, exploitation rights are traditionally dealt with on an individual per-country (i.e. territorial) basis. As explained in more detail in another presentation, this custom has its origins in the concept of territoriality, based on the country of protection doctrine.

The "country of protection doctrine" (also called "principle of country protection") is an internationally accepted concept in intellectual property determining that the creation, scope and nature of an intellectual property right are all governed by the laws of the country for whose territory protection is sought. Consequently, various copyright issues are resolved differently depending on the country for whose territory protection is sought. This means that an author's copyright protection with regard to a work is split up into an entire bundle of individual country-copyrights whose fate can be entirely different and which can be created, assigned or lapse entirely separately.

Based on this concept, the individual per-country-copyrights are usually licensed in limited bundles of territories (e.g. G/A/S = Germany, Austria, Switzerland) or with regard to individual territories only.

4.1. Traditional "Territorial Pricing"

Since the market conditions in various countries have always been very different and individual country-copyrights could be licensed separately, it has also always been the case that a copy of the same work could be acquired at different prices in different countries. Often this was because the entity exploiting a copyrighted work in one country was different from that exploiting it in another country, with each fixing its own independent price. This resulted, for example, in the fact that traditionally in the UK music is considerably more costly than in continental Europe (e.g. in Germany), let alone Eastern European countries.

However, by now the entertainment industries are much more consolidated and in most cases works are no longer distributed in different markets by different entities, but only by one group of companies respectively various subsidiaries of one parent company. Nevertheless, the exploiting enterprises have retained the traditional pricing schemes for the various markets and have upheld high prices in countries where willingness and ability to pay were higher than elsewhere (e.g. the UK).

28) See, e.g., Wandtke-Bullinger/Manegold (l.c.), §§ 88 ff., 8; Frohne, "*Filmverwertung im Internet und deren vertragliche Gestaltung*" ("Exploitation of films on the Internet and its contractual terms"), article in law journal "Zeitschrift für Urheber- und Medienrecht" ("Journal for Copyright and Media Law"), ZUM 2000, 819; Schwarz, "*Klassische Nutzungsrechte und Lizenzvergabe bzw. Rückbehalt von Internet-Rechten*" ("Classical types of use and the granting of licenses respectively the retention of Internet rights") article in law journal „Zeitschrift für Urheber- und Medienrecht" („Journal for Copyright and Media Law"), ZUM 2000, 816 f.
29) See http://www.mazine.ws/node/139
30) http://www.ft.com/cms/s/7e076da6-09cc-11da-b870-00000e2511c8.html
31) Maxdome is the VoD service of Pro7Sat1Media AG. See www.maxdome.de
32) http://en.wikipedia.org/wiki/Steven_Soderbergh#Latest_work ; http://en.wikipedia.org/wiki/Bubble_(film)
33) http://en.wikipedia.org/wiki/Steven_Soderbergh

4.2. Effect: Price Discrimination

In effect, the current situation meets the description of price discrimination because the same product is sold by the same offeror at different prices to different consumers, according to their respective willingness to pay. While such price discrimination is principally admissible because the offeror has the freedom to set her own prices, it also always calls for arbitrage dealings: a consumer to whom a product is sold at a lower price buys it not for her own consumption but in order to resell it to another consumer to whom it was offered only at a higher price; and both share the price difference. A similar form of arbitrage is the (re)import of copies of a work from countries with a lower price level.

Until a few years ago, however, such arbitrage was widely illegal with regard to copyrighted works (in contrast to any non-IP-protected products) because any resale of a copy required a distribution right (e.g. s. 17 of the German UrhG). By enforcing this right, copyright holders could effectively prohibit any resale of a copyrighted product in another country unless the importer obtained a separate licence (= an official "direct import" licence).

4.3. Principle of European-wide Exhaustion

With regard to the territories of the European Union, however, the European Parliament decided in 2001 that prohibition of the resale of a legally acquired product in another country of the EU – even if the product is copyrighted – would violate the principle of free movement of goods (Article 28 of the EC Treaty) and therefore introduced the European-wide applicability of the principle of exhaustion into copyright law:[34] this principle provides that once an IP-protected product is sold legally within the EU, it can be resold within the entire European Union. The distribution right can no longer be invoked to prevent this form of resale.[35] By this stance, the country of protection doctrine remained in principle untouched, however since then it must be read in the light of European Community Law.

The new rule of European-wide exhaustion was implemented into German Law as para. 2 of s. 17 of the UrhG which reads:

> "If the original work or copies thereof have been put into circulation in the territory of the European Union or of another Contracting State of the Convention Concerning the European Economic Area through sale thereof with the consent of the holder of the distribution right, their further distribution shall be permissible with the exception of rental."

4.4. Territorial Price Differences in Digital Distribution: European Commission Statement of Objections regarding iTunes

However, the distribution right is traditionally understood as only applying to physical copies of a work. Therefore, the principle of European-wide exhaustion also only applies to physical copies. Thus, when digital distribution arrived, copyright holders continued their traditional practice of selling – digital – copies of the same copyrighted product at different prices in different regions by licensing the rights for different territories at different prices – or even not licensing specific territorial rights at all.

Recently, in the music business, this practice was challenged when the European Commission sent a statement of objections against territorial restrictions in on-line music sales to Apple's iTunes' music store as well as the four worldwide major record labels (Universal, SonyBMG, EMI, Warner).[36] This Statement of Objections issued a reprimand on the grounds that, for example, the price for a piece of music in the British iTunes music store is 18% higher than in the countries of the EURO zone. However, a customer, for example, in the UK is prevented from ordering the same piece of music from the iTunes music store from the EURO zone because credit card validation is restricted to card holders of the respective country.

34) Basis for the establishment of this principle was the analogous adjudication of the European Court of Justice in patent cases: comp. ECJ 15/74 – Centrafarm v. Sterling Drug and ECJ 187/80 – Merck v. Stephar.
35) Directive 2001/29/EC of the European Parliament and of the Council of 22 May, 2001 on the harmonization of certain aspects of copyright and related rights in the information society.
36) See e.g. www.financialtimes.de/technik/medien_internet/181968.html

The European Commission objected to such practice on the basis of European antitrust regulation as a "territorial sales restriction" in violation of Article 81 of the EC Treaty because it effectively prevents competition between the different national iTunes stores. The underlying rationale, however, is very similar to the above explained exhaustion/free movement of goods doctrine.

In reaction to that Statement of Objections, iTunes proclaimed that it would prefer in any case to run one European-wide store but that it had not been able to acquire the necessary European-wide licences from the labels. The labels in turn argue that they are entitled to distinguish their licences territorially – as they always have – and that in some cases they were unable to grant all necessary rights for the entire EU because they did not possess all of them. Consequently, they argue that a respective order or fine by the Commission would effectively force them to apply a "European-wide copyright" which could and should only be introduced by the legislative bodies.

Similar proceedings could also be instituted with regard to territorially different pricing of VoD content, if access to services abroad is effectively inhibited by any means. However, if the differentiated pricing is due to independent entities exploiting the works in the respective territories in different ways, a competition-centered approach could distinguish such a situation from the one in the iTunes case.

Even the one-stop European-wide licensing of the necessary bundle of national copyrights from a single collecting society is currently still under heavy political discussion and still far from reality in the near future.[37] Therefore, it will take a little longer before privately owned businesses too will be swayed to be willing to grant European-wide licences and relinquish established sectionalist prize-optimization measures.

37) See, e.g. Poll, "*Grenzüberschreitende Lizenzierung von Musikwerken in Europa - Weiterführende Überlegungen*" ("Cross-border licensing of musical works in Europe – continuative considerations"), article in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 2007, XXVII; von Einem, "*Auswirkungen der Empfehlung der EU-Kommission zur Rechtewahrnehmung auf das System der Gegenseitigkeitsverträge*" ("Impact of the recommendation of the EU-Commission regarding collective rights management within the system of reciprocal representation contracts"), article in law journal "Multimedia und Recht" ("Multimedia and the Law"), MMR 2006, 647.

The Music Industry's Experience

Philippe Kern
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1. Introduction

I have been asked by the European Audiovisual Observatory to reflect on the experience of the music industry and the music business. I am glad to do this, because I think it is very useful in relation to what is going to happen, or what is already happening today in film. I would like to start by explaining what is happening in music, in my view, and in what way the history of the experience in music is relevant to film. In the second part, I would like to dwell on the issue of licensing because I think the main business of the film industry in the future is going to be the VoD licensing business. I will share with you my views on how, in practice, the collective management of VoD licences of European films on new digital delivery platforms could benefit the European film industry, thereby taking into account its structural specificity.

2. Developments in the Music Industry

2.1. The Advent of the Internet

Seven years after the start of Napster the music industry is still struggling to find a business model. The turnover of the music industry has decreased by almost 25 % in five years. Neither the download business nor other internet business has been able to compensate for lost sales at retail level. This is the lesson film people should really think about, even if the business models are quite different.

The music industry was slow to embrace the future. When people who had business models for the internet were going to see a record company, the record company would welcome them with a copyright lawyer or the General Counsel, because the main issue was: "How can we protect our copyright and how can we avoid piracy?" This was the initial way of looking at developments in the new technologies. Also, at the time the – then five – majors in the music business were thinking of actually controlling distribution over the internet because they were already controlling physical distribution. The idea was to develop business models whereby they would also control digital distribution. You may remember PressPlay and MusicNet – the two ventures with which the music majors had previously tried to enter the digital distribution market. Those two ventures collapsed when they were overtaken by smarter ventures and pirate sites.

The legitimate market was then overthrown by the illegitimate market because for consumers it was easier to "steal" music than to "buy" it. In a way, the industry let the market disappear in front of its eyes. However, the one company that created a market was, at the end of the day, a technology company: Apple. The success of the iTunes system has put Apple into a dominant position in the

* www.keanet.eu

download music market causing the music industry in general to lose control over distribution and, to some extent, pricing.

This is also something on which the film industry needs to reflect. Apple created the market and the music industry has become to a large extent dependent on the commercial policy of a hardware company controlling 70% of the market of legal downloads.

2.2. Moving Towards a "Licensing Business"

Because of the technological changes, the function of record companies is changing: it is moving from the trade in packaged goods (CDs) to a licensing business. More and more record companies resemble music publishers. Their main activity has become to focus on managing and licensing rights to users who wish to access music recordings. This, in turn, changes their relationship with artists and is reflected in deals enabling the music company to invest in the artist's brand and in its merchandising rights.

Another analogy relating to the licensing strategies is of interest to the film industry: the major players, which have large catalogues, and human and financial resources, are in a position to license users individually. Companies such as Universal, EMI, Warner Music and Sony-BMG are in a position to strike individual deals with large users such as Apple, MTV or Google for the use of their recordings. But what has happened to the smaller record companies? In contrast with film, music has a history of collective rights management. As a result, most of the performing rights and broadcasting rights were licensed by collecting societies: the *Gesellschaft zur Verwertung von Leistungsschutzrechten* (GVL)[1] in Germany, Phonographic Performance Ltd (PPL)[2] in the UK, and so on. But because the majors withdrew their repertoire or the mandate from these collecting societies, the collecting societies lost their power to get into the licensing business in regard to interactive digital delivery and to represent the independent repertoire. Like the film industry, the market share of independent music is around 20 to 25%. Individual independent record companies were in no position to negotiate fair licensing terms. So they were forced to take their destiny into their own hands and consider negotiating with users on a collective basis.

They had to act this way as the users looking for music content would not waste too much time knocking at each door to identify the rightsholders and ask for a licence. In practice, the user seeking a licence will find ensuring individual rights too complicated and not bother with it, or if he does, the user will pick and choose among record companies, saying "OK, I am going to make a deal with this one because it has a great artist, but I do not care about this one, and if this one gives me a licence, it will be for promotional reasons against no payment". This is indeed what happened initially, when Apple and MTV set up their systems. They refused to negotiate on a collective basis with the independent record companies. And the independent record companies, mainly through making noise in the press, obliged these large companies to enter into contracts. It showed that by acting collectively in solidarity the smaller companies were able to leverage their negotiating position and to avoid their marginalisation on digital networks.

In my view, this approach is the best way to increase the bargaining position of smaller rightsholders and to reach licensing terms equivalent to those of the major players.

Collectively, independent record companies represent 20 to 25 % of the market. They are as big as a major record company and therefore should be able to negotiate equivalent commercial terms and as a result avoid being excluded from the online market.

To this effect they created a company named Merlin, which is aimed of managing Internet rights for independent record companies.

3. Approach for the European Film Industry

For me, the essential point in relation to VoD development is the issue of market access. How do we enable film companies, in particular the European film companies that are essentially small and medium-sized, to access this emerging online market? In my view, the film people will have no choice

1) https://www.gvl.de/index.htm
2) http://www.ppluk.com/

but to move towards some kind of collective licensing model. Obviously this is very new for the film business because the film business (in contrast with music) has always acted on an individual licensing basis. It is only in relation to the exploitation of cable retransmission rights through the Association of International Collective Management of Audiovisual Works (*Association de Gestion Internationale Collective des Oeuvres Audiovisuelle* – AGICOA)[3] that film producers are acting on a collective basis.

I should add that acting collectively should not be made compulsory. It should be left to the rightsholder to decide what is in his best interest. For a successful film individual licensing will probably make more sense than a collective deal.

3.1. Size May Matter

I believe that in the end collective action will make sense for the majority of film companies if they want to access the VoD market and influence its development with regard to the benefits of diversity and choice. Even a large rightsholder like, for example, Pathé or Gaumont in France may be too small in size or lack a catalogue with sufficient potential to appeal to an international audience to make a deal with Apple tomorrow. In the music business even the largest independent producers would not get their phone calls returned.

What might guarantee that Pathé will access these platforms or get the same deal as a major Hollywood studio? What is the distinguishing characteristic of the European film industry compared to Hollywood? The main element is that in Europe companies are not vertically integrated, or if they are, the vertical integration relates merely to a single national territory but does not exist on an international basis. Therefore, in Europe companies need to pool their resources and catalogues in order to become valuable commercial partners with users seeking content. A collective action enabling a one-stop-shop licensing approach is in the interest of the users. Users and platform owners are hungry for content. But how do they get European films? If it requires an army of lawyers to negotiate on a company-by-company and a territory-by-territory basis, they are not going to bother for a long time. It is necessary to promote a system which facilitates access to European VoD rights. This is essential to encourage the presence of European films on digital platforms.

The difficulty of acquiring licences for VoD exploitation hinders the development of a legitimate market with a significant catalogue of European works.

3.2. Existing Initiatives in Europe

I think the responsibility of the rightsholders and of the European business community is to make it easier to get a license. And if they make it easier, they will gain access to the platforms, because the platforms are going to look for content: a large variety of content. At least, that is my bet. To prove this, I was scouting for collective approaches that might exist at European level and I discovered three initiatives, which I would like to point out to you as interesting developments.

3.2.1. Collective Negotiation

The first initiative is located in Denmark, it is called the VOD-company. Fifteen producers decided to join forces with a view to holding on to their video-on-demand rights and negotiating collectively with the telecom operator and the broadcaster in Denmark. They may choose among two approaches: the first is "let's keep our video on demand rights, let's not sell it to the distributor" and the second is "let's all together negotiate the best possible deal with the telcos".

It seems that in Europe the general deal offered to the rightsholders is a fifty-fifty revenue share. The revenue is split evenly between the telecom operator and the rightsholder. Obviously, the producers are afraid that they might create a dangerous precedent: whereas fifty-fifty at this time, when VoD is very little developed and is actually not making much money, may sound interesting, it may be a completely foolish deal in five or ten years time which rightsholders may then regret. So, they say: "No, let's get together and let's not find ourselves in a position where – on an individual basis – we might be happy with a fifty-fifty split, because we cannot resist. We are too small and therefore we are forced to take the money on offer. Let's have a collective approach to reinforce our bargaining position".

3) http://www.agicoa.org/

3.2.2. Collective Establishment of a VoD Platform

The second example is Universciné in France, which is a different business model. Whilst the Danes have so far only set up some kind of negotiation vehicle, Universciné gathers together 32 producers that are shareholders of a VoD platform. The platform has the function of a portal for independently produced films and can thus satisfy the demand for art films. Again, a collective approach is pursued with 32 producers getting together in order to run the business.

3.2.3. Establishment of a VoD Platform through a Collecting Society

The third initiative is, I think, the most interesting and probably the way forward. It was developed in Spain by the collecting society representing film producers and TV producers, called *Entidad de Gestión de Derechos de los Productores Audiovisuales* (EGEDA).[4] EGEDA received a mandate from the audiovisual producers in Spain to set up a VoD platform and serve consumers through a reliable and lawful system. The VoD platform was launched in April 2007 and is called Filmotech.com. In addition, EGEDA is mandated to negotiate licensing contracts with telecom companies, broadcasters or ISPs looking for films for their digital delivery services. Here we have once more a complete collective process approach,whereby EGEDA, which essentially collects money from private copying in Spain, has used private copying royalties to develop a service that could become the model of the future for European business.

3.3. A European Approach?

I have just described briefly three national initiatives, which reflect on rights fragmentation in Europe. It would be interesting to work out a European approach to make the most of the position of European cinema in what has become essentially an international business and to enhance the circulation of European films across frontiers. It is regrettable that in the framework of the MEDIA programme the European Commission preferred promoting the development of national platforms over linking these platforms across Europe or making them share catalogues in order to reinforce the bargaining position of rightsholders vis-à-vis platforms that in the future will dominate the VoD market. On a collective basis, European filmmakers hold approximately a 20 to 25 % market share in Europe. This means that in market share terms the European cinema is as big as a Warner, a Universal, or a Disney.

Such a market position should enable European rightsholders to negotiate good licensing terms with users and to participate in the development of a legitimate market, which is the best way to fight illegal download.

Another important aspect is that today a film producer who wants to make a film usually has to arrange for the pre-sale of his film in order to finance the production. Therefore, distributors and television companies exert considerable pressure to buy the VoD rights. If they cannot acquire the VoD rights, they may simply not invest in the film's production. This is something we really need to really think about, because, if we want the producer to be in a position to derive revenues from this new form of exploitation, he needs to be in a position either to hold on to the VoD rights or make sure that his VoD rights are properly exploited.

On the other hand, European producers have two choices: either they say "Hollywood is going to decide for us and we are going to follow the Hollywood model", or they are going to say "OK, we may have a say in the development of the business, and we had better organise ourselves using the experience of the music business. And let us try to make it possible for users to access European films and more easily than to access Hollywood films."

Hollywood also faces a certain dilemma. What is its interest? Today it is the DVD business. It is not the VoD business. The big American players may actually be slower in getting into this market, because they are in the business of controlling traditional distribution. European players, in my view, may have a different interest in expanding the internet market because internet gives them the tool that they do not have today in relation to international distribution. This is the long tail theory, which illustrates the advantage of internet over traditional distribution channels. The end of the "tyranny of the shelf space" which condemns European films to stay in the theatres for only one or two weeks and then disappear.

4) http://www.egeda.es/

Obviously, the main hurdle to the electronic distribution of European films is the difficulties caused by rights fragmentation. But, I think, this hurdle can be overcome in particular through DRM technology.

4. Conclusion

European filmmakers and producers have a responsibility to create a legitimate market because without it the VoD market will be taken over by pirates. What has protected the film industry so far is simply the fact that it takes much more time to download a film than to download music, but this is going to disappear with the further development of broadband access.

The filmmakers/producers have an interest in developing the market because of their interest in having as many users as possible in the market place. They want to avoid the situation whereby the market is controlled by one or two dominant players. The more they make content available on a non-exclusive basis, the more players the market will have and the more competitive it is going to be.

In my view the financial success of VoD depends on the ability of rightsholders to facilitate the acquisition of licences through one-stop-shops. Revenues will come from licensing contracts concluded with various national and international platforms – the difficulty will not be how to strike a deal with the national players – the national film industry will be able to achieve this – the problem will rather be how to access international platforms. Licensing at national level is possible because national films are an important source of content for France Telecom or Canal+ in France or KPN or Liberty Media in Holland.

But the most successful VoD platforms are likely to operate internationally and you want to make sure that European films are accessible via these platforms. This is the only way to enter the international VoD market. It will happen as it did in music: the international players such as YouTube, VIACOM, Google, or Yahoo, Apple will drive the market. For Europeans the key is to access their platforms.

Furthermore, European producers and filmmakers should access those platforms on non-discriminatory terms so that they actually get the same licensing conditions as Hollywood.

A final point concerns the role of public authorities in addressing the development of the VoD market. Today the European film industry depends heavily on state support but the latter is essentially geared towards traditional distribution such as theatrical distribution. State aid does not allow European producers to take risks on the Internet. For example, numerous European countries will not grant distribution aid for Internet release which does not respect the traditional exploitation windows. This is regrettable because our small and medium-sized enterprises could show much more courage in testing new business models than Hollywood Majors and regulation should not slow them down.

It is time to reflect on support mechanisms that actually act as a disincentive to the development of the VoD market. This is where the Observatory could perhaps be a useful platform to address what might be wrong at the regulatory level.

Since this workshop shall serve as a basis for a written report, I hope that the report is going to be positive and that it will highlight the opportunities for the European film business, especially in showing the opportunities VoD offers for distribution on an international scale. On the related questions, we have to offer support given that there is little discussion among the rightsholders themselves. They are all busy with making their films and finding the finance to reach their production goals. VoD is for many film professionals something they know of as being important. But they do not have the time and the resources to figure out how to tackle it. The role of the Observatory is to raise the relevant issues (technological, regulatory, financial and legal) in a positive way and to offer a forum for discussion – at least to the extent that Europeans do not want to take their destiny into their own hands.

Transferability of the Music Industry's Experience to the Film Sector

Bertrand Moullier, Narval Media

1. Introduction

I have been asked to react to what my colleague, Philippe Kern, has said about the transferability of a Europe-wide collective licensing model, whose core concept is derived from music industry practice, to the film industry. In the course of doing so, I will pick up on the points that were discussed already and which I will further develop – these concern in particular the Article 81 EC issues and the current EC Commission's statement of objections on the iTunes' deployment in Europe. One of the key questions here is whether the objections raised over the licensing of music in the EU could rightfully apply if cinema films were to be licensed in the same way.

2. Characteristics of the Film Industry

I would like to start by making a few points about what is specific to the film industry. There are a number of features of film production and distribution which need to be understood before attempting to apply a licensing model to it which would be an import from the music sector. We need to understand the main structural differences and how they affect business and licensing models. During the discussion this morning, there was a reference to the fact that the Anglo-American music industry tends to be characterised by big rights' aggregators. The model there is that the companies tend to buy all rights for world exploitation: a song is a song and hardly needs to be modified for different territories. If Johnny Hallyday takes a Johnny Cash song and turns a standard such as "Wanted" into "*On me recherche*", the new version is an original work, it can be distributed world-wide in its own right, perhaps not with the same degree of success, but that is a different matter…

2.1. "Patchwork" Financing Dilutes the Control of Rights

By contrast, and it is a huge contrast which bears underlining here, the movie industry that I know well, i.e. for the most part the independent segment, is characterised by the "patchwork" financing of films from a variety of sources. This form of financing is mostly done by setting-off certain rights against certain amounts of money in order to raise money to fund the cost of making the movie, which as you all know costs considerably more than would a song, even in a low budget configuration. This patchwork approach – at this stage in the development of the industry – rests on the territoriality of rights. Today therefore, licensing specific rights within specific territorial boundaries is still the main vehicle for financing this type of film. And if you were tempted to jump too swiftly to the conclusion that this is not the case in Hollywood, think again: Hollywood is plagued by this hyper-inflation problem with production costs rising well above the retail price index. One way in which it has chosen to deal with the matter is to remove the production risk from the balance sheet as much as possible by having split-deals involving several studios in the same movies, sharing out territories or by letting independent distributors outside the US take distribution rights for certain territories against, say, a Minimum Guarantee (MG).

So, unlike the music industry, few film companies are able to come to the table and say "We are the copyright and the exploitation rights holders for the whole world and we can from that base envisage multi-territory exploitation and licensing". In fact, in the European context, you have all heard of "co-production", which is the way in which most films over a certain level of budget are put together. In a co-production, most of the more lucrative licensing territories are gone, so to speak, before you even shoot the first frame of the movie and no company has a concentration of all the rights. Even the copyright is shared pro-rata according to the stake taken by each co-producing partner. That is the way in which we in the film industry manage to finance it at all in the first place.

2.2. Costs of Releasing a Film Vary Widely from One Country to Another

The second specific point about the film industry is relevant to the issue already discussed in relation to the licensing of music and alleged discriminatory pricing. There are huge costs associated with releasing a movie and these costs also vary considerably from one territory to the next. In the European area, you are dealing with different language versions, be they dubbed or subtitled. This entails important costs which are specific to releasing a film in a specific territory or language area at a specific time. And you are dealing with a business model for film in which the film theatre remains the primary launch market. This model entails very high going-to-market costs just to "open" the film in the theatrical infrastructure as it currently exists. If you are in Hollywood, the cost of opening a blockbuster movie in the North American theatrical market alone was USD 34 million [average per film] last year. In most of Europe, you will be looking to spend EUR 300,000 in a big territory if you want to launch a European film in a proper manner, but you may be able to release it at half this cost – or much less - in a smaller country. So these are very significant but also very variable costs. What should be established here is that pricing further down the line from theatrical, in other forms of rights' exploitation, corresponds to differences in the cost to the rightsholders using different launch strategies in different countries. To expect uniform pricing for the licensing of films from one territory to another, would therefore ignore the reality of important cost differentials in the release of the films depending on where in the EU you are.

2.3. Timing and Territorial Scope of Release

In theory at least, pan-European collective licensing of movies might become easier to strategize if the film release patterns and dates were more coordinated within the EU. There is a relatively new approach which permits more coordination in time: it is called "Day-and-date" and refers, in fact, to two practices. One approach to Day-and-date is to release the film across all media platforms, ignoring the old release window arrangements, within a particular country. This non-sequential approach was used for the Steven Soderbergh film "Bubble" which was released on a multi-platform basis in the US. It played in the distributor's owned-and-operated cinemas the same week as it was premiered on their cable network and released on DVD and over the net.

The other approach to Day-and-date is what Hollywood does across the world on its big tentpole movies, which is to open in all the movie theatres on the same day or, more likely, over a concentrated period, typically two weeks. This is something you can only afford to do in the film business if your film has such a blatantly gigantic competitive advantage over any other releases that week anywhere in the world that the majority of the younger audience would be willing to queue round the block for it. So if you have got Spiderman 3 or Matrix 2 then you are in business. If you have anything that has less of an impact than that, you have to compete at any given time with between 10 and 15 other movie premieres within the same area. This is a phenomenon from which the music industry suffers a lot less because of the plasticity of its medium. I think we have a very long way to go before the Day-and-date approach becomes an established practice in the European film industry. This is the kind of strategy that benefits the Hollywood studios, who now have over 80 years' experience in handling their own movies across the globe. Sadly, Europe does not have such companies.

I hope these points have been useful in highlighting some of the structural impediments that make it difficult to envisage a pan-European online licensing model for film. The current business model almost dictates the fragmentation of rights because financing depends on it, initial releases are almost always un-synchronised and require different versions to be released at different times of the year, and launch costs – though always high – are very variable, which means it is legitimate that pricing for licenses would vary from one country to the next.

3. Can Independents Retain VoD Rights?

I would now like to touch on some of the points that Philippe Kern raised. The key issue which he explored is that of independent producers in Europe securing online video rights and being able to control how these are licensed and possibly also have an impact on negotiations on the revenue-sharing aspects of online earnings. All this also touches on the non-exclusivity issue which I think is a very important one for any producer looking to license movies in that new segment of the market within Europe. Now, the doctrine here is: firstly, keep your rights, and, secondly, if you do license them, license them on a non-exclusive basis. Non-exclusive deals are advised because this is an immature market and the opportunity cost of granting exclusivity on VoD does not compensate for what you would get by licensing it at the same time to other platforms.

Although it is logical to hold out for non-exclusive deals, in practice this is hampered by something that we talked about earlier in our discussion and which I think is very characteristic of the European market: it is the power of incumbent media companies, and I am referring in particular to analogue free-to-air broadcasters and pay-TV platforms which continue to be the leading financing drivers for European cinema. In determining what gets financed at the point of development (and what does not), those incumbents therefore have a lot of bargaining power at the point of negotiation for the making of the film or for the making of a programme. This enables them, effectively, if they so wish, to lock up the VoD rights very much upstream of the process, and then - to use an expression known and beloved of competition authorities - to "warehouse" those films or programmes so as to avoid any rival platform picking them up and using them to boost its own competitiveness. That is a very significant issue, and I think it challenges those who wish to bring about a united strategy for independent European film makers. I agree with the "*union fait la force*" theory presented by Philippe Kern - namely that if producers get together in a sort of agricultural cooperative system, if they build a critical mass of rights - their bargaining power with VoD licensees will increase significantly. However, the current reality is that whilst independents are free to get together at the point of distribution, each film production/financing deal is always negotiated individually; and in that format, the incumbent media companies can apply pressure to successfully wrest control of VoD licensing rights.

4. Examples of Emergent Business Models

4.1. The Cooperative Model - Three Roles in One

Let us now look at some of the emergent business models out there and ask whether they may go some way towards offering European film producers a different approach to European online licensing. I know of at least two "new kids on the block" whose models represent exciting new paradigms.

The one that is currently closest to my image of the "agricultural cooperative" is a French business called Universciné. Universciné is not just a platform, it is a three-fold proposition: (i) it is an aggregator of movies, it currently boasts 52 members in its cooperative model who all pledge and bring their movies to the venture, (ii) it is also a platform in its own right with a lot of added value - features, such as interviews with the directors, Electronic Press Kits, etc, and anything else that true film buffs might like – and (iii) it is a distributor. So it distributes on its own platform, or it makes available to the public on its own platform and also cuts licensing deals with the range of other operators on the French market, from IP-TV operators to Download-to-Rent and streaming platforms and so on. As such, because of the way this is set up, it is – if you like - growing its own fruit, selling the fruit at the farm gate and shipping the fruit all over the world, much like our cooperative.

The advantage of this strategy is that it encourages in the French producer-members of Universciné the development of a bargaining position in which they pledge online video rights to this platform before entering negotiations with the big media operators on financing for the production of the next film or the next audiovisual content. So, in a way, this is a bit like the French film author's (screenwriters and directors) approach of bringing an assignment of certain rights to their collective societies, so that these are already off the table as a matter of course when they negotiate for their hire on a new French film, for instance.

4.2. Licensing VoD Rights for a Limited Period of Time

The second applied strategy involved the UK producers looking at their relationship with Channel 4, and saying: "OK, we will grant you exclusivity, but this exclusivity is going to be on a limited basis. You are going to be allowed to run the content on your VoD platform during the lifetime of your

primary licence". The primary licence is the standard broadcast licence, or "free-to-air broadcast licence", as it is often called. For example, in the case of Channel 4, there is an agreement for a thirty days' window, during which the channel has the contractual right to make the programme available on its Video-on-Demand 4VOD platform for a while; then there is a five-months "blackout" provision, the blackout meaning either the producer is happy to let the channel run with the programme for six months effectively (subject to further payment), or it is not. In the latter case, neither Channel 4 nor the producer is allowed to exploit the product on any other VoD platform at the same time. After the six months has elapsed, the producer is free to exploit the VoD rights as he pleases.

This is what I would call a *better-than-nothing* approach. The good news about it is: whereas a primary broadcast licence would run for anything between two and five years (if it is regulated, as it is in France or the UK) or even all the way up to fifteen years or even in perpetuity, which tends to exhaust any ancillary value, this negotiated VoD window runs for a maximum of six months. Thereafter the channel can bring no pressure to bear in order to get a producer to let go of its rights for a longer period of time if the producer is unwilling.

A quick footnote on the French example: a fact about this market for rights' licensing is that the regulator has intervened historically to limit the capacity for the incumbent media companies, the large broadcasters such as TF1 or FRANCE Television to take a financial interest in secondary and ancillary rights. As a result, if you are a big gatekeeper like a broadcaster and you have pre-bought a broadcast free-to-air licence on a movie, you are allowed to take another financial interest in another segment of the ancillary market, but you cannot just buy out all ancillary rights and walk off with them. That, of course, tends to empower through regulation the sort of vision that Philippe Kern was so eloquently exposing.

4.3. Volume Matters, But Will It Suffice to Get Better Revenue Sharing Terms?

Another comment on Philippe Kern's model: I think he is right in that if 52 producers come together as a cooperative with a whole back catalogue, they are in theory going to have more bargaining power than one or two of them alone. One of the features of the BSkyB business in the UK is that operators such as BSkyB like volume, they are in the volume business, and I think VoD is going to be a volume business too. The point here with BSkyB in the old days was that a British producer could make a British film with American stars with about the same budget as films which were part of the standard output deal with Fox or MGM or Warner Brothers. If he tried to sell this film to the channel individually the same movie that would have fetched a good price, e.g. USD 1.2 million (GBP 594,281) per unit as part of a studio output deal with e.g. Paramount, would fetch, if he was lucky, GBP 200,000. So, for European independents to want to be in the volume business is good logic, to the extent that they can, because buyers prefer volume.

4.4. The Concept of Exclusivity - Will It Work Now or Later?

But, at the same time, given the state of immaturity of the VoD market, it does not necessarily follow that you can do a lot about influencing the revenue split at this point, even if you are licensing collectively either through a private venture or a collecting society. Why? Because you cannot say to an operator: "I am going to take my film to somebody else, who is going to give me better terms". Internet VoD is a very thin revenue-earner at this point; I think all the economic studies confirm this. Therefore I doubt that, currently, aggregating power on behalf of the independents is enough to influence the revenue split in any significant way. As this market matures and maybe moves towards more exclusive deals, this might change but I have my doubts about the financial success of a collective licensing model just yet.

In conclusion, whilst I believe there is true merit in asking ourselves serious questions about how to make the EU more licensing-friendly for films, a lot of structural changes will have to occur in the manner in which films are currently financed, distributed and marketed before a pan-European collective licensing model can emerge as a weighty alternative to the current business model.

The Changing Role of the User in the "Television without Frontiers" Directive

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1. Introduction

"Traditional" media regulation knew well-defined roles: media undertakings distributed a (limited) number of programmes to a mass of anonymous users, who were often also cynically referred to as "eyeballs". Regulatory intervention concentrated on the supply side. The users of audiovisual services, although a central objective of regulation, played only a very subdued role in broadcasting law, as passive receivers of a (well-regulated, hence diverse) media offer.[1]

The role of the user in audiovisual markets is changing. Selection, aggregation, and even production and distribution are no longer the privileges of broadcasters and network operators alone. Already for some time now, users have been actively involved in the content distribution chain.[2] What is different today, as compared to a decade ago, is that audiovisual markets have begun to respond to the signals from the more active user, and to develop more interactive models for the distribution of audiovisual content.

Video-on-demand services are one example. Depending on the configuration of the service, the user can choose a time (near-video-on-demand) and often even an individual film to watch (video-on-demand). Already this is quite a revolution if compared to traditional "broad-casting". More recently users can even choose among content made by other users, or produce and distribute audiovisual content themselves. Services such as YouTube, MySpace and the Dutch Tribler respond to the increasingly value-adding digital user and explore new ways to integrate her into their business models.

The changing role of users of audiovisual services might eventually shake the very base of traditional media policy. It is early days yet. It is certainly not too early, however, to become aware of changes and muse about possible implications for media law and policy. The objective of this article is to scrutinize some aspects of traditional government involvement with audiovisual media from the perspective of the changing role of the users. Aspects that will be discussed include the justification for government intervention in the first place, the image of the user, the character of intervention and the new issues that are likely to play a role in future media law and policy. The point of reference will be the revised proposal for a Directive on the Regulation of Audiovisual Media Services.[3]

1) N. Helberger, "The 'Right to Information' and Digital Broadcasting - About Monsters, Invisible Men, and the Future of European Broadcasting Regulation", 17 [2006] Entertainment Law Review, pp. 70-83.
2) See for example Y. Benkler, "The Wealth of Networks, How Social Production Transforms Markets and Freedoms", Yale Press, 2006, available at http://www.benkler.org/wonchapters.html , p. 68 ff.
3) Amended proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities ("Audiovisual media services without frontiers"), Brussels, 29 March 2007, COM(2007) 170 final, available at http://ec.europa.eu/avpolicy/docs/reg/modernisation/proposal_2005/com_2007_170_en.pdf (hereinafter "Audiovisual Media Services Directive").
Editor's note: On 11 December 2007 the Directive has been adopted. The text of Directive 2007/65/EC is available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_332/l_33220071218en00270045.pdf (hereinafter "AVMS Directive final").

2. The Changing Role of the User of Audiovisual Services

One defining characteristic of modern information markets is the growing involvement of users in the supply chain. To understand the revolutionary potential of this development for media markets, policy and law, one has to remember that interaction between users and service providers in traditional broadcasting went no further than the user switching her television set on or off, and, later, zapping from one programme to another.

2.1 From "Eyeball" to Consumer

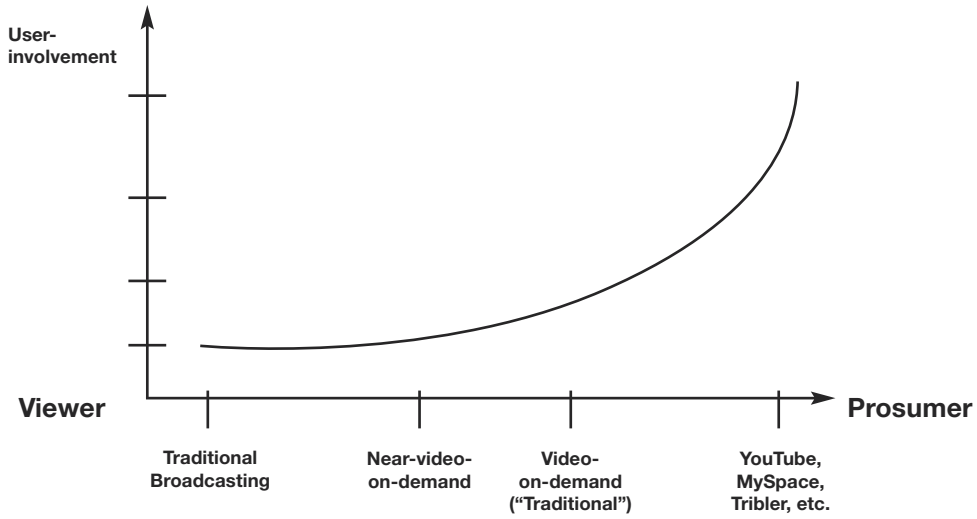
Two important technological innovations turned the audience into active market participants, in other words consumers, who purchase audiovisual content directly from service providers. These were the increase in transmission capacity through digitisation (the "end of scarcity") and the proliferation of technologies to control access to and use of content on an individualised basis. It then became possible for service providers to communicate directly with their users via return channels, to establish direct commercial relationships and to offer a choice of personalised and diversified services. As a consequence, the first commercial video on demand services arrived in the US and in Europe in the 1990s.

2.2 From Consumer to Prosumer

Meanwhile, improvements in the technological infrastructure of the Internet opened up new possibilities for information-storage, creation, and dissemination. In the emerging decentralised "architecture of participation"[4] of web 2.0, the individual nodes of the network – the users – assume functions as aggregator, diseminator, rater, storer, etc. Users are not any longer passive viewers but active consumers or rather: "prosumers".[5] The power of so called web 2.0 applications lies in aggregating the intelligence, workforce, (storage and distribution) capacities and time of users, and in maximising network effects by involving the long tail (i.e. the bulk of niche markets that are not or not primarily served by traditional media).[6] A new generation of audiovisual services seeks to integrate value created by users for users. Many of these services are still in the beta-phase, and in search of a profitable business model.[7] KPN's Shoobidoo,[8] for example, encourages users to upload video on the shoobidoo platform. Other users, so called "directors", volunteer to choose from the videos submitted the ones that fit into "their" channel. Eventually, these channels could be integrated into one of KPNs commercial TV platforms (MineTV (IPTV) or imode (mobile TV)).[9] The Dutch site ikoptv,[10] a cooperation between Dutch media "giant" Endemol and regional broadcasters, engages citizen-reporters to film and report news from their respective regions, and fill television channels with their "phonecast". Citizen-reporters are offered a mobile phone (with photo and video functions) and the opportunity to win a prize for the best report each month. Another level in the distribution chain is targeted by Tribler,[11] a service developed in cooperation with two Dutch universities, public broadcasters and the Ministry for Economic Affairs. Tribler is a P2P based community site that involves users in the distribution of audiovisual content. One user becomes the uploader to the next user. Users can build a friendster community, and engage within this community in cooperative downloading, thereby speeding up download times. "Friends" may also donate bandwidth and help someone else ("collector") in gaining a complete file.

Common to all these and other interactive services is the establishment of an individualised, more or less interactive, sometimes commercial relationship between users and service providers. The level of interaction can range from letting users choose individual contents or times, to engaging them actively in the supply chain - turning the traditional "active sender- passive receiver" model into its opposite.

4) T. O'Reilly, "What is Web 2.0. Design Patterns and Business Models for the next Generation of Stofware", O'Reilly Network, 9 March 2005, available online at www.oreillynet.com/lpt/a/6228
5) The term was coined by Alvin Toffler in his book "The Third Wave", Morrow, 1980.
6) O'Reilly 2005, *op. cit*.
7) S. Limonard, "User driven business models for digital television. Exploring the long tail for audiovisual content on TV and the internet online", B@Home 2007, available online at: https://doc.telin.nl/dscgi/ds.py/Get/File-70649/User%20driven%20business%20models%20for%20digital%20television . C. Pascu et.al, "Social computing. Implications for the EU innovation landscape", paper presented at the EuroCPR 2007 Conference "Policies for the content industries" 25-27 March 2007, Seville, Spain. Organisation for Economic Co-operation and Development (OECD), "Participative Web: user-created content", Report, DSTI/ICCP/IE(2006)7/FINAL, 14 April 2007 (OECD 2007), available online at: http://www.oecd.org/LongAbstract/0,3425,en_2649_33757_38393116_119666_1_1_1,00.html
8) http://www.shoobidoo.nl/
9) Limonard 2007, *op. cit.*, p. 70.
10) http://www.ikoptv.nl
11) https://www.tribler.org/



Graph: User involvement in audiovisual services

3. The Changing Role of Users and the Audiovisual Media Services Directive

A principal objective behind the regulation of audiovisual services is the realisation of a pluralist, diverse and qualitative outstanding media offer.[12] This is also true for European media law. According to the revised and soon-to-be-adopted Audiovisual Media Services Directive, the

> "growing importance for societies, democracy – in particular by ensuring freedom of information, diversity of opinion and media pluralism – education and culture justifies the application of specific rules to these services."[13]

The traditional role of the user in that context is that of a passive receiver and a citizen. As citizens, users are possessors of fundamental rights and political freedoms, including most prominently freedom of speech and the ability to participate in the public discourse. A major justification for government intervention derives from the state's positive obligation to set the conditions that allow users benefit from a democratic media offer that reflects the heterogeneous preferences and interests of the audience, and that acts as a platform for democratic discourse as well as entertainment and education.[14] Government involvement seems the more necessary because as passive receivers, users themselves have little influence on the media offer. As will be shown further below, media regulation targets the supply side with the implicit goal of generating a media offer that serves the interests of users.

The arrival of the active consumer challenges these established concepts in audiovisual law. Consumers' ability to actively influence the programme output, or as some call it, the "democratization of media production",[15] is one important argument against the traditional protectionist approach, which has been repeatedly criticized by legal and economic academics alike as patronizing and overly restrictive.[16] Already the arrival of pay-TV, arguably a very mild form of active involvement, caused academics to inquire whether "information on demand" is possibly all "that is essential to freedom of expression (from a constitutional viewpoint) providing users demand the right information about

12) P. Valcke, "Digitale Diversiteit", De Boek & Larcier, Brusssels, 2004; European Commission, "Media pluralism in the Member States of the European Union", Commission Staff Working Document, SEC(2007)32, Brussels, 16 January 2007; Eric Barendt, "Broadcasting Law", Clarendon Press, Oxford, 1993.

13) Recital 3 of the Audiovisual Media Services Directive and of the AVMS Directive final.

14) More about the positive obligation of states in the context of the realisation of freedom of expression, D.J. Harris, M. O'Boyle and C. Warbrick, "Law of the European Convention on Human Rights", Butterworths, London, 1995, p. 383; P. van Dijk and G.J.H. van Hoof, "Theory and Practice of the European Convention of Human Rights", Kluwer Law International, Den Haag, 1998, p. 26; A. Mowbray, "The Development of positive obligations under the European Convention of Human Rights by the European Court of Human Rights", Hart Publishing, Oxford, 2004.

15) OECD 2007, *op. cit.*, p. 35.

16) In this sense for example D. Wentzel, "*Medien im Systemvergleich. Eine ordnungsökonomische Analyse des deutschen und amerikanischen Fernsehmarktes*", *Schriften zu Ordnungsfragen der Wirtschaft*, Lucius & Lucius, Stuttgart, 2002; E. Noam, "*Der Einfluß von Markstruktur und Eintrittsschranken auf die Vielfalt der Fernsehprogramme*", in Mestmäcker (ed.), *Offene Rundfunkordnung*, Bertlesmann Stiftung, Gütersloh, 1988.

political matters."[17] How much more must the arrival of the prosumer challenge established justifications for government involvement with the media.

3.1 Scope

The changing role of the user did play a role in the revision of the "Television without Frontiers" Directive (now: Audiovisual Media Services Directive – AVMS Directive), albeit a limited one. On the one hand, the AVMS Directive opted for including interactive services (or in the terminology of the AVMS Directive: non-linear services),[18] such as video on demand, within its scope. It thereby extended media regulation and its objectives to the Internet also. On the other hand, the AVMS Directive acknowledges that a certain level of interaction between service providers and users can remove the justification for some of the - compared to other media - typically stringent rules that apply to audiovisual services. According to the AVMS Directive, "[n]on-linear services are different from linear services with regard to choice and control the user can exercise and with regard to the impact they have on society. This justifies imposing lighter regulation on non-linear services, which only have to comply with the basic rules provided for in Articles 3a to 3h."[19]

In other words, as opposed to users of traditional broadcasting services, users of video-on-demand services are expected to take greater care in minding their own interests. Individual responsibility replaces government responsibility. This also has consequences for the scope of the AVMS Directive:

According to the AVMS Directive, the more interactive and less television-like a service is, the less users can rely on public regulation of the quality of audiovisual content.[20] Still covered by the AVMS Directive are interactive services "for the viewing of programmes at the moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider".[21]

The active contribution of users of these services involves choosing from a pre-defined catalogue the item and the time at which she wishes to watch the program.

Services that include content that has been produced by "prosumers" fall outside the AVMS Directive, provided such services have no broad public impact[22] and that they are "primarily non-economic and [...] not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purpose of sharing and exchange within communities of interest".[23]

According to the wording of the AVMS Directive, services that operate on the basis of user generated content, are not subject to obligations under the Directive. A question for further research is the qualification of platforms that do operate on the basis of user generated content, but that do so for commercial purposes and/or in competition with traditional broadcasting. Services such as YouTube or MySpace are not any longer restricted to only offer lay-material. They also serve as platforms for the distribution and promotion of material that originates from professional suppliers.[24] Moreover, in preparation of the forthcoming presidential elections in the US, MySpace and YouTube play an important role in informing and dialoguing with the public. To give other examples, Shoobidoo functions as a platform for scouting new content for KPN's IPTV or mobile channels. Similarly, www.ikoptv.nl characterises itself as a "revolutionary new television programme", not as a private, non-economic website.[25] In other words, the question is whether or not it is still justified to treat user generated service platforms – to the extent that they act for commercial purposes and/or take over functions of traditional broadcasting – as purely private services and to exclude them from the scope of the Directive? Does the mere fact that the content of these services was produced by consumers and not by professional creators, already release service providers from any responsibility for the overall

17) B.M. Owen, "Economics and Freedom of Expression: Media Structure and the First Amendment", Ballinger, Cambridge 1975, p. 27.
18) Article 1 (e) of the Audiovisual Media Services Directive, Article 1 (g) AVMS Directive final.
19) Recital 28 of the Audiovisual Media Services Directive, Recital 42 AVMS Directive final has slightly altered the wording.
20) Recital 13 (a) of the Audiovisual Media Services Directive, Recital 17 AVMS Directive final.
21) Article 1 (e) of the Audiovisual Media Services Directive, Article 1 (g) AVMS Directive final.
22) Recital 13 of the Audiovisual Media Services Directive, Recital 16 AVMS Directive final.
23) Recital 13 of the Audiovisual Media Services Directive, Recital 16 AVMS Directive final.
24) See e.g. heise online, "Myspace lizensiert Hollywood-Inhalte", news report, 22 July 2007, available online at: http://www.heise.de/newsticker/meldung/93085
25) http://www.ikoptv.nl/

quality of the offer? Much will depend on the interpretation of the notion of "editorial responsibility",[26] which is used to exclude mere distributors from the scope of the Directive.[27] Another question in this context is whether the complementary liability rules of the E-Commerce Directive[28] respond to the need of users of such services for protection from harmful or otherwise undesirable content.

3.2 Image of the User

"[W]hile broadcasting is designed to benefit viewers and listeners, they neither know what they want nor where their interests lie."[29] This quote from a report on the future of the BBC from the 1980s exemplifies the traditional image of the user in broadcasting regulation. The idea that consumers do not know what they want or need resulted in a paternalistic concept, common most notably to national broadcasting laws, in which it is up to the state to decide what is needed. This can partly be explained by the fact that broadcasting was basically a "one-way-street" which made it very difficult to ascertain what consumers actually wanted and needed. Identifying the consumers' preferences and interests was left to marketing experts and advertisers.

The Audiovisual Media Services Directives introduces a new image of the user that challenges the more traditional perception. The Directive speaks about the "media-literate" user. This is a user who is "able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies."[30]

In other words, the new media-literate user of audiovisual services is a market participant who not only knows what she wants but also makes an active effort to find it (and even to produce it herself).

It is interesting to note that the characterisation of the media-literate user of audiovisual services approximates to the concept of the European "average consumer" who is "reasonably well informed and reasonably observant and circumspect".[31] This observation is supported by the fact that the Audiovisual Media Services Directive refers frequently and explicitly to the user of audiovisual services as consumer. In comparison, in the former "Television without Frontiers" Directive, the notion "consumer" appears only twice and is mainly used in the context of rules on advertising.

The AVMS Directive does not further define the prosumer, that is consumers who produce and distribute audiovisual content for other users. From the recitals of the Directive it can be concluded that the activities of the prosumer are understood as being of a purely non-commercial (semi-)private nature, generating content for the purpose of sharing and exchanging within communities of interest.[32] These activities are private in the sense that they are not considered to play a role in the realisation of public information policy goals. In the reading of the Directive, the activities of prosumers are not in competition with television broadcasters[33] – an assumption that still needs to be proven.

26) Article 1 (ab) of the Audiovisual Media Services Directive, Article 1 (c) AVMS Directive final defines "editorial responsibility" as the "exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided."
27) Recital 14a of the Audiovisual Media Services Directive, Recital 19 AVMS Directive final.
28) See Article 3 (4) of the Audiovisual Media Services Directive, Article 3 (8) AVMS Directive final, together with Articles 12 and 13 of the Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereinafter "E-Commerce Directive").
29) A. Peacock, "The Future of Public Service Broadcasting", in C. Veljanovski (ed), Freedom in Broadcasting, Institute of Economic Affairs (IEA), London, 1989, p. 53.
30) Recital 25a of the Audiovisual Media Services Directive, Recital 37 AVMS Directive final.
31) European Court of Justice, Case C-210/96, Gut Springenheide GmbH and Rudolf Tusky v. Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung, 16 July 1998, E.C.R. 1998 I-04657, para. 31; European Court of Justice, Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v. Mars GmbH, 6 July 1995, ECR 1995 I-01923, para. 24. See Recital 18 of Directive 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No. 2006/2004 of the European Parliament and of the Council ("Unfair Commercial Practices Directive") (Text with EEA relevance), OJ L 149 (11 June 2005).
32) Recital 13 of the Audiovisual Media Services Directive, Recital 16 AVMS Directive final.
33) Ibidem.

3.3 Character of Intervention

The changing perception of the user of audiovisual services also has consequences for the character of public intervention to benefit her interests. Traditionally, audiovisual laws focused on imposing a number of obligations on providers of audiovisual services: rules on short reporting, lists of important events, protection of minors, prohibition of hate speech, rules on the promotion and production of European works (as opposed to Hollywood and Bollywood content) and extensive rules on advertising. As far as interactive services are concerned, a paradigm change is on its way. First, the AVMS Directive uses a "lighter touch" approach, imposing only some of the rules that apply to traditional broadcasting services (mainly the rules on hate speech, protection of minors, and relaxed advertisement rules and obligations concerning the share of European works). In addition, the general rules on consumer protection (e.g. in the E-Commerce Directive) apply.[34] The ability to actively choose what the user is watching translates into increased personal responsibility and a reduced level of government intervention.[35] Note that it is not the principal goal – protection from harmful content and excessive advertising, access to diverse and quality content, etc. – that changes or is no longer applicable to online services,[36] but the means of its realization (self-protection instead of government intervention).

Second, the AVMS Directive seeks to empower the sovereign user, much in the tradition of consumer law empowering consumers. The Directive is devoted to the promotion of "media literacy in all sections of society".[37] According to the Directive, media-literate people will be "better able to protect themselves and their families from harmful or offensive material."[38] To this end, the Directive introduces a new obligation for all providers of audiovisual services (including broadcasting and on-demand services) to provide consumers with information on the name, address, website and email of the provider.[39] The underlying idea is to assist consumers in being responsible for their own choices by providing them with detailed information on the source of their information.[40]

Consumer information has traditionally been an important element of (European) consumer policy.[41] The primary goal of consumer information is to improve consumers' autonomy and freedom to choose.[42] The general assumption is that the provider of the service is at an advantage because he knows more about the products or services he sells than the consumer. Information asymmetries can prevent consumers from getting the deal that corresponds best with their own individual preferences and needs. Legal intervention with the goal of stimulating increased consumer information seeks to empower consumers to take care of their own needs, and to drive the market towards an offer that conforms to their preferences.

The consumer information approach in audiovisual law is new, and has not been subject to much discussion yet. Similar to consumer law, there are a number of general concerns regarding consumer information as a tool to safeguard the interests of users. These concerns include, for example, the fact that consumer information is aimed at the educated middle-class consumer, criticism from behavioural economics of the idea of the consumer as rational decision-maker, and that consumer information cannot replace initiatives to remove lock-ins and obstacles to functioning competition.[43]

With the introduction of consumer information as a tool into audiovisual law, another question arises: to what extent is informing and educating the consumer of audiovisual services sufficient to realise the public policy objectives behind media regulation (including access to a diverse and plural media offer, protection of minors and protection from harmful content, etc.)?

Initiatives to inform and educate users of audiovisual services should not obscure the fact that new forms of interactive media might lessen the need for traditional broadcasting-style public intervention.

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34) See Recital 29 and Article 3 (4) of the Audiovisual Media Services Directive, Recital 43 and Article 3 (8) AVMS Directive final.
35) See e.g. Recitals 40 and 42 of the Audiovisual Media Services Directive, Recitals 55 and 57 AVMS Directive final.
36) Compare also Recital 31 of the Audiovisual Media Services Directive, Recital 44 AVMS Directive final.
37) Recital 25a of the Audiovisual Media Services Directive, Recital 37 AVMS Directive final.
38) Ibidem.
39) In addition, e-commerce law applies, including its rules on consumer information. See Recital 29 and Article 3 (4) of the Audiovisual Media Services Directive, Recital 43 and Article 3 (8) AVMS Directive final, together with Articles 5 and 6 of the E-Commerce Directive.
40) Recital 29 of the Audiovisual Services Directive, Recital 43 AVMS Directive final.
41) See G. Howells, "The Potential and Limits of Consumer Empowerment by Information", 32 [2005] Journal of Law and Society, p. 349 352 ff, N. Reich, "Diverse Approaches to Consumer Protection Philosophy", 14 [1992] Journal of Consumer Policy, p. 257, 259.
42) Reich 1992, *op. cit.*, p. 258.
43) For a critical discussion see Howells 2005, *op. cit.*, p. 356 ff.

They could, however, trigger new problems for users of audiovisual content, e.g. in terms of search, trust and access under fair and affordable conditions.[44] Moreover, experiences from other sectors, such as the online music market, have demonstrated that the way digital content is marketed to consumers can raise a host of new problems that affect not only consumers' economic interests, but also fundamental communication rights (privacy, freedom of speech) and public, social and individual interests in the media.[45] It remains to be seen whether the application of the general rules of e-commerce law to the audiovisual sector is sufficient to respond to the needs of users of audiovisual content and public policy objectives for this sector.

Finally, a question on which the AVMS Directive is silent is the possible contribution of active users to the realisation of the public interest objectives behind audiovisual service regulation. Empowered by new technologies, users could actively contribute to public information policy goals, such as the realisation of a pluralist and diverse information offer, the protection from harmful content, the evaluation and findability of quality content, the removal of capacity problems, the representation of different cultures and minorities in Europe, etc. To the extent that the Directive envisages an active contribution from consumers, their contribution to the realization of the goals of the Directive is restricted to the private sphere and consists of protecting themselves and their families through informed choices. Future technological and market developments will prove whether traditional service provider-user structures will prevail, or if the time is finally ripe for Brecht's vision of broadcasting as a means of communication to materialise, that is to:

> "change this apparatus over from distribution to communication. The radio would be the finest possible communication apparatus in public life, a vast network of pipes. That is to say, it would be if it knew how to receive as well as to transmit, how to let the listener speak as well as hear, how to bring him into a relationship instead of isolating him. On this principle the radio should step out of the supply business and organize its listeners as suppliers."

Brecht was one of the first European intellectuals to advocate the interactive and hence truly democratic potential of broadcasting media.[46] It will be the task for media policy to consider if and, if so, how the active contribution of users to making audiovisual markets more diverse, more accessible, more interesting, etc. could be encouraged and dealt with.

3.4 Conclusion

Changes in the role of the user of audiovisual services have also entered the Audiovisual Media Services Directive and resulted in a levelled approach of public intervention. The regulation of audiovisual services with active user involvement is characterised by a lighter touch approach and the phasing out of government responsibility to the extent that the individual ability of audiovisual users to protect themselves from harmful or otherwise undesired content increases. The Directive also emphasises consumer information and education as new elements of media policy, and imposes new information obligations on providers of audiovisual services. These initiatives are directed at the "media-literate" user, that is the sovereign user who is able to mind his own interests, as opposed to the passive receipient of traditional media law.

The review of the original "Television without Frontiers" Directive, though acknowledging in principle changes in the role of users, missed the chance of tackling in this context some more fundamental questions. As far as the changing role of users is concerned, the AVMS Directive is in the first place concerned with the (reduced) application of traditional media rules to new services. The question remains whether the changing role of users, also in their commercial relationship with providers of audiovisual media services, gives rise to new threats and, possibly, need for government involvement. Further research is also needed to decide what the full (positive and negative) implications of a more active user are for the activities of established players in this sector. Also, the contrary question of how to deal with the contribution of users to the realisation of the general objectives of public information policy is one that the time seems ripe for discussion.

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44) N. Helberger, "Controlling access to content. Regulating Conditional Access in Digital Broadcasting", Kluwer Law International, Den Haag, 2006, p. 274 ff..

45) See N. Helberger, N. Dufft, S. van Gompel, K. Kerényi, B. Krings, R. Lambers, C. Orwat en U. Riehm, "Digital Rights Management and Consumer Acceptability: A Multi-Disciplinary Discussion of Consumer Concerns and Expectations",State-of-the-Art Report, INDICARE, December 2004, available online at: www.indicare.org

46) B. Brecht, "*Der Rundfunk als Kommunikationsapparat. Rede über die Funktion des Rundfunks.*", in: B. Brecht, Werke, Suhrkamp, Berlin/Frankfurt/M, 1992, Vol. 21, S. 553 (in German, the English translation is available at: http://home.freeuk.net/lemmaesthetics/brecht1.htm).

The Position of Public Service Broadcasters

Gregor Wichert
Zweites Deutsches Fernsehen (ZDF)

Copyright as a legal concept has to keep up with technological development of the media. So, legislation has to safeguard the role of copyright law as an appropriate tool in today's dynamically changing media landscape. To achieve this goal, copyright should not only be designed to be a weapon against piracy. It must also enable honest players to obtain fair and open access to all the rights that they require in order to provide their services in the digitised environment. Broadband cable, Internet, 3G, IPTV are the keywords that turn the focus of attention towards the issues to be settled between business partners, competitors and users.

On 31 March 2006 an EBU Copyright Symposium, attended by over 160 participants, held a thorough debate about broadcasters' immediate needs as regards copyright in a digitised and globalised environment. A document[1] presented during the conference highlights the core demands that are quoted below:

1. Effective Collective Rights Management

(1) One-stop-shop principle for rights administered by collecting societies

Collecting societies operating in the field of music should continue to be in a position to grant licences for the entire world repertory, for both off-line and on-line services. With particular regard to phonograms, producers should be obliged to entrust their rights to collecting societies, so that the latter are in a position to grant licences in parallel with those of authors' societies.

(2) Incidental reproduction

Where the law entitles broadcasters to broadcast commercial phonograms, subject to payment of equitable remuneration, any incidental reproduction of the phonogram made for the sole purpose of facilitating the broadcast and which has no economic relevance of its own must be regarded as covered by the entitlement to broadcast (rather than giving rise to a right of authorization/prohibition, which could, in fact, be used to thwart that very entitlement).

(3) Good governance of collecting societies

Whereas collecting societies remain an effective and indispensable tool for permitting the use of rights, it must be ensured, by appropriate means, that they cannot abuse their dominant position.

1) Available at www.ebu.ch/CMSimages/en/needs_03_05_en_tcm6-43777.pdf

2. Simplified Rights Clearance

(4) On-line delivery of broadcasts (streaming/simulcasting/on-demand)

As in the case of traditional broadcasting, and as expressly recognized by the EC Sat-Cab Directive for the comparable field of satellite broadcasting (where the signal can be received simultaneously in a large number of countries), the *applicable law* can only be that of the country where the act of streaming/simulcasting takes place (as opposed to where the programmes can be received, i.e. in principle all countries throughout the world).

The same must apply with regard to the right of making available, which, for broadcasters, becomes particularly relevant where they offer their audiences (licence-fee payers) the possibility of time-shifted on-line access to their programmes.

(5) Simultaneous retransmission of broadcasts over any "new media" platforms

The established system of simplified clearance of cable distribution rights should therefore be extended to comparable cases of retransmission of broadcasts by commercial third-party operators over wire, mobile and other wireless "new media" platforms, such as broadband (e.g. DSL), mobile telephony and digital terrestrial or satellite platforms, provided that such retransmission takes place simultaneously, completely and without any modification and, in particular, provided that the individual subscribers to the retransmission service are clearly identifiable and that they are charged by the third-party operator for access to the programme service.

(6) Rights in broadcasters' own archive programmes

There is no limit to legal imagination in this field, as long as legislative means are introduced which ensure that broadcasters are entitled to make their archive programmes (i.e. their own productions and commissioned productions fully financed by them) available to their audiences subject, where applicable, to fair remuneration.

3. Balance of Interests: Protection as well Openness

(7) WIPO Broadcasters' Treaty

Adoption of this Treaty is overdue, to protect broadcasters against theft of their programme-carrying signals and the simultaneous or deferred use thereof by any means, including distribution via "new media" platforms. Broadcasters also need updated protection to be able to reply positively to requests for legitimate use of their signals, for which there is a constantly growing demand as a result of the digital revolution.

(8) Digital Rights Management

Future DRM systems must be acceptable to all stakeholders, including consumers, and must respect basic principles of copyright law. Moreover, in order to avoid "gatekeeping" effects in new media services, the abuse of proprietary rights - whether of copyright or of any other nature - should be prevented. DRM systems must keep digital reception technology attractive for all viewers and listeners, via open and interoperable standards, and provide equal access for broadcasters to all media platforms.

Whereas these eight points equally describe the demands of commercial and public service broadcasters, the latter have specific legal obligations. Nevertheless public service broadcasters have to play a fundamental role in the new digitised and globalised environment. In this respect "public service" has two dimensions: Firstly, in terms of technical coverage which means that ideally every household should be in a position to receive the programme services; secondly, in terms of social cohesion which means that all groups or sectors of society must be served by the public service (rich and poor, old and young, educated or less educated, those with certain particular interests whether they are religious, cultural, sportive or others). Public broadcasters ensure that all citizens can participate in the information society and that minorities have adequate access to offers independent of existing business models. They offer trustworthy guidance and are able to compensate for market failure.

To safeguard the specific public service character of new media activities, including VoD offers, Germany's public service broadcasters will carry out a three-step procedure:

- Firstly, public service broadcasters will be required to argue that such offer is covered by the public service remit and therefore serves the democratic, social and cultural needs of German society.
- Secondly, the offer has to contribute to editorial competition in a qualitative way, and
- Thirdly, the broadcasters have to specify the financial impact of the new service.

Third parties will have the opportunity to put forward their point of view. This procedure will be established by law in 2009.

Current Issues under French Law

European Audiovisual Observatory

1. Cases against Video Sharing Services

1.1. Several decisions have been issued by French courts recently in cases brought against Google Video, Dailymotion and other operators of "video sharing services".

These suits have been brought by film producers and authors, and involve the posting of cinematographic films, documentary films and televisions programmes on these services.

The plaintiffs claim that the unauthorized distributions of their works on these platforms are copyright infringements, and that these operators act as publishers.

The defendants claim that their activity is to be classified as a hosting activity, and claim the benefit of the limitation of liability instituted by Article 6(I)(2) of the *Loi pour la confiance dans l'économie numérique* (Law on electronic commerce), which repeats the provisions of Article 14 of the Electronic Commerce Directive.

1.2. The Court of First Instance of Paris gave a first decision against Google Video in the form of an interlocutory injunction granted by the *Juge de la Mise en Etat* (Judge in charge of pre-trial proceedings) dated 16 May 2007, ordering Google Video not to make available on its service a documentary film, subject to a fine of EUR 10,000 for each further posting, pending trial.

The plaintiffs had asked the judge for this interlocutory injunction following repetition of the alleged infringing acts during pre-trial.

The judge did not adjudicate on the question of whether or not Google Video may benefit from the exemption from liability for hosting services, which is at the core of the dispute, and considered that it would be for the trial judge to characterize the service.

However, the judge held that even if, as Google contended, its activity was to be classified as a hosting activity, the limitation of liability instituted for these services is conditional on the fact that the host does not have actual knowledge of the illegal activity or information and that upon obtaining such knowledge, the host acts expeditiously to remove or to disable access to the information. The judge held that Google, which was informed of the illegal distribution of the documentary on its service, cannot contend that it took all the necessary measures to prevent access to it.

The Judge further indicated that the fact that the documentary was posted by different users was irrelevant.

1.3. A second decision was issued by another chamber of the same Court against the operator of MySpace on 22 June 2007. This case involved the unauthorized posting of a video of a sketch on MySpace. Although the case was an application for an interlocutory injunction similar to the one concerning Google, this chamber adopted a different approach and clearly characterized MySpace as a publisher, and not as a mere provider of hosting services:

> "Whereas if it is undeniable that the defendant company exercises technical functions as a provider of hosting services, it does not restrict [its activities] to this technical function; indeed, by imposing a structure of presentation by frames, made available for the hosted material, and by distributing at the time of each viewing, advertising from which it obviously benefits, it has the status of publisher and must assume the corresponding liabilities".

The reasoning is strikingly similar to that adopted recently by the Court of Appeal of Paris in its decision of 7 June 2007 against Tiscali, in a case involving the unauthorized posting of cartoons by a subscriber on a personal space provided by Tiscali.

1.4. A few weeks later the chamber of the Court of First Instance due to rule on the Google case issued the first decision on the merits in another case involving video sharing services. This case concerns the sharing of a cinematographic film on the service Dailymotion. In its decision of 13 July 2007, the Court decided against Dailymotion. In its judgment, it considered that Dailymotion was not a publisher because the videos were provided by the users themselves. This implies that the chamber characterized Dailymotion as a provider of hosting services. However the Court considered that, in its capacity as a provider of hosting services, Dailymotion should have had knowledge of facts and circumstances which should have led it to believe that illegal videos were being offered online via its service. Consequently, it was held liable for this infringement. The Court ordered Dailymotion to pay EUR 13,000 in damages to the producer and EUR 10,000 to the exclusive distributor of the film, and to publish the Court's decision on the Dailymotion website. The decision has been appealed.

On 19 October 2007 the same Court issued a similar judgment against Google Video. Applying the same reasoning, it also characterized Google Video as a mere provider of hosting services.

The position adopted by the Court of First Instance of Paris results in the exclusion of liability for the first act of making a work available on these services. However the standard liability for infringement seems to re-apply should the infringing act be repeated after the service operator has been duely informed, even in cases where another user made the new posting.

1.5. At least one other decision against Google Video is expected soon from the Court of Commerce of Paris.

2. Industry Agreements / Compulsory Collective Administration

2.1. In 1999, 2002 and 2004 the French audiovisual rights collecting society SACD concluded agreements with certain professional organisations representing producers concerning the exploitation of cinematographic works on VoD (the "VoD Agreements").

These VoD Agreements provide for a "minimum remuneration " for authors for VoD exploitation of their works, to be collected directly by the SACD from VoD services. This remuneration amounts, for authors as a group, to 1.75% of the price paid by the public to access the works distributed.

In order to achieve a uniform application of this mechanism, the VoD Agreements demand that contracts entered into between producers and authors contain a reference to the VoD Agreements:

> "The assignment by the author to the producer of the right to exploit the work by means of telecommunication allowing the public to have access to the work subject to the payment of a specific ("individualized") price, and in particular by pay-per-view and video on demand, is made under the conditions set forth in the agreement dated 12 October 1999 between the SACD and the professional organizations of producers."[1]

In addition, the VoD Agreements provide that the above clause "will be an integral part of contracts entered into before the agreement", unless these contracts expressly assign VoD rights against a corresponding remuneration.

2.2. The Copyright Law of 1 August 2006 inserted in Article L.132-25 of the French IP Code a new paragraph, which allows the minister responsible to extend by decree agreements on the remuneration of authors entered into by collecting and authors' societies and representative organisations of the audiovisual sector to apply to all "interested actors" of the sector concerned:

> "The agreements relating to the remuneration of authors entered into between the professional organizations of authors or the collecting societies mentioned in Title II of Book III and the organizations representative of a sector of activity can be made compulsory for all the interested actors ("intéressés") of the concerned sector of activity by decree of the Ministry in charge of culture".[2]

In application of this text the Minister of culture and communications on 15 February 2007 adopted a decree, which extends the VoD Agreements, without further specification. The decree reads:

> "The provisions of the agreements of 12 April 1999, 5 February 2002, 12 April 2002 and 17 February 2004, concerning the remuneration of authors of cinematographic and audiovisual works in case of exploitation of these works by any mode of electronic communication allowing the public to have access to it subject to a specific price, in particular through pay-per-view and video on demand, are made compulsory for all undertakings in the sector of cinematographic and audiovisual production".[3]

2.3. The decree is currently under challenge by a professional organisation of talent agents. The grounds for challenge concern, *inter alia*:

- An alleged compulsory assignment of VoD rights (for contracts entered into before entry into force of the VoD agreements) – issue of compatibility with the Berne Convention and EC Law raised.
- The compulsory collective administration of the VoD rights – issue of compatibility with the Berne Convention and EC Law raised.
- The modification of existing agreements.
- The extension of the scheme to non-SACD Members.
- Competition issues (exclusion of individual administration by authors and their agents).

1) "*La cession par l'auteur au producteur du droit d'exploiter l'œuvre par tout moyen de télécommunication permettant au public d'y avoir accès moyennant le paiement d'un prix individualisé, et notamment en pay per view et vidéo à la demande, lui est consenti aux conditions prévues par le protocole en date du 12 octobre 1999 signé entre la SACD et les organisations professionnelles de producteurs.*"

2) "*Les accords relatifs à la rémunération des auteurs conclus entre les organismes professionnels d'auteurs ou les sociétés de perception et de répartition des droits mentionnées au titre II du livre III et les organisations représentatives d'un secteur d'activité peuvent être rendus obligatoires à l'ensemble des intéressés du secteur d'activité concerné par arrêté du ministre chargé de la culture.*"

3) "*Sont rendues obligatoires, pour toute entreprise du secteur de la production cinématographique et pour toute entreprise du secteur de la production audiovisuelle, les stipulations du protocole d'accord du 12 avril 1999, complété par les protocoles d'accord des 5 février 2002, 12 avril 2002 et 17 février 2004, concernant la rémunération des auteurs d'œuvres cinématographiques et d'oeuvres audiovisuelles en cas d'exploitation de ces oeuvres par tout procédé de communication électronique permettant au public d'y avoir accès moyennant un prix individualisé, notamment en paiement à la séance et en vidéo à la demande.*"

OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
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Ministère de la Culture et de la Communication
Direction du développement des médias

Video on Demand in Europe

This report provides a comprehensive picture of Video on Demand in 24 European countries as of early 2007 and includes descriptions of more than 150 operational services.

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- **Is there a predominant model?**
- **Which are the emerging trends in VoD?**
- **Does VoD imply change in film and TV landscapes?**
- **What are the current business strategies of the main VoD players in Europe?**

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- Technical conditions of VoD
- Business models for VoD
- Regulation
- The position of VoD within the film and audiovisual industry
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Each country chapter contains:

- An overview of the national audiovisual landscape
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- European trends
- Establishing transparency norms and indicators

More than 150 VoD services from the 24 European countries are covered.

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