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Digitisation and Online Exploitation of Broadcasters' Archives

IRIS
Special

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Digitisation and Online Exploitation of Broadcasters' Archives

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**Digitisation
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Published by the European Audiovisual Observatory

On 5 November 2010, Commissioner Neelie Kroes spoke – not for the first time – on the opportunities that digitisation of cultural works offer to artists, the general public, the question of cultural diversity and Europe as such.¹ Forward looking, she pointed out that the variety of copyright laws could be a potential stumbling block for using these opportunities and announced that “Instead of a dysfunctional system based on a series of cultural Berlin walls,...” she wanted “...a return to sense.”

In her speech she also explained what, in her view, makes the system dysfunctional:

“Take for instance copyright. For 200 years, it has proved a powerful way to remunerate our artists and to build our creative industries. But copyright is not an end in itself. Copyright exists to ensure that artists will continue to create. Yet we see more and more often that it is not respected. In some sectors, the levels of piracy demand that we ask ourselves what are we doing wrong. We must ensure that copyright serves as a building block, not a stumbling block.

Look at the situation of those trying to digitise cultural works. Europeana, the online portal of libraries, museums and archives in Europe, is one key example. What a digital wonder this is: a single access point for cultural treasures that would otherwise be difficult to access, hidden or even forgotten.

Will this 12 million-strong collection of books, pictures, maps, music pieces and videos stall because copyright gets in the way? I hope not. But when it comes to 20th century materials, even to digitise and publish orphan works and out-of-distribution works, we have a large problem indeed. Europeana could be condemned to be a niche player rather than a world leader if it cannot be granted licenses and share the full catalogue of written and audio-visual material held in our cultural institutions. [...]

1) Neelie Kroes, European Commission Vice-President, Speech/10/619 on “A digital world of opportunities” given on 5 November 2010 at the Forum d'Avignon - Les rencontres internationales de la culture, de l'économie et des medias, Reference: available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/619&format=HTML&aged=0&language=EN&guiLanguage=en> Among others, she stated: “My goal, in promoting cultural diversity and content adapted to the digital age, is for European creativity to be even stronger. Europe has boundless cultural wealth to offer its citizens, and indeed to the world. Europe is and must remain a global cultural force.”

Today our fragmented copyright system is ill-adapted to the real essence of art, which has no frontiers. Instead, that system has ended up giving a more prominent role to intermediaries than to artists. It irritates the public who often cannot access what artists want to offer and leaves a vacuum which is served by illegal content, depriving the artists of their well deserved remuneration.”

In Europe, many broadcasters, especially those in the public service category, possess a wealth of cultural works in their archives, including self-/co-produced or commissioned audiovisual works. Many broadcasters are keen to digitise them in order to have them available for traditional – but now digitised - broadcasting services but also and increasingly so for their latest non-linear services.

As the European Commissioner rightfully reminds us, digitisation projects can turn out to be costly and time consuming mainly because of the need to clear copyrights. This challenge might even render a whole undertaking impossible. Exactly because of this, is it very important to understand what aspects of the legal field of copyright make rights clearance so difficult and how these difficulties could best be solved. As a matter of fact despite some harmonization through EU directives, copyright is still a national domain and as a result of this we have as many different copyright laws as we have states in Europe. But is this the weightiest problem as we are often told as well as the main stumbling block especially for broadcasters' archives?

The following thoughts and questions could serve as a crosscheck:

- if we were to accept that all broadcasters' archives in Europe would be subject to one single copyright system, would this system be likely to offer solutions for uses that did not exist at the time when the system was established? Would such a system offer solutions covering tomorrow's technology and, if so, what would they look like?
- Let us further concede, *de facto*, that the mere magnitude of rights that exist for audiovisual works and that need for clearance under no matter what copyright regime poses a huge challenge. What, then, does this mean for the struggle to find fair and efficient ways to deal with orphan works? How can the interest of the public in seeing these works and the interest of the media service providers to offer them online be reconciled with the interest of rightsholders to be remunerated or even not show their works at all?
- What are the other reasons that might account for, or at least contribute to, the difficulties in the digitisation of broadcasters' archives in a legally correct manner? Might language barriers, cultural preferences or financing models play a role? Do we know enough about the market without frontiers that we seek to establish? Is there a demand for European-wide accessible archives and services?
- If we had a copyright system that facilitated the establishment of European-wide exploitable digital archives, how would we deal specifically with the archives of public service broadcasters? Who would have the right to access these archives and what would be the reasonable conditions of access and use that the legal framework could stipulate? Does the fact that archives of public service broadcasters were established with public money generate an obligation to open them to competitors or the public? Does it matter that the citizens of the country where the public service broadcaster in question is established have provided the financing of these works?
- The main function of copyright law is to protect rightsholders and to incite creativity. If we assume that consumers ask to remove copyright barriers that stand in the way of desired European-wide services, would rightsholders agree? And if so, how much copyright

protection and contractual freedom would they be willing to give up and in exchange for what? At what point would the creative forces loose their interest to create new works because of the lack of copyright protection?

Hence, where the statements of Commissioner Kroes take certain points as being a foregone conclusion, this IRIS Special starts by raising the basic questions and indeed goes further.

In line with the general policy of the European Audiovisual Observatory, this publications seeks to inform its readership on this topic, given that the discussion about the digitisation and online exploitation of audiovisual works is of great importance to the audiovisual sector and it matters that policy and lawmakers take informed decisions. This IRIS Special very concretely contributes to the dialogue about digitisation and exploitation of cultural works that Commissioner Kroes called for. It does so by presenting the many facets of the copyright and competition law issues that should be raised even when looking only at one well-defined portion of the cultural works whose accessibility is at stake – i.e., the broadcasters' archives.

The publication starts with a general overview about the pertinent copyright questions. This first article explains where and how copyright may generally impact the digitisation and online exploitation of archives.

The following articles introduce four different examples of applying the law in archiving practice. The first example concerns the Archive's Rights Data Collection System of the Austrian public service broadcaster ORF. Possibly the most amazing aspect of this system is the fact that, despite its potential to be a role model of forward looking arrangements for rights clearance and registration of existing archive material (at least for comparable settings) it has apparently attracted little attention. The second example takes us to the very specific legal framework for archives containing "state socialist heritage" including the archives of state-owned public service media companies. Hungary is not only struggling to come to terms with the legal framework but also the practical arrangements for the digitisation of broadcasters' archives. The third example takes us to the kind of project that states might launch if they wish to systematically digitise past and future audiovisual material that they consider to be part of their national cultural heritage. The responsibilities of the Netherlands Institute for Sound and Vision include the Dutch public broadcasters' archive. The article explains in detail the comprehensive work of the Institute thereby highlighting its cooperation with broadcasters. Among others this cooperation resulted in a significant reduction of the orphan works problem. The fourth example explains the system that the BBC introduced to manage the rights clearance aspects for the digitising of its broadcasting archive. The information about the size of the BBC archive and related thereto the immense manpower needed for rights administration are very telling as are the explanations concerning the strategies for making even more archived content available in the future.

The last two examples, in particular, illustrate the great challenge raised by the lack of information on rightsholders, the emergence of digital copyrights and the application of "old" rules or "traditional" contractual arrangements to "new" business models.

In order to further complicate an already demanding intellectual exercise, the next article adds a distinct but inseparable copyright battlefield – the collective management of music rights in the case of the online exploitation of television archives. The merit of this text is to explain how copyright clearance works for music rights on the continent after the paradigm shift introduced by the 2005 Music Online Recommendation of the European Commission and how the

system is different for Anglo-American repertoires. Both approaches may matter for clearing the music rights in archived films and should therefore enter the discussion.

The archives of public service broadcasters are often very rich in material. In particular, major public service broadcasters such as the BBC, France Télévisions and the ARD or ZDF used public money to produce, co-produce and commission audiovisual works. Furthermore they were present from the very beginning of television. Accordingly, the archives of public service broadcasters are of considerable economic value and objects of desire not only for the general public but also for those who entered the scene only later, namely the commercial broadcasters. This gives enough food for the competition of law and policy questions raised in a further article featured in this IRIS Special.

The three following articles discuss in detail the copyright issues concerning cross-border exploitation. Starting with a look at the restrictions caused by the territoriality of copyrights and the ways copyrights may be used, moving on to judicial and legislative responses, the first article concludes with proposals for possible solutions to overcome territoriality in the specific case of broadcasters' archives. The next two articles discuss the pros and cons of the solutions for cross-border online exploitation of broadcasters' archives thereby emphasizing the goal of an internal market, on the one hand, and the rightsholders perspective, on the other.

With the exception of the articles on the ORF Archive's Rights Data Collection System and the Audiovisual Archives in Hungary, all other texts are based on presentations given at the workshop which the European Audiovisual Observatory organized and held jointly with the Institute for Information Law (IViR) on 24 April 2010 in Amsterdam. The participants had a full day to share views and discuss the questions raised by the presentations. The summary of this exchange is contained in the last contribution to this IRIS Special as the grand finale.

In addition to the authors of this IRIS Special, it is thanks to the expertise, knowledge and enthusiasm of the workshop participants that the Observatory can release this IRIS Special. We are grateful to Javier Aragonés (Suárez de la Dehesa, Attorneys-at-Law), Pierre-Jean Benghozi (Pôle de recherche en économie et gestion – PREG), Cécile Despringre (Society of Audiovisual Authors – SAA), Klaus Hansen (European Coordination of Independent Producers – CEPI), Christian Hauptmann (RTL group Luxembourg, representing the Association of Commercial Television in Europe – ACTE), Pranvera Këllezi (European Broadcasting Union – EBU), Rob Kirkham (BBC Vision), Dávid Kitzinger (Hungary National Audiovisual Archive/John von Neumann Digital Library and Multimedia Centre), Michael Kühn (Norddeutscher Rundfunk – NDR), Mieke Lauwers (Project Schoonschip – Beeld en Geluid), Alfredo dos Santos Gil (Nederlandse Publieke Omroep – NPO), Alexander Scheuer (Institute of European Media Law), Adrian Sterling (Queen Mary Intellectual Property Research Institute, University of London), Harald Trettenbrein (European Commission, DG InfoSoc and Media), Stefan Ventroni (Poll Strasser Ventroni Feyock, Attorneys-at-Law), Hanneke Verschuur (Stichting Lira), Anna Vondracek (KEA European Affairs) and Frédéric Young (Société des auteurs et compositeurs dramatiques – SACD) for all their contributions. Gabriela Krassnigg-Kulhavy (Austrian Broadcasting Corporation, Department for legal affairs and international relations) deserves the credit for having drawn our attention to the Austrian model and the related written contribution.

Obviously the Institute for Information Law (IViR) supported and drove this project in various valuable ways: Bernt Hugenholtz made a presentation and written contribution, Kim de Beer managed the difficult task of summarizing the workshop discussion, Lucie Guibault guided

the workshop as chair, and Anja Dobbelsteen looked after the workshop logistics. Even more significant is the input of Christina Angelopoulos and Stef van Gompel with whom we worked out the concept for the workshop and selected its participants. In addition they are co-editors for this publication. Last but not least, a lot of work on the content of the workshop and the publication was also done by Francisco Javier Cabrera Blázquez, analyst in the Observatory's department for legal information. He too participated in the workshop.

Strasbourg, December 2010

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Broadcasters' Archives – National, International and Regional Copyright Aspects

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I. Broadcasters' archives

In this overview the subject matter under consideration is archived material held by broadcasters (whether public service or commercial), including manuscripts, tapes and disks of previously broadcast material. The services provided by broadcasters are assumed here to include online availability of selected programmes.

Broadly speaking the rights here considered are those of copyright and related rights. Most countries of the world (including all Member States of the Berne Union) must, by virtue of the applicable international instruments (see below II.), protect original literary, dramatic, musical and artistic works against unauthorised copying and communication to the public and must also grant protection of "moral rights" in such works, that is, the rights of recognition of authorship and protection of the integrity of the work against distortion, mutilation etc. In addition, many countries protect related (or "neighbouring") rights, that is, the rights of performers, sound and film recording producers and broadcasting organisations against unauthorised use of their respective performances, recordings and broadcasts.²

Copying of protected subject matter may be by traditional means (e.g. printing, the making of films or sound recordings) or by digital processes.

Since a great deal of the material used by broadcasters will be protected by copyright or related rights, the obtaining of the necessary permissions for the initial live broadcast of an item of protected subject matter may be obtained directly from the respective rightsholder or from a collecting society (see VII. and VIII. below).

For the purpose of this overview it is assumed that the necessary permission for the initial broadcast has been obtained by the broadcaster and that the broadcaster has retained a copy of the broadcast containing the broadcast item in its archives, all with the permission of the respective rightsholder or rightsholders.

1) © Adrian Sterling 2010. This text is a summary of the address given by the author at the Expert Workshop held by the Institute for Information Law, University of Amsterdam, on 24 April 2010.

2) For general description of the rights accorded by copyright and related rights, see J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, 3rd edition 2008) ("WCL") (online updates available at: <http://www.sweetandmaxwell.co.uk/wcl>).

It should be borne in mind that a single item of transmitted material, such as a sound or audiovisual recording, may embrace a multitude of rights, e.g. those of copying, and communication to the public, in the respective integers of the recording (original literary, dramatic, musical or artistic works, performance, recording, etc.) and moral rights of authors and performers. Furthermore, these rights may be owned by different persons in different countries (apart from moral rights where the respective author or performer will be the rightsholder).

In sum, the challenges facing broadcasters in relation to the use of archived material include:

- assessment of the copyright/related rights status of each component element in each item to be re-broadcast;
- identification of the relevant rightsholders;
- obtainability of licences for copying and communication to the public of each item involved as regards each country of transmission and reception; and
- conformity to requirements of observing moral rights.

In the Internet context, making protected material available on demand online is, by virtue of the WIPO Treaties 1996, part of the right of communication to the public. A particular challenge therefore arises in relation to such use of protected material, given the global nature of Internet communication.

A major difficulty in the application of the on demand online availability right is that there is no international agreement as to who precisely makes available online or where such making available takes place (country of initiation of signal, countries of communication transmission, countries of reception or one or more of these). Consequently different legal situations may apply in different countries in this respect.³

II. Applicable law

For the purpose of this overview it is assumed that the broadcasting stations involved are located in countries which are bound by the Berne Convention (1971) ("Berne"), Rome Convention (1961), TRIPs Agreement (1994), WIPO Copyright Treaty (1996) ("WCT") and WIPO Performances and Phonograms Treaty (1996) ("WPPT").⁴ The beneficiaries here considered are authors of works (in the sense of Article 2 of Berne), performers and sound recording producers. Questions concerning protection of other rights, such as design rights, semiconductor topography rights and rights of database makers and broadcasters, are not considered here.

The relevant copyright and related rights involved in the use of archived material are, as respectively applicable, moral rights (including those of attribution and preservation of integrity of work or performance) and economic rights (including those of reproduction, translation, adaptation, distribution of copies and communication to the public (including on demand online availability in terms of WCT Article 8, WPPT Articles 10, 14)). There may be additional rights under the applicable national laws.

III. Transmissions in broadcasting and by making available on demand

The different situations regarding local transmissions (i.e. those destined for reception in the country of initial transmission) and cross-border transmissions need to be taken into account. While local transmissions need the permission of the respective rightsholders for the country concerned, permission for the re-use of protected archived material in cross-border transmissions needs to be considered in the light of all the relevant laws involved, including in this context the provisions of regional law, for example that of the European Union and that applying in accordance with the North

3) For a detailed description of the problems in this area, see WCL, Chapter 13.

4) For description of these instruments and membership details, see WCL Chapters 17-24 and paras 40.01-40.03. See also III. below.

American Free Trade Agreement (NAFTA) (covering Canada, Mexico and the United States of America) and the Cartagena Agreement (signatories: Bolivia, Colombia, Ecuador, Peru and Venezuela).⁵

IV. Territorial division of rights

It is the common practice of publishers and other rightsholders to assign rights or license the exercise of rights to different persons in different territories, so that, for instance as regards a particular work, the reproduction right may belong to one person and the communication right (whether covering broadcasting or making available on demand online) to another person in the same territory.

Furthermore, there is the difficulty of determining the scope of assigned or licensed rights, e.g. whether the rights licensed in relation to initial and archive transmissions embrace both broadcasting and making available on demand online.

V. Identification of rightsholders

Rightsholders may change during the period of archiving and the identification or tracing of the relevant rightsholder may be difficult or not possible. The problems of identification and tracing arise particularly in the case of orphan material, that is where the rightsholder as regards the respective moral or economic rights in the subject matter involved is unidentifiable or untraceable, such subject matter constituting "orphan material" (not being limited to works, but also embracing performances, sound and film recordings, broadcasts and databases).

National systems regarding licensing of orphan material include the following:

- Canada (licensing through the Copyright Board)
- Japan (licensing through the Agency for Cultural Affairs)
- Scandinavia (extended collective licence system)

In the UK, Clause 43 of the Digital Economy Bill 2009 gave the Secretary of State power to grant (under various conditions) permission for individuals and collecting societies to license the use of orphan works. The proposal regarding licensing of orphan works emanated from the UK Intellectual Property Office, which took into account (expanding, and not following on all points) the proposal of the British Copyright Council (extended collective licensing by collecting societies; application to Copyright Tribunal where required licence not available through collecting society). Though supported by many rightsholders, the proposal was (following questions arising as to the government's proposal for application of extended collective licensing to non-orphan works, as well as orphan works, and other aspects of the proposal) dropped from the Bill at Committee Stage in the House of Commons on 6 April 2010. On 8 April 2010 the Bill as thus amended was passed into law as the Digital Economy Act 2010.⁶

5) Note the Austrian cases *Schott v. Universal Edition* ("Direct Satellite Broadcasting"), OLG Vienna, 30 November 1989: (1990) G.R.U.R. Int. 537 (law of country of intended distribution applies) and "*Tele-Uno*", OLG Graz, 6 December 1990: (1991) G.R.U.R. Int. 386; OGH, 28 May 1991: (1991) G.R.U.R. Int. 920 (unauthorised transmission from abroad received in Austria breached transmission right under Austrian Author's Right Law) and the French Case *Radio Monte Carlo v. Syndicat National de l'Edition Phonographique* (SNEP), CA Paris, 19 December 1989, (1990) 144 R.I.D.A. 215 (applicable law in case of transmission from Monaco received in France was where damage occurred, i.e. France). See also the discussion on this topic in WCL, paras 9.43-9.44.

6) See Orphan works and other orphan material: the BCC proposal, available at: http://www.britishcopyright.org/pdfs/policy/2009_024.pdf. For the debates in Parliament concerning the proposed Clause 43, see: <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100406/debtext/100406-0012.htm>. The government's proposal that extended collective licensing should apply to non-orphan works was not part of the British Copyright Council's proposal. It is hoped that the matter will be reconsidered by the UK Parliament, and the British Copyright Council continues to advocate its proposal, while taking into consideration the points made in the Parliamentary debates.

A number of other national laws have statutory provisions giving limited possibilities of authorised use of works or performances where the relevant rightsholder is untraceable, etc.⁷

There is also the problem of the different national systems of initial ownership of rights, for instance in the case of joint works (different rules under UK Copyright, Designs and Patents Act 1988 section 10, the US Copyright Act 1976, section 101, and laws of the civil system, e.g. Italy) and employees' works (the employer will (subject to contract) be first owner under UK and US law, but the employee will (subject to contract) be first owner under French law and other civil system laws).⁸

VI. Diversity of applicable exceptions

Different exceptions apply in different countries, e.g. as regards ephemeral recordings by broadcasters and the exception regarding reproduction, etc. of artistic works in public places.⁹

With regard to cross-border transmission, it is necessary to take account of the fact that what may be permissible in one country may not be permissible in another. Thus, an act of scanning, uploading or transmission which may be permissible in the United States under the "fair use" rules of section 107 of the US Copyright Act 1976 may not be permissible, for instance, under the more restricted "fair dealing" rules of sections 29-30 of the UK Copyright, Designs and Patents Act 1988 or articles L.122, L.211 of the French Intellectual Property Code 1992. So a licence from the owner of the relevant right in countries where the exception concerned does not apply will be needed in such countries to ensure the legitimacy of any communication to the public (and associated reproduction) of the protected material concerned.¹⁰

VII. Term of protection

An item of subject matter (for instance an author's musical work) may be protected in one country but not, where the term of protection has expired, in another country, for instance as between a country protecting for author's life plus 70 years ("*70 years post mortem auctoris*") and one protecting for such life plus 50 years ("*50 years p. m. a.*"). So an act such as the re-broadcasting of an item of archived material which is legitimate in a 50 years *p. m. a.* country (for instance copying) may not be legitimate in a 70 years *p. m. a.* country (for instance in the case of uploading and initial transmission in one country and reception and downloading in another).

VIII. Collecting society administration

A licence granted by a collecting society in respect of an initial broadcast needs, as far as subsequent use is concerned, to be examined as to the extent to which, in relation to repeat use, such licence covers, as regards the subject matter involved, all countries of reception. The same applies as regards use of the item in subsequent online transmission.

IX. Obtaining global licences

At present it is understood that it is not possible for an Internet service provider (whether host, access provider, linker or storer) to obtain from any of the established collecting societies a global licence for on demand online Internet availability anywhere in the world of the whole of the society's

7) See for example, UK Copyright, Designs and Patents Act 1988, s.190.

8) See *Itar Tass Russian News Agency v. Russian Kurier Inc*, 153 F.3d 82 (US 2nd Cir. 1998) (US Court applied Russian law to determine initial ownership of rights in work by employee of Russian newspaper located in Russia). In the EU the employer will (subject to contract) be the first owner of the copyright in computer programs created by its employees (see Computer Program Directive, Article 2(3); see also, in the same Directive, Article 2(1) regarding collective works).

9) Cf. UK Copyright, Design and Patents Act 1988, s.62 and German Author's Right Law 1965 art. 59(1).

10) In this connection, note the decision (made since the holding of the Workshop) of the US District Court, S.D. New York, in *Viacom International Inc. v. YouTube and Google*, 23 June 2010.

repertoire. Such a licence may be available for a particular item or particular items of protected subject matter, but this is of little or no use to providers of networking sites such as YouTube in respect of the user-generated content uploaded to such sites or in the case of projected on demand online Internet availability of archived material.¹¹

X. Conclusion: the global imperative in exercise and licensing of Internet rights

It is submitted that the advent of the borderless communication society created by the Internet demands the reassessment by rightsholders and their representatives of their traditional methods of licensing reproduction and communication rights. It is suggested that collecting societies should establish a global Internet licensing agency to which prospective users of protected material on the Internet (including web-broadcasters, Internet service providers, user-generated content uploaders and peer-to-peer file-sharers) can apply for the necessary global licences without territorial restriction.¹² Failure to provide such a service will increase the force of claims that copyright does not work in the Internet era and should as regards Internet use be abolished. Success in providing prospective users with "easy access, easy licensing" on a global basis, recognising the realities of modern communication and its ever increasing penetration into the means of sharing knowledge and entertainment in modern society, will ensure the continuation of the maintenance of the principle of copyright in the interest of creators, disseminators and the public.

11) User-generated content (content uploaded by a site user to social networking and other sites) may consist of material protected by copyright or related rights. Such material may have been created, performed or produced by the uploader and in such case may be called respectively "user-created content" in the case of original literary, dramatic, musical or artistic works, "user-performed content" in the case of performances, and "user-produced content" in the case of sound or film recordings. On the other hand the user may upload content created, performed or produced by other persons ("third party content") or in which no rights exist under any law ("unprotected content"). Furthermore such content may have been jointly created, performed or produced. The different legal considerations applying to the different categories of uploaded content need to be carefully distinguished, both in regard to local and to cross-border transmissions: cf. IV above.

12) For proposal in this connection, see J.A.L. Sterling, "The GILA System for Global Internet Licensing", available at: http://www.qmipri.org/documents/Sterling_JALSGILASystem.pdf. An EU-wide regime for licensing which will cover the cross-border transmission of archived material (whether rightsholder identifiable or orphan) is clearly of advantage in pursuance of the EU single market objective. However, such a regime must, it is submitted, if it is to be internationally effective, cover such transmission to all countries. For survey of the problems raised in the context of the European Union by the territorial nature of copyright, see P.B. Hugenholtz, "Copyright and Territoriality in the European Union, Briefing note for the European Parliament, Working Group on Copyright", 24 February 2010 (contains commentary on and proposal for unification of EU Copyright Law, as to which see also Wittem Group European Copyright Code proposal, April 2010, and J.A.L. Sterling, "European and International Copyright Law: Consolidated Texts and Commentary" in course of preparation for publication).

The ORF Television Archive's Rights Data Collection System

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I. The ORF television archive

In the 1980s, ORF systematically began to turn its television archive into a modern, computer-assisted central service facility. To this end, in 1987/1988, the "Documentation and Archives" Department was set up, with the key task to centralise exploitation, administration and long-term protection of all broadcast materials and selected original materials (so-called "raw materials"). From the outset, the main objective was not only to store the existing ORF archive material but also to process it in a way that would enable it to be optimally used and exploited in the future, both internally as part of new ORF programme productions and externally with regard to granting licences to third parties (ORF distribution operations).

II. The computer programmes/databases

1. Farao/Fesad

As a first step, from 1988 the existing archive material was entered into ORF's own Farao database (*Fernseh-Archiv- und Abfragesystem des ORF* [ORF Television Library and Retrieval System]) according to content-based criteria. This database was refined and renamed Fesad (*Fernseh-Archiv-Datenbank* [Television Library Database]) in 2009. The primary purpose of Farao (Fesad) is to document the archive material in terms of content and subject matter. For example, the title, content and subjects of a production and the names of individuals, producers, actors, etc. are entered into the computer system to enable content-based searches to be carried out.

It was recognised in practice very early on that a precondition for the efficient use and exploitation of archive material located via the Farao database was the swift clearance of rights. Accordingly ORF began working internally from the beginning of the 1990s on the creation of its own rights data collection system, which was to be linked to Farao (now Fesad) to enable joint reproductions and queries concerning the "content" and the "rights situation" of the archive material.

2. Orfeus

In 1996, ORF installed and put into operation a computer programme specially developed by ORF itself, known as Orfeus (*ORF Rechte Fernsehen Eingabe und Suche* [ORF television rights input and search]). The data on the rights of every ORF production with an individually allocated production number – i.e., all important ORF programmes – are entered into the Orfeus system. From 1996 to 2009,

slight adaptations were made to Orfeus to incorporate new technical and legal developments. In 2009, the system was fundamentally reorganised and extended.

Orfeus is used to record all contracts for each individual production (production number) as well as the rights data relating to them. The following rights data are entered into the computer tables provided:

- a) Substantive exploitation rights:
 - Broadcasting rights:
terrestrial television rights, unencrypted satellite rights, encrypted satellite rights, 3sat rights, BR-Alpha rights, Arte rights, integral cable retransmission rights, general cable broadcasting rights, pay-TV rights, mobile TV rights;
 - Audiovisual rights:
especially DVD, VHS, CD-i, CD-ROM, others;
 - Online rights:
general online rights, on-demand rights, Internet, IPTV, podcasts, streaming, downloads;
 - Catch up TV rights;
 - Public viewing rights/Communication rights:
commercial public viewing rights, non-commercial public viewing rights;
 - Other rights:
radio rights, phonographic rights, archiving rights, print rights, merchandising rights, trademark rights, publication rights, reproduction rights, interactive use rights;
- b) Territorial application (licence areas), especially: rights for Austria and South Tyrol, rights for the German-speaking areas and countries, European rights, world rights;
- c) Time-based application (beginning and end of the licence period);
- d) Editing rights (rights to adapt) and rights to transfer to a third party;
- e) Quantitative elements (number of contractually determined television broadcasts);
- f) Payments, business models;
- g) Exclusivity yes/no;
- h) Limitations;
- i) Excerpt rights.

After the results (the legal situations) have been completely fed into the Orfeus rights data collection programme, they are transferred to the Farao (Fesad) archiving system by means of a so-called "compressor programme". Orfeus has in fact been successfully linked to Farao (Fesad).

3. Rights cases in Farao/Fesad

Parallel to Orfeus, in the case of less important television programmes (programmes that do not have their own production number) – especially excerpts, short items, parts of programmes, "raw materials", etc. – rights situations have been documented since 1996 in Farao (Fesad) using a system based on simple "rights cases". This means a classification of standardised legal situations with classification numbers. For example: rights case 1 = full ORF copyright; rights case 4 = full copyright in Austria; rights case 5 = full copyright in Europe; rights case 99 = item may not be used, etc. The precise extent of the rights in each case, that is to say the actual scope of a rights case, is defined in the general data processing information.

4. Diva

In ORF's Diva (*digitales Vertragsarchiv* [digital contract archive]) computer system, all contracts and all "Edit Decision Lists" can be scanned 1:1, stored and made available for retrieval. The Diva system is linked to Orfeus.

III. ORF – Staff/Organisational responsibilities

The documentalists from the Documentation and Archives Department are responsible for entering data into Farao (Fesad), in consultation with the ORF editorial staff.

Data were entered into Orfeus from 1996 to 1998 by various ORF staff with no legal education. A check lasting several weeks conducted by a lawyer at the end of 1998 on the quality of this work revealed a very high error rate. In early 1999, the ORF management accordingly decided that all entries into Orfeus from then on had to be made by qualified lawyers. A separate Orfeus office was formally set up and attached to the Documentation and Archives Department. Erroneous entries made up to then were corrected and regular data entering work was commenced. At present (2010), there are three lawyers working in this office.

Entries into Diva are carried out by the ORF departments responsible for issuing contracts.

All ORF staff mentioned are involved in both the current and retrospective collection of data.

IV. Summary

As a result of the implementation of ORF's different database systems, the corporation's staff quickly receive information today on existing archive material (this is, of course, only possible if they possess the necessary internal database authorisations). It is particularly worth stressing that combined enquiries concerning the "content" of a production and the "rights" involved can be made thanks to the electronic transfer of the data on rights from Orfeus to the content information in Farao (Fesad). ORF's television archive is thus of strategic importance for new productions and new modes of exploitation as well as for the sale of rights by ORF.

State Socialist Heritage – Audiovisual Archives in Hungary

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There is a great deal to say about state-owned broadcast archives all over Europe. Especially in post-communist countries, public service television and radio companies have been state-owned monopolies for decades. Because of its long history as a vehicle for state propaganda, new democracies in the region share a conception of the media as a strategic resource that has to be subject to regulation either to prevent wrongdoing or to promote common notions and values. In Hungary, the 1989 Constitution requires a two third majority in Parliament in order to legislate on most questions of media law.

Since 1996, the Hungarian public service broadcasters (MR, MTV and Duna TV) have the formal status of private companies (PLCs) with only one shareholder, namely the Hungarian Parliament. This shareholdership is arranged for through three public foundations, all founded by Parliament, that formally own the public service broadcasters. There is a permanent parliamentary committee that deals with media matters and controls the operation of these foundations. The foundations exercise ownership rights through their respective boards, which are comprised of delegates of the political parties. These boards control the broadcasters, have the right to appoint the president of the broadcasting company, approve the annual business plan and annual business report, and decide on major investments.¹ Public service broadcasters operate under the country's business law but have a public service contract with the National Radio and Television Commission, which aims to secure the promotion of public interest in their programming. These characteristics bring Hungarian public service broadcasters very close to state broadcaster models.

The Hungarian system for ownership of public service broadcasters eventually became so unpopular and ineffective that the newly elected government has just proposed a new media law. The new bill has been nicknamed "Media Constitution" by journalists.

In this transitional phase, there is no elaborated and accountable notion of public service media in operation, which results in the general lack of an accountable financing policy, programming guidelines, monitoring measures, as well as a clear policy on the use of public service media archives. Hopefully, the newly proposed law will solve this situation.

The archives of public service broadcasters do not fall under any specific regulation. They are rather treated like the archives of any private company, with one important exception: according to the current media law (Act I of 1996 on Radio and Television Broadcasting) state-owned public

1) For a more detailed description see Mark Lengyel "PSM in Hungary – on the long way from state broadcasting to public service media" in P. Iosifidis (ed.) *Reinventing Public Service Communication: European Broadcasters and Beyond*, Palgrave MacMillan, 2010.

service media companies are obliged to build and preserve their broadcast archives. The law, however, does not foresee any specific access rights for citizens. As a result, the archives of public service broadcasters, built during their four to five decade long monopolies, have become company assets, instead of public collections. In practice, this has meant very restricted access to archival footage for the wider public, on the one hand, and very uneven competition conditions for the mushrooming new broadcast and online media, on the other. Although public service broadcasters' operations had been thoroughly funded by taxpayers up until 1989, the new private company status of the archives imposes heavy constraints on access and reuse. Despite restricted access and problems in management, revenue from archive footage sales is still relevant to the budget of public service broadcasters, albeit it should be noted that this source of income is hardly ever counted as a state subsidy.² On an average summer week (i. e. off season, when the broadcasting industry seeks to spend as little money as possible), state television broadcasts archival productions three times during primetime (humour and music) and five times late at night (archive news). The listed price of any 60 minutes of archive footage is about three to four times the average international price.

Only 10% of Hungarian State Television archives have been digitised retrospectively. Privileged use of monopolised archives does not provide sufficient incentives for digitisation. It means restricted access to the archives for the financing community (i. e. the tax payers), on the one hand, and for media and other creative industries, on the other. The former violates the right to access cultural heritage and knowledge and thus leads to a democratic deficit, while the latter results in biased competition. In the last four to five years, the Hungarian State Radio has adopted a more open archival policy and has also started an intellectual property rights clearance project. Intellectual property rights make using archival productions very difficult, because contracting had not been an issue during state socialism and accordingly the copyright situation is often unclear.

There are approximately 400 000 hours of radio and television footage in the archives of Hungarian national public broadcasters from the last century. There is a collection of 140 000 hours digitally processed and stored in the National Audiovisual Archive (NAVA), the Hungarian legal deposit archive for national broadcasters since 2006. Our collection is currently available in more than 900 schools and libraries (NAVA Points). We also have special digital collections of various origins (news programmes, feature films, newsreels, gramophone records, etc.). NAVA is trying to open its archive as widely as possible without harming rightsholders and distorting the media market. We provide full access to every record (i. e. every archived programme) at the NAVA Points and a database with a short preview of no longer than 60 seconds for everyone on the Internet. Currently, we are working on a business model with private and public broadcasters to provide unrestricted access to their programmes in our archive.

2) In general, different types of subsidies exist, namely, on the one hand, a regular money transfer, a capital transfer or a state guarantee for a loan and, on the other hand, indirect subsidies in form of regulatory steps resulting in monopolies, fixed prices, or free exploitation of national heritage assets such as state radio and television archive catalogues.

Rights Management – An Example of Practical Experience

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I. Introduction

In their article “The Orphan Works Problem: the Copyright Conundrum of Digitising Large-scale Audiovisual Archives, and How to Solve it”, Bernt Hugenholtz and Stef van Gompel point out that rights management information is one of the first solutions that comes to mind when trying to solve the orphan works problem or, as they put it: “the difficulties in locating rights owners are largely caused by the lack of metadata”.¹ Of course this is obviously true, but there is more to it. Not only will lack of information concerning the copyright status of (audiovisual) works create orphan works, but the incorporation of rights management information is vital for the dissemination of copyright protected works in a digital (audiovisual) environment in general. Even if the information exists in analogue form, it has to be digitised and linked to the work in question in order for it to be available in an automated way. Otherwise, a complete digital orphanage is created.

The Netherlands Institute for Sound and Vision (*Nederlands Instituut voor Beeld en Geluid*), with its twofold responsibility of being the national audiovisual cultural heritage institute and the Dutch public broadcasters' archive, has been working on digital rights management since the digital broadcasting and archiving infrastructure at the Mediapark in Hilversum was put into use in September 2006. Since then, the production process of the (public) broadcasting organisations and the audiovisual archive are totally intertwined. Broadcasts nowadays automatically and continuously flow into the digital archive and, vice versa, complete programmes or programme clips are provided automatically through the archive's extranet system to the programme makers.

Besides this, the institute has been given the opportunity to digitise a large part of its legacy material thanks to the mass digitisation project *Beelden voor de Toekomst* (Images for the Future). Audiovisual productions usually involve copyright protected works that need to be cleared before making them available to the public is permitted. In any case, digital files cannot do without metadata from the first moment they are conceived. As it became possible for the archive to provide its users with a rapidly increasing amount of digital video and audio files in an automated way, the need for the archive to develop an equally automatically functioning rights management system became apparent. In order to achieve this, the current gap between existing information and the information that is required in a computerised environment had to be bridged. Therefore, the institute established a special copyright information project called *Schoon Schip* (Clean Sweep).

1) B. Hugenholtz and S. van Gompel, “The Orphan Works Problem: the Copyright Conundrum of Digitising Large-scale Audiovisual Archives, and How to Solve it”, reprint of an article submitted for consideration in *Popular Communication – The international Journal of Media and Culture*, London (Taylor and Francis), 2010, available at: http://www.ivir.nl/publications/vangompel/the_orphan_works_problem.pdf

What follows is the description of the Netherlands Institute for Sound and Vision's (hereafter: Sound and Vision) best practice regarding (digital) rights management, including the identification of rights. To view this in the proper context, however, first of all a brief outline will be given of the special relationship between the institute and the public broadcasting organisations. This relationship is unique because the archive is not organisationally linked to these organisations. Sound and Vision is an independent, publicly funded institution. In this respect the position of the archive is more in line with that of the *Institut national de l'audiovisuel* in France (the French National Audiovisual Institute – INA) than with the archives at, for example, the British Broadcasting Corporation (BBC) or *Radiotelevisione Italiana* (RAI). Also, we will briefly analyse the digitisation programme and the agreements with these broadcasting organisations. The focus, however, will be concentrated on actual rights management and the rights management information project.

II. Broadcasting environment

Sound and Vision was established in 1997 as the result of a merger between four smaller national audiovisual archives, among which the audiovisual archives of the Dutch public broadcasting organisations and the broadcasting museum. With this merger, the biggest audiovisual archive in the Netherlands (and even one of the largest in Europe) came into being, comprising approximately 700 000 hours of film, radio, television and music, which increases at a yearly rate of around 50 000 hours.

There is no such thing as a legal deposit (in French, *dépôt légal*) in the Netherlands, but the institute is nevertheless committed to some specific responsibilities assigned to it by the Dutch Government. In the 1990s the council of ministers explicitly mandated two audiovisual archives in the Netherlands to preserve the Dutch national audiovisual heritage: EYE Film Institute Netherlands (former Film Museum), for safeguarding the cinematic heritage of artistic, cinematographic value, and Sound and Vision, for keeping the audiovisual heritage with a special informative, cultural and historical significance. At Sound and Vision, the history of Dutch society and that of its audiovisual media is preserved and represented. This includes, amongst others, the audiovisual productions commissioned and/or financed by the government itself and the programmes of the public service broadcasting companies. The latter responsibility is also incorporated in the Dutch Media Act.²

The digital infrastructure of production, broadcasting and archiving that came into force in 2006 implies that all broadcasted programmes, whether of radio or television, are imported automatically into the archive immediately after broadcasting. These productions are accompanied by a basic set of metadata that is imported into the catalogue and may be further enriched by the archive staff. Conversely, the system allows the (broadcast) professional user to directly search, order and download clips or complete programmes from the digital archive through the multimedia catalogue. A totally digital workflow has been designed for the exchange of audiovisual documents between the 26 different national public service broadcasters, their shared broadcast facilities and the archive.

An important impetus for the digital availability of larger amounts of material for users is the project "Images for the Future".³ This project started in 2007 as a consortium of six partners, three of which are collecting and custodial institutions. Its aims are to restore, preserve, digitise and encode approximately 300 000 hours of film, video and audio material, along with almost three million photos. The project has a total budget of around EUR 173 million to run for seven years (2014). Because Sound and Vision has by far the largest collection, it gets the biggest slice of the cake: EUR 119 million.

The Images for the Future project is publicly funded through the *Fonds Economische Structuurversterking* (Economic Structure Enhancement Fund – FES), created out of the revenues from Dutch natural gas supplies, that focuses on both large, innovative infrastructural construction works, like bridges and highspeed railways, and also on building the knowledge infrastructure. The ultimate goal of the project is to open up a basic collection of film, radio, television and photo material from the audiovisual archives, to be used by creative professionals, educational institutions and the general

2) Dutch Media Act 2008, Articles 2.146, 2.167 and 2.180

3) Images for the Future website, available at: <http://www.beeldenvoordetoekomst.nl/en>

public. Consequently, the Images for the Future project is also of great importance to the broadcasting organisations. An important part of their heritage and that of other existing audiovisual collections is being digitised and subsequently made available for use for whatever digital platform selected in high as well as low-resolution formats.

Sound and Vision usually is not the copyright owner for most of its holdings. Only the collection that was obtained from the former film archive of the Dutch Government Information Agency (*Rijksvoorlichtingsdienst*) under the 1997 merger was accompanied by a transfer of rights from the government to the new institute. Since World War II, the government has been an important commissioner of not only information films, but also of Dutch documentary films. The transfer of the rights by the director and producer to the state was standard procedure, mostly including exploitation through unknown platforms in the future. Sometimes an individual remuneration is provided for in case of reutilisation of the film. Regarding broadcasts however, the producer of the programme – who may be the broadcasting organisation or an independent producer – is the copyright holder, while sometimes third parties are also involved. Furthermore, the broadcasting organisations themselves always hold their neighbouring rights.

III. Rights clearance

As the public service broadcasters' archive, Sound and Vision acts as an intermediary with regard to the distribution and exploitation of existing audiovisual content for all kinds of users. User groups may include audiovisual professionals, from the broadcasting industry or otherwise, all parts of the educational sector and/or the general public. Regarding copyright clearing, in the 1990s a basic agreement was reached with the broadcasters that none of their archival material should be disseminated unless the broadcasting company concerned gives its consent. As a consequence, for every single request for broadcast material an application is submitted to the specific broadcaster's sales department, where a licence is issued for the specific use that is intended.

No archival material will be delivered to the user until the broadcasting company concerned has given its approval. The collected royalty fees are completely passed on by the archive to the broadcasters. The fees are based on an extensive tariff system, which has been mutually agreed upon. This specific position of Sound and Vision as an intermediary also means that the broadcasting organisation itself is responsible for possible third parties that might be involved in the transaction, be it an independent producer or a freelance contracting party. Basically, these are the broadcaster's contract partners, not those of the archive. Moreover, the archive requires an indemnity (certificate of indemnification) from the user as a measure of legal certainty.

This basic procedure for every individual search for and transaction of (programme) material may have been satisfying in the analogue era, but in the digital domain it is no longer adequate. In order to be able to disseminate larger amounts of (broadcasting) material all at once, in particular for educational and cultural use, more appropriate arrangements had to be made. With the aim to digitise the archival material, to develop (educational) services through online platforms and to give access to the material within its totally computerised and highly interactive Sound and Vision Experience, some additional agreements were negotiated. It took five years to come to the so-called Archive Agreement, a collective agreement that became the basis of all further agreements.

The agreement eventually was signed by practically all parties involved in audiovisual production and in the clearing of copyright and related rights. First the *Nederlandse Publieke Omroep* (the Netherlands Public Broadcasting Agency – NPO), which represents all public service broadcasters, and the *Vereniging van Onafhankelijke Televisie Producenten* (Association of Independent Television Producers – OTP) signed. Then followed CEDAR (Service Centre for Authors' Rights and Related Rights) and NORMA (the Organisation for Neighbouring Rights of Performing Artists) on behalf of the various collecting societies for copyright and related rightsholders, and NVPI (Dutch Association of Producers and Importers of Image and Sound Carriers). Finally, the Netherlands Institute for Sound and Vision naturally signed as well. Apart from the exceptions set by copyright law, the Archive Agreement basically allows Sound and Vision to practice its full mission as a cultural heritage institution. Parties give their consent for the reproduction and communication to the public of copyrighted works within the framework of – in particular – its archival, educational and cultural functions in a digital world.

On the one hand, the agreement confirmed the actual existing practice of reproducing material and making it available to the public under the specific conditions set by law or those agreed upon in the past with the public broadcasting organisations. In this way it meant to reassure the various partners regarding Sound and Vision's ambitious digital programme. On the other hand, it allowed the archive to really develop certain digital platforms without being impeded in advance by copyright restrictions, in particular an online streaming video platform for educational purposes, under the condition of advance notification and in exchange for a specified remuneration. Furthermore, provision was made for the digitisation of large amounts of material for not only preservation purposes, but also with a view to offering digital access.

This first "digital agreement" was reached in 2005. In order to refine some items in the agreement, shortly after this the so-called *Teleblik* Agreement (Television Agreement) was negotiated with exactly the same parties. This focused entirely on the online streaming video platform for educational institutions in a networked environment. 85% of primary schools are currently using this service, together with about an equal percentage of secondary schools. In *Academia*, the online streaming platform for higher education, 30 000 digital audio and video items are available for 460 000 student users. In the meantime, five Flemish institutes have also become involved.

Rights clearance at Sound and Vision excludes music. The broadcasting companies in particular have specific online procedures that deal directly with the relevant collecting society, mandated for that purpose by the original rights owners. All music that is played on the radio, for example, is reported directly through an online form to BUMA/STEMRA on a daily basis. BUMA/STEMRA is designated by the government to be the collecting society for music authors.

IV. Digital rights management

The (audiovisual) archive of the 21st century is a digital archive. In general the archive's holdings no longer consist of physical objects that are stored in the vaults: in the so-called "tapeless environment", the holdings consist of digital files on a server that essentially can be based anywhere. The practice of keeping records is rapidly transforming into a practice of media asset management. At Sound and Vision nowadays digital storage already contains around 200 000 hours of audiovisual documents. And in 2009, for the first time, more than half of the 100 000 annual queries/requests for audiovisual clips and programmes was dealt with through downloads. The archive has indeed become digital.

On the one hand, the digital archival infrastructure of Sound and Vision consists of the digital archive as a repository, where the digital material pours in, whether it is born digital (like the daily broadcasts' flow) or whether it concerns newly digitised archival material. On the other hand, however, the system includes the multimedia catalogue, which, among other things, contains programme descriptions and is directly linked to the digital archive. Basic concepts in the digital domain are those of "content" and "metadata". Although the notion of content is generally used for all kinds of information, in the multimedia domain it is rather defined as the sum of essence + metadata.⁴ It is impossible for files, audiovisual or otherwise, to be retrieved or even to be understood without metadata. These represent all the relevant information on the file for every possible user, whether this is a technician, an archivist, editor, researcher, or, for that matter, a lawyer.

Ultimately however, content, being the sum of essence and metadata, only reaches its real significance when the user actually has the right to use it. Only then is the equation complete: content + right to use = media asset. Only then can the content be considered a real asset. The definition of asset may be taken literally here as something that is of value or benefit, though not necessarily of economic value. The information about copyrights is defined as a separate category apart from, but indissolubly connected to, the whole of the asset. In that way the ponderous weight of copyright information is emphasised. Even though the file is perfectly accessible through its (technical and descriptive) metadata, it is of little use when the rights information is lacking and the permission to use is subsequently impeded.

4) This widely accepted definition was originally developed by the Society of Motion Pictures and Television Engineers (SMPTE).

On the basis of this understanding, Sound and Vision developed a special digital rights management application (DRM) linked to the multimedia catalogue and its metadata structure, on the one hand, and to the actual digital delivery module, on the other. The application functions as a filter in the automated delivery process. It is impossible for an item to be delivered to the customer without going through this "sieve". In essence, there is no real difference to the analogue handling method that was processed for many years by the customer service desk. In this respect, the DRM module in the catalogue is nothing more than the transition of the traditional process to a digitised form. Nothing new here.

What is different, however, is the layout of the digital tool. Essentially, there are two kinds of rights information. There is the formal information directly linked to the programme, which can usually be found in the catalogue description. This includes information about the maker, the producer, production dates, *et cetera*. The second kind of rights information focuses specifically on the exploitation of the material. In particular, this concerns the various licence conditions alongside the formal information. The DRM system focuses on these specific conditions.

Originally based on the rights management database developed in the context of the European IST project Amicitia,⁵ the DRM system contains five different conditional sections: type of use, distribution platform, territory, period and size or number. Together, they reflect the whole concept of rights management that consists of the combination of a legal entity, a specific type of use, a particular distribution platform, a fixed period of time and a particular size or number. There are two sides of the coin in the DRM system, which, in a nutshell, can be summarised as follows: which owner has a right for what type of use, through which distribution platform, in what territory, for what period of time and in what size or number. This mirrors perfectly the other side of the coin: which user requests some kind of material for what type of use, through which distribution channel, in what territory, for which duration and in what size or number.

These five conditional sections – or categories – also reflect the main subjects in production and copyright contracts. The first three sections mentioned are in turn each divided into about six subsections, but the last two categories (those regarding period and size/number) are open to any interpretation. The section on type of use distinguishes between educational, cultural, commercial and private use, alongside a subsection for specific public broadcasting use, which involves particular agreements among the organisations themselves on the use of each other's material. The section on distribution platforms distinguishes between broadcasting (offline), narrowcasting, pay-TV, on demand (online), fixed media and (public) screening. The section on territory distinguishes between five different (combinations of) countries and language areas. In all of these three sections though, there is the possibility of choosing for the option that all subsections be valid.

The DRM system is designed essentially in a technology independent way. This is an important line of approach. The idea is to make the system sustainable by preventing it from becoming obsolete as soon as new digital devices and platforms are developed. The various sections and subsections can be linked in every possible combination, in a way that every kind of reutilisation is covered, including future distribution platforms or channels. This is also of great significance because it is quite complicated and costly to change the configuration of the system with every change in technology.

The correct copyright status or exploitation combination for every programme title or programme series is directly linked to each particular item in the catalogue. Consequently, after searching the catalogue and logging into the system, the user can order a specific item. Then he/she has to indicate the kind of use he/she wants to make of this specific material, through which distribution platform he/she is going to launch it, for how long and in which specific region it will be available. While this is happening, the query is linked to the whole range of levies that are incorporated in the system, so the user knows what he/she will be charged. Finally, a traffic light system shows the user whether he/she can: order the material right away (green); if the system will send an email to the broadcasting organisation and/or other parties to get a licence for this specific use (yellow); or if the item in question is completely blocked for whatever legal reason (red).

5) Amicitia, which stands for Asset Management Integration of Cultural Heritage in the Interexchange of Archives, was a European IST project which ran from 2000 to 2003, and aimed at enabling remote, multilingual access to archive content stored in a distributed environment. More information available at: <http://www.joanneum.at/?id=341&L=0>

A basic version of this system is currently in use at Sound and Vision. An extended version is under construction and is expected to be finished by the end of the year. After that, the system will gradually be developed further.

V. Identifying rights

In order to make digital rights management work, it is essential that correct and sufficient information on the copyright status of the audiovisual productions is available to the system. Currently, information on the makers is partly available in the catalogue description; information on the exploitation conditions, however, hardly ever is. This is only logical, seeing as formal information on makers is hard evidence, which is unlikely to change. The director of a film will forever remain the director of that particular film. Exploitation information, on the other hand, is volatile. It can change time after time with a transfer of rights, the expiration date of agreements, *et cetera*.

To solve the lack of relevant exploitation information for its new digital rights management system, Sound and Vision started the rights information project *Schoon Schip* (Clean Sweep). The government subsidised the undertaking because it considered the improvement of rights management inside the archive to be of great cultural as well as economic importance. The project was assigned responsibility for collecting data retrospectively on the copyright status and exploitation situation of the archive's material, as well as for incorporating these data into the system. Eventually, the project was supposed to improve access to the audiovisual material and in particular to that material that is in the digital domain. This obviously fits well with the mission of Sound and Vision, as well as that of the Images for the Future programme.

Various kinds of rights information can be collected from various sources. For more recent years digital sources are usually available, but information from earlier years is often confined in paper archives. These have to first be searched for and subsequently explored to find relevant information. Eventually, the result is converted to the digital system. To begin with, the project made an effort to complete the formal rights information on mainly producers, along with directors and scriptwriters, of television productions. This information was mostly sourced from the credits of television programmes, compiled by one of the collecting societies in the Netherlands, and from the logbooks of the broadcasting companies. In order to be able to collect exploitation information, however, paper contracts needed to be consulted. When these contracts relate to large amounts of broadcasting material, they can usually be found at the broadcasting companies premises.

Teams of documentalists have been dispatched to several broadcasting organisations to make an inventory of the existing contracts in the paper archives *in situ*. The members of the teams flip through the pages of large amounts of (mostly unsorted) production files, looking for relevant information in contracts or other documents. This procedure provides a quick understanding of whether information is relevant or not. Sometimes only broadcasting personnel know of previous agreements. All relevant information collected is then registered in a provisional digital file, which is later converted to the DRM system. The procedure also includes the digital scanning of the original paper contract, if existent. This scan remains with the broadcasting company concerned, which will not want the complete contract information to be in the hands of a third party, such as the archive. The contract should obviously be considered as proprietary information. Finally, once the relevant information has been collected, a quality check is carried out and the data is inserted into the DRM system. The broadcasting company and Sound and Vision share the costs of this hands-on and therefore time-consuming job. They equally benefit from it.

Experience has shown that on average only one quarter of the programmes or programme series prove to have a written contract. For the rest a contract is simply not there, although this is also an important observation to be recorded. This is caused partly by the fact that the broadcasting companies are often the producers of their own programmes. If this is the case, programmes have been made by the broadcaster's own staff, which usually means that, according to the law, the employer (i.e. the broadcaster) owns the copyright in the productions made by his employees. It is only since the 1980s that the involvement of independent producers or the practice of co-producing between several broadcasting parties has increased. A lot of production contracts that are found in broadcasting paper archives can be dated from this time onwards. This leaves the issue of freelancers. As to that, for many years the broadcasting companies issued a standard contract, which involved in essence the transfer of

copyright to the broadcasting organisation in exchange for the right to a specific remuneration for a maximum period of 10 years. This does not necessarily mean, however, that the right to communicate the work to the public through platforms unknown at the time was included.

The Clean Sweep project is still running. After a laborious start, especially due to the initial aloofness of the broadcasting companies, the results until now involve the registration of the exploitation situation of around 60 000 hours of radio and television programmes. By the end of 2010 this will hopefully have increased to 80 000 hours. It has been a huge effort for something that has never been done before, at least not in the archival domain and hardly in the broadcasting industry. Moreover, in a way this process will never end. What has been done by the Clean Sweep project is just a first step. It simply laid the foundation for further inquiries into the current copyright status of audiovisual productions. This might lead to adjustments. The volatility of (especially) the exploitation information results in the need for a continuous updating of the information if the final goal of effective rights management by the archive is to be achieved.

VI. Conclusion

Sound and Vision has been commissioned by the government to safeguard the Dutch audiovisual heritage and make it available as widely as possible. And that is what it does, not only with the digital infrastructure for broadcasting professionals at the Media Park and in the Sound and Vision Experience on its own premises, but also online. The institute has its own web portal, YouTube channel and a number of educational platforms, besides websites on specific (media) historical subject matters and the archival contribution to the public service broadcasters' "Programme missed" application (to be compared to the BBC iPlayer). In addition, it developed an open media platform offering online access that aims to stimulate the creative (re-)use of audiovisual archive material⁶ and, rather experimentally, a video labelling game based on crowd sourcing. Furthermore, Sound and Vision participates in several national and European research and development projects on, amongst other things, multilingual access to audiovisual sources and automatic image and speech recognition, partly initiated by the Images for the Future programme.

To make all this happen, a lot of arrangements regarding copyright protected material had to be made. A very important starting point was the collective Archive Agreement concluded with all relevant stakeholders in audiovisual production and copyright management in the Netherlands. Here, preservation and digitisation are coupled with accessibility for educational and cultural use. Regarding certain specific digital applications developed by the archive, separate agreements with the broadcasting companies were reached. Developing a digital rights management database was the most important next step, supported by the rights information project Clean Sweep.

Digital rights management at Sound and Vision is still in a fairly early stage, but nevertheless a substantial foundation has been laid on further. It took an intensive search for information on existing agreements, concealed in contracts or otherwise inaccessible. Sound and Vision launched the project, supported by extra project funding, currently by the Images for the Future programme. One of the main advantages is that the audiovisual material can be delivered faster and more efficiently by the archive. For the broadcasting companies the knife cuts both ways: its programme makers are able to search through a larger amount of digitised material and access it in a fast and efficient manner, while their organisations in their capacity as rights owners license more material and consequently earn more money. Moreover, the project links to the terms of a "diligent search" that is required in case a copyright owner cannot be found by collecting and registering rights metadata in the system. To make the DRM system sustainable and therefore ready for future developments in digital devices and platforms, efforts have been made to design the structure of the system to make it as technology independent as possible.

There is always a certain tension between Sound and Vision's role as a heritage institute and the actual goal of living up to its assignment of making the copyright protected heritage available to the public. For roughly the same reason there has always been some tension between Sound and Vision's

6) Open images website, available at: www.openimages.eu/.en

responsibilities as a national memory institute and its position as the audiovisual archive of the public service broadcasting companies. This is also noticeable as far as the Clean Sweep project is concerned. To make it a success, cooperation with the broadcasting organisations is vital. After some initial cautiousness, various broadcasting companies were actually willing to participate with an open mind. Some broadcasting companies still protect their propriety however.

The participation of the broadcasting companies in the digital rights investigations also means the opening up of a lot of information that is needed to gain a clear view of the copyright status of the audiovisual material in the archive. The result of this is that few orphan works are left. If there are any, at least the intensive search for the information to be recorded in the digital rights management system contributes to the thought that a diligent search has been performed. In essence, the information on the copyright status is mostly there. This work method seems to correspond with the main orphan works solution that Bernt Hugenholtz and Stef van Gompel indicate in their article cited at the beginning of this paper, namely producing a rights management database in order to tackle the orphan works problem.

There is still a long way to go in terms of effective copyrights management. In the digital world, access is no longer restricted to a country's own borders. More and more international heritage projects are being initiated, for instance Europeana⁷ (a project in which Sound and Vision also participates). Also, international access to local online heritage platforms is possible and often wanted. Adequate rights management in one country is one important step, but greater goals can be reached through an extended, international database. It seems, however, that only international collecting societies would be capable of managing this. To achieve a situation with fewer obstacles that many are aiming for, steps are already being taken in a European context, as, amongst other things, the European Commission Green Paper on Copyright in the Knowledge Economy⁸ proves. The response from the Dutch heritage institutions stresses the importance of looking for any possible way to stimulate the improvement of access to European heritage material for at least cultural and educational purposes, i.e. for non-commercial use.

On a national level, the Clean Sweep project has been established to collect rights metadata in retrospect. Every day however, new film, radio and television programmes pour into the archive, for the most part automatically through the digital broadcasting infrastructure. To avoid making this retrospective project interminable, more copyright metadata than is currently customary should accompany the daily flow of programmes into the digital archive, together with technical and descriptive metadata. Adjustments to the current service level agreements on the exchange of metadata in the digital chain of the public broadcasting infrastructure are only logical. A new project will be initiated to prepare for this progress. As the producers of the Visualization of the Metadata Universe put it: "Rights metadata is the information a human or machine needs to provide access to a resource, provide appropriate notification and compensation to the rightsholders, and to inform end users of any restrictions that may exist".⁹ No better way of defining in a nutshell what exactly rights management should do.

7) For more information on EUROPEANA see: <http://www.europeana.eu/>

8) The Green Paper of 16 July 2008 is available at:

http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm#greenpaper

9) Seeing standards: A Visualization of the Metadata Universe, available at: <http://www.dlib.indiana.edu/~jenrile/metadatamap/>

Digitisation and Online Exploitation of Broadcasters' Archives – Practical Experience of Rights Licensing

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I. Introduction

This article gives a BBC perspective on some of the practical issues related to the rights clearance aspects of digitising the BBC's broadcasting archive and making it more widely available. It broadly describes the content of the BBC's archives and the relatively limited ways in which programmes in the TV and Radio archive have been exploited to date. The BBC's Strategy Review¹ has recently set out a more ambitious programme to digitise the archive and to make more material permanently available. The article describes this strategy and the issues it gives rise to in terms of the rights clearances aspects. The article refers to the experience of the BBC Archive Trial and looks at the options for future archive rights clearance on a substantial scale. It also refers to the policy options being considered for revised regulation and legislation relating to copyright.

II. The BBC Archive

There are over 400 000 TV and Radio programme titles in the BBC programme archive, comprising of about one million hours of content. About 700 000 hours are film and video and about 300 000 hours are audio. There are names for one million individual programme contributors associated with this material, but inevitably, especially for some of the oldest material, there are no programme records available or only limited information. There is also a substantial BBC written and photographic archive including four million items of sheet music, four million photographs and over one million items of sound recordings, as well as BBC correspondence and records accumulated over the past 80 years. A 10-year preservation programme is underway in relation to this material, which involves transferring parts of it into digital formats at a substantial annual cost.

The BBC, like most broadcasters, has constantly re-used and exploited some of its archive of programmes. BBC Worldwide, the separate commercial arm of the BBC, has been highly successful in investing in and exploiting a relatively small number of popular programmes (in the context of the entirety of the BBC's output). This involves, for example, the sale of DVDs and audio formats and licensing the secondary broadcasting use of programmes in the UK and internationally. Some standard programme contributor contracts, e.g. for actors and writers, provide for payment of a royalty share from the programme exploitation, making the issue of rights clearance for this commercial archive relatively straightforward, because it is economically attractive to rightsholders. However, even

1) BBC Trust, BBC Strategy Review, available at:
https://consultations.external.bbc.co.uk/departments/bbc/bbc-strategy-review/consultation/consult_view

the exploitation of the commercial archive presents some new rights clearance challenges. Firstly, online commercial exploitation via download-to-own, download-to-rent or online subscription has the potential to exploit commercially the so-called "long tail" of archive programmes – older material which might attract only a relatively small number of consumers and which it would have been uneconomic to make available as, for example, a DVD. However, it is more likely for older programmes than more recent ones that programme contributors will have been contracted under contracts of limited scope which will not include the rights for online exploitation. As a result, many of the BBC's "long-tail" of archive programmes will require rights clearance before they could be exploited commercially.

Secondly, even in relation to more recent programmes which do provide clearance for all forms of commercial exploitation, there is the practical issue of applying royalty terms in the context of the new online business models. Royalty payments of course have typically been accounted for against the producer's income for the sale of a particular programme – but how is a producer's income defined for a particular programme when it has been made available for streaming or downloading from the website of a third party aggregator, such as You Tube, as part of a substantial library of material intended to attract advertising revenue?

As with the ever-evolving business models for the online exploitation of music shows, producers, distributors and other rightsholders in television programmes will also have to work out and agree upon appropriate business models for commercially exploiting the archive online.

Some of the BBC's TV and Radio archive has also been re-used historically on a public service basis (in the BBC context this means making it available for free to the audience and without advertising). A relatively small number of archive programmes will be repeated on the BBC's public service TV and Radio channels, either to provide the audience with an opportunity to watch or listen to a recent programme again or because the programme was particularly popular or regarded as having a particular significance. Certain BBC services or segments of services will specifically provide another opportunity for audiences to watch or listen to archive programmes. BBC Radio 7 is a speech-based archive Radio service; whilst Radio 4 has regular slots devoted to archive programmes. BBC 4 television uses archive TV programmes selectively – typically in the context of programme themes or seasons. The current BBC Charter (granted by the Crown and which is the legal basis of the BBC) sets out a number of specific obligations in relation to the preservation of the BBC archive and giving licence fee payers opportunities to have access to at least some of it. More recently, the BBC has begun to make elements of the archive available online. This is in the form of on-demand thematic collections² and on-demand programme strands,³ as well as on-demand short-form clips increasingly used in multiplatform products.⁴ These examples provide a glimpse of the potential for audiences of gaining access to archive material in the context of a rich and interesting online environment, but at present there is only a fraction of the one million hours of BBC TV and Radio archive actually available.

Fundamental to unlocking the programme archive is the creation of a catalogue to provide a database of the programmes and the contributors to those programmes, along with a search facility to make sense of the material. A BBC project proposal, called Project Genome, based on digitising the Radio Times – which provides a comprehensive record of the BBC's broadcast history going back to 1923 – is being planned as the way to provide this building block.

III. BBC Strategy Review

The most recent BBC overview on how it can exploit its programme archive is set out in the BBC Strategy Review document, published in March 2010. The main points are the following: firstly, that the BBC will set a course through to the end of this Charter period and into the next to deliver a transformation in the public's ability to search, discover and access the library of content that their licence fees have created. Secondly, increasing access to the BBC's current and future programme library will entail making some content permanently available and extending the availability, where possible and appropriate, of the rest. Thirdly, the intention is to position the BBC and its archive

2) BBC Archive Collections, available at: <http://www.bbc.co.uk/archive/collections.shtml>

3) BBC Programmes A-Z, available at: www.bbc.co.uk/programmes/a-z/by/inourtime/all

4) BBC Wildlife Finder, available at: www.bbc.co.uk/wildlifefinder

as part of a large and growing set of public archives made available by UK institutions, acting as an enabling force to link and support them in an increasingly connected public space. Fourthly, the commercial value of the programme library will be realised as a part of this strategy, balanced with opening up those sections of the library that have exceptional cultural, historic or educational value as a publicly accessible "permanent collection". Initially there will be with a focus on BBC journalism providing a journal of record of the UK and secondly on culture, knowledge building and learning, based on the partnerships with the wider UK cultural sector.

The BBC strategy is for a transformative approach to making far more of the programme archive permanently available in innovative ways and to do this in partnership with other cultural institutions which hold archives, in order to help create a connected digital space. The ambition is to deliver archive content in new and innovative ways to create a rich, perpetual cultural resource for the UK. By making this content available across public and commercial services the BBC can both maximise availability to audiences and seek to generate value for creators and rightsholders.

IV. BBC iPlayer

Innovation on the basis proposed in the Strategy Review poses real challenges for the BBC in terms of copyright and rights clearances. These challenges have their roots in the copyright contracting arrangements which date from a different technological era. In that era it was practicable for the BBC to obtain licences from individual rightsholders in most types of copyright works for the limited ranges of uses and exploitation that were possible. Where rights did need to be managed collectively – such as for broadcasting music – or were managed individually, a clearance for certain specific platforms and a single country would generally have sufficed. The legacy of this rights clearance system is twofold. Firstly, the system of managing rights clearances is disproportionately complex. For example, the BBC launched its on-demand catch-up service, iPlayer, on 25 December 2007. It now attracts some 40 million requests a month for streams, illustrating its popularity. The negotiations for the rights agreements for the BBC to run iPlayer were extremely drawn out. They began in 2002. Over the subsequent five years almost 70 new agreements were reached with rightsholders' bodies entailing thousands of hours of rights management activity. These measures created a framework in which the rights for 1 000 hours of content are now potentially cleared to be made available weekly on the iPlayer across multiple platforms (there are 10 versions of BBC iPlayer on separate devices and services), but this system still requires a small dedicated team of rights professionals to check and cross-check the rights availability of content on an ongoing basis. Programmes in the schedules of the linear channels produced in-house by the BBC since autumn 2006 have been made in accordance with a rights framework enabling producers to clear upfront all the rights needed for online and catch-up uses. However, programmes made before then by the BBC (and being repeated) or acquired from third parties or which rely heavily on third party material (e.g. acquired film clips) may not be cleared for these uses. This results in the withholding of some material from the iPlayer service, because the necessary rights have been withheld by rights owners, usually to the bemusement of BBC audiences. The point here, before considering the difficulties associated with archive rights clearances, is that in a multiplatform age rights clearances are not readily available on a multiplatform and technology-neutral basis – even for new programme material.

V. BBC Archive Trial

Secondly, as things stand there will be substantial rights clearance difficulties in making available the BBC's programme archive. Issues of significant difficulty include scripted programmes made before 2002 in which the BBC did not acquire online and on-demand rights and has been unable to reach any agreement with rightsholders on how to resolve this. The third party film component of historic news programming will present difficulties because information on rights will not have been obtained during the rapid production process. Finally, by way of example, there are thousands of programme presenters where historic contracts would not have obtained rights for on-demand use because this could not have been contemplated at the time. In the second half of 2007, the BBC undertook an Archive Trial, which entailed making 1 000 hours of archive programmes available online for streaming for a six-month period in order to assess the appetite and interest among audiences for a service of this type. Programme material was deliberately selected from programme genres, such as documentary or other factual and natural history, which in broad terms are less complex in rights clearance

administration than, for example, drama and comedy (because, broadly, more of the material in these types of programmes will be BBC-owned or contracted on the basis of use in all media). In order to make this limited amount of archive material available for a short time period, the BBC had to spend 6 500 person hours checking material for rights implications and subsequently obtaining permission for this use from about 300 individual or collective rightsholders and leaving about 300 others on an "await claim" basis. The BBC television archive contains about 1 million hours of programmes and the programme archives of the members of the European Broadcasting Union (Europe's public service broadcasters) contain another 28 million hours of Radio and TV content. The BBC estimates that clearing 10 000 hours of BBC television archive to be made available online would require 60 rights staff working for a year. Clearing the entire BBC archive would require 800 staff working for three years, at a cost of GBP 72 million.

The challenges described are not only historical ones, affecting archive programmes made under contracts of limited scope, in terms of the platforms and media for which use was contracted. There also continues to be reluctance amongst some rightsholders to allow their programme contributions to be used on all new media platforms. It is not suggested that these concerns are illegitimate. They might arise from a concern that the BBC's uses will compete with the rightsholders own primary exploitation, that an opportunity will be created for piracy or simply be the product of uncertainty about granting rights for technologies whose capacities are not totally defined. These perplexities are all legitimate, but they do conspire to limit the full potential of the technology and the value chains that can be created.

From a BBC operational point of view it also means that about 250 000 person hours a year at a cost of over GBP 4.5 million are required to service the re-clearances and further payments that arise from current contracts of limited scope – and without at present being able to address the fundamental issue, which is to find a way of never having to re-clear them again. Administrative costs involved in the clearance of rights – as opposed to fees for creators or distribution costs aimed at reaching audiences in innovative ways – do not help the creative industries or the users.

VI. Current rights administration

Before looking at some possible ways of taking forward the issues arising from clearing rights in BBC archive content, it is useful to sketch a brief outline of the main ways in which the BBC has contracted copyright and the rights in performances to date, in order to understand how the difficulties have arisen. The processes involved in issuing 300 000 contracts to contributors every year is helped by standardising contract terms where possible. The BBC historically has dealt with a wide range of rightsholders and representatives to reach agreements or to take an agreed approach based on standard terms. A range of agreements, licences and standard terms have been maintained by these relationships and these can be summarised in a smaller number of "models", which give rise to different considerations in terms of archive clearances. The first model is that all rights are acquired from employees, including for example the performance rights of the members of the BBC's orchestras and any performing rights or rights in literary or dramatic works created by presenters, narrators and other talk's contributors. However, it is only from the mid-1990's that standard presenter and talks contracts have acquired all rights or included an additional payment term if specific additional use is made of the programme. Previously these contracts, not all of which would have resulted in programme contributions protected by copyright or performer's rights, will have been of limited scope related only to broadcasting. This issue is largely contractual, rather than copyright-related, but the consequence is that for the TV archive alone the BBC estimates that there are 160 000 contracted contributors in archive programmes which are contractually not cleared in terms of being able to make the programme material available online.

The second model is that collective bargaining agreements with Trade Unions have standardised the terms on which the BBC contracts on an individual basis with actors, writers and freelance musicians engaged by the BBC. These agreements provide for subsequent payments on the basis of either residual or royalty payments. A supplement to this second model is that the representative body may be mandated to agree additional rights of usage; an effective extension to this model, albeit still requiring thousands of individual payment transactions. Where talent unions are not mandated in this way and thousands of individual rights clearance transactions will have to be undertaken to use archive programmes, as in the case of scriptwriters, it is a very unsatisfactory situation. Rights

are outstanding in tens of thousands of archive TV and Radio script contributions and other types of literary or dramatic works commissioned by the BBC.

The third model is collective agreements, mostly in relation to music rights, which define the repertoire being licensed and the rights granted on the basis of a blanket payment. For the use of archive programmes this model is the most efficient way to obtain clearances, provided it is possible to report which works are included in the programmes.

The fourth model, covering some types of existing works, is that standard terms have been agreed with a representative body for individual contracts covering their use. Artistic works are covered by agreements of this kind for example, as is use of published works in radio programmes. Unless alternative solutions can be agreed upon, these works would for the most part require individual clearances and again these would number in the tens of thousands.

At the heart of these models over past years have been the key commercial terms of what level of initial payment will be made and the basis on which rights are being granted. Relative bargaining power comes in here and the traditional approach has naturally been for the seller or supplier of rights to do so on a narrowly defined basis, while the BBC as buyer or user seeks the broadest basis.

This has resulted in a multiplicity of commercial outcomes over the years in the contracts covering programme contributions, creating a great deal of complexity and uncertainty in the context of a programme archive going back to 1923. The BBC already devotes GBP 4.5 million per year to service the re-clearances and further payments arising from the present limited use that is made of the programme archive – substantial further re-clearance of the archive on a largely individual contributor basis is barely feasible, given the costs that would be involved. The BBC's objectives in terms of archive rights management are to firstly dramatically improve the degree of certainty over our ability to use the contributions in archive programme content and secondly to radically simplify the processes currently involved in obtaining and administering those rights. One of the most important measures that can be adopted is to transfer substantial areas of rights clearance and management from an individual to a collective licensing basis and the BBC now believes that regulatory intervention would be justified to support this and help address the problems of archive rights clearances.

However, in relation to programme contributions commissioned by the BBC, at present there is an effective collective licensing approach to use of the archive online potentially available only in relation to freelance TV directors. For actors and musicians, there are presently limited collective licensing arrangements which cover the use of these programme contributions in the BBC's iPlayer online catch-up services and the BBC will seek a collective licence to cover the use of performances in archive material made available online. The issues of economic value and how to identify and report programme contributions will need to be dealt with. For presenters and talk's contributors where the contractual volumes are huge there is no alternative at present to individual clearance or re-contracting other than proceeding on a risk assessment basis. This aspect represents a substantial administrative obstacle to exploiting the archive.

As regards pre-existing intellectual property-protected works used in archive programmes, largely efficient and pragmatic collective licensing solutions are available in relation to music rights. The issue of multi-territory licensing coverage might arise if archive material was made available online ex-UK, although services funded by the BBC licence fee are intended primarily for UK audiences. This issue would have to be addressed, however, in relation to a BBC Worldwide commercial online service which was made available internationally. In relation to all the other types of pre-existing material protected by copyright and/or contract which will have been included in large volumes in archive programmes, there is at present no alternative other than to seek clearance on an individual basis.

VII. Archive clearance solutions

If there is a consensus that the solution to at least some of the difficulties of archive rights clearances lies in further collective licensing, which the BBC will voluntarily enter into where possible, the question arises of whether and how this approach might be underpinned by legislation or regulation. Some underpinning would appear to be a way to help the development of a copyright management system that balanced strong copyright protection with straightforward access to

copyright material, which seems to be critical if the full value of digital technology combined with the richness of archive content is going to be realised. The Digital Agenda for Europe is being based on the measures needed to create a vibrant digital European economy and includes references to a simplified system of licensing intellectual property rights, in particular to cover the whole European Union. The European Broadcasting Union has presented a policy paper "Modern copyright for digital media"⁵ to the European Commission, proposing a series of measures intended to create a coherent framework for audiovisual media rights management. In the UK, the BBC noted with disappointment the eventual inability of the government to enact Clause 43 of the Digital Economy Bill, which contained enabling measures to facilitate the use of orphan works and support extended collective licensing schemes.

Of the policy options being considered we believe that two developments would particularly assist with simplifying rights administration in the digital world. Firstly, the wider application of the Nordic model of extended collective licensing, which could be particularly helpful in stimulating the market to develop effective collective solutions for the problems associated with uncleared archive material. In looking to possible future collective licensing solutions individual rightsholders and creators would want to have sufficient trust and confidence in collective bodies, which will require proper regulatory oversight. Secondly, the wider application of the country-of-origin principle (as applied in the Cable and Satellite Directive⁶) to facilitate initial rights clearance on a technology and platform-neutral and, where necessary, multi-territory basis would further audio-visual services, including archives being made available on an innovative basis.

VIII. Conclusion

The BBC's practical difficulties with clearing rights in the programme archive are rooted in historical contracting practices and some aspects of the copyright system, which do not best serve contemporary needs given the capacities of digital technology. The BBC will continue to work, in collaboration with creator stakeholders, to increase the level of certainty over the ability to use the rights in BBC content and to substantially simplify rights administration. However, in relation to some of the intractable problems of individual rightsholder clearances, regulatory changes to support effective collective management of rights should be part of the future landscape. The views of creators and rightsholders on this and the other issues will need to be taken full account of in any specific developments, but the BBC is concerned that without intervention on these issues the full potential of the BBC's and other broadcasters' archives may not be realised.

5) Modern copyright for digital media, EBU policy paper, March 2010, available at:
http://www.ebu.ch/registration/policy2010/index_EN.php

6) Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

Collective Management of Music Rights in the Case of the Online Exploitation of TV Archives

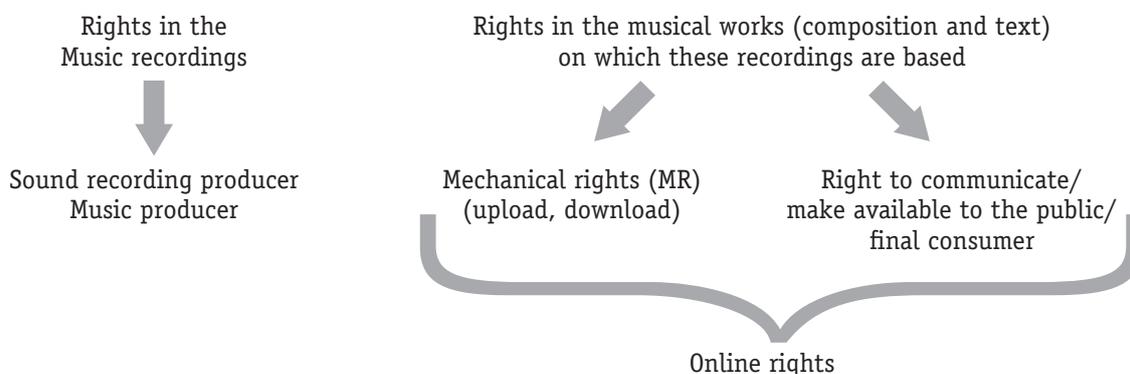
Stefan Ventroni

Poll Strasser Ventroni Feyock, Lawyers, Munich

In the case of the online exploitation of previously broadcast television productions (referred to below as "TV archives"), the following rights are affected with regard to the music rights involved:

- the right of the music producer or (in the case of the use of published sound recordings) the sound recording producer (label) in the *music recordings* and
- the rights in the musical works (composition and text) on which these recordings are based.

Figure 1: Film music



The scope of this article is limited to the issue of rights clearance with respect to *musical works* contained in television archives, because the online exploitation of television archives (eg, making content available on demand via download or streaming) – whether it be by the broadcaster itself or through third parties – raises particular legal issues regarding the musical works involved. These issues have been brought about by a paradigm shift undergone by collective music rights management in this area since 2005. While television broadcasters were up to then able to acquire¹ the relevant usage

1) It has been and remains a matter of dispute in Germany in this connection whether it is necessary in the case of the second run rights in a television production (e.g., on DVD or online) to obtain not only a GEMA licence but also additional permission or a synch right from the music publishers. Moreover, the question may arise in an individual case as to whether a licence from the relevant sound carrier producers is required if music recordings from published sound carriers are used. However, the scope of this article is limited to the issue of the collective management of online rights in music works.

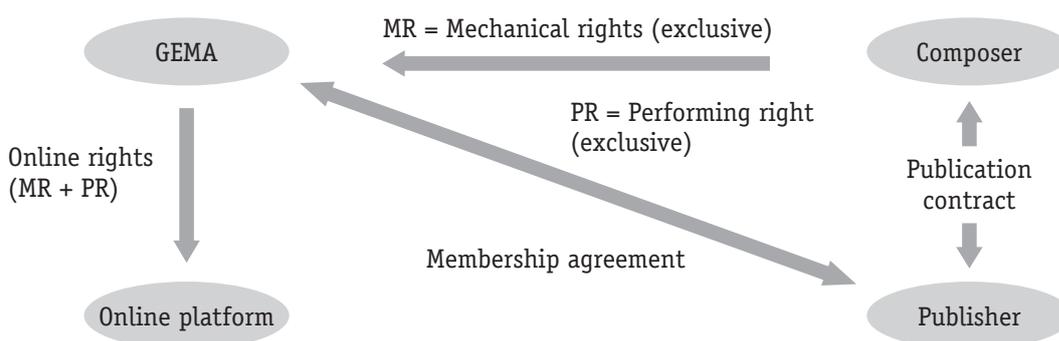
rights (i.e., the *mechanical right*² for the upload and download and the *performing right* for making the item accessible to the final consumer) with respect to the musical works used in their productions from a collecting society (such as GEMA in the case of Germany³), this is no longer possible for a large proportion of the world repertoire of musical works. Instead, many music publishers think that the aforementioned usage rights (referred to below as “online rights”) in musical works of Anglo-American origin can only be acquired from the organisations and companies (see below) set up for this purpose (see further below).

The starting-point for this paradigm shift is a recommendation from the European Commission of 18 October 2005 criticising the fact that licences granted by collecting societies (CSs) for online use are limited to their own territory and states that multi-territory licences are needed in this age of the cross-border online use of musical works. Such licences would, it said, improve the legal certainty of users and foster the development of legitimate online services, thus increasing, in turn, rights holders’ revenues. In order to achieve the aim of multi-territorial licensing, the Commission called in its “Option 3” recommendation to rights holders for the right to withdraw all online rights from the CSs and assign the management of these rights for a geographical area of their choice to a collecting society of their choice. At the same time, the Commission unexpectedly called for the abandonment of the system of reciprocal agreements, which involve collecting societies worldwide mutually agreeing to the management of their respective national repertoires abroad. In this way, each CS can grant the rights to the world repertoire in its territory.

EMI⁴ was the first rights holder to take the Commission at its word, withdraw online rights (as far as possible, see below) from the CSs, such as GEMA, and entrust their management to CELAS⁵, which was set up for this purpose. The question of whether this is the right way to promote the online market cannot be answered without explaining the CELAS model: as already pointed out, anyone wanting to offer music as downloads or streams must have acquired the mechanical right and the performing right. GEMA always licenses both rights as a standard online right at uniform rates, whereas CELAS separates these rights to its repertoire into mechanical and performing rights: mechanical rights as the exclusive licensee of EMI and performing rights on behalf of GEMA and the PRS.

The background to this arrangement is the different copyright regulations in the Anglo-American countries and continental Europe: put briefly, Anglo-American publishers can withdraw mechanical rights (but not performing rights) from the CSs and either manage them individually or assign their management to third parties, but in most cases this is not possible for continental European publishers.

Figure 2: Chain of title for the continental European repertoire



In Germany, for example, the composer/songwriter normally assigns to GEMA both the exclusive mechanical rights and the exclusive rights to the public performance of his/her works. GEMA combines these rights and grants them as a single online right to online services that exploit musical works.

2) In the terminology of music law, “mechanical right” means right to make a recording of a copyright work.

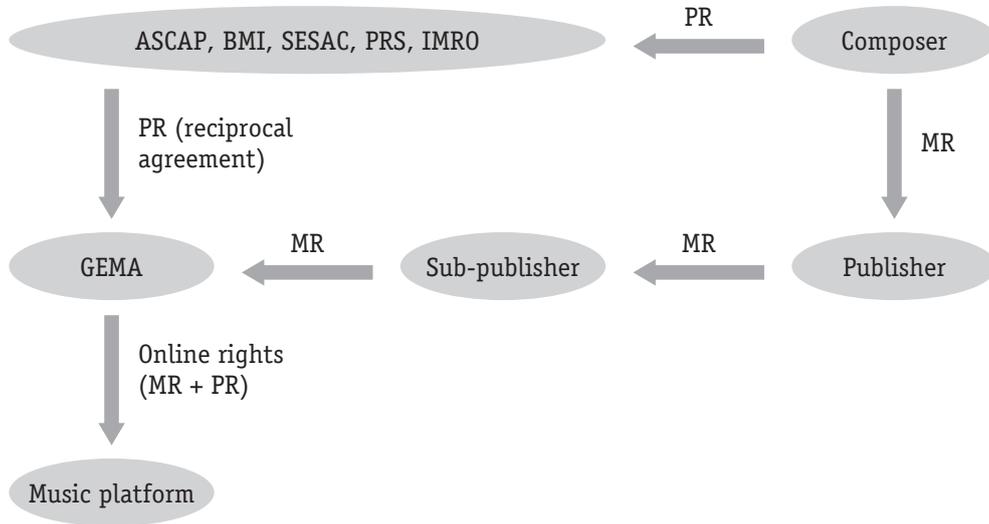
3) Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte.

4) EMI Group Limited is a limited liability company registered in England and Wales.

5) CELAS is a limited liability company set up by GEMA and MCPS/PRS and has its registered office at GEMA.

The publisher (which has concluded a publication contract with the composer) shares in the GEMA royalties through the membership agreement. However, publishers have no control over online rights as they have been assigned to GEMA by the composer/songwriter.

Figure 3: Chain of title for the Anglo-American repertoire⁶

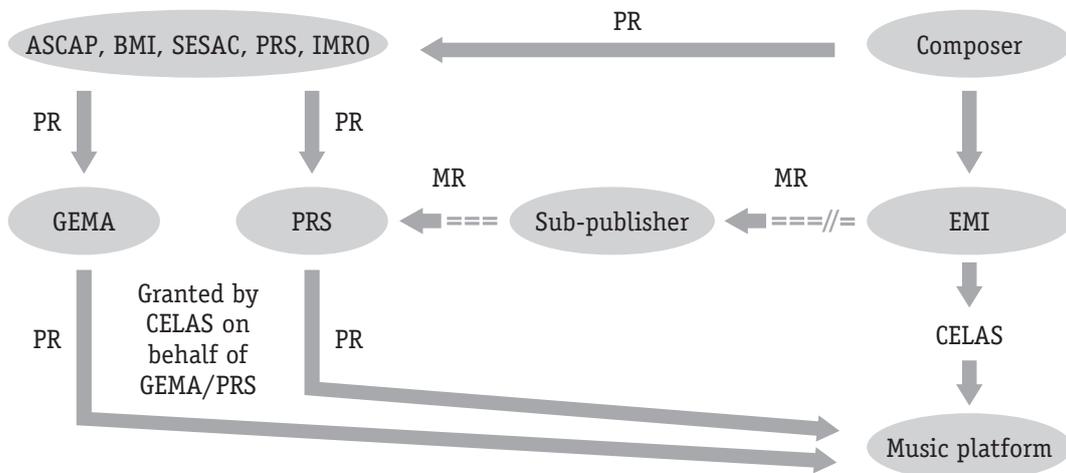


In the Anglo-American legal area, the composer/songwriter does *not* assign the mechanical right to the collecting society but to the publisher, which normally grants it to the relevant collecting societies abroad (eg, GEMA in Germany) via a sub-publisher. By cancelling the contract with the sub-publisher, publishers are able to regain control over the mechanical right.

This explains why publishers can (only) withdraw from the collective management of rights in the context of the *Anglo- American* repertoire and only with respect to the *mechanical right*. EMI has done precisely this.⁷

Figure 4: CELAS licensing arrangement

Pan-European online licence for the Anglo-American EMI repertoire



6) ASCAP stands for The American Society of Composers, Authors and Publishers, BMI for Broadcast Music, Inc., SESAC for Society of European Stage Authors & Composers, PRS for Performing Rights Society and IMRO for the Irish Music Rights Organisation.
 7) EMI claims it has withdrawn mechanical rights, for example from GEMA, by cancelling its contracts with sub-publishers.

It should be pointed out at this point that the arrangement chosen by CELAS has been adjudged by the Munich Regional Court (*Landgericht*)⁸ and the Munich Court of Appeal (*Oberlandesgericht*)⁹ to be rights splitting, which is illegal under copyright law. Until the issue is finally clarified by the Federal Court of Justice (*Bundesgerichtshof*), this puts a major question mark over the right of CELAS to grant online licences or assert claims for injunctive relief or for payment of royalties with respect to the use of the Anglo-American EMI repertoire.

As a result of the Commission's recommendation, there are now in addition to CELAS, which was set up on the initiative of EMI Publishing, numerous other initiatives led by other music publishers (in most cases, major music publishers)¹⁰ and collecting societies to reorganise the collective management of music rights in the online sphere. With the exception of the Nordic Model, they include the following pan-European central licensing initiatives partially controlled by collecting societies and partially by music publishers.

Figure 5: Pan-European licensing initiatives/models for the online distribution of music

Initiation and control by collecting societies	Initiation and control by music publishers
<p>ARMONIA (SACEM, SGAE, SIAE) Alliance Digital (MCPS-PRS)</p> <p>[Nordic Model (KODA, STEF, STIM, TEOSTO, TONO, EAÜ, AKKA/LAA, LATGA-A)</p> <p>The Nordic Model is unlike the other models as it does not involve a pan-European central licensing body. Rather, the participating collecting societies have mutually empowered one another to grant a multi-state licence for the music repertoire directly managed by them for the territories of the participating collecting societies.]</p>	<p>CELAS (EMI) PAECOL (GEMA, Sony/ATV Music Publishing) PEDL (MCPS-PRS, STIM, SACEM, SGAE, BUMA/STEMRA, Warner/Chappell Music) DEAL (Universal Music Pub.) Peer music</p> <p>Pan-European Central Online Licensing (PAECOL) is, like CELAS, a limited liability company but GEMA is its only shareholder.</p> <p>Pan-European Digital Licensing (PEDL) is a central licensing model of the music publishers Warner/Chappell Music for the Europe-wide management of its Anglo- American repertoire.</p> <p>DEAL is – unlike CELAS and PAECOL – not a separate company with its own legal personality but an alliance based simply on an agency contract between SACEM and Universal Music Publishing, the issue of licences being handled by SDRM.</p>

Most of the above-mentioned companies or alliances are responsible for the Europe-wide licensing of the repertoires of the following music publishers (although it is in some cases unclear whether the rights management is on an exclusive or non-exclusive basis):

8) *Zeitschrift für Urheber- und Medienrecht* 2009, pp. 788 ff. (judgment not final).

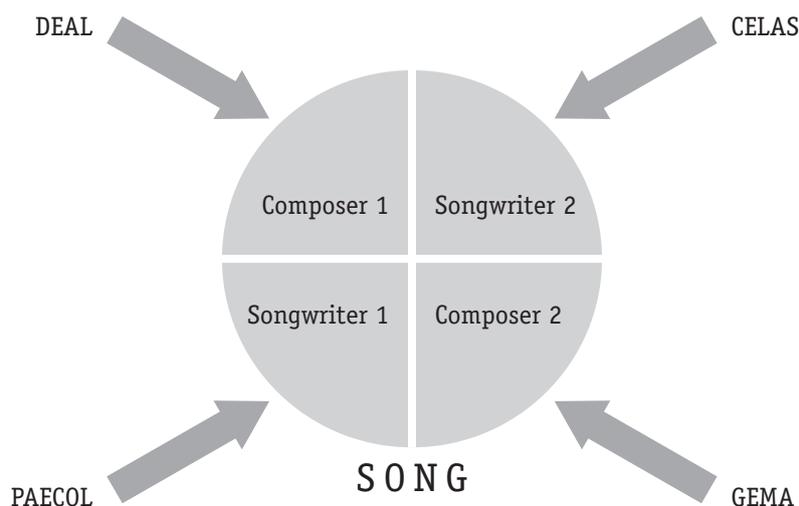
9) Judgment of 29 April 2010, Case 29 U 3698/09.

10) See as an overview of the situation at 7 February 2008 the EU Commission's report *Monitoring of the 2005 music online recommendation*, available at http://ec.europa.eu/internal_market/copyright/docs/management/monitoring-report_en.pdf

- Anglo-American/French universal repertoire: DEAL (probably non-exclusive¹¹)
- Anglo-American Warner Chappell Music repertoire: PEDL (probably non-exclusive¹²)
- Anglo-American Sony/ATV Music Publishing repertoire: PAECOL (probably exclusive¹³)
- Anglo-American/Latin American peer music repertoire: MCPS-PRS/SGAE (exclusive)
- Repertoire of French, Spanish and Italian composers: ARMONIA (exclusive¹⁴)
- Repertoire of approx. 800 independent music publishers: Alliance Digital (non-exclusive¹⁵)
- Repertoire of the Nordic and Baltic composers: Nordic Model

These new licensing models also made the issue of rights clearance more complicated in the case of the exploitation of television archives in the context of music rights. One reason for this is the resulting multiple separation of online rights in musical works at the repertoire and usage rights levels (separation into mechanical rights and performing rights) and, even, at the level of a work. In the case of works created by several authors (split copyrights), each part of a work can be represented by a different rights holder.

Figure 6:



For the user, this results in a larger number of licensors. A multi-territory licence is of little benefit to users if it only relates to fragments in each case. While users have up to now been able to acquire rights in the world repertoire of *one* CS (one-stop shop) for at least their own territory (see figure 7),

11) Nonetheless, the grant of territorial online licences by the other European collecting societies appears to be no longer possible. See Stefan Müller, "Rechtswahrnehmung durch Verwertungsgesellschaften bei der Nutzung von Musikwerken im Internet", *Zeitschrift für Urheber- und Medienrecht* 2009, pp. 121, 128 and 131; A. Butler, "A More Perfect Union", *Billboard*, 19 April 2008, Vol. 120 Issue 16, pp. 30 ff).

12) In the case of this model, Warner/Chappell Music has also granted non-exclusive online licences to the collecting societies involved.

13) However, GEMA appears to continue to be entitled to grant licences for Germany for the Anglo-American publishing repertoire of Sony/ATV Music Publishing (see GEMA 2008 annual report, p. 21).

14) The participating collecting societies have evidently brought into the joint venture on an exclusive basis the rights to the Community-wide online use of works by authors with whom they have a direct contractual relationship, which means these rights are no longer available to the other European collecting societies via reciprocal agreements. See the GESAC statement of 1 July 2007 on the Commission's recommendation, p. 3.

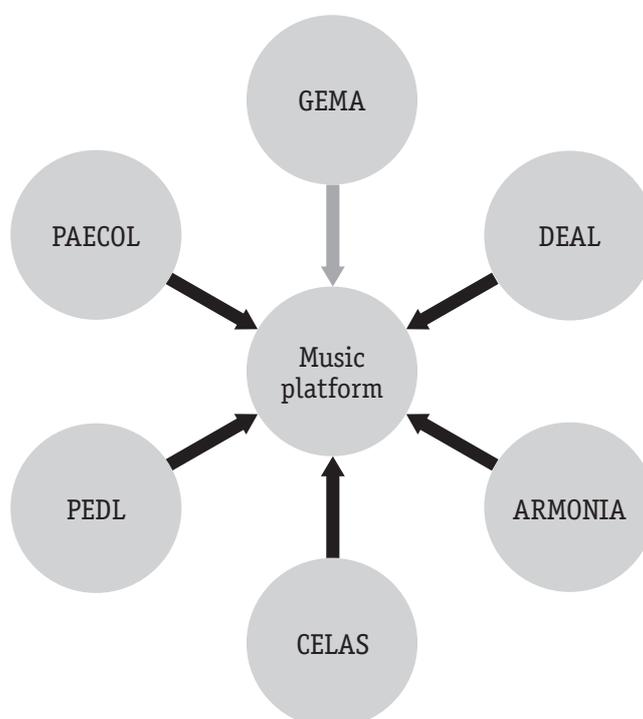
15) According to the rights management contracts concluded between Alliance Digital and the music publishers, the latter are still entitled to grant their online rights individually in addition to their management through Alliance Digital.

they now have to find out for the item they are offering who is responsible for managing rights/partial rights in what work/part of a work (see figure 8). Services that in some cases use several million musical works thus face a difficult task. In this connection, mention should be made of the (failed) attempt by BUMA/STEMRA to grant pan-European licences in the world repertoire at a uniform rate, against which GEMA obtained an interlocutory injunction from the Mannheim Regional Court.¹⁶

Figure 7: Yesterday: “national licences through a one-stop shop”



Figure 8: Today: Pan-European licences for fragments of repertoires and rights



16) Mannheim Regional Court, *Zeitschrift für Urheber- und Medienrecht* 2009, pp. 253 ff.

The Exploitation of the Audiovisual Cultural Heritage in Broadcasters' Archives A Competition Law and Policy Perspective

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I. Introduction

In their archives European broadcasters hold a huge stock of productions made or commissioned by themselves. The total is about 10 million in radio and 2 million in television, i.e. 28 million hours of content, going back to the very beginning of broadcasting.² Such archives constitute a unique and invaluable record of each country's political, social and cultural life.

Public service broadcasters are committed to making all or part of their archives available to the public. Online accessibility and availability to the public of Europe's cultural and audiovisual heritage is also the main purpose of the Commission's initiative on digital libraries.³ Online accessibility is considered a precondition for maximizing the benefits for citizens. The Commission and the European Parliament also highlight the importance of giving Europe's diverse, multilingual heritage a clear profile on the Internet⁴ and disseminating it worldwide.⁵

The creation, preservation and management of broadcasters' archives, including digitisation, entail high fixed costs and, consequently, the need for significant prior investment, coupled with high expenditure for archive management. These costs are, in addition to the investment, necessary to produce the archive material for its initial use. Moreover, the clearance of rights for new types of usage (on-demand use, for example) with all individual contributors to each single production (or, where applicable, their heirs) increases enormously the cost of management and, therefore, the cost of exploitation of such archives, without there being any guarantee of success (since re-use of the archive production will practically be ruled out if even a single contributor cannot be found or refuses

1) The views expressed herein are the author's and do not reflect those of the European Broadcasting Union.

2) "Modern copyright for digital media: EBU Policy Paper", available at:

http://www.ebu.ch/registration/policy2010/images/EBU%20POLICY%20Paper_EN_FINAL.pdf

In 2005, the Commission estimated that a large amount of archive material needed to be protected: "A survey of ten major broadcasting archives found 1 million hours of film, 1.6 million hours of video recordings and 2 million hours of audio recordings. Total European holdings of broadcast material are probably 50 times larger. Most of the material is original and analogue. 70% of the material is at risk, because it is decaying, fragile or on obsolete media. Every year Europe's audiovisual archives lose 10,000s of hours of the oldest part of their collections." (Communication from the Commission of 30 September 2005, "i2010: digital libraries", COM(2005) 465 final, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:EN:PDF>

3) Communication from the Commission of 30 September 2005, "i2010: digital libraries", COM(2005) 465 final, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0465:FIN:EN:PDF>

4) Commission Recommendation of 24 August 2006 on the digitalisation and online accessibility of cultural material and digital preservation, OJ 2006 L 236/28, recital 3.

5) European Parliament resolution of 27 September 2007 on i2010: towards a European digital library, OJ C 219 E/296.

to cooperate). These high costs set barriers to entry, which are the same for public and commercial broadcasters. However, given the extent of their archives and the longer period involved, public service broadcasters would generally have to bear higher costs. This also follows from the fact that public service broadcasters invest more funds in original productions than do their commercial counterparts.

When broadcasters considered the prospect of including these productions in specialised “niche” programme channels or of offering them in on-demand services, they all too soon discovered that, with a few exceptions (in particular, musical *petits droits* works), finding all relevant agreements as well as all rightsholders and renegotiating an appropriate level of remuneration for the rebroadcasting and acquisition of the necessary rights for use not envisaged under the original production agreements was either impossible or individual right owners (or their heirs) could not be identified or traced or else such administrative efforts would be totally disproportionate to the intended use. The complexity of the administrative work involved in this rights clearance exercise is illustrated by the BBC’s contribution elsewhere in this IRIS Special issue. Moreover, further details and examples of this problem, as related to so-called “orphan works”, were recently explained in a public hearing of the European Commission.⁶

The solution is for countries to provide for a *simplified legal mechanism* which effectively allows (all) broadcasters to exploit their own archive productions (naturally, subject to payment of equitable remuneration, as appropriate, to rightsholders who contributed to the production). The need to find such a remedy is supported, for example, by a Declaration of the Council of Europe’s Committee of Ministers,⁷ while legislative (framework) solutions have indeed been found in some countries, such as Denmark and Switzerland. It needs to be understood that different options are possible within such a regulatory framework and it seems most appropriate to leave most, if not all, details to the national level. One option which may be attractive for countries which have not yet found such a solution is the model of the so-called “extended collective agreement”, a regulatory mechanism which has produced positive results, most especially in the Nordic countries.⁸

Despite the fact that such solutions should be found primarily on the national level, what the objective should be needs to be recalled. It is important to realise that the notion of “broadcasters’ own archive productions” means only those radio and television productions which were produced either by the broadcasting organisation itself (“in-house productions”) or by a production company commissioned for that purpose by the broadcasting organisation, but where the broadcaster assumed full responsibility for its financing.

Meanwhile, some concerns were expressed by other players in the broadcasting market about a perceived “distortion of competition” that would emerge should public radio and television broadcasters indeed be allowed to make use of such a specific legislative solution for their archives in the above-mentioned sense. The present document offers an initial analysis of those concerns under the general principles of competition law and policy.

II. Markets, competition policy and exploitation of PSB archives online

The purpose of European competition and State aid law and policy is to ensure effective competition in the internal market, which in turn permits a greater choice among products for consumers at the lowest cost, and higher levels of output and innovation. The main positive outcome of an efficient market is that more content is made available to citizens and consumers. In terms of innovation, competition raises the incentives to innovate and introduce new media services on the market. With respect to archives, this means that any additional content which is made available to citizens increases European citizens’ welfare. From a cultural policy standpoint, this is all the more important

6) See the website of DG Internal Market, available at:

http://ec.europa.eu/internal_market/copyright/docs/copyright-info/orphanworks/weber_en.pdf

7) See Council of Europe, Committee of Ministers, “Declaration on the Exploitation of Protected Radio and Television Productions Held in the Archives of Broadcasting Organisations”, 9 September 1999, available at:

http://www.ebu.ch/CMSimages/en/leg_ref_coe_decl_archives_090999_tcm6-4469.pdf

8) On extended collective licensing, see Stef van Gompel, “Audiovisual Archives and the Inability to Clear Rights in Orphan Works”, IRIS *plus* 2007-4 (at point 3.2), available at: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2007.pdf

for historic archives, part of which comprises content highly valued as part of our cultural European heritage.

Increasing the amount of archived content online is thus an objective which national and European governing bodies value and wish to achieve. But what impact would such initiatives have on market participants? From the point of view of consumers and citizens, the initiative is indisputably positive. The investment in online content and new technology would also create new markets and contribute to the development of the media industry. However, the high cost of digitisation, preservation and management of archives raises issues related to the difficulties faced by public and private operators with regard to the funding of such services. Public service broadcasters do not have sufficient funding to support the digitisation of all their archives. Hence the need for additional funds and to carry out an initial assessment and selection of truly valuable content worthy of being preserved and digitised. In this regard, it should be noted that only part of the content available in the public service broadcasters' archives has the cultural and historical relevance to qualify as "cultural heritage". From a commercial point of view, even a smaller part of this material would have an exploitable economic value. The high cost of digitisation and the difficulties inherent in the on-demand business models make it even more difficult to attract substantial sums from private investors. However, the need for major investment upfront underscores the need to recover the investment. Any sustainable business model needs to consider the balance between the necessary upfront investment and the subsequent commercial exploitation of archives, while ensuring the widest possible access by end-users and citizens. If such parameters are not taken into account, the amount of archived content made available online is liable to remain insignificant and the above-mentioned objectives would be in jeopardy.

Against the backdrop of efforts to make public service broadcasters' archives available online, private actors raise issues which relate to their market position from another standpoint. It is suggested that the increased amount of archive content made available online and in the traditional broadcast market through public funding would stifle competition and reduce private initiative. Some other arguments favour making public service broadcasters' archives available free of charge to the industry.

These arguments should be carefully assessed before they are adopted as guiding principles from a competition policy standpoint. Indeed, it seems that the commercial exploitation of archived content is difficult, something which partly explains the difficulty of finding private investment. In addition to cultural objectives, this is an argument in favour of public funding for the digitisation, preservation and management of archives, and not the opposite. However, the Member States of the European Union and the Commission do not have infinite resources and any commercial exploitation of publicly funded content should therefore be encouraged. Public funding and commercial exploitation of the valuable parts of archives will make possible the gradual expansion of archives made available online and their use by citizens. Following the extremely careful approach suggested by private operators would run the risk of jeopardizing the main objective of serving all European citizens, in order to protect the private interests of part of the industry.

III. Competition law and access to PSB archives

Competition law, including State aid law, aims to create and preserve the right incentives for public and private broadcasters and this body of law should ensure that the initial investment made by broadcasters in their archives can be recouped. Consequently, even apart from the intellectual property rights held by the broadcasters themselves in their archives, there can be no general obligation under competition law to grant free access for some resources, simply because faced with that prospect no entity would make an investment to digitise, preserve and manage archives. This would ultimately freeze innovation and reduce choice for consumers.

Access to public or private archives could be imposed only in exceptional circumstances, on the basis of general competition law. The conditions for obliging a company to grant access to its own infrastructure or other resources are extremely restrictive and that is even more the case when intellectual property is involved. The refusal by an undertaking which holds a dominant position and owns an intellectual property right to grant a licence to another undertaking to use that copyright constitutes an abuse of a dominant position within the meaning of Article 102 TFEU, where the following conditions are fulfilled:

- the undertaking which requested the licence intends to offer new products or services not offered by the owner of the intellectual property right and for which there is potential consumer demand;
- the refusal is not justified by objective considerations;
- the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of the final products by eliminating all competition on that market.⁹

This extremely cautious approach to intervention is explained by the commonality of objectives of intellectual property and competition law with regard to economic incentives to invest and innovate. Competition law intervenes only in exceptional circumstances where the protection of intellectual property law accords the owner substantial market power, given the absence of other substitutes on the market, and when the owner abuses this power. For that reason, compulsory licensing remains an exceptional remedy in competition law and, even where access is granted, exclusivity is considered a normal business model in the industry. In principle, competition law does not have a say in the number of licences to be granted, but can limit exclusivity only in time and scope.

However, public service broadcasters would normally have a considerable incentive for the commercial exploitation of their archives and access to the material by third parties would not be problem. The issue of the commercial exploitation of archives would arise more in terms of access charges. Even in rare cases of obligation to grant access to intellectual property, competition law cannot require that access be granted free of charge. The price to be levied should at least cover fixed and variable costs and provide for a reasonable rate of return.

IV. State aid law considerations

Public funding and the obligation on public service broadcasters to digitise their archives is a matter of national law. Public service broadcasting organisations are entrusted with a public service mission. Their remit is defined at the national level, and it may include the digitisation and preservation of archives. National authorities have to design a funding model which would permit the initial investment, either by granting public money or through mixed funding schemes.

State aid law does not oblige public service broadcasters to digitise and make available their archives. On the other hand, it does not restrict them in the exploitation of their archives online, whether in respect of the content or the geographical areas in which their archives are made available online. The possible restrictions of competition may be prevented by the newly introduced *ex ante* assessment.¹⁰ If a broadcaster were to introduce a significant on-demand service which would use a significant amount of highly relevant archived content, the *ex ante* assessment would offer competitors the right tool to make their concerns known. The final decision on whether to allow the launch of such services on the market would be based on a balance between public and cultural policy and sound competition policy considerations.

From a purely behavioural standpoint, a refusal to grant access to their archives by public service broadcasters would be incompatible with EU State aid law, if such a refusal created a disproportionate distortion of competition which was not necessary for the fulfilment of the remit. Even in such cases, only the refusal would be considered disproportionate; there would be no obligation to grant access free of charge to other market operators. With regard to citizens, EU State aid law makes it possible to charge reasonable individual payments to fund such services.¹¹

9) Judgment of the Court of 6 April 1995, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission (Magill)*, ECR 1995 I-743; judgment of the Court of 29 April 2004, case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, ECR 2004 I-5039, point 52; judgment of the Court of First Instance of 17 September 2007, case T-201/04, *Microsoft Corp. v. Commission*, ECR 2007 II-3601.

10) Communication from the Commission on the application of State aid rules to public service broadcasting, [2009] OJ C 257/1, paragraphs 84 ff.

11) Court of First Instance Judgment of 12 February 2008, case T 289/03, *British United Provident Association Ltd (BUPA) and Others v. Commission*, ECR 2008 II-81, point 189.

V. Concluding remarks

The reflection on the online exploitation of public service broadcasters' archives should focus first of all on citizens' interests. This means that any additional content which is made available increases European citizens' welfare. This is all the more important for historic archives, which comprise content highly valued for the cultural European heritage.

Some private broadcasters suggest that the online exploitation of archives by PSBs would stifle competition and reduce private initiative, and that there should therefore be some content and output restrictions (less content should be made available online by PSBs). Any such approach would run the risk of jeopardizing the main objective of serving all European citizens. The objective of preserving effective competition and fostering efficient markets would also be lost, since less output (content) would be proposed to citizens. Instead, any measure which has an impact on archives should be accompanied by the right incentives for private and public service broadcasters to invest and innovate and, ultimately, make their archives available to the public.

Audiovisual Archives across Borders – Dealing with Territorially Restricted Copyrights

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I. Introduction

Since the late 1980s the European Community has carried out an ambitious programme of harmonisation of the law on copyright and related (neighbouring) rights, with the primary aim of fostering the Internal Market by removing disparities between the laws of the member states. This programme has resulted in no fewer than seven directives on copyright and related rights that were adopted in a 10-year interval between 1991 and 2001.¹ While the seven directives have indeed created a measure of uniformity between the laws of the member states, they have largely ignored the single most important obstacle to the creation of an Internal Market in content-based services: the territorial nature of copyright. Despite extensive harmonisation, copyright law in the European Union is still largely linked to the geographic boundaries of sovereign member states. Consequently, copyright markets in the European Union remain vulnerable to compartmentalisation along national borderlines. Even in 2010, content providers aiming at European consumers need to clear rights covering some 27 member states.

Audiovisual archives aiming at European audiences are regularly confronted with problems associated with territoriality in copyright. Licences allowing archives to make available online audiovisual content are more often than not restricted to national territories. This is usually the case for licences granted by collecting societies that almost without exception operate on the basis of territorially restricted mandates. As a consequence, audiovisual archives offering content online are often not accessible for viewers residing in foreign countries. For example, the BBC Archive² does not make its archive available online to visitors to its website with IP addresses registered outside the United Kingdom.

1) Computer Programs Directive (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17 May 1991), Rental Right Directive (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 27 November 1992), Term Directive (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24 November 1993), Satellite and Cable Directive (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, 6 October 1993), Database Directive (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27 March 1996), Information Society Directive (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22 June 2001), Resale Right Directive (Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13 October 2001).

2) The BBC Archive, available at: <http://www.bbc.co.uk/archive/>

Territorial fragmentation appears to be particularly rampant in respect of online television sports coverage. Whereas, for example, many national broadcasters transmitted the 2010 Winter Olympic Games online on multiple broadband channels, access to these channels from abroad was usually restricted, apparently for copyright-related reasons. Clearly, for consumers of such services, the Internal Market has yet to materialise.³

This article juxtaposes the territorial nature of copyright with the ambitions of holders of audiovisual archives aspiring to offer transnational services. It commences with a description of the rule of territoriality in copyright law; goes on to discuss various existing legal doctrines that mitigate its detrimental effect on the Internal Market; describes in which way territoriality affects audiovisual archives; and concludes by contemplating possible solutions.

II. The territorial nature of copyright

Copyright creates exclusive rights in works of literature, science and art. In the European Union, despite almost 20 years of harmonisation of copyright, copyright has remained essentially national law; each of the Union's 27 member states boasts its own national law on copyright and neighbouring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the member state where the right is granted. This is a core principle of copyright and related rights, enshrined in the Berne Convention and other international treaties,⁴ which – because of the obligation under the EEA for member states to adhere to the Berne Convention – can be described as “quasi-acquis”.⁵ In its *Lagardère* ruling,⁶ the Court of Justice of the European Union (ECJ) has recently confirmed the territorial nature of copyright and related rights.

The territorial nature of copyright has various legal consequences.

1. Disparities in national law

In the first place, since copyright is granted autonomously by each member state for its own territory, rules on copyright may vary from one member state to the other. Although the seven harmonisation directives in the field of copyright and related rights have removed these disparities in distinct fields (e.g. computer programmes, rental and lending, satellite broadcasting and cable retransmission, term of protection, databases, artists' resale right, etc.), important areas have remained largely or completely unharmonised. This is the case in particular for limitations and exceptions to copyright. While the Information Society Directive of 2001 provides a “shopping list” of some 21 limitations and exceptions, all but one of these limitations are optional. Member states may implement at their own discretion any or all of the limitations on the Directive's list. As a consequence, audiovisual archives may enjoy relatively broad statutory freedoms to digitise broadcast content in one member state, while in another member state no similar freedom may exist.⁷

2. Territorial application of the law

A second and related aspect of territoriality is that, according to the rule of private international law, the law of the country where protection is sought (the so-called *Schutzland*) governs instances

3) See European Parliament, Resolution of 21 June 2007 on consumer confidence in the digital environment, Strasbourg, 21 June 2007, A6-0191/2007, sec. 30.

4) European Commission, “Green Paper on Television without Frontiers”, COM(84) 300 final, Brussels, 14 June 1984, p. 301.

5) J. Gaster, ZUM 2006/1, p. 9.

6) *Lagardère Active Broadcast*, ECJ 14 July 2005, case C-192/04, par. 46: “At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.”

7) Institute for Information Law, “Study on the Implementation and Effect in member states' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society”, report to the European Commission, DG Markt, February 2007.

of copyright infringement.⁸ This rule implies that making a film or other audiovisual work available online affects as many copyright laws as there are countries where the posted work can be accessed. In other words, copyright licences for such acts need to be cleared in all countries of reception – normally, all 27 member states of the EU.

3. Territorially fragmented rights

Due to the rule of national treatment found *inter alia* in Art. 5(2) of the Berne Convention, works or other subject matter protected by the laws of the member states are protected by a “bundle” of 27 parallel (sets of) exclusive rights. A third consequence of territoriality is, therefore, that copyright of a single work of authorship can be “split up” into multiple territorially defined national rights, which may be owned or exercised for each national territory by a different entity.

This is the case, for instance, with copyrights in musical works. In practice, composers, song writers and music publishers grant their copyrights to collective rights management organisations that operate on the basis of strictly nationally defined legal mandates. While these collecting societies usually represent, by means of reciprocal contracts with other societies, most composers and songwriters in the world, the copyrights granted or entrusted to them are strictly national, so they lack the legal mandate to license uses that exceed national borders, such as online download services that operate transnationally.

III. Judicial and legislative responses

Over time, ECJ and the EU legislature have responded to the problems of territoriality, by mitigating its consequences in various ways. These responses, however, have been uneven and remain incomplete, particularly with regard to making works available online.

1. Community exhaustion

The ECJ has recognised early on that the territorial exercise of rights of intellectual property negatively affects the free circulation of goods, which is a core characteristic of the Internal Market. In a series of decisions preceding the harmonisation of copyright and related rights, the ECJ held that the right to control the distribution of copyright protected goods is exhausted following the putting on the market of these goods inside the Community with the consent of the rightsholder(s).⁹ This so-called rule of “Community exhaustion” was codified, much later, in Art. 4(2) of the Information Society Directive.

As a consequence, markets for copyright protected goods can no longer be partitioned according to national borders; parallel (or “grey”) importing of copyright protected goods, such as books or DVDs that originate from other EU member states, is legitimate. No similar rule of exhaustion, however, has been developed in respect of the provision of audiovisual content-related *services*, as Art. 3(3) of the Information Society Directive makes clear. “The rights referred to in paragraphs 1 and 2 [i.e. right of communication and making available to the public] shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.” Audiovisual services, therefore, remain vulnerable to the concurrent exercise of rights of public performance, communication to the public, cable retransmission or making available in all the member states where the services are offered to the public.

Consequently, content-related services that are offered across the European Union require licences from all rightsholders covering all the territories concerned. If a service is offered to all consumers residing in the European Union, as will be the case for many services offered over the Internet, rights for all 27 member states will have to be cleared. This will be particularly problematic if the rights in

8) Art. 8 of the Rome II Regulation.

9) See for instance *Deutsche Grammophon v. Metro SB*, ECJ 8 June 1971, Case 78/70, ECR [1971] 487.

the member states concerned are in different hands. This may be the case, for instance, for rights in musical works that are exercised by national collecting societies, or for rights in cinematographic works that are often split up for reasons related to film financing.

2. The satellite broadcasting solution

Apart from the rule of Community exhaustion, the only structural legislative solution to the problem of market fragmentation by territorial rights can be found in the Satellite and Cable Directive of 1993. According to Art. 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, i.e. where the "injection" ("start of the uninterrupted chain") of the programme-carrying signal can be localised. Thereby the Directive has departed from the so-called "Bogsch theory", which held that a satellite broadcast requires licences from all rightsholders in all countries of reception (i.e. within the footprint of the satellite). Since the transposition of the Directive, only a licence in the country of origin (home country) of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting has been created and market fragmentation along national borders through the cumulative application of several national laws to a single act of satellite broadcasting was avoided.

The satellite broadcasting rule of the Directive does not, however, apply to audiovisual content services offered online. Audiovisual archives wishing to offer transborder online services across the European Union will therefore have to clear the rights from all rightsholders concerned for all the member states of reception.

IV. Possible solutions

Clearly, to audiovisual archives with transnational ambitions copyright territoriality presents a serious impediment. While the difficulties of securing licences from thousands or even millions of – often hard to identify – rightsholders are already monumental at the national level, these problems are multiplied for digitisation projects with transnational ambitions. In cases where these problems become insurmountable, remote access to digitised collections will necessarily be restricted to national audiences.

Disparities in national copyright protection, particularly as regards limitations of copyright, may result in additional impediments. While digital archiving may be perfectly legitimate in some member states, the same activities may require licences in others, thereby raising obstacles to the establishment of transnational audiovisual archive services.

The harmonisation directives in the field of copyright and related rights adopted by the European legislature since 1991 have largely ignored the territorial nature of the economic rights. As a consequence, even in 2010, content providers aiming at European consumers need to clear rights covering some 27 member states. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States, where copyright is regulated not by the single states, but at the Federal level.

The Google Book Settlement that presumably allows Google to digitise and make available online on the American market tens of millions of books, illustrates – perhaps better than any other recent development – the comparative disadvantages of a European market still divided by national copyrights and divergent copyright limitations, and the urgency of pursuing solutions.¹⁰

The question, therefore, should be addressed whether solutions can be found in respect of copyright-related online services. Three different approaches might be considered.

10) See "It is time for Europe to turn over a new e-leaf on digital books and copyright", joint Statement of EU Commissioners Reding and McCreevy on the occasion of the Google Books meetings in Brussels, 7 September 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/376&format=HTML&aged=0&language=EN&guiLanguage=en>

1. Extending the satellite broadcasting model to the Internet

One possible solution would be to extend to the Internet the "injection right" model of the Satellite and Cable Directive. This is not a new idea. Already in the 1995 Green Paper that preceded the Information Society Directive,¹¹ the European Commission toyed with the idea of applying to the Internet the country of origin approach that typifies the Satellite and Cable Directive. But this suggestion was immediately discarded by all rightsholders consulted. Rightsholders feared they would lose control of copyrighted content once it was offered online, under a licence, somewhere within the European Union. It was also pointed out that transmission of works over the Internet is not merely an act of communication to the public, as is satellite broadcasting, but also concerns the right of reproduction. Works made available online are stored on servers and copied repeatedly on their way from the content provider to the end user.

Similar concerns are reflected in a more recent European Commission Staff Working Document that accompanies the Communication of the Commission on "Creative Content Online".¹²

2. Promoting multiterritorial licensing

A much less ambitious approach would be to keep the territorial nature of copyright intact as a matter of principle, but to promote multiterritorial licensing. This is the approach apparently advocated by the Commission in its Communication on Creative Content Online. While recognising the problems of multiterritorial licensing in the audiovisual sector, the Commission no longer discusses the country-of-origin approach of the Satellite and Cable Directive as a viable solution. Instead, the Commission suggests a more modest solution that would allow broadcasters to simulcast over the Internet primary broadcasts for which only local rights have been cleared.

3. Unification of European copyright law

Nevertheless, if the European Union is really serious about achieving an Internal Market for content-related goods and services, the problem of territoriality in copyright must be confronted in a more fundamental way. As the Institute for Information Law has suggested in a major study on the future of European copyright law that was carried out for the European Commission,¹³ a truly structural and consistent solution, which would immediately remove all copyright-related territorial obstacles to the creation of a Single Market, would be the introduction of a unified European Copyright Law. The idea of a European (or Community) Copyright is gradually receiving the attention it deserves, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner for Information Society and Media, Viviane Reding, expressly endorsed the idea of a European Copyright Law:

"Last, but not least, one could think of a more profound harmonisation of copyright laws in order to create a more coherent licensing framework at European level. A 'European Copyright Law' – established for instance by an EU regulation – has often been mooted as a way of establishing a truly unified legal framework that would deliver direct benefits. This would be an ambitious plan for the EU, but not an impossible one."¹⁴

11) European Commission, "Copyright and Related Rights in the Information Society", Green Paper, COM(95) 382 final, Brussels, 19 July 1995, p. 41 ff.

12) "Commission staff working document - Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market", COM(2007) 836 final, Brussels, 3 January 2008, p. 25-26.

13) P.B. Hugenholtz *et al.*, "The Recasting of Copyright & Related Rights for the Knowledge Economy", Report to the European Commission, DG Internal Market, November 2006, p. 210.

14) Viviane Reding, speech delivered at Visby/Gotland on 9 November 2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>. Similar ideas are expressed in a "Reflection paper" on "Creative Content in a European Digital Single Market: Challenges for the Future", which was jointly issued by the DGs InfoSoc and Markt, available at: http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf

Importantly, the Lisbon Reform Treaty has introduced a specific competence for Community intellectual property rights in Art. 118 TFEU: “In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorization, coordination and supervision arrangements.”¹⁵

As former Commissioner Reding has suggested, devising a European Copyright Law would be an ambitious undertaking – at best a project of the very long term. This distant perspective has not, however, discouraged a group of European copyright scholars (the so-called Wittem Group) to jointly work on the drafting of a model *European Copyright Code* since 2002. In April 2010 the Wittem Group published its annotated code; it is available online at www.copyrightcode.eu.¹⁶

15) The “ordinary procedure” that Article 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote.

16) The author of this article is a member of the Wittem Group.

The Desirability of Cross-border Exploitation from a Political and Economic Point of View – Working towards an Internal Market

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A truly internal market for audiovisual media services – including on-demand services – is not only in the interest of the audiovisual industry, but also of citizens. In terms of economic advantages, the European Policy Centre recently estimated that completing the Digital Single Market would boost EU GDP by more than 4%.² The Digital Agenda for Europe (DAE)³ puts this in an overall Information and Communication Technology (ICT) context and estimates that the ICT sector represents a market value of EUR 660 billion annually, with more than 250 million daily Internet users.

I. Citizens' expectations

European integration has created consumer expectations. Today, citizens not only count on using a single currency and on travelling without border restrictions, but they are also used to buying all sorts of things – from books to cars – abroad and using them at home. The fact that the internal market in some areas is not fully realised frustrates citizens. Consumers expect to have access to the services of another member state in their home country and vice versa. There is a presumption that there are no boundaries for accessing services within the EU's Single Market.

A recurrent theme in citizens' complaints relates to the inaccessibility of broadcasts outside a given member state. This concerns pay-TV services, but also some public service broadcasts. Citizens' complaints also relate to online services. The major music online store, Apple's iTunes, does not offer one unified European Union-wide music store. Some countries are not served at all, while some songs are only available in some national iTunes stores and not in others.

II. "An ever closer union among the people of Europe"

These expectations fostered by citizens are not the result of over the top rhetoric, but are rooted in the promises and objectives of the Treaties. In order to contribute to *an ever closer union among the people of Europe*,⁴ the European Institutions should work on promoting and protecting the five freedoms guaranteed under the Treaty on the Functioning of the European Union (TFEU), i.e. free

1) This article expresses the views of the author only. It is in no way binding on the European Commission.

2) EPC, "Digital Single Market", available at: http://www.epc.eu/documents/uploads/1088_digital_single_market.pdf

3) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Agenda for Europe, COM (2010)245, Brussels, 19 May 2010, available at: http://ec.europa.eu/information_society/digital-agenda/documents/digital-agenda-communication-en.pdf

4) Article 1 of the Treaty on European Union.

movement of goods, free movement of citizens, freedom of establishment, freedom to provide services and free movement of capital.

III. An internal market

Moreover, Article 3 of the Treaty on European Union (TEU) states that “[t]he Union shall establish an internal market...”. Article 26 of the TFEU states that “[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”. It becomes obvious that the “internal frontiers” that are erected by territorial selling of copyright protected works and creative content in this respect inherently contradict the idea of an internal market.

For the audiovisual sector, further secondary legislation in the form of two EU Directives aims at transposing the treaties’ language into an internal market practice of freely circulating audiovisual media services.

IV. The Audiovisual Media Services Directive

The name of the former “Television without Frontiers Directive” (TVwF) already clearly described its objective. The title of the revised Audiovisual Media Services Directive (AVMSD)⁵ no longer includes the addendum “*without frontiers*”, but the objective remains unchanged. A number of Recitals of the codified Directive confirms this, while Recital 2 even says that “audiovisual media services provided across frontiers by means of various technologies are one of the ways of pursuing the objectives of the Union”. Recital 5 refers to the double-faceted nature of audiovisual services as both cultural and economic and makes a first link to fundamental rights, which is later confirmed in Recital 16.⁶ The country of origin principle should be regarded as the core of the Directive, as it is essential for the creation of an internal market (Recital 33⁷ and Article 2). All of this is linked to the trans-border provision of services.

The AVMS Directive applies to all audiovisual media services, which it defines as services which are under the editorial responsibility of a media service provider and are transmitted by electronic communications networks. Archives that are made available to the public by broadcasters are consequently subject to the Directive’s rules for non-linear, on-demand services.

V. The SatCab Directive

To ensure that broadcasting services could circulate freely in the Union, the “Television without Frontiers Directive” was complemented by a sister Directive on copyright, satellite broadcasting and cable retransmission. The so-called SatCab Directive confirms and ensures that only one law, that of the originating country as defined in the Directive, is applied to the act of satellite broadcasting. The Directive aims at ensuring a secure legal framework for cross-frontier satellite broadcasting. At the same time, it guarantees a certain level of protection for all right-owners in all EU countries. Additionally, it aims at facilitating the simultaneous and unchanged cable distribution of foreign

5) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 [2007] OJ L332/27 (hereafter: Audiovisual Media Services Directive or AVMS Directive). Codified Directive 2010/13/EU available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

6) Recital 16 reads: “This Directive enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union, in particular Article 11 thereof. In this regard, this Directive should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.”

7) Recital 33 reads: “The country of origin principle should be regarded as the core of this Directive, as it is essential for the creation of an internal market. This principle should be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.”

(terrestrial or satellite) broadcast programmes with a provision according to which all rights should be exercised compulsorily through collecting societies, except the rights exercised by a broadcaster in respect of its own transmissions.⁸

The SatCab Directive follows the same logic as the TVwF Directive and the AVMSD. The Directive provides for the establishment of a common market and an area without internal frontiers by clarifying that only one law, i.e. the law of the country of origin, is applicable to the act of satellite broadcasting.

The broadcasts, transmitted across frontiers by satellite and cable, are one way of pursuing the establishment of a common market and the abolition of obstacles to the free movement of services.⁹ The Directive avoids the cumulative application of different national laws through eliminating all criteria linked to the countries where the programmes are receivable.

The Satellite and Cable Directive of 1993 was intended to break down national barriers and enhance the trans-border broadcasting and cable retransmission of television programmes within the European Union. To this end, the Directive introduced two legal instruments. Firstly, in an attempt to prevent the European satellite market from being fragmented, it created a unitary right of satellite communication which can only be exercised in the country of origin ("uplink") of a satellite transmission. Secondly, the Directive sets out a system of compulsory collective management of cable retransmission rights, in order to facilitate and promote collective licensing and avoid "black-outs".

This Directive was adopted in order to complement the content and country of origin rules of the TVwF Directive. However, it only deals with those distribution platforms that the legislator could envisage at the time: satellite and cable. Distribution via the Internet, with all its possibilities, was not known and therefore not regulated.

VI. The Communication on Public Service Broadcasting

When discussing the desirability of cross-border exploitation of the archives of *public service* broadcasters, it is helpful to recall the Communication from the Commission on the application of State aid rules to public service broadcasting.¹⁰ This document clarifies that Union law does not hinder cross-border use of these archives. The Communication lays down the conditions that public service broadcasters' services in general and their services based on the use of archives in particular must meet to be compatible with Union law:

- The undertaking must be explicitly entrusted by the member state with the provision of the service (no 37 ii).
- The definition of the public service mandate falls within the competence of member states (no 44) and should be as precise as possible. It should leave no doubt as to whether a certain activity is intended to be included in the public service remit or not (no 45). However, the Communication acknowledges the specific nature of the broadcasting sector and the need to safeguard editorial independence.
- A qualitative definition, i.e. goal-oriented, is considered to be sufficient (no 47). "The definition of the public service remit may also reflect the development and diversification of activities in the digital age and include audiovisual services on all distribution platforms" (no 47).
- It is not for the Commission to decide which programmes are to be provided and financed. The role of the Commission is limited to checking for manifest error. This would be the case if activities could not reasonably be considered to meet – in the wording of the Amsterdam Protocol – the "democratic, social and cultural needs of each society". Moreover, "a manifest error could occur where the State aid is used to finance activities which do not bring added value in terms of serving the social, democratic and cultural needs of the society" (no 48).

8) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L248/15 (hereafter: SatCab Directive).

9) SatCab Directive, Recital 3.

10) Communication from the Commission on the application of State aid rules to public service broadcasting (Broadcasting Communication) [2009] OJ C 257.

- Whenever the scope of the public service remit is extended to cover new services, the definition and entrustment acts should be modified accordingly.

Looking forward, the Communication acknowledges that technological changes have fundamentally altered broadcasting and that there has been a multiplication of distribution platforms and technologies, including video on demand (no 5). Therefore it is not surprising that one entire chapter of the Communication, “6.7 Diversification of public broadcasting services”, is dedicated to the changing media landscape. The Commission considers that public service broadcasters should be able to use opportunities offered by digitisation and diversification of distribution platforms on a technology neutral basis to benefit society. Even an element of remuneration is considered admissible under certain circumstances (no 83). Member states shall consider, by means of prior evaluation based on an open public consultation, whether significant new audiovisual services meet the requirements of the Amsterdam Protocol, i.e. whether they serve democratic, social and cultural needs of society, while duly taking into account their potential effect on trading conditions and competition (no 84). The assessment as to whether possible negative effects on the market are justified by the added value would only be objective if carried out by a body which is effectively independent from the management of the public service broadcaster.

Accordingly, the EU legal framework, in general, and the Communication, in particular, does not in principle exclude the opening of the archives of public service broadcasters.

Various policy papers and policy initiatives flesh out the parameters that in the view of the Commission will or must play a role in the exploitation of digital content, including broadcasters' archives. Adapting the copyright framework in order to overcome the perceived fragmentation of the internal market is at the centre of many of these.

VII. The Monti Report

The Single Market is at the heart of Europe's founding fathers' original idea and yet is still unfinished business. In his political guidelines for this Commission, President Barroso pointed at the gaps and “missing links” that hamper the functioning of the Single Market. Echoing this orientation, the European Council of 26 March 2010 agreed that the new Europe 2020 strategy should address “the main bottlenecks ... related to the working of the internal market and the infrastructure”. The Monti Report “A New Strategy for the Single Market”,¹¹ commissioned by President Barroso, identifies some of the bottlenecks with regard to the Digital Single Market. It notes that the European markets for online digital content are still underdeveloped, as the complexity and lack of transparency of the copyright regime creates an unfavourable business environment. It concludes that it is urgent to simplify copyright clearance and management by facilitating pan-European content licensing, through the development of EU-wide copyright rules, including a framework for digital rights management. The regulatory regime should also ensure the conditions for expanding the digital content and broadcasting markets by addressing licensing and copyright levies. A clear and predictable EU framework for orphan works would unleash an important untapped potential. The key recommendations of the Monti Report with regard to online digital content are:

- Proposals for an EU copyright law, including an EU framework for copyright clearance and management;
- Proposals for a legal framework for EU-wide online broadcasting.

VIII. Convergence come true

These recommendations are particularly pertinent under the current circumstances. Technological developments, like digitisation and broadband penetration, are challenging the business models of the creative industries, including broadcasters. New players have entered the scene, for example telecom operators, User-Generated Content portals, content aggregators and social networking platforms.

11) M. Monti, “A New Strategy for the Single Market – At the Service of Europe's Economy and Society”, Report to the President of the European Commission José Manuel Barroso, 9 May 2010, available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf

Statistics show a growing demand for content online.¹² Broadcasters are increasingly faced with a situation where audiences are unhappy when a programme broadcast on a linear scheduled service is not available on demand. This however raises a number of copyright issues, which have pushed the public service broadcasters to publish a policy paper that asks for European regulatory intervention.¹³

IX. EU 2020 and the Digital Agenda

As stated in the Commission's Communication "Europe 2020, a strategy for smart, sustainable and inclusive growth",¹⁴ the issue of the fragmentation of the digital market is addressed in the Flagship Initiative "Digital Agenda for Europe". Within the framework of this initiative, the Commission will work on creating a true Single Market for online content and services. In this sense, the Digital Single Market should provide for borderless and safe EU web services and digital content markets, with adequate protection and remuneration for rightsholders and active support for the digitisation of Europe's rich cultural heritage.¹⁵

For the development of a Single Digital Market, it will be essential to offer European consumers a wide range of innovative content on various platforms, including mobile Internet. With the increase in legal services, payment flows to the owners of copyright will increase as well. The adequate remuneration of authors and a fair chance to recoup investments made in the creation of content is not contrary to consumer-oriented policy, but complementary to it.

The DAE calls for a new Single Market to deliver the benefits of the digital era (DAE point 2.1):

"The internet is borderless, but online markets, both globally and in the EU, are still separated by multiple barriers affecting not only access to pan-European telecom services but also to what should be global internet services and content. This is untenable. First, the creation of attractive online content and services and its free circulation inside the EU and across its borders are fundamental to stimulating the virtuous cycle of demand. However, persistent fragmentation is stifling Europe's competitiveness in the digital economy. It is therefore not surprising that the EU is falling behind in markets such as media services, both in terms of what consumers can access, and in terms of business models that can create jobs in Europe."

In the Digital Agenda for Europe, the Commission announces the following action areas in the field of audiovisual media policies:

"To maintain the trust of rightsholders and users and facilitate cross-border licensing, the *governance and transparency of collective rights management* needs to improve and adapt to technological progress. Easier, more uniform and technologically neutral solutions for *cross-border and pan-European licensing* in the audiovisual sector will stimulate creativity and help the content producers and broadcasters, to the benefit of European citizens. Such solutions should preserve the contractual freedom of rightsholders. Rightsholders would not be obliged to license for all European territories, but would remain free to restrict their licences to certain territories and to contractually set the level of licence fees.

If nee be, additional measures will be examined which take into account the specificities of all the different forms of online content. In this regard, the Commission does not exclude or favour any particular option or legal instrument.[...]

12) For example, statistics from the German IT Association BITKOM cite a turnover of EUR 112 million for music downloads in 2009, which corresponds to a 40% increase (compared to EUR 78.75 million) in turnover for music downloads in 2008. The expectations for 2010 are that they will further increase.

13) S. Edwards, P. Kamina and K.N. Peifer, "Modern Copyright for Digital Media – Legal Analysis and EBU proposals", March 2010, available at: http://www.ebu.ch/registration/policy2010/images/EBU%20Copyright%20WHITE%20Paper_EN_FINAL.pdf

14) Communication from the Commission, "Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth", COM 2010(2020), Brussels, 3 March 2010, available at: http://ec.europa.eu/eu2020/index_en.htm

15) Website of the Digital Agenda for Europe, available at: http://ec.europa.eu/information_society/digital-agenda/index_en.htm

Digital distribution of cultural, journalistic and creative content, being cheaper and quicker, enables authors and content providers to reach new and larger audiences. Europe needs to push ahead with the creation, production and distribution (on all platforms) of the digital content. For instance, Europe has strong publishers but more competitive online platforms are needed. This requires innovative business models, through which the content would be accessed and paid for in many different ways, that achieve a fair balance between rightsholders' revenues and the general public's access to content and knowledge. Legislation may not be necessary to enable such new business models to prosper if all stakeholders cooperate on a contractual basis. The availability of a wide and attractive online legal offer would also be an effective response to piracy."¹⁶

Key Action 1 of the DAE concerns the simplification of copyright clearance, management and cross-border licensing by:

- Enhancing the governance, transparency and pan-European licensing for the (online) rights management by proposing a *framework Directive on collective rights management* by 2010;
- Creating a legal framework to facilitate digitisation and dissemination of cultural works in Europe by proposing a *Directive on orphan works* by 2010, to conduct a dialogue with stakeholders with a view to further measures on *out-of print works*, complemented by rights information databases.

The DAE also envisages other actions, in follow up to the Content-Online initiative:

By the end of 2010, a Green Paper addressing the opportunities and challenges of online distribution of European audiovisual works and other creative content is envisaged. The Commission has also announced that after an extensive stakeholder dialogue, a report will follow up by 2012 on the need for additional measures allowing EU citizens, online content services providers and rightsholders to benefit from the full potential of the digital internal market, including measures to promote cross-border and pan-European licences, and without excluding or favouring at this stage any possible legal option.

X. Conclusion

The trans-border provision of audiovisual services is politically desirable and economically important. The simple internal market logic that should be applied to all kinds of products and services with regard to these specific "cultural services" is reinforced by potential gains in cultural diversity and media pluralism. The current market fragmentation, however, has its roots in the legacy of complex business models that are not easy to develop or replace. Recent Commission documents make a clear pledge for a Single Digital Market for content services. Exactly how this objective will be reached is still under consideration, but the commitment is there.

16) DAE, point 2.1.1.

The Desirability of Cross-border Online Exploitation of Broadcasters' Archives from a Political and Economic Point of View – A Rightsholders' Perspective

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The desire for cross-border online exploitation of broadcasters' archives comes from the larger phenomenon of the online dissemination of digital protected material, made possible today thanks to improved digitisation capacities and costs and the international appeal of the Internet. The cultural benefit of such dissemination is obvious, as it can give a second life to programmes outside the constraints of linear exploitation.

However, from an economic point of view, all that seems technically possible is not always at zero cost and won't necessarily match market demands. Therefore, the political desire needs to be assessed in light of the economic conditions, in order to develop solutions integrated into the media economic structure for the overall cultural and economic benefit of a sustainable European audiovisual sector.

Before entering into the substance of the debate, it is of primary importance to define the main elements of the discussion. We will then analyse the desirability of the cross-border online exploitation of broadcasters' archives from the authors' perspective and, finally, will conclude by setting out the conditions for the successful online exploitation of broadcasters' archives.

I. Scope of the discussion

We first need to define what a broadcaster's archive is and what kind of online services are concerned.

1. Broadcasters' archives

1.1. *Ratione materiae*

For the purpose of the discussion on the online exploitation of broadcasters' archives, the material concerned has to be defined. In this context, it seems appropriate to consider only broadcasters' past archived productions, which were either produced or commissioned and financed by broadcasters under their own editorial control.

This definition excludes other material held by broadcasters which does not consist of audiovisual programmes (print material, etc.), but also audiovisual programmes which have not been produced or commissioned and financed by broadcasters, such as films, sport and certain drama programmes.

1.2. *Ratione temporis*

The notion of oldness seems obvious in the context of archives. However, this notion may be interpreted very differently depending on the perspective and on the country in question. Several European countries have adopted legal or contractual mechanisms to allow the exploitation of broadcasters' archives and have defined the material covered by such mechanisms.

In Switzerland, a 2007 law¹ has provided for the mandatory collective administration of rights on broadcasters' archives (both public and private). According to this law, a broadcaster's archive is a production produced or commissioned and financed by a broadcaster, broadcast at least 10 years ago.

In France, the *Institut national de l'audiovisuel* (INA) was established in 1975 to exploit the audiovisual archives of the French public radio and television broadcasters, which today comprise 1.5 million hours of programmes. In addition to this initial collection, which has been progressively digitised, INA has, since the adoption of a law in 2000², the exclusive exploitation right over extracts of programmes produced by public broadcasters, one year after their first broadcast, and an exploitation mandate for full programmes, also one year after their first broadcast. Accordingly, the scope of activity of INA is very wide and is not limited to old programmes.

Another model involves the imposition of a cut-off date. In Belgium, for example, the *Société pour la numérisation des archives* (SONUMA) was established by the French Speaking Community, the Walloon region and the public television *Radio Télévision Belge Francophone* (RTBF) in 2009 to preserve, digitise and exploit the radio and television archives of RTBF from its origins to 31 December 2007. However, all RTBF programmes, including the audiovisual productions made after this date (which are preserved and digitised by RTBF), are supposed to be exploited by SONUMA.

In fact, for certain broadcasters, every programme produced or commissioned and financed which has been broadcast once can be considered to be an archive. This does not mean that the broadcasters have the right to do whatever they want with this material. They might still have to clear other rightsholders' rights, in particular authors' rights.

2. Online exploitation

2.1. *Online services*

Broadcasters have developed online services for their broadcasted programmes, whether simultaneous streaming services, catch-up TV or on-demand services. These services can be operated directly by broadcasters or by commissioned third parties. They can address the general audience through the Internet or specific audiences through, for instance, dedicated channels restricted to educational institutions. Some of the institutions established to preserve and exploit broadcasters' archives also licence broadcasters' archives, including for commercial purposes, to third parties for a wide range of uses.

2.2. *Cross-border exploitation*

Broadcasters' online services are not generally designed for an international audience. On the contrary, broadcasters, in particular public ones, usually target their national audience, from whom their resources, whether from public funds or advertising, originate. It therefore appears that the cross-border dimension of the online services of broadcasters' archives is secondary for broadcasters, except to address their expatriates or to contribute to the promotion of their country's culture and language in the world and on the Internet.

In this context, the online services of broadcasters rarely provide for language adaptations, which are so crucial for multi-territory exploitation in the audiovisual sector. However, most broadcasters want to acquire exploitation rights covering the entire European Union.

1) Article 22a of the Federal Law on Copyright and Neighbouring Rights of 5 October 2007, which entered into force on 1 July 2008.

2) Law of 1 August 2000 related to the freedom of communication.

II. Desirability of cross-border online exploitation of broadcasters' archives from the audiovisual authors' perspective

Audiovisual authors are fully committed to the largest possible access to audiovisual works and have a longstanding record of fighting for the circulation of European works within Europe. However, they do not overestimate the benefits of cross-border access to online services as a way of achieving a wide dissemination of works, in a sector where distribution is so important for the success of a film.

1. Audiovisual authors are fully committed to the widest possible access to audiovisual works

Audiovisual authors create works to express themselves and to reach an audience, wherever it might be located. They support the maximal exposure of their works to the widest audience possible. In this perspective, creators can only support cross-border online exploitation of audiovisual works.

Creators have supported the establishment of the MEDIA Programme³ since the beginning and have fought for significant budgets to be adopted to support the development, the distribution and the promotion of European audiovisual works. The 2007-2013 MEDIA Programme also covers the new dimension of the use of digital technology in the distribution of films and other audiovisual works, taking account of general media distribution rules and economics:⁴

- each audiovisual work has to create its own market;
- nobody can predict the potential market for audiovisual works;
- media distribution relies on signalling and discrimination;⁵
- with 23 linguistic markets, the EU faces heavy discrimination costs, as each linguistic market carries its own risk, needs to be addressed according to its cultural profile and requires its own set of investments.

In this context, there are strong economies of scale in distributing the same audiovisual work in one linguistic market on several platforms, but no economy of scale in distributing the same work in various territories due to the replication of the signalling investment, the addition of the commercial risks and the small value of a single content brand. That is why 55% of the MEDIA Programme funds are dedicated to distribution, the key for reaching potential audiences.

Digital technology has created huge opportunities for creators and consumers through increasingly flexible consumption patterns, time and place shifting, social networking and audience engagement, which support the promotion of European works to new audiences and in general provide opportunities for the vital marketing and promotion of audiovisual works. However, from an industry point of view, there might be conflicting interests between the different platforms (theatre operators, pay-TV operators, distributors, sales agents, Internet companies, etc.), as audiovisual online services put traditional revenue sources for the financing of the works into question, without even mentioning the damages of the unauthorised online dissemination of works.

The European Audiovisual Observatory has identified 700 on-demand audiovisual services available in Europe at the end of December 2008.⁶ VOD revenues have increased sharply (from EUR 27 million in 2003 to EUR 544 million in 2008), but remain marginal compared to the EUR 5.6 billion of theatres' gross box office revenues and the EUR 10.2 billion of DVD turnover. We conclude that the European VOD markets are still in their infancy.

3) Media programme, European Commission, available at:

http://ec.europa.eu/information_society/media/overview/index_en.htm

4) See "The Economics of Audiovisual Media" by Olivier Bomsel, ParisTech Chair of Media and Brand Economics in KEA and Cerna "Study Concerning Multi-Territory Licensing for the Online Distribution of Audiovisual Works in the EU", commissioned by DG INFSO, June 2010, available at: http://ec.europa.eu/avpolicy/docs/library/studies/multiterr/workshop_slides.pdf

5) Signalling is a capital intensive investment to communicate on the content and meaning of the audiovisual work. It largely depends on brands: who talks, who prescribes, who recommends matters. Discrimination aims at differentiating audiovisual works and attracting the audience to specific audiovisual works among the large offer.

6) European Audiovisual Observatory, "More than 700 on-demand audiovisual services available in Europe", press release, Strasbourg, 16 October 2009, available at: <http://www.obs.coe.int/about/oea/pr/vod2009.html>

2. The online circulation of audiovisual works in Europe

The Society of Audiovisual Authors (SAA) believes that the European Commission overestimates the desire of consumers for cross-border access to online services.

What do consumers want? They want access to a rich and diverse online offer of audiovisual works, wherever the platform is located. They need assurance that their consumers' rights are fully respected and enforced. This includes protection of payment and access to information in their own language. Therefore, in the absence of language adaptations, online services fail to address cross-border consumer demand, except for that of expatriates and language learners.

Rather, for consumers to have access to a diversified offer, it is of the utmost importance that the Audiovisual Media Services Directive,⁷ adopted on 11 December 2007, is strictly and carefully implemented by all member states.⁸ Article 13 of the codified Directive provides that member states shall ensure that on-demand audiovisual media services promote the production of and access to European works. The article specifies that such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered.

Recital 69, which notes that on-demand audiovisual media services "should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity" proposes a third measure of support for European works: the attractive presentation of European works in electronic programme guides.

The Directive does not provide figures neither for the financial contribution nor for the share and/or prominence of European works in the catalogues. Member states should nevertheless include recommendations in their national law providing the minimum figures that should be met. It is up to the member states to determine the appropriate share/prominence and level of the financial contribution according to the local characteristics of their markets.

The financial contribution of on-demand services could consist of the obligation to invest a share of the turnover of the service concerned in the production and rights acquisition of European works (the investment rate could increase according to the turnover) and/or to contribute to the national film and audiovisual production fund, following the existing obligations of broadcasters in a number of European countries. Alternatively or simultaneously, catalogues should contain an important proportion of European works.

Detailed indications, including figures where possible, will be necessary to make these obligations concrete and allow a follow-up at European level. Unfortunately, it appears that the implementation of Article 13 of the Directive in the member states rarely includes figures to be met by the on-demand audiovisual media services.

At this stage, it seems that only a few countries have set a mandatory minimum share for European works in the catalogues of programmes offered: the Spanish law of 31 March 2010 stipulates that 30% must be European works and that 50% of this 30% must be Spanish works, while the French decree⁹ to

7) Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 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 [2007] OJ L332/27 (hereafter: Audiovisual Media Services Directive or AVMS Directive). Codified version available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

8) The deadline for the implementation of the Directive was 19 December 2009.

As of 24 June 2010, Austria, Cyprus, Estonia, Greece, Finland, Hungary, Lithuania, Luxembourg, Latvia, Poland, Portugal, and Slovenia lacked complete implementation of all the rules or had not yet officially informed the Commission that the rules are in place, as required. Consequently, the Commission sent reasoned opinions to these Member States leaving them two months to notify the Commission of full implementation of the Directive. After that deadline, the Commission may refer them to the Court of Justice of the European Union. See IP/10/803 of 24 June 2010, available at:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/803&format=HTML&aged=0&language=EN&guiLanguage=en>

9) *Décret no 2010-1379 du 12 novembre 2010 relatif aux services de médias audiovisuels à la demande* (Decree n° 2010-1379 of 12 November related to on-demand audiovisual media services).

implement the law of 5 March 2009 requires a 50% share for European works and a 35% share thereof for French works in catalogues during the three first years of the service (60/40 thereafter along the same lines as those set for the broadcasting quotas).

Audiovisual authors strongly support Article 13 of the Directive, which mirrors the broadcasting quotas for European works of the Television Without Frontiers Directive. They believe that, unless encouraged by financial incentives or regulatory measures, most of the online platforms would only market what is currently available in cinemas and would neglect the incredible opportunity that the online exploitation of European works represents for the circulation, visibility and success of European cinema and audiovisual programmes.

Indeed today, according to a study by KEA and Cerna,¹⁰ VOD has not yet improved the circulation of EU audiovisual works.

Therefore, apart from the issue of investment in production, the presence and visibility of European works *in all VOD platforms* is essential to give a chance to European works in their own markets and to build a culturally diverse European online market. Access to foreign monolingual platforms would only address niche markets of expatriates or language learners and would not fulfil the objective of access to European cultural diversity for all.

III. How to facilitate the online cross-border exploitation of broadcasters' archives?

Authors, being committed to the widest possible dissemination of their works, support the online exploitation of broadcasters' archives, including cross-border services. They believe that, if authors' rights in such programmes are to be respected and enforced, collective management societies are the best interlocutor for broadcasters to conclude satisfactory agreements which would both allow them to exploit the works and authors to be remunerated.

1. The current legal framework

The European Commission Reflection Document on "Creative Content in a European Digital Single Market: Challenges for the Future" of October 2009 insists on the fragmentation of the European market and on the drawbacks of the territoriality of copyright regimes. It nevertheless recognises that "the present legal framework does not in itself prevent rightholders from commercializing their works on a multi-territory basis. The problem lies more on the side of commercial and contractual practice which is based on the existing fragmentation of copyright legislation in the EU."¹¹

As a remedy to the territoriality of copyright laws, the Reflection Document introduces the idea of creating a Community copyright which would take precedence over national laws or exist in parallel to them, on the basis of Article 118 of the Lisbon Treaty, which provides a new legal basis for the creation of European intellectual property rights.

Like most rightsholder organisations, SAA expressed its scepticism about this proposal in its contribution to the public consultation,¹² for three main reasons:

- SAA does not see how a Community copyright would create a European digital single market for audiovisual works in a context where so many elements of the market are territorial, in particular languages, cultures, taxes and the financing of works, just to name a few;
- Harmonisation of legislation on the current legal basis (Article 114) has proved to be practicable. What matters is not the legal basis, but the content of the harmonisation;

10) Supra FN 2.

11) Page 12 of the document.

12) "Creative Content in a European Digital Single Market: Challenges for the Future", SAA Contribution, January 2010, available at: http://www.saa-authors.eu/dbfiles/mfile/700/717/SAA_Contribution_EC_Reflection_doc_Content_Online.pdf

- Article 118 has obviously been introduced for industrial property purposes and refers to the setting up of centralised Union-wide authorisation, coordination and supervision arrangements, which is not relevant to authors' rights.

The Communication on a Digital Agenda for Europe adopted by the new European Commission on 19 May 2010 does not mention the exploration of the possibilities for EU-wide copyright rules nor does it include any reference to Article 118 of the Lisbon Treaty. On 18 May, in reply to a question of a Member of the European Parliament on this issue, M. Barnier, the new Commissioner for Internal Market and Services (including copyright issues) declared that "the use of Article 118 is not the approach favoured by the Commission. The Commission approach is a pragmatic one: to create a legal framework which favours pan European licences. This would achieve our goals better than the introduction of a new single centralized copyright title."¹³

Thus, Commissioner Barnier has announced that he will present in 2010 the following proposals:

- A Framework Directive on collective rights management;
- A Directive on orphan works;
- A Green Paper on the opportunities and challenges of online distribution of audiovisual works and other creative content.

The preliminary results of the KEA and Cerna study on multi-territory licensing for the online distribution of audiovisual works in the European Union also conclude that copyright is not a bottleneck to multi-territory VOD exploitation and that market demand is responsible for the prevalence of territorial licensing over international licensing.

The study identifies the following legal obstacles to cross-border licensing:

- National disparities in copyright enforcement, in particular regarding illegal file-sharing, authors' rights and consumers' protection;
- A discriminatory VAT regime;
- Little coordination of national regulatory interventions in fields such as ratings, windows and financial aid.

It therefore appears clear that the present copyright system is not in itself an obstacle to multi-territory licensing, but that the way copyright is exercised can be. The key issue is to enhance licensing efficiency, whilst at the same time respecting the pillars of international copyright rules: contractual freedom, exclusivity and territoriality.

2. Collective administration of rights is a facilitator for the dissemination of broadcasters' archives and a guarantee that audiovisual authors are paid

The collective management of authors' rights in the audiovisual sector as regards the relationship with broadcasters has a long track record of efficiency in facilitating the exploitation of works. Collective administration of rights also represents a guarantee that audiovisual authors are paid.

In European countries, audiovisual authors' collective management societies administer mainly secondary rights, such as cable retransmission, private copying, educational uses, etc., but many of them also administer broadcasting rights of audiovisual authors. Whether on a legal or contractual basis, collective management societies have negotiated and administer agreements concluded with broadcasters and therefore know their activities very well. Some of them are currently discussing the extension of their agreements to cover online services of broadcasters, such as catch-up TV and on-demand services.

For the particular domain of archives, some audiovisual authors' collective management societies have already concluded agreements with broadcasters which cover the online exploitation of broadcasters' archives.

13) Free translation from the original French.

One of the most quoted examples is the general agreement that French authors' societies have concluded with INA. In response to the request made by INA, which wanted to ensure that its collection of archives could circulate as widely, as simply and as efficiently as possible, while complying with French intellectual property law, the French authors' societies agreed to issue a general economic rights exploitation licence for their entire repertoire, covering all modes of exploitation. In return, INA has undertaken to pay a percentage of its turnover from the sales of archival material and of the revenue from its co-production activity and to periodically send detailed documentation to the authors' societies, so that they can distribute the royalties to the authors concerned.

In Switzerland, exploitation rights on broadcasters' archives, as defined in point 1.2., can only be exercised by collective management societies, except if a contract exists and contains provisions on the exploitation of the material, in which case the contract is applicable.

In Germany, special legislation¹⁴ provides for a remuneration right for authors of works concerning formerly "unknown uses" (e.g. digital exploitation) in respect of contracts concluded between 1966 and 1997. The remuneration right can only be administered by collective management societies. Due to this legislation, collective management societies are in negotiation with broadcasters to define the adequate authors' remuneration for the digital exploitation of the audiovisual archives.

Audiovisual authors' collective management societies have always pleaded for agreements with broadcasters at national level to define the best conditions for the exploitation of broadcasters' archives, both for broadcasters and authors. They are very pleased to see that public broadcasters have renounced the idea of a European exception to copyright for the exploitation of archives, which was still under discussion during the negotiations for the 2001 Directive on Copyright in the Information Society, and that they are now ready to discuss with authors' societies.

3. EBU White Paper: modern copyright for digital media

In March 2010, the European Broadcasting Union (EBU) published a White Paper titled "legal analysis and proposals for modern copyright for digital media"¹⁵, in which it presented its proposals for modernising the European framework for copyright relating to audiovisual media. In the introduction, the EBU recalls that public service broadcasters fully support a high level of protection for copyright and related rights in the EU, including adequate remuneration for all rightsholders. However, the EBU believes that EU copyright law is in urgent need of a coherent framework for simplified rights clearance for the online world. The document clarifies that the EBU only calls for a limited reform addressing the audiovisual media sector, which would not require any modification of the 2001 Copyright Directive.

Among seven proposals for facilitating clearance of rights and online licensing, the EBU makes two proposals which can have an impact on the cross-border exploitation of broadcasters' archives.

3.1. *Extension of the country of origin principle for online licensing*

According to the EBU, rights clearance should focus on a concept of communication to the public of audiovisual media services, covering both broadcasting and non-linear audiovisual media services (broadcast-like services). In particular, the licensing mechanism applicable to satellite broadcasting provided by the 1993 Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, the so-called "country-of-origin" rule, should be extended on a technologically neutral basis to all initial communications to the public of online audiovisual media services, i.e. including making programmes available to the public as part of a broadcast-like service.

This mechanism would allow the implementation of a "one-stop shop" for rights acquisition, since, under the country of origin rule, communication to the public, e.g. through satellite communications, only needs to be cleared in the country of origin of the communication, rather than in each country

14) Section 137 l of the German Copyright Code, as amended in 2007.

15) S. Edwards, P. Kamina and K.N. Peifer, "Modern Copyright for Digital Media – Legal Analysis and EBU proposals", March 2010, available at: http://www.ebu.ch/registration/policy2010/images/EBU%20Copyright%20WHITE%20Paper_EN_FINAL.pdf

where the communication is received. The EBU clarifies that the value of broadcasting rights would naturally take into account all the parameters, such as the actual audience, the potential audience and the language version, which are indicated in Recital 17 of the 1993 Directive.

It has to be mentioned that the EBU also clarified that its proposals are not intended to challenge exclusivity or the current practices of licensing of premium content, such as films and sport.

As already indicated above, audiovisual authors' collective management societies are ready to extend their agreements with broadcasters to cover their online services (in fact some already do cover such services), including on a cross-border basis.

3.2. Unlocking broadcasters' archives

The EBU proposes a simplified legal mechanism to enable broadcasters to exploit their own productions or commissioned productions in their archives (not those for which the rights are held by an external producer), provided that the rightsholders affected by re-use are remunerated.

This could take the form of the award of a general mandate to a recognised collective management society, enabling it to authorise communication to the public, including making available online. An alternative solution would be the application of the "extended collective licences" system to rights included in the archives of broadcasting companies.¹⁶ The EBU also quotes the abovementioned German example.

The EBU makes it clear that it is therefore not necessary for member states to introduce absolutely identical solutions to resolve difficulties in exploiting broadcasters' archives falling within their jurisdiction and that, inevitably, the details of the solutions will vary from country to country.

With this proposal, the EBU is looking for legal certainty and the guarantee that EU Member States will ensure that appropriate mechanisms will be put in place to allow broadcasters' archives to become available online. It also recognises the essential role of collective management societies in authorising exploitation and administering payments for rightsholders.

IV. Conclusion

The desirability of the cross-border online exploitation of broadcasters' archives appears clear from both a political and cultural point of view and is fully supported by audiovisual authors. The economic conditions for such an exploitation can certainly be defined and agreed upon by broadcasters and audiovisual authors' collective management societies in collective agreements at national level, with the aim of both enhancing the visibility of the European audiovisual heritage, while at the same time respecting audiovisual authors' contributions and claims for compensation.

16) See Stef van Gompel in *Audiovisual Archives and the Inability to Clear Rights in Orphan Works (IRIS plus 2007-4)* http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4_2007.pdf

Expert Workshop on “Digitisation and Online Exploitation of Broadcasters’ Archives” – Summary of the Discussion

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I. Introduction

On 24 April 2010, the Institute for Information Law of the University of Amsterdam (IViR) and the European Audiovisual Observatory held a Joint Expert Workshop in Amsterdam on the topic of “The Digitisation and Online Exploitation of Broadcasters’ Archives”. The aim of the workshop was to examine the great opportunities for large-scale digitisation and the making available to the public of creative content currently contained in broadcasters’ archives that have emerged in the new digital environment, as well as the legal and economic obstacles that stand in their way. Broadcasters’ archives contain highly valued cultural and historical material; the objectives of digitising such archives include the making available of this material to citizens and the preservation of the cultural heritage contained therein. In the last decennium, projects such as the BBC Creative Archive and the Inamédiapro database have shown the enormous potential of audiovisual content. Recently, the Netherlands Feature Film Association (NVS), the EYE Film Institute Netherlands and the Institute for Sound and Vision have also launched the “Filmotech” initiative, which aims to make high-quality Dutch audiovisual material accessible for the public.¹ The ability to clear copyright and related rights is fundamental for the success of these projects. However, most large-scale digitisation and reutilisation projects are confronted with enormous rights clearance difficulties, arising, first of all, from problems of scale (i.e. the immense number of works for which rights need to be secured), as well as from more specific rights clearance issues relevant to audiovisual content, such as the question of orphan works or of multiple ownership of audiovisual works.

The aim of the workshop was to exchange ideas from a variety of perspectives as to these issues and to form a platform for discussion on potential ways forward. Several stakeholders were thus represented in the group of participants. The workshop consisted of nine presentations followed by question and discussion rounds. The presentations were grouped into four subtopics: (a general introduction on) the legal framework for digitisation; rights clearance and orphan works; online exploitation of public service broadcasters’ archives, including relevant competition aspects; and cross-border exploitation. This workshop report provides a summary of the opinions expressed and conclusions reached during the discussion rounds. A thematic, rather than a chronological, approach has been taken.

1) See <http://filmotech.nl/en/>

II. Defining the scope of the subject and establishing the legal framework

At the very beginning of the discussion, several workshop speakers and participants pointed out the importance of clearly defining the notion of broadcasters' archives in order to properly assess the complexities of the subject and to uncover effective solutions. Similarly, establishing the legal framework with regard to the digitisation and online exploitation of broadcasters' archives at a European and a national level was also seen as important. The ensuing exchanges are detailed below.

1. Defining broadcasters' archives

From the presentations and subsequent discussions it became immediately clear that different opinions were present among the group of participants as to how to approach the definition of archive material. Two of the speakers, Adrian Sterling and Cécile Despringre, specifically attempted definitions of broadcasters' archives in their presentations. Adrian Sterling suggested defining archive material as the totality of the material held by broadcasters (both public service and commercial), including manuscripts, tapes and disks of previously broadcast material.² Cécile Despringre, by contrast, advocated limiting the definition of archive material exclusively to audiovisual content, such as television programmes and animated images, leaving aside all print material and fixed images, which raise different issues. In her opinion, it is also important to limit the definition of archive material to broadcasters' own productions or at least to material commissioned and financed by broadcasters. This would, for example, exclude cinematographic works. She also added a temporal dimension to the definition, confining archival material to material dating back a certain length of time. The notion of oldness, of course, will differ between jurisdictions, depending on the way with which archives are managed.³

Another element discussed in this context was the qualification of archive material as cultural heritage. Scepticism was expressed in this regard, given the possible shielding effect with regard to competition rules that such qualification could have for public service broadcasters. In any case, a number of organisations, such as the International Federation of Film Archives and UNESCO, have already established criteria for defining cultural heritage. These criteria may be used to narrow the archive material which may be described as cultural heritage to works which are of real importance to the cultural domain. The example of the Netherlands Institute for Sound and Vision, which does not qualify all the material which is broadcasted by public service broadcasters as cultural heritage, confirms this conclusion.

2. The (European) legal framework with regard to copyright and digitisation

Adrian Sterling's presentation set out the legal framework with regard to copyright and the digitisation process. Firstly, the subject matter, rights and rightsholders, which are involved in the digitisation process, need to be assessed. Secondly, it is important to establish the relevant legal framework.

2.1. Subject matter, rights and rightsholders involved

In the context of the digitisation of broadcasters' archives, the relevant works are musical and audiovisual works. While musical works and audiovisual works are different and bring to the fore different challenges in the digital era, music does need to be discussed in the context of audiovisual works, as it is often incorporated into audiovisual material. In any case, the assessment of the rights and rightsholders involved in musical works immediately makes clear the complexity of the copyright situation. For example, in the case of a phonogram of a live performance, the rights involved are: the economic rights and the moral rights in the musical work and in the performance, the economic rights in the phonogram and the economic rights in the broadcasting. The beneficiaries in this case are the

2) See the article by Adrian Sterling in this publication.

3) See the article by Cécile Despringre in this publication.

composer and the writer of the lyrics of the musical work, the singer and the instrumentalists, the producer of the phonogram as well as the broadcasting station. Although the phonogram still seems like a fairly simple subject matter to analyse, as normally only three or four rightsholders will be involved, in practice the transfer of rights complicates the picture; musicians may transfer their rights to their bandleader or to the record company and the record company may exercise the rights itself or transfer them to a collecting society.

The identification of rightsholders with regard to audiovisual works is even more difficult. Even in simple productions several potential rightsholders will be involved. Furthermore, differences often exist between national laws concerning the different players participating in the production of such works. In some countries the rights are centred on the producer, which often makes the exploitation of the film less difficult. Even in such cases, however, when looking at films in archives, the initial assumption should always be that a variety of different rightsholders will in all probability be involved; the producer will rarely actually be the single owner of all rights. Another difficulty is the likely incorporation of other copyright-protected works in audiovisual productions. For example, films or TV productions can be based on pre-existing literary works, feature artistic works (e.g. photographs) or integrate musical works. Finally, the differences between jurisdictions with regard to the term of protection also complicate the correct identification of rights. Globally speaking, certain works can still be protected in countries with a term of protection of 70 years after the death of the author, but not in countries with a term of protection of 50 years after the death of the author.

Lastly, the moral rights of the authors of the audiovisual works, as well as of the works contained in audiovisual works, also need to be taken into account. A good example of the importance of moral rights is a judgment by a Swedish Court about the use of commercial breaks. The Court found that commercial breaks during films on television constitute an infringement of directors' moral rights.⁴

2.2. European Copyright Law and the Realisation of a Single Digital Market

The presentations of Adrian Sterling and Bernt Hugenholtz both dealt with the European legal framework with regard to copyright and digitisation. Both presentations elaborated on the legal framework for turning existing audiovisual works in analogue format into digital copies and for their subsequent exploitation. Both the European legislator and the national legislators have introduced copyright legislation which is relevant to the digitisation process. On both levels legislation has been influenced by international treaties such as the Berne Convention and the TRIPs Agreement. Before the EU began the process of harmonising copyright across the Community, national copyright [and related rights] laws were affected by EU legislation only to a limited degree, through the general rules of competition law and the free movement of goods.⁵ The influence of EU legislation on national copyright laws began in earnest with the harmonisation measures.⁶ In total the European legislator has issued seven copyright directives to date.⁷ While EU legislation and treaties such as the Berne Convention and the TRIPs Agreement have created a lot of similarities between member states, plenty of differences still persist.

In practice copyright is still limited to national borders. The territorial nature of copyright has three interrelated legal consequences for the online exploitation of audiovisual works. First of all, territoriality means the territorial application of copyright law only within the confines of the sovereign territory of a given country. Secondly, territoriality enables and facilitates a mechanism of splitting up of the ownership of rights across national borders, the consequence being that the same right will find itself in different hands depending on the jurisdiction examined. This has been happening on a large scale particularly in the area of performance rights, film distribution, broadcasting and

4) Judgment no. T2117-06, *TV Aktiebolag v. Dödsboet efter VS* – See H.H. Mijsche, “Commercial Breaks Infringe Moral Rights in Sweden”, IRIS 2008-6: 16.

5) The influence of competition law on the digitisation of broadcasters' archives will be discussed in Section 3 of this report.

6) For a short overview of the history of harmonisation see § 1.1 of M.M.M. van Eechoud, P.B. Hugenholtz, S. van Gompel, L. Guibault and N. Helberger, “Harmonizing European Copyright Law: The Challenges of Better Lawmaking” (Alphen aan de Rijn, Kluwer Law International, 2009).

7) The Computer Programs Directive (1991), The Rental and Lending Rights Directive (1992), which has been repealed and replaced by Directive 2006/115/EC, The Satellite and Cable Directive (1993), The Term of Protection Directive (1993), which has been repealed and replaced by Directive 2006/116/EC, The Database Directive (1996), The Copyright in the Information Society Directive (2001) and The Artists' Resale Rights Directive (2001).

now online rights. Thirdly, disparities still exist between the national laws of member states. After 20 years, harmonisation is still far from complete, with multiple pockets of national individuality, from copyright limitations and exceptions⁸ to the rules with regard to ownership, still unaffected by harmonisation.

Harald Trettenbrein's presentation pushed this point by emphasising the importance of the realisation of an internal market for audiovisual media services. The objective of European integration is constantly repeated in the (recitals of) EU treaties, regulations and directives.⁹ Both citizens and the audiovisual industry could benefit from a true internal market for audiovisual media services. Economically, the completion of the Single Digital Market could have significant advantages. In a recent study carried out by the European Policy Centre, it was stated that the completion of the Single Digital Market would be worth more than 4% of the EU GDP.¹⁰ In addition, the completion of an internal market could have advantages for cultural diversity and media pluralism.

In this context, the current activities of the European Commission must be mentioned. In a Communication entitled "A Digital Agenda for Europe", the Commission has undertaken to work towards the creation of a single market for online content and services.¹¹ The first key action of the Digital Agenda is to simplify copyright clearance, copyright management and cross-border licensing. To achieve these goals two new directives have been proposed: a framework directive on collective rights management and a directive on orphan works. These directives would be part of the legal framework with regard to copyright and digitisation.

III. Competition aspects of the digitisation of broadcasters' archives

The presentation of Pranvera Këllezi turned the discussion to the competition aspects of the digitisation of broadcasters' archives. The objective of competition law, including state aid law, is to protect effective competition in the European internal market and the national markets. Effective competition is in the interest of consumer welfare, since it creates more choice, new products and services, as well as higher quality. The main issues of relevance in this context are the funding of the digitisation process, access to the archives and remuneration for exploitation.

In the context of public service broadcasting, it is important to realise the role of national legislation. The regulation of public service broadcasters is a national matter. European state aid law cannot create an obligation for national broadcasters to preserve and digitise their archives; such a decision is exclusively in the hands of the national legislator, who would also be in charge of deciding on a funding model.

Competition rules aim to create and to preserve the right incentives to invest. The digitisation and preservation of archives require enormous investments, making the recovery of costs of heightened importance. According to Pranvera Këllezi there cannot be a general obligation under competition law for broadcasters to grant access to their archives. Where an undertaking holds a dominant position, an obligation to provide access will be imposed in the following exceptional circumstances: where the refusal to grant access relates to a product or service indispensable to the exercise of a particular activity on a neighbouring market; where the refusal is of such a kind as to exclude any effective competition on that neighbouring market; and where the refusal prevents the appearance of a new product for which there is potential consumer demand.¹²

Even if a public service broadcaster was obligated to make its archives accessible to the public by national law, this would not necessarily mean that such access would have to be on a free-of-charge

8) Article 5, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (hereafter: Copyright Directive).

9) See the article by Harald Trettenbrein in this publication.

10) European Policy Centre, "Digital Single Market", available at: www.epc.eu/documents/uploads/1088_digital_single_market.pdf and http://www.epc.eu/dsm/2/Study_by_Copenhagen.pdf

11) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "A Digital Agenda for Europe", 19 May 2010, COM/2010/0245 final.

12) ECJ 17 September 2007, case T-201/04 (*Microsoft Corporation v. Commission of the European Communities*), paragraph 332.

basis. Competition rules, including state aid rules, do not prescribe free access. Charging reasonable access fees to citizens would be plausible.¹³

Access issues were extensively debated among participants. It was generally agreed upon that the archives of public service broadcasters should be opened up. In view of the public funding of the material currently present in the archives, it is hard to justify exclusive access for public service broadcasters; the view was thus expressed by some participants that any commercial user should have access to the archives. The allocation of public funding to digitise the archives reinforces this argument. The option of non-exclusive licensing at fair and equitable prices was also mentioned, as was the experience with the Public Sector Information Directive.¹⁴ The Directive cannot directly be applied to broadcasters' archives, but it does support the principle that state agencies are under an obligation to open up what they own in terms of data to re-sellers (whether commercial or otherwise) under fair and equitable conditions. With regard to broadcasters' archives, it is not only economic aspects that are involved, but also cultural aspects which must be taken into consideration. According to several participants, the cultural heritage aspect in the case of broadcasters' archives makes an even stronger case for the opening up of such archives.

IV. Rights clearance

Digitisation confronts broadcasters with questions of rights clearance in cases where they do not hold all the necessary rights. With the exception of own TV productions which do not incorporate other types of works (e.g. musical works included in the production or literary works on which the production is based), broadcasters must obtain permission from rightsholders whose rights were never transferred or who only transferred "analogue" rights to the broadcaster. In practice, locating rightsholders and clearing the rights is not easy, particularly for older works. The fact that, in the area of audiovisual works particularly, the possibility of multiple ownership is likely, adds to the complexity. But even if the rightsholder is easy to locate, the contractual situation might still be unclear. For example, in old contracts negotiated before the digital age, digital rights were not dealt with. Problems of scale aggravate rights clearance further, as archiving projects involve an immense amount of works for which rights need to be disentangled and secured.

The presentation of Mieke Lauwers of the Netherlands Institute for Sound and Vision ("Sound and Vision"), the Dutch national audiovisual cultural heritage institute and public broadcasters' archive, showed the practical difficulties of rights clearance and the way in which Sound and Vision has approached them. Sound and Vision has initiated the so-called Clean Sweep project (*Schoon Schip*), which is intended to resolve the problem of indentifying rights and rightsholders through the systematic gathering and registering of copyright information relating to Sound and Vision's collection. The main goal is to increase access to the archived audiovisual material in a fast and effective way. The project is based on a voluntary co-operation between Sound and Vision and broadcasting companies. After the collection of all available information, the next step would be the description of the current situation, which would also entail the issue of dealing with the clearance of future (digital) rights. There are many advantages to this project: it reduces the problem of orphan works, rightsholders (including the broadcasting companies) can licence more material and thus earn more money and more material can be made available to users.¹⁵

Similar problems were encountered by the BBC, as Rob Kirkham's presentation on that corporation's practical experiences with rights clearance demonstrated. The BBC makes its archive material available online through several websites, such as those of the BBC Archive, the BBC Wildlife Finder and the BBC Sport Cricket Archive.¹⁶ The presentation mainly focused on the copyright issues faced during the digitisation process of the content for the BBC Archive. By sharing the practical problems which the BBC encountered with the online dissemination of its archive content, Rob Kirkham demonstrated

13) See the article by Pranvera Këllezi in this publication.

14) Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information, [2003] OJ L345/90.

15) See the article by Mieke Lauwers in this publication.

16) See www.bbc.co.uk/archive/, www.bbc.co.uk/wildlifefinder/ and <http://news.bbc.co.uk/sport2/hi/cricket/archive/default.stm>

the significance of the rights clearance problem. The BBC would welcome a platform-neutral solution underpinned, where necessary, by legislation. Without an effective solution, there is a significant risk of losing the incentive to disseminate archive material. The presenter suggested two possible solutions: a multi-territory one stop licensing system and the Nordic model of extended collective licensing.¹⁷

The ensuing discussion centred around the question of orphan works and collecting societies as a possible solution to this problem.¹⁸ It was again agreed upon that a workable definition of orphan works should provide the starting point. Criteria as to how extensive a search for a rightsholder should be to qualify a work as an orphan work must be established. It is also important to establish which institutions should be in charge of declaring the orphan status of works. One participant referred to recent experiences in the United Kingdom with Clause 43 of the Digital Economy Bill, the so-called "orphan works proposal". The proposal was intended to create a mechanism for licensing copyright material where the copyright holder could not be identified after a diligent search, but drew a lot of criticism from rightsholders, particularly as concerns the definition of the term "orphan". For example, photographers were concerned that the mere extraction of metadata from a photograph would result in its orphanage. Although eventually Clause 43 was dropped,¹⁹ it was suggested that the proposal had potential. At the same time, the UK experience demonstrates effectively that any successful solution will have to both reflect rightsholders' concerns and enable the actual use of orphan works.

Collective licensing was also mentioned as a possible solution for the orphan works issue. On the one hand, the opinion was put forth that this approach would not solve the problem, but only transfer it further down the line to collecting societies, which would however be equally unable to locate rightsholders and clear the rights. The only result would be that licensing fees would accrue to collecting societies and eventually be invested to cultural ends, never however managing to reach the actual authors. On the other hand, the view was expressed that scepticism about collecting societies might be successfully balanced out through proper regulation. A third participant agreed that collecting societies are the future: similar problems with mass licensing involving unknown rightsholders have after all been solved relatively successfully through collective rights management. An important question, however, would be whether collecting societies are the preferred approach only with respect to archive material or also for current and future productions. One of the participants was of the opinion that collecting societies are both absolutely essential with regard to the retrospective clearing of rights in existent material and might also prove to be the best approach to the handling of future creations, as they could provide a single solution to the two problems of the simplification of the system of rights clearance and the creation of legal certainty.

Another participant pointed out the tension between the intellectual property rights of the individual and the push for the dissemination of information, which represents a general interest. The question was raised whether a solution might best be sought through negotiation between the concerned parties themselves, such as the rightsholders, users, broadcasting companies and any involved intermediaries, or whether a third party ought to be entrusted with designing a way out. The Copyright Tribunal in the UK, a mechanism which provides an independent point of reference for disputes about the scope and the value of collective licensing, was mentioned as an example of the latter approach.²⁰ The objection raised to this suggestion was that it involves an expensive instrument, which is not always effective and which, moreover, does not offer a practical solution for small users.

V. Collecting societies

Collecting societies manage the rights of their members collectively. On behalf of their members they negotiate rates and terms of use with users, they issue licences authorising certain uses and they collect and distribute royalties to rightsholders. For users and organisations that make use of

17) See the article by Rob Kirkham in this publication.

18) See for this topic: S. van Gompel & P.B. Hugenholtz, "The Orphan Works Problem: The Copyright Conundrum of Digitising Large-Scale Audiovisual Archives, and How to Solve it", *Popular Communication - The International Journal of Media and Culture*, 2010-1, p. 61-71.

19) See *The Guardian*, "Digital Economy Bill Rushed through Wash-Up in Late Night Session", available at: www.guardian.co.uk/technology/2010/apr/08/digital-economy-bill-passes-third-reading

20) See for the Copyright Tribunal: www.ipo.gov.uk/ctribunal.htm

immense amounts of copyrighted works in particular, it is practical to obtain a licence to use a large repertoire of works, rather than to search for and negotiate licences with every individual owner of the rights being used. Conversely, it would also be difficult for a rightsholder to uncover every potential user of his or her work and collect payment. In the digital age the means of disseminating and reproducing copyrighted works have grown. Collecting societies have accordingly grown in importance for rightsholders with regard to obtaining the appropriate compensation for the uses of their works.²¹

For projects concerning large-scale digitisation and exploitation of audiovisual material, collective licensing may facilitate the clearance of rights significantly. At the moment, collecting societies do not yet play a major role in the audiovisual field. It is nevertheless useful to learn from the experiences of collecting societies in the music industry, particularly given that music so often features in audiovisual material.

The presentation of Stefan Ventroni focused on the collective licensing of music in the context of the online exploitation of broadcasters' archives and highlighted the complexity that currently characterises collective rights management in the music industry. As the presentation made clear, the developments in the collective rights management arena brought by the introduction in 2005 of the Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services²² have completely rearranged the collective licensing landscape, exacerbating existing problems. Prior to the adoption of the Recommendation, a network of reciprocal agreements existed between the individual collecting societies; each collecting society could license the entire worldwide repertoire in its own territory. The main downside of this system was that no collecting society was allowed to license outside its own territory, since the reciprocal agreements between them explicitly prohibited such multiterritorial licensing. In practice this meant that on-demand music services were obliged to seek licences (often under very different terms) in each territory in which they wanted to operate.

The European Commission, recognising the problem and the need for a pan-European licensing system, drafted the Online Music Recommendation. The idea behind the Recommendation was to give rightsholders the option of withdrawing their online rights and transferring them to another collecting society, which would then be able to grant pan-European licences to providers of online music services. The problem with the new regime is aptly illustrated by the creation of CELAS, a company set up by the British collecting society PRS and the German collecting society GEMA to administer the Anglo-American music repertoire held by EMI publishing. EMI publishing was the first rightsholder which withdrew its online rights from collecting societies and entrusted their management to CELAS, which was specifically created for this purpose. As Stefan Ventroni argued, however, in effect this setup failed to achieve the desired objective: far from simplifying licensing and encouraging competition between collecting societies, the new arrangements with CELAS accomplished the opposite result. The licensing process is now more complicated under the new regime, while a new monopoly has been created, working against the interest of users.

Stefan Ventroni explained this as follows. For online exploitation to legitimately take place, two types of rights are necessary: mechanical reproduction rights (permitting uploading and downloading) and performing rights (covering transmission to end-consumers). In the old regime, both rights often found themselves in the hands of a single collecting society, such as GEMA in Germany, which could grant the licence for online exploitation to an online platform. In this way the online platform could get a licence covering the worldwide repertoire for, in this case, the German territory. Under the new regime, however, new complex twists are added to the licensing process. The mechanical reproduction rights, which were owned by EMI, are now administered by CELAS, whereas the performing rights, which EMI did not own because they had often been transferred by authors to national collecting societies, have remained in the hands of these societies. Consequently, if a user wishes to obtain a licence for the online use of the EMI repertoire, it now has to acquire a licence both from CELAS, covering mechanical reproduction rights, and from the various national collecting societies, for performance rights.

21) See the Introduction and Chapter 1 of D. Gervais, *Collective Management of Copyright and Related Rights*, 2nd ed. (Alphen aan de Rijn, Kluwer Law International, 2010).

22) Commission Recommendation of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, [2005] OJ L276/54.

In the previous situation, national licences, encompassing, for example, all rights for Germany for the entirety of the worldwide repertoire, could be granted from licensing one-stop-shops, such as GEMA. In the current situation, a pan-European licence is indeed granted, but only for fragments of repertoire and rights. If a platform wishes to feature large numbers of songs, it becomes very difficult to ascertain which song is controlled by which collecting society. This makes rights management in the online environment enormously complex.²³

A further consideration is the, as yet, legally unclear status of CELAS. CELAS does not consider itself to be a collecting society and, as a consequence, it may escape the control of the laws regulating the functioning of such societies. In principle this could make CELAS a legally completely unaccountable monopoly.

At this point in the discussion a spirited debate arose among participants on the future of collecting societies. It was questioned whether any way back to the old system might be possible or desirable. Another conceivable solution could lie in the removal of the territorial restrictions to the reciprocal agreements. The adoption of legislation forbidding exclusivity clauses in membership agreements would force collecting societies into efficiency, by confronting them with the competition of parallel licensing within Europe.

The discussion continued by addressing the major underlying problem of the splitting up of exploitation rights among different collecting societies. This problem already existed before the emergence of the online environment. One of the participants wondered if there could be a larger role for regulation in this context; particularly in view of the great number of differences still persistent between the member states in this area, the envisaged European directive harmonising certain aspects with regard to collecting societies, such as for example the criteria necessary for their establishment and the control of their administration of rights, might address at least part of this problem.

VI. Cross-border exploitation

Already in his opening presentation, Adrian Sterling emphasised the changes that the Internet has brought to audiovisual content. Previously, broadcasting companies controlled audiovisual material, exerting the power to decide to which countries it would be transmitted. By contrast, the current situation can be described as a borderless communication society, in which users across the globe can access content from all over the world. In today's world, the expectation is that cultural content will be available online, while, if it is online, it is online everywhere, unless it is blocked.

Contrary to the Internet's marked lack of regard for national boundaries, from their very inception, copyright systems are nationally focused legal disciplines. National laws, of course, are in principle only applicable within national territories. As the situation currently stands, therefore, someone desiring to place content online can contact the relevant rightsholder(s) and obtain a licence for a single EU Member State, the entire European Union or maybe even for the world. Alternatively, a collecting society may be contacted. However, at the moment the system of collective licensing is still nationally oriented; as observed above, the pan-European licensing system is still far from perfect, while there is no major collecting society which can provide either traditional broadcasters or online service providers with a global licence for its repertoire.

As a result, rightsholders nowadays have to completely rethink the way in which they exercise their "Internet rights". The idea was put forth that in the modern interconnected era, when an author approaches a publisher or music producer, he should agree with them that they may grant licences which cover access throughout the world. In this way the publisher would be authorised to give collecting societies, broadcasters or Internet service providers permission to place the material online. The focus of policymakers and legislators, it was suggested, should be on easy access and easy licensing. Copyright is founded in human rights and should be protected. In this perspective, a system of global licensing was viewed as being necessary for copyright to be recognised and respected. Some participants voiced the opinion that such a development would be in the interest of creators, disseminators and the public alike.

23) See the article by Stefan Ventroni in this publication.

The prospect of global licensing gave rise to a lively exchange of opinions: one of the participants was sceptical about the financing system that could support such a regime. From an academic point of view, it was contested, there may indeed be a need for cross-border licensing; however in practice such an approach may simply prove both unnecessary and unworkable. The example of iTunes can illustrate the significance not only of rights, but also of business models.²⁴ Although in all probability many authors may indeed wish to disseminate as much content as widely as possible, what business model could sustainably support such attempts? It seems likely that the companies setting up online platforms would be those called upon to foot the bill, but they may not necessarily have the means to acquire European or global licences for the content they provide.

Other participants disagreed with this view, using the iTunes example as an argument in favour of global licensing. As was asserted, it took 2.5 years before iTunes was finally available in Europe and the reason behind the delay is directly attributable to the complexities of clearing national rights. The problem is still unsolved in some parts of Europe. Disseminating on a worldwide basis may indeed mean that online platforms would have to spend more money on licensing. On the other hand, however, clients willing to pay for access to content likely exist, but are under the current regime denied that possibility. Far from being purely an academic concern, the need for cross-border licensing is based on the perception that such a move would be beneficial for the general economic and cultural welfare. Authors and consumers can benefit from a system unencumbered by onerous licensing procedures. At the same time, however, it was pointed out that, even if an effective structure for global collective rights management was to be found, a significant amount of money which otherwise could be invested in paying authors more or making content cheaper would still be absorbed by licensing. It was submitted that more efficient solutions than global collective management could be conceivable. With the right system in place, Europe could produce more online services than is currently the case and have a much more thriving online market than that which exists today.

Later on in the workshop, Bernt Hugenholtz's presentation reignited the cross-border discussion, by bringing to the fore the question of how to realise worldwide, in addition to mere national, exploitation. Through the example of several websites, such as Telefoot and RTL Television Now,²⁵ which are not accessible, for example, in the Netherlands, it became clear that there is a problem with the making available of audiovisual material online in Europe, whether from archives or from other sources. Diverging opinions were expressed as to the extent to which copyright has contributed to the creation of this situation – in the context of public service broadcasting, the nationally defined public service remit and market considerations are additional relevant factors. Yet, it is indisputable that copyright remains one of the main causes for the limitation of access to audiovisual content online strictly to national borders – in the United States, for example, comparable problems with online access are not encountered on a regular basis.

The European Union has searched for solutions to the territoriality question on the basis of the obstacles that it poses to the idea of the common market; the differences between the current 27 national copyright laws can form a significant barrier to trade. Consequently, effective solutions have been implemented for some areas. For example, the exhaustion rule sets boundaries to the exclusive right to control distribution of a work incorporated in a tangible article. According to Recital 28 of the Copyright Directive, the first sale in the Community of the original of such a work or copies thereof by the rightsholder or with his consent exhausts the right to control further resale of that object within the EU. As a result, when copyrighted goods are circulated into the market in one member state, they can then be freely resold across the EU without the rightsholder's consent. The exhaustion rule applies to books, CDs and DVDs, averting territorial fragmentation in these markets. However, it does not apply in the case of services, including online services.²⁶ This means that the right to make available online belongs exclusively to the rightsholder, both upon its initial exercise and in subsequent stages.²⁷ In practice this means that the exhaustion rule will not apply to online content provision services, such as iTunes.

24) See C. Angelopoulos, "European Commission: Apple announces plans to equalise prices for music downloads across Europe", IRIS 2008-4/101.

25) The websites are available at: www.tf1.fr/telefoot/ and <http://rtl-now.rtl.de/>

26) See Article 3 para. 3, Article 4 para. 2 and Recital 28 of the Copyright Directive.

27) See on this topic: E. Tjong Tjin Thai, "Exhaustion and Online Delivery of Digital Works", E.I.P.R. 2003-5, p. 207-211.

Another solution, which is especially interesting in the context of broadcasting, is that of the satellite broadcasting model, as introduced by the Cable and Satellite Directive.²⁸ In this model, a licence is only needed in the country of uplink, immediately solving the problem of having to license a single transmission across multiple territories. Nevertheless, although the model is certainly operational, it is often undermined by restrictive licensing practises combined with signal encryption. A totally different model, also based on the same Directive, that has been successful is that of the exercise of cable retransmission rights on a compulsory basis by collecting societies. This model made cable retransmission on a grand scale possible through the imposition of compulsory rights management. In the context of cross-border online exploitation, both models are worth considering.²⁹

Currently a few slightly promising developments in the context of pan-European Internet licensing are noteworthy. First, there is the IFPI Simulcasting Agreement, cleared by the European Commission in 2002, which allows broadcasters to obtain record producers' rights for the transmission of terrestrial programming simultaneously over the Internet into numerous countries on the basis of a single, multi-territory licence.³⁰ However, the Agreement is limited in scope, as it applies only to phonographic rights. Secondly, the Online Music Recommendation was intended to enable rightsholders (particularly music publishers) to withdraw their rights from collecting societies, something which is indeed currently taking place. Yet in practice, as analysed above, this has not proved to be a workable solution and seems rather to have exacerbated the problem.³¹ Thirdly, the Santiago Agreement, an attempt by several organisations to create a platform for online licensing, was also mentioned. In a preliminary assessment the Commission concluded that the agreement was compatible with the European competition rules and invited interested third parties to submit their comments. However, the Santiago Agreement was abandoned by the notifying parties and the Commission did not adopt a final decision on the issue.³²

In general, not much movement has been noticeable in the area of voluntarily solutions. It was therefore suggested by workshop participants that, if the need to create a pan-European market for audiovisual content is agreed upon, legislative action might be a possible way forward. One of the options, currently being considered by the European Commission, would be to investigate the extent to which the satellite broadcasting model could be applied to the Internet. Direct application, however, would not be possible, because the Internet as a platform does not operate in the same way as satellite broadcasting, meaning that localising the initial uplink in Internet transmissions would prove considerably more difficult. A second option might be extending the cable retransmission model, although this could also pose challenges. With cable transmissions, primary and secondary exploitation can be distinguished, something which would not be feasible in the online context. A third model could be found in the concept of extended collective licensing, a solution which is becoming very popular especially in the context of online archives. This approach might provide the necessary fair balance between the protection of primary exploitation and the facilitation of secondary uses.

However, these are all partial, not definite, solutions. In a joint statement issued by EU Commissioners Reding and McCreevy on the subject of Google Books, the need to take a hard look at the current copyright system in Europe and to adapt Europe's still very fragmented copyright legislation to the digital age was emphasised.³³ All the problems which follow from the differences between national laws create a nightmarish situation for digitisation projects. Accordingly, Bernt Hugenholtz ended his presentation by stating that, in the long term, the possibility of a unified European Copyright Law, which would replace national copyright laws, should be seriously considered. If adopted, a European copyright code should be a directly binding instrument based on Article 118 of the TFEU, which expressly mandates the European Union to establish copyright legislation at the

28) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L248/15.

29) P.B. Hugenholtz, "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", *IRIS plus* 2009-8, p. 7-19.

30) Commission Decision 2000/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the E.C. Treaty and Article 53 of the EEA Agreement, [2003] OJ L107/58, (*IFPI Simulcasting*).

31) See the article by Stefan Ventroni in this publication.

32) See on this topic: V. Dehin, "The Future of Legal Online Music Services in the European Union: a Review of the EU Commission's Recent Initiatives in Cross-Border Copyright Management", *E.I.P.R.* 2010-5, p. 220-237.

33) Joint Statement of EU Commissioners Reding and McCreevy on the occasion of this week's Google Books meetings in Brussels [editor's note: 37th week of 2009], available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEM0/09/376>

European level. A unified copyright code would present a lot of advantages, such as the removal of the territoriality principle, and it would consolidate the European *acquis*. It would also greatly increase transparency and legal certainty. A group of academics, the Wittem group, has been working on such a code for years. The Wittem Project's European Copyright Code was published on 26 April 2010 and might serve as a model or reference tool for future harmonisation or unification of copyright at the European level.³⁴

The idea of a unified European Copyright Law opened an animated debate among the participants as to the actual need for worldwide access. One of the participants pointed out that in the idea of global licensing there exists an assumption that users desire access to material from all over the world. It was questioned whether this assumption accurately reflects reality. Arguably, the cultural diversity that is a hallmark of Europe's cultural heritage also erects natural boundaries to the geographical reach to which European cultural material can reasonably aspire. In the context of audiovisual works particularly, the language issue raises further questions as to the appropriateness of cross-border dissemination. The cultural heritage contained in an Italian broadcasters' archive, for example, will almost exclusively consist of material in the Italian language, making its value and attractiveness in Asia dubious in practice. In this regard, audiovisual works differ from musical ones, as language plays a bigger role in their appreciation and consequently dissemination. Other participants however disagreed, pointing out that European culture has historically informed and shaped culture elsewhere on the globe, as well as borrowed from and incorporated foreign elements into its traditions. A sustainable demand from outside of Europe for European audiovisual material would likely not be difficult to release, while such enriching cultural exchanges should be encouraged and permitted to take full advantage of modern digital means. The role of Europe in the world from a political, cultural and economic point of view was also mentioned in this context, as well as the need to protect the European image.

In fact, during the discussion, the extent to which broadcasting markets really are national markets was critically examined. Instead of a mere fact to be accepted, this could equally well be a self-fulfilling prophecy, with markets following national borders simply because only the possibility of obtaining national rights is on offer. Language is certainly a relevant factor, but it is unclear whether it is decisive. In the publishing industry, for example, it would seem that a demand for foreign language books outside their country of origin does exist. It is likely that the broadcasting market has resisted transnational development simply out of habit. Another possibility of course might be that the viewers upon which the broadcasting companies are focusing could also function as a confining factor. In general, when deciding upon their broadcasting programming, broadcasting companies tend to focus on the nationals of their own country. This leads to a situation where a typical Dutch programme is only interesting for Dutch citizens and Dutch citizens in foreign countries.

Further on in the discussion the issue of the territorial fragmentation of rights was addressed. One of the participants expressed the opinion that territoriality could be seen as being equally in the interests of the rightsholder, the licensor and the licensee. National broadcasters want exclusivity over certain programmes, without being encroached upon by foreign broadcasts from other countries. The same interests apply to music publishers, who also grant licences on a territory-by-territory basis. Would a unique European Copyright be reconcilable with the possibility of restricting licences to certain territories? If not, this might indeed function well in the field of collective copyright management, but in the area of individual licensing it may have devastating consequences both for the industry and for rightsholders. This view was however disputed, with participants agreeing that, although at a micro level there are certain intermediaries who benefit hugely from the splitting up of rights and the consequent possibility of price discrimination, the main focus should not lie on the interests of only certain stakeholders, but on general economic and cultural welfare in Europe.

One of the participants expressed a fear of the consequences of cross-border exploitation for certain categories of audiovisual works. A single market solution, it was posited, could signal the collapse of existent business models. A careful assessment of the consequences of cross-border exploitation for certain markets was thus advocated. As was pointed out however, it is not the task of the European Union to protect business models, which are by nature intended to come and go with the times.

34) European Copyright Code, available at: www.copyrightcode.eu

Finally, with regard to a unified European Copyright, the freedom of contract was also briefly discussed. One of the participants doubted whether the request for access could be reconciled with contractual freedom. Contractual freedom may only be removed through the institution of mandatory licensing. Certainly, the interface between creating a European copyright framework and contract law is enormously complex. A comparison was made with the clearing up of national distribution rights, which did not completely ban practices of purely territorial licensing. And of course a European Copyright Law would not immediately solve all problems. However, removing legal barriers will solve several issues in the short and long-term.

VII. Conclusion

The workshop covered several different aspects of the designated topic of the “Digitisation and Online Exploitation of Broadcasters’ Archives”. It became clear that not all questions examined could yet lead to conclusive answers. As revealed by the presentations and discussion, the main points that policymakers and legislators need to address are the following:

- Agreement upon a definition for broadcasters’ archives through the establishment of the relevant criteria, especially regarding what kind of audiovisual work should be included and whether a time element should form part of the definition;
- Addressing questions regarding the financing of the digitisation process and the legal implications of using public money for such digitisation;
- Seeking solutions, possibly through legislation, for the difficulties broadcasters encounter with rights clearance for the online dissemination of their archive content (among which variations of the collective licensing model may be included);
- Agreement upon a workable definition of orphan works and the establishment of criteria on how extensive a search for a rightsholder should be to qualify a work as an orphan work. Solutions for the orphan works problem should also be sought;
- Addressing the functioning of collecting societies with regard to the licensing of Internet rights, in view of the fact that it is not currently possible to obtain a global licence from a collecting society;
- Identifying the advantages and disadvantages of further harmonising copyright laws with regard to developing cross-border online services using archives, including examining the possibility of a unified European Copyright Law.

The archives of many television broadcasters now contain material which includes more than half a century of contemporary, documentary and entertainment history and are of immense cultural and economic value. Digitisation has created an entirely new technical basis for making these assets available to a wide audience, and there are a whole range of projects aimed at opening up audiovisual archives (including those of broadcasters). Examples that might be mentioned are the BBC Creative Archive, the Dutch Filmotech initiative or the French Inamédiapro database.

However, many projects to open up broadcasters' archives and exploit them online generally run up against serious problems when it comes to clearing the rights for these archived works. These problems arise, firstly, due to a contractual practice that developed in the pre-digital era and to aspects of copyright law that do not really meet the needs of the digital age. Secondly, the very large number of works stored in archives constitutes a challenge that is not easily overcome.

The aim of this IRIS Special publication is to discuss the subject of "Digitisation and online exploitation of broadcasters' archives" from a number of different perspectives. The team of authors involved is accordingly made up of representatives of many different interests: copyright holders and those who look after their interests, television broadcasters, lawyers and copyright experts. Their contributions can be divided into four subject-areas:

- The legal framework of digitisation
- Rights clearance and dealing with orphan works
- The online exploitation of public service broadcasters' archives, including relevant competition aspects
- Cross-border exploitation.

This IRIS Special thus not only provides you with legal guidance but is at the same time a field report written by specialists who are facing the challenge of opening up broadcasters' archives to a wide audience. By working out existing problems that have hitherto not been satisfactorily resolved, both policy-makers and legislators are shown where immediate action is needed.

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