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CABLE RETRANSMISSION OF BROADCAST CHANNELS

Joint statement by broadcasters, film producers and authors

- ***GLOBAL (i.e. multilateral) LICENSING AGREEMENTS for the cable retransmission of broadcasts, i.e. single contracts involving all categories of right-holders on the one hand and cable operators (or national associations thereof) on the other, are FAVOURED BY RIGHT-HOLDERS, including broadcasters.***
- ***Licensing agreements involving multiple collecting societies and other right-holder groups have been a WELL-ESTABLISHED PRACTICE in Europe for several decades and occasion the LOWEST NEGOTIATION AND ADMINISTRATION COSTS of all possible business models. Even in countries where cable operators refused to conclude global licensing agreements, multiple right-holder groups have successfully licensed their repertoire to those operators.***
- ***The proposal by cable operators that broadcasting organizations should be obliged to acquire and manage all cable retransmission rights on behalf of the cable operator is unacceptable for right-holders and would create higher transaction and administration costs. Consequently, such a proposal SHOULD BE UNEQUIVOCALLY REJECTED.***

The rights clearance model proposed by cable operators in the "Solon" study,¹ whereby the broadcaster should be obliged to clear all rights for the television channels that the cable operator wishes to offer to its paying subscribers, is apparently based on a desire to transfer the cable operators' legal and financial responsibility to the broadcasters. However, this would obviously contravene well-established licensing patterns which have successfully facilitated the cable retransmission of television programmes for many years. Moreover, for the reasons set out below, making broadcasters a mere rights clearance entity on behalf of cable operators and burdening them with the cost of the cable distribution activity is neither legally justified nor feasible in practice:

- ❖ Under copyright law, the *raison d'être* of the exclusive cable retransmission right is the ***intended economic benefit*** of this activity by the cable operator. This follows on from Article 11bis(1)(ii) of the Berne Convention, from case-law of the European Court of Justice and from national copyright laws and European recommendations. Consequently, given that cable operators use television programmes (and the relevant rights) for their own business purposes, they are legally and financially responsible for acquiring the cable retransmission rights from all right-holders concerned.

¹ The full final text of the "Solon" study is available at http://www.cableeurope.eu/uploads/documents/pub-27_en-2006_05_09_solon_study_final.pdf.

- ❖ The act of cable retransmission, for which consumers must pay a subscription fee, is operated and managed only by the cable distributor. Given that the latter is selling the retransmitted programmes to consumers *for commercial purposes*, the copyright liability for such retransmissions should not be placed on the shoulders of any right-holders in the value chain.
 - ❖ For the simultaneous, complete and unchanged cable retransmission of (foreign) broadcasts, the 1993 Satellite and Cable Directive introduced a simplified rights clearance system, facilitating the *collective licensing* of retransmission rights of certain right-holders. This system, which helps copyright users to obtain the retransmission rights which they need, was adopted *specifically upon request from cable operators*.
 - ❖ Under the 1993 Satellite and Cable Directive, broadcasters are intentionally provided with the necessary *flexibility* to negotiate their rights as they deem appropriate. In the model proposed by the Solon study, the economic risk of the negotiations for all the retransmission rights would be a burden entirely for the broadcaster alone.
 - ❖ Also, such a model would deprive the collecting societies of the possibility of being involved in *direct negotiations* with the cable operator, in order to sell their rights direct to those making commercial use of their repertoires, as originally intended by the 1993 Satellite and Cable Directive.
 - ❖ The proposed model would therefore involve more negotiations, because it would require additional discussions between the broadcasters and the other right-holders, thereby creating *higher transaction and administrative costs*.
 - ❖ Unlike the case of multiple-party licensing agreements, where right-holders sit around the same table with cable operators, in the proposed model broadcasters cannot sufficiently anticipate whether (and, if so, in which countries and under which commercial circumstances) their channels will be retransmitted in the future. The broadcasters would thus have *no solid basis for negotiations* with the other right-holders.
 - ❖ Today, retransmission rights are remunerated by cable operators according to actual usage/consumption, e.g. on the basis of the actual subscription model and the retransmitted channels. In the proposed model, collecting societies would have to ask for payment from broadcasters *without knowing in advance the scope of actual retransmissions*, i.e. which channels would be retransmitted and on which commercial basis (subscription model, fees, etc.). This would also lead to an *unjustified and unnecessary increase in negotiation costs*.
 - ❖ These difficulties can be further illustrated by broadcast retransmissions via the *new media platforms*, as the business models of the new media operators were not known in advance to broadcasters and other right-holders.
 - ❖ New media platform operators do not expressly enjoy the benefit of a mandatory collective licensing scheme for clearing the retransmission rights which they need. Consequently, the legal framework for simultaneous, complete and unchanged retransmission of broadcasts creates an obvious *incentive for a similar system of rights clearance* for broadcast retransmissions by such other media operators.
 - ❖ The average revenue per cable television subscriber (in Western Europe) is approximately 200 Euros per year. The average copyright remuneration for cable retransmission (all rights included) per cable television subscriber is *approximately 1 Euro per basic package channel per year*. This fee is less than the average cost of one daily newspaper, about half the roaming cost for a four-minute telephone call (peak-time Euro-tariff) and only a fraction of the average cost of a cinema ticket.
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