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SROC Contribution to the DG INFSO Consultation Online Distribution of Audiovisual Works in the European Union 18 November 2011

Introduction

The Sports Rights Owners Coalition (SROC) is pleased to offer its thoughts on this important consultation on the future of online distribution of audiovisual works in the European Union. This response addresses primarily Sections 2 & 3 of the Commission’s Green Paper. We will take the opportunity to set out some general positions on the key issues at stake here, and then respond to the specific questions of most relevance to the European sports organizations.

SROC is an informal group of representatives of international, European and national sports bodies, operating as a forum through which sports can share information and experiences. Individually and collectively we represent a majority of European and International leading and most popular sports and competitions, attracting millions of spectators, with many of our events available to consumers across a growing variety of broadcast platforms, including online.

As innovative rights holders, we are directly concerned by the promotion of a European approach which respects the commercial choices of our members and provides a platform for them to distribute their works as widely as possible and in the most tailored way to give maximum quality to our fans across Europe. Protecting our rights against any infringements is key to sustaining and creating jobs in this high-value sector for Europe.

Responding to the Consultation Questions

1. What are the main legal and other obstacles – copyright or otherwise - that impede the development of the digital single market for the cross-border distribution of audiovisual works? Which framework conditions should be adapted or be put in place to stimulate a dynamic digital single market for audiovisual content and to facilitate multi-territorial licensing? What should be the key priorities?

As acknowledged by the KEA study on Multi-Territory Licensing, prepared for the European Commission¹, *“the audiovisual sector is a high-risk sector because media products are ‘experience’ goods, which are valued differently by each consumer as well as by different cultural communities. Because of the linguistic and cultural specificities across borders, the European audiovisual industry is structurally fragmented [...] increased international availability of audiovisual works will by itself not lead to a significant increase in cross-border demand for such works. In cultural markets, consumer demand needs to be stimulated. Consequently, public policy should also help audiovisual SMEs to implement digital marketing strategies to reach wider audiences.”*

The main obstacle that SROC members face in terms of creation of a digital single market is the lack of a “digital single demand”! Sport is territorial by nature. National matches and competitions are watched more fervently by those from hosting or participating countries. This can be seen at a glance from the national lists of designated events which can be safeguarded by Governments for free-to-air television broadcasting. While the lists of course include major world events like the Olympics, they serve as a clear demonstration that sports events – from the Giro d’Italia in Italy, the finals and semi-finals of national and international football club competitions in Germany, to the All-Ireland Senior Inter-County Hurling Finals in Ireland – are principally of importance in domestic markets; their value and appeal likewise differs across Europe.

According to a 2009 study from RBB Economics, *“the EU consists of Member States with distinct cultural, linguistic and viewing preferences. The European audio-visual industry is organized to accommodate those differences and ensure that a targeted product is made available to European consumers so that stakeholders across the audio-visual industry are more able to recoup their substantial and risky investment in the production and distribution of content. Territorial exclusivity is critical to the practice of accommodating the different viewing preferences within the EU because it enables audio-visual products to be sold within Member States on an exclusive basis and in a way which meets demand in each member state within the EU².”*

¹ KEA Study Multi-Territory Licensing of Audiovisual Works in the European Union, Executive Summary Prepared for the European Commission, DG Information Society and Media, page 3 and page 9 <http://www.keanet.eu/docs/mtl%20-%20exec%20summ%20en.pdf>

² “The benefits of territorial exclusivity in the European audio-visual industry”, RBB Economics, London, February 2009

Territoriality of football media rights has also been recognized in a number of decisions by the European Commission, including the UEFA Champions League decision³. *“Due to the character of distribution, which is national due to national regulatory regimes, language barriers, and cultural factors, the Commission recognized the geographic scope of the upstream markets for the media rights to be national”*.

Sport competitions have a very different value depending on the territory in which they are being watched. Even in the case of football, there is no demand from broadcasters and content providers for the delivery of content on a European basis⁴. A “one-size-fits-all” approach would appear to go against the diverse consumer demand in the Member States and it would inhibit flexibility to provide specific required content in each Member State.

The other important obstacle for the development of a digital single market is the ever growing number of IPR infringements online.

With an abundance of illegal offers polluting the online audiovisual market it is still difficult to motivate investments. Competition is tough enough as it is, without illegal free-riders being able to piggyback on our innovations and those of our partners.

SROC members find it particularly difficult to address digital piracy of live sports broadcasts due to the swift nature of the reaction needed to shut down these sites. The value of our events is mostly in their live broadcast, so time is of the essence. SROC hopes that the EU institutions can help sport and other content providers by providing concrete measures to protect their rights.

Major sports events and competitions are very attractive, and in great demand, making them particularly vulnerable to attack from content pirates. The most pirated sport globally is cricket, which sees around 1000 different websites illegally hosting pirated coverage of its live events, despite an excellent range of legal online offers. Many sites are funded by advertisement or even operating as subscription channels, with the pirates being directly remunerated.

These undertakings look to exploit sports content to create profit, without contributing to the sports development, nor to job creation or to tax revenues. For SROC, the legal certainty required to drive the development of innovative content services online can only be provided by a comprehensive regime to protect IPRs, both within the EU and beyond its borders. Any digital market, whether European or national, remains fragile while piracy of content is so prevalent.

In certain markets we have been able to develop a good working relationship with hosting services in order to protect our content through filtering technologies. One excellent example of this is the

³ Decision of 23 July 2003, Joint selling of the commercial rights of the UEFA Champions League

⁴ In its recent rights sales process in mainland Europe, the Premier League offered its live audiovisual rights both on an individual territory basis and in country groups, including a “pan-European” territory containing all countries in mainland Europe. That “pan-European” territory did not attract a single bid.

agreement between the French Football League and DailyMotion. Through a close and fruitful cooperation, a 'digital imprint' technology has been developed which allows DailyMotion to automatically identify and remove any of the League's audiovisual content which is put on their website without authorization. This technology is now also being developed by rival platforms and we would hope to see it rolled out more widely as soon as possible. Such an example serves to show what can be achieved through active collaboration, and proves the effectiveness of technology and filtering as a non-punitive way to block pirated content at source.

In order to complement these measures, we would request greater efforts from ISPs and online platforms to monitor users' activities. This should of course respect all data protection and individual privacy requirements. We would simply ask that if illegal activities are identified, there is a possibility and a provision to warn the infringing user of the breach and potentially to take appropriate measures in case of repeated offences. Information-sharing between different stakeholders, in full respect of consumers' rights, is key to the battle against illegal online activities.

SROC hopes that the EU institutions can help sport and other content providers to embrace new technological tools and provide concrete action to protect rights. Our members welcome this consultation, and opportunity to contribute to the Commission's future priority planning.

2. What practical problems arise for audiovisual media services providers in the context of clearing rights in audiovisual works (a) in a single territory; and (b) across multiple territories? What rights are affected? For which uses?

3. Can copyright clearance problems be solved by improving the licensing framework? Is a copyright system based on territoriality in the EU appropriate in the online environment?

When SROC members sell the rights to their events, this is usually done on a platform-neutral basis, meaning the purchaser can offer the content via traditional media, online, or via a combination of both as is often the case. When these rights are not purchased by traditional media in certain territories, SROC members explore the possibility of selling direct to customers online. Examples include World Marathons and the International Tennis Federation who offer online access to their events if no rights holders exist in a given territory. These choices are based on the business sense of making such services available. Other sports also provide an online platform as an alternative, even though events are shown on television. For example, all UEFA Champions League games are also available to watch "a la carte" through the UEFA website. Six Nations Rugby Limited gives its broadcasters certain rights to exploit their broadcasting rights on the internet. Major events can nowadays be accessed legally and directly on the Internet.

Sports organizations across Europe cater to a variety of different markets, and currently supply services on both multi territorial or territorial formats and a wide range of complementary technology platforms. SROC members do not encounter any specific problems regarding rights'

clearance or licensing. We feel that the current copyright framework offers enough flexibility to be able to sell on territorial, multi territorial or even pan European basis. As mentioned above, the main current barrier we face to selling across borders is the level of consumer demand, which our members actively seek to address by providing increasingly innovative and entertaining services. In order to allow a thriving market for all our members' competitions and to generate the competition needed, we reject a one-size-fits-all model of pan-European licensing which will only serve the interests of the already dominant players in the long-term.

In its Green Paper, the European Commission makes reference to the Premier League case. Although this is clearly a complex ruling, which will be referred back to the UK Court, SROC notes that the ruling does not call into question the territorial exclusivity principle, only some clauses granting absolute territorial exclusivity and preventing passive selling might be illegal. Moreover, the CJEU clearly indicates that broadcasting in a public house is a "communication to the public" within the meaning of the EU Copyright Directive, and therefore cannot be carried out without prior authorisation of rights holders. Finally, at paragraphs 100-104 the CJEU clearly states that Member States have the right to grant sports organisations with specific rights and protection which are equivalent to those afforded under copyright laws. An example is the "Sports Event Organisers Right" under French law. SROC feels that the judgment is firm in its recognition of the specific and original nature of sports competitions and their inherent social and cultural value in Europe and the virtue of a strong rights framework.

4. What technological means, for example individual access codes, could be envisaged to enable consumers to access "their" broadcast or other services and "their" content, irrespective of their location? What impact might such approaches have on licensing models?

8. How will further technological developments (e.g. cloud computing) impact upon the distribution of audiovisual content, including the delivery of content to multiple devices and customers' ability to access content regardless of their location?

Sports organisations are exploring such technologies with their broadcast partners and remain aware of the niche market of highly mobile subscribers to their content who would like to access their 'purchased at home' content whilst travelling. These groups represent a tiny percentage of the market, but we nevertheless seek to accommodate them as far as possible.

Sports organizations face no legal obstacles to the cross-border distribution of their works. Some Sports rights holders already provide cross-border/multiterritorial licensing solutions when it fits the market demand. For instance, the rights of the International Cricket Council (ICC) World Twenty 2009 were sold to Eurosport for Europe (except the UK and the Netherlands where the rights were acquired by local broadcasters). As mentioned above, more and more sports rights holders – such as World Marathons, the International Tennis Federation and the Rugby Football League – offer online access to their events (especially in territories where there is no terrestrial broadcasting for a given event).

5. What would be the feasibility, and what would be the advantages and disadvantages of, extending the "country of origin" principle, as applied to satellite broadcasting, to online audiovisual media services? What would be the most appropriate way to determine the country of origin" in respect to online transmissions?

6. What would be the costs and benefits of extending the copyright clearance system for cross-border retransmission of audiovisual media services by cable on a technology neutral basis? Should such an extension be limited to "closed environments" such as IPTV or should it cover all forms of open retransmissions (Simulcasting) over the internet?

SROC would call for extreme cautiousness when it comes to any extension of the country of origin principle or the cable clearance system to online audiovisual media services.

First of all, even the Commission recognized in the Green Paper that *"more than fifteen years after the application of the relevant Directive, this approach (i.e. the country of origin) does not seem to have led to a broad emergence of pan-European satellite broadcasting services"*⁵.

Moreover, allowing an online service, once licensed for an exclusive content in one territory, to cover all EU territories would simply destroy the value of SROC members and other content providers' rights. This would mean applying the exhaustion principle to services, an approach suggested by the Advocate General in the Premier League case but that the CJEU decided not to follow.

7. Are specific measures needed in light of the fast development of social networking and social media sites which rely on the creation and upload of online content by end-users (blogs, podcasts, posts, wikis, mash-ups, file and video sharing)?

Sports organisations are acutely aware of the challenges faced by the development of social networking sites, and the desire of individuals to use and exploit sports content. We need to be vigilant as to how these tools are used for unauthorized commercial exploitation, and any risk to undermining our legitimate commercial rights.

Sports organisations are working with their commercial partners to address such issues, and are subject only to commercial rather than technical or legal barriers.

⁵ COM (2011) 427 final, p. 13

9. How could technology facilitate the clearing of rights? Would the development of identification systems for audiovisual works and rights ownership databases facilitate the clearance of rights for online distribution of audiovisual works? What role, if any, is there for the European Union?

The rights ownership database is a good example why a “one-size-fits-all” approach is not efficient. This initiative might be useful in the music sector, or maybe in the movie sector, but as far as sport content is concerned it is difficult to see any added value for this system.

Rights ownership is quite clear when it comes to sport content and the organizer of a competition owns the rights attached to it.

13. What are your views on the possible advantages and disadvantages of harmonizing copyright in the EU via a comprehensive Copyright Code?

14. What are your views on the introduction of an optional unitary EU Copyright Title? What should be the characteristics of a unitary Title, including in relation to national rights?

On this topic, SROC agrees with the assessment of the Green Paper that the “*feasibility, actual demand for, and the tangible advantages of, such a title, together with the consequences of its application alongside existing territorial protection must be thoroughly examined*”⁶.

Apart from the timing issue (replacing national titles by a European one would probably take years, if not decades, to achieve), surely a full harmonization by means of a “European Copyright Law” would be based on the highest level of protection among the EU Member States.

For more information, please contact SROC at sportsrights@sroc.info

⁶ COM (2001) 427 final, p. 13