



RESPONSE

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## Proposed Revision of TV Without Frontiers

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DCMS Consultation on European Commission's proposals, 6 June 2006

### Executive Summary

PPL and VPL<sup>1</sup> welcome this consultation by the UK Government. The European Commission's proposed revision of the TV Without Frontiers Directive would, if implemented, have a negative impact on the music industry and the wider creative economy.

The online market for music, and music video in particular, is growing fast under the auspices of existing legislation, principally the E-Commerce Directive<sup>2</sup> and the Copyright Directive<sup>3</sup>. There are still issues around illegal content, particularly copyright infringing material, but these are best handled by adapting existing legislation which is designed for the online world, rather than trying to translate a regulatory structure which has been built around spectrum scarcity. We have two specific proposals to address these conflicting legislative approaches.

- **Scope.** We support a variant of Option 3, whereby the Directive retains its existing scope, ie the established definition of broadcasting, but the regulatory conditions are updated to reflect the broadcasting environment as it is now.
- **Copyright.** We propose that a clause is added to the TV Without Frontiers directive making a clear derogation for copyright in order to avoid forum shopping.

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<sup>1</sup> PPL and VPL are the UK collecting societies licensing on behalf of 40,000 performers, 3,000 record companies and 1,000 music video producers. See Appendix A.

<sup>2</sup> EU Directive 2000/31/EC *Directive on Electronic Commerce*, 2000.

<sup>3</sup> EU Directive 2001/29/EC *Copyright in the Information Society*, 2001.

## **A. BACKGROUND**

1. It is important to understand the context of the proposed TV Without Frontiers Directive and, in particular, the extension of scope. Europe is moving towards an economy driven by value in intangible assets. The creative industries already represent 5.3% of Gross Value Added<sup>4</sup> and the creative economy is growing twice the rate of the rest of the economy. Even manufacturing in Europe is increasingly IP-based.
2. Music has been at the forefront of the digital explosion. Music, albeit largely illegal file-sharing, has driven the demand for internet connectivity and latterly broadband. Legitimate online music services were launched in Europe in 2004. In the UK, the growth was so dramatic that within eighteen months, download sales exceeded sales of physical singles. As bandwidth capacity expanded to cater for full track audio-visual downloading and streaming on demand, music video services were launched – in 2005 on mobile (by 3 and others), and later in 2005 on PC/portable devices (by iTunes and others). Initial growth has been similarly dramatic and most industry executives predict that online revenues will represent over 25% of total music revenues within the next three or four years.
3. This growth has been underpinned by existing legislation drafted for the online environment, most notably the E-Commerce Directive and the Copyright Directive.

## **B. OPTIONS AND SCOPE**

1. *To what extent would Option 2, 3, or 4 ease market entry for new providers of audio-visual media services, or prevent it or make it more difficult?*
2. *To what extent would Option 2, 3 or 4 limit the freedom of firms active in the markets which are affected to determine their own prices, product characteristics and/or quality and standards, means of advertising the product and distribution channels?*
3. *What would be the costs and benefits, both direct and indirect, to the UK generally and across the various audio-visual services?*
4. *What impact would the Options have in terms of compliance costs, especially for smaller firms?*
5. *Would any of the Options give rise to a potential for displacement of economic activity as between different parts of the audio-visual services sector? Would it give rise to decisions in this sector to relocate to or invest in non-EU locations?*
6. *Would Option 4 have any indirect impacts on firms' competitiveness in audio-visual services, or more generally?*
7. *If the TVWF Directive were extended to add only mass-media video-on-demand services of the kind currently available- so excluding all other forms of 'non-linear', on-demand services - what would the costs and benefits be?*

<sup>4</sup> *The Contribution of Copyright and Related Rights to the European Economy*, Turku School of Economics and Administration, 2003.

[http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2002b53001e34\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf)

4. There are similarities between online and offline and, in principle, laws which apply offline should apply online as well. However, the broadcasting environment is very specific, as is the regulatory environment which has grown around it. The regulation of broadcasting and the application of law to online services must be approached differently because of two critical factors. They are ubiquity and global service.
5. Offline, spectrum is a scarce commodity. It is controlled by governments and is licensed to broadcasters on specific terms. Those terms are easily enforced through the granting of spectrum, without which the broadcaster could not operate. Online, there is no such scarcity. Bandwidth is available to anyone with the means of paying for it. It is not controlled by governments. Therefore, that regulatory mechanism which allows such detailed scrutiny of broadcasters no longer applies. Online, delivery systems are ubiquitous; offline, broadcasting is controlled by governments.
6. Similarly, offline broadcast services are largely contained within one territory. Broadcasters wishing to enter another territory must obtain spectrum (with conditions attached). Online, however, a service can be located anywhere in the world, it can move at will and it can target any number of other territories, within or outside Europe. If the supply-side conditions imposed on European-based operators are too onerous, they will simply move their operations overseas.
7. Thus, while the same basic laws (decency, protection of minors, copyright) should apply, the regulatory approach will need to be different as between offline broadcasting and online delivery. The TV Without Frontiers Directive is well suited to the offline world and has helped broadcasters operate services in different territories within Europe. However, translating that supply-side regulatory approach to the online world is fundamentally flawed. Governments do not have the regulatory levers (such as allocation of spectrum) to be able to control services in the same way and their powers in relation to services emanating from outside European boundaries are very different.
8. This fundamental flaw shows itself in many of the debates around the Commission's proposal for the revised TV Without Frontiers Directive. Many of the issues which the revised Directive purports to address are already subject to European legislation, taking on board the different approach to regulation demanded of the online world. The E-Commerce Directive, for example, deals with country of origin for a wide range of information services online. Whilst there remain problems, not least the continuing proliferation of illegal copyright-infringing material, these should be dealt with by revising the E-Commerce Directive (in particular, the liability provisions) rather than superimposing new legislation based on a spectrum licensing regulatory system.
9. Another consequence concerns the definition of broadcasting. This term has become well established within European and national legislation. The received definition is now the basis for many other pieces of legislation which would be fundamentally changed by any change in the definition of broadcast. For example, many continental European legislatures make a distinction between broadcasts and webcasts for the purposes of copyright. A change in the definition of broadcast would have a consequent detrimental change in the copyright and underlying

rights granted to record companies and performers. The definition of broadcast should therefore remain as it is currently understood, thus recognising the distinction for these purposes between the online and offline worlds.

10. For these reasons – regulatory mechanisms for broadcasting versus online, the established legislation for online services and the established definition of broadcast – we have backed the UK industry consortium resisting the expansion of scope. **We support a variant of Option 3, whereby the Directive retains its existing scope, ie the established definition of broadcasting, but the regulatory conditions are updated to reflect the broadcasting environment as it is now.**

### **C. COUNTRY OF ORIGIN, PLACE OF ESTABLISHMENT, JURISDICTION, AND DEROGATION**

*9. Are there any instances in which the current lack of harmonisation of controls on non-linear audio-visual services among Member States is limiting competition in this sector?*

*10. Specifically, have businesses felt that the current derogations under Article 3 of the Electronic Commerce Directive harmed their business and thus whether the inclusion of their services under this proposed new Directive would be beneficial?*

*11. Would the rules proposed in Article 2.3, for establishing which Member State has jurisdiction over any particular non-linear service, provide clear and effective jurisdiction in this sector?*

11. PPL and VPL have been consistently supportive of the country of origin principle to enable businesses based in one territory to operate freely in other European territories. In the Services Directive, for example, PPL and VPL resisted an amendment which would have excluded collecting society services from the remit of the directive. Our view is that a collecting society based in one territory should be able to operate in other European territories. This is already current practice as record companies and performers throughout Europe have appointed PPL to license their repertoire and collect their royalties on their behalf.
12. There is an important caveat to the country of origin principle. It should not apply to commercial terms, such as copyright licences. The value of a copyright and its use in a particular context relates to that market and it is the local market valuation that should apply. This principle, tariff of destination, derives from the rights granted in the Copyright Directive and is enshrined in the DG Competition decision<sup>5</sup> on simulcasting. It recognises the fact that local market conditions should determine the value of a copyright. It also protects against copyright havens (outside Europe) and forum shopping.

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<sup>5</sup> Commission Decision of 8.10.2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 – IFPI “Simulcasting”)  
<http://europa.eu.int/comm/competition/antitrust/cases/decisions/38014/en.pdf>

13. There is unfortunately direct evidence of forum shopping when the country of origin principle was misapplied in the Cable and Satellite Directive<sup>6</sup>. When satellite operators were able to locate their uplink anywhere in Europe and obtain a copyright licence in that territory, it was not clear that the licence should be valued on the basis of tariff of destination. Consequently, some background music operators moved their uplink specifically to take advantage of a cheaper copyright licence. Their customers and their main operations were located in the UK but they shopped round other European territories before deciding to locate the uplink (and purportedly their operational base) to Holland. Despite the apparent relocation, their customers and operations remained principally in the UK.
14. As we have seen from the Cable & Satellite Directive, rules on place of establishment are hard to enforce, particularly if there is an economic incentive to be economic with the truth. As outlined above, businesses should not be able to exploit place of establishment and the country of origin principle for forum shopping.
15. In order to avoid this forum shopping, **we propose that a clause is added to the TV Without Frontiers directive making a clear derogation for copyright**. This will also remove one area of conflict between the proposed directive and existing legislation, in this case the Copyright Directive.

#### **D. FILM RIGHTS AND SHORT REPORTS**

*23. Article 3f2 of the Directive would require Member States to ensure that audio-visual media services do not transmit cinematographic works outside the periods agreed with their licence holders. This re-enacts Section 7 of the existing TVWF Directive, but applied to audio-visual services as a whole rather than simply to television broadcasters. Would this provision achieve anything, given the existence of copyright law?*

*24. Article 3b offers a limited transfrontier right of access to footage of major events, including (and especially) sports events for television news purposes. Does this strike a fair balance between the respective rights of the rights holders, broadcasters, news agencies, sports organisations and other event organisers, and the interests of the public? Should this right be available to broadcasters in all Member States, or should it be available only in Member States that already allow such access to footage of major events to their own domestic broadcasters?*

16. The proposed articles on film rights and short reports both have direct impact on copyright legislation. It should be made explicit that the TV Without Frontiers Directive is not intended to alter copyright legislation. We have therefore proposed (paragraph 15 above) that a clause is added to the TV Without Frontiers Directive making a clear derogation for copyright.

**PPL/VPL**  
**September 2006**

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<sup>6</sup> Council Directive 93/83/EEC, *Cable & Satellite Directive*, 1993

## Briefing note on PPL and VPL

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### PPL Facts and Figures

- Licenses on behalf of 3,000 record companies and 40,000 performers.
- Licenses 200 TV channels and 300 radio stations broadcasting recorded music, as well as over 200,000 pubs, nightclubs, restaurants, shops and other places playing recorded music in public.
- Has negotiated bilateral agreements with 20 other collecting societies to collect overseas airplay royalties.
- Collected £86.5m in airplay royalties for performers and record companies in 2005.
- Distributes revenue using a comprehensive track-based system – analysing over 17m uses of recorded music reported by TV and radio stations, background music suppliers and venues playing recorded music in public. All track plays are matched to PPL's repertoire database CatCo, containing information on 7m tracks.
- Distributes to all the performers – featured artists, session musicians and backing vocalists – as well as the record companies that create the sound recordings that are played.
- Is the largest performer/producer licensing society in the world.

### PPL Recent Achievements

- In 2005, achieved a 5.4% growth in net revenue for the rightholders.
- In the last five years, has increased net revenue by nearly 40%, generating an additional £20m payable to record companies and performers, and almost halved the cost/revenue ratio.
- In 2005, PPL's CatCo was selected as the database underpinning the official combined download and singles chart.
- Signed the IFPI Simulcast Agreement in 2002 and the Webcast Agreement in 2003 paving the way for multi-territorial licences.

## **PPL and Performers**

- In 2001, set up the Performers Forum with AURA, Equity, MPG, MU and PAMRA.
- Located several thousand artists due royalties as a result of the joint RoyaltiesReunited campaign.
- In 2003, signed two Memorandums of Understanding laying down the principles for closer cooperation and collection of overseas airplay royalties.
- In 2006, obtained clearance from the OFT to merge performer operations and amended PPL's Articles of Association to create a new structure for PPL, integrating collection and distribution of UK and overseas royalties for all performers. The new structure provides four Performer Director positions and creates a Performer Board to oversee performer business.

## **VPL Facts and Figures**

- Represents 1,000 music video producers.
- Licenses 60 TV channels broadcasting music videos, including 25 specialist music channels.
- Licenses around 2,000 pubs, nightclubs and other places playing music videos in public.
- Collected £12.8m in airplay royalties for music video producers in 2005.
- Analyses usage information from TV stations and background music services for distribution to rightholders.
- Offers a sourcing service, Music Mall, for back catalogue video clips and other footage.
- Is the largest music video collecting society in the world.

## **VPL Recent Achievements**

- Recently concluded a licence with MTV on behalf of independent companies throughout Europe.
- In 2003, integrated management operations with PPL resulting in cost efficiencies to rightholders.
- Concluded licence arrangements for new video on demand services, such as Home Choice, NTL and Telewest, and the new store forward and narrowcast services.
- Announced a video digitisation project to provide online delivery of music videos to users.

**September 2006**