EBU

OPERATING EUROVISION AND EURORADIO

COPYRIGHT GUIDE
PRACTICAL INFORMATION FOR BROADCASTERS

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ABOUT THE EBU

The **European Broadcasting Union** (EBU) is the world's foremost alliance of public service media (PSM). Our mission is to make PSM indispensable.

We represent 117 media organisations in 56 countries in Europe, the Middle East and Africa; and have an additional 34 Associates in Asia, Africa, Australasia and the Americas.

Our Members operate nearly 2,000 television and radio channels alongside numerous online platforms. Together, they reach audiences of more than one billion people around the world, broadcasting in more than 160 languages.

We strive to secure a sustainable future for public service media, provide our Members with world-class content from news to sports and music, and build on our founding ethos of solidarity and co-operation to create a centre for learning and sharing.

Our subsidiary, Eurovision Services, aims to be the first-choice media services provider, offering new, better and different ways to simply, efficiently and seamlessly access and deliver content and services.

We have offices in Brussels, Rome, Dubai, Moscow, New York, Washington DC, Singapore and Beijing. Our headquarters are in Geneva.

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ABOUT THE EBU LEGAL & POLICY DEPARTMENT

In a fast-changing technological, political and regulatory envi-ronment, we advise our Members on specific legal issues, offering practical solutions in the fields of EU and national competition, copyright and media law that are specific to their needs. We analyse proposals, explore the implications with legislators and promote a legal framework which allows our Members to operate with optimum efficiency whilst continuing to contribute to the democratic, social and cultural needs of society. We also manage EBU membership and statutory matters and advise on all EBU contracts, including the Eurovision Song Contest, sports, news and networks.

Dear reader,

This Guide is intended as a practical toolkit for editors and programme makers working for public service broadcasters, with the aim of increasing awareness of all the rights and obligations under copyright law to be taken into account when creating, selecting and using protected material.

We hope that the Guide will prove useful, in particular, for industry newcomers and non-experts who find themselves dealing with copyright-relevant issues in their daily activities, to gain a better understanding of copyright basics. ideally it should also debunk some persistent myths or misunderstandings that often surface when copyright is debated between interested parties, and above all, it should assist in spotting relevant issues and knowing when to seek expert legal advice.

Please note that the purpose of this Guide is to provide a general introduction and overview covering most of the key copyright issues for public service broadcasters. to this end, and taking into account the complexity of copyright law, it should by no means be considered as a substitute for legal advice.

The EBU legal department has long experience in providing tailored legal advice to its members on all aspects of copyright law. should you require any assistance or advice on copyright, apart from that received from your own legal department, please do not hesitate to contact Head of Intellectual Property, Anne-Sarah Skrebers (skrebers@ebu.ch).

This Guide is available in print version and online. Please check our website at www.ebu.ch/legal to make sure you have the most recent version, as it will be updated from time to time.

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INTRODUCTION

WHY DOES COPYRIGHT MATTER FOR BROADCASTERS?

Copyright is – together with trademarks, patents and designs - part of intellectual property law. It provides creators of works with the exclusive rights to forbid or allow any other person, for a certain period of time, to use these works (or copies thereof) for their own endeavours. Just as anyone wants to protect their property, creators want to protect their works, and broadcasters want to protect their activities. Copyright is intended to guarantee an economic reward in order to induce authors and other contributors to radio and television programmes to be creative and innovative. Therefore, without adequate copyright protection of their programmes and signals, not only broadcasters' core services, but also their very survival, would be at stake.

The regulation of rights clearance is one of the pillars of the legal framework for copyright and an essential precondition for the dissemination of broadcasters' content on any platform. Therefore, from a practical perspective, copyright is the lifeblood of every broadcaster, private or public, large or small, in any part of the world. As the primary task of broadcasters is to create and broadcast programmes, copyright is an indispensable part of their daily activities, their long-term strategies and their corporate policies. This is true, both with respect to a broadcaster's great reliance on protected material (making rights clearance a fundamental budgetary concern), as well as with respect to the protection of its own programmes.

Broadcasting is an industry that depends on innovation and creativity and in which copyright is a vital component. It determines each broadcaster's ability to invest in the acquisition or production of content and in organising, promoting and distributing that content to the public. Each year, public service broadcasters invest 10 billion euros in high quality and diverse European content: news, documentaries, entertainment and fiction.

The importance of intellectual property rights (IPR) for the economy and employment in general has been demonstrated in many studies. A recent report by the Office for Harmonization in the Internal Market (OHIM) and the European Patent Office (EPO) stated that IPR intensive industries account for a quarter of the EU's employment and almost 40% of its GDP. It is therefore not surprising that the protection of the right to intellectual property is enshrined in the EU's Charter of Fundamental Rights. In this context, broadcasters' input should not be underestimated: a recent study by the World Intellectual Property Organisation (WIPO) demonstrated that broadcasting is globally the third largest economic contributor to the creative industries, almost triple the contribution from the music sector and more than three times the size of the film industry's contribution. The high relevance of broadcasters' activities, by whatever means, to a country's overall cultural output is undeniable.

The advent of the Internet and the development of new platforms and new services have shaken up many established business models. Broadcasters are part of this fast-moving and seemingly neverending process where audiovisual media, platforms and devices converge. Nevertheless, although certain reforms are required to make copyright more suitable to the digital age, the fundamental basis for copyright protection has not changed. Online copyright infringement is particularly harmful as it undermines the general public's respect for copyright principles which, in the long term, may have dramatic consequences for the production and availability of high-quality content. Therefore, copyright remains at the very heart of successful broadcasting and, as public service broadcasting is a key driver of social cohesion and cultural development, it also supports freedom of speech.

COPYRIGHT BASICS IN A NUTSHELL

CREATING PROGRAMMES

When making a radio or TV programme, you will need to ensure that the programme does not infringe any rights held in the material that is used in the programme.

To assess whether the use of existing material requires permission, you should ask yourself these basic questions:

- can this type of material be protected?
- does the material meet the requirements for protection?
- has the protection expired?
- is your use of the material infringing?
- does the use fall under an exception?

NEVER ASSUME
that the use of a work is lawful simply because

- You found it on a publicly accessible website.
- You intend to use it without charging viewers or listeners.
- You are mentioning or even promoting its author.
- You fully own your copy (and think you should be free to use it).
- You are only using a small part of the work.
- You have modified the work.
- You believe that your use is in the public interest ("freedom of speech").

USING EXISTING MATERIAL FOR IN-HOUSE

CAN THIS TYPE OF MATERIAL BE PROTECTED?

National copyright laws usually enumerate types of works. In principle, this allows for types which were unknown at the time of drafting of the legislation to be protected as well.

Most copyright laws protect the following "works", by granting their creators **author's rights:**

- literary works, such as novels, short stories, poems, speeches;
- dramatic works, such as scripts, plays;
- musical works, such as songs, operas, musicals;
- artistic works, such as drawings, paintings, sculptures, architectural works, blueprints, diagrams and maps;
- photographic works (photos);
- audiovisual works, such as feature films, television series, documentaries;
- computer programmes;
- databases.

National laws also recognise so-called **related (or neighbouring) rights** that will exist in addition to, and independent from, the underlying authors' works:

- performers (such as actors, orchestras) enjoy protection of their performance;
- phonogram producers (record companies) enjoy protection of their phonograms (sound recordings);
- film producers enjoy protection of the fixation of their films;
- broadcasting organisations of their broadcasts.

Copyright can be a bundle of rights. For instance, a music CD normally consists of various forms of protected matter, notably a musical work, a literary work and a sound recording (with the consequence that the use of even one CD can involve the rights of several right holders). To give another example, a television production can enjoy protection as an audiovisual work (by an author's right) as well as a film in its fixation (by a related right), while the signal of the television broadcast would enjoy its own protection (also as a related right). All these rights can exist at the same time, protecting different right owners and without interfering with each other.

> Rule of thumb:
> Generally assume that the material you wish to use is eligible for protection.

DOES THE MATERIAL MEET THE REQUIREMENTS FOR PROTECTION?

Only original works of authorship are protected. This does not mean that the work must be completely new or have great artistic merit. Even a badly written novel or a banal photo will be protected under copyright law. The work must be the author's own intellectual creation. Originality refers here to the fact that the work originates from the author. The threshold for originality is very low, which means that many items will pass this test easily.

For a subject matter protected by related rights, there is no originality requirement.

> Rule of thumb:
> You should assume that the material you wish to use will usually meet the originality requirement.

HAS THE PROTECTION EXPIRED?

The duration of protection is harmonised within the eu. The term of protection of copyright for a literary or artistic work is set at 70 years from the death of the author of the work (or from the death of the last surviving author in the case of joint authorship). In practice, this means that for literary, dramatic, musical and artistic works created by people who died before 1944 you can assume that copyright has now expired.

In reality, the calculation of the term can be very complicated. The term of protection for a cinematographic or audiovisual work is set at 70 years after the death of the last survivor among the following four contributors: the principal director, the author of the screenplay, the author of the Dialogue and the composer of music specifically created for use in this work. If the youngest of those persons was 25 years old at the time of production, the film work could easily enjoy 120 years of protection.

The term of protection of related rights (performers, producers of phonograms, film producers and broadcasting organisations) is set at 50 years. This term is to be calculated on a case-by-case basis. The start date for the protection of a performance will be the date of the performance or the date of the (lawful) publication or communication of its recording (fixation). The term for phonograms and films is calculated from the publication or communication of the recording, while the term for broadcasts starts on the date of the transmission. In the eu, the copyright term for performers and phonogram producers was recently extended from 50 to 70 years.

Rule of thumb:
Finding audiovisual material in the public domain (free of copyright) is very hard. Copyright survives its author for a long time, and the related rights can even survive the company that owned the right.

IS YOUR USE OF THE MATERIAL INFRINGING?

To determine whether your intended use could be infringing copyright, you need to look at the exclusive rights conferred by law to the copyright owner and distinguish economic rights from moral rights.

Economic rights allow the copyright owner to make commercial gain from the exploitation of his/ her work. The two key economic rights for all broadcast related activities are:

- *the reproduction right*, which involves all acts where any copy, even temporary or only in part, is made (examples are photocopying, scanning, taping, digitising, filming);

- *the right of communication to the public*, which includes broadcasting, but also streaming or uploading on the internet.

These rights have a broad scope, as they are intended to provide a high level of protection and to enable the right owners to receive an appropriate reward in exchange for the use of their works.

It is important to realise that both commercial and non-commercial use can constitute an infringement. Non-profit use or use which could be seen as promoting the artist will not be less infringing (though the non-commercial character may have an impact when payment of damages is sought).

Parts of a work are treated similarly as the work as a whole. The various parts of a work thus enjoy protection, provided that they contain elements which are the expression of the intellectual creation of the author of the work. For example, it has been held by the highest court in the eu that an extract comprising 11 consecutive words from a protected work could infringe the author's reproduction right.

Moral rights are granted only to authors, independently from the economic rights. These rights cannot be transferred nor (completely) relinquished, though the exercise of these rights can be made subject to contractual arrangements. Almost all national copyright laws incorporate the right of attribution (or paternity right), which is the right to be acknowledged as the author, and the right of integrity which protects the work from being subjected to modifications that are detrimental to the author's honour or reputation.

Rule of thumb:
Any use by a broadcaster without permission will amount to infringement, unless you can rely on a specific exception under your national law.

DOES THE USE FALL UNDER AN EXCEPTION?

National copyright laws provide for exceptions, to strike a balance between the interests of right owners and users. Exceptions can also reflect overriding public interests such as free speech, education or information.

As a general principle, exceptions can only be applied in certain special cases that are expressly defined in the law. It is therefore important to know the exact conditions that apply.

- A **quotation** is only lawful if you use no more material than necessary and mention the source. Some countries may subject the use of quotations to further restrictions, limiting the various contexts in which quotations can be made or excluding certain types of works;

- The exception for **ephemeral recordings** (temporary copies) of works made by broadcasting organisations "by means of their own facilities and for their own broadcasts" is obviously very important. For broadcasters, the exception should equally apply to new media services, and in particular webcasting and on-demand services;

- Equally important for journalists and broadcasters is the exception for **reporting on current events** (see "specific programmes" below);

- The exception for **incidental inclusion in other material** can be very useful, for example when a painting comes into the picture during an interview;

- The exception for **works permanently located in public places** is highly relevant for news reports, but also for fiction programmes; typical examples are public sculptures or buildings which become visible on footage made outdoors and which may be protected as works of architecture or applied art;

- The exception for **private copying** is of main interest for broadcasters in countries with a so-called private copy levy system, as they should be entitled to receive a share of the overall remuneration collected under such systems. It is sometimes difficult to know which carriers or equipment are subject to such levying schemes.

For the sake of clarity, it is important to understand that there is no general exception for freedom of expression, though this notion is implied in some of the exceptions, such as the right to report on current events.

Note that there is no harmonisation of the exceptions in the eu, and in each case you should check with a lawyer for the correct interpretation in your jurisdiction (provided in case law) before relying on any such exception.

Rule of thumb:
When you think that you can rely on an exception, please check carefully that you meet all the conditions – if in doubt, ask your lawyer.

OBTAINING PERMISSION

Once you have established that you need permission to use existing material, the following questions can arise:

- Whose permission do you need?
- How can you obtain permission from collaborators and contributors?
- What to do if you cannot find all the right holders (orphan works)?

WHOSE PERMISSION DO YOU NEED?

As a general rule, the creator of the work, its author, will be the initial copyright holder. However, to answer the question "who holds the rights that i need?", There are several rules in copyright contract law which may lead to other persons or entities being considered as the right holder.

As broadcasting and making available on the internet clearly fall within the scope of the exclusive rights, a broadcaster will need to obtain the permission for all the materials it uses, on whatever platform. In cases where the use involves numerous possible right holders, broadcasters frequently use collective licensing arrangements, in particular for music (see below), where the right owner transfers rights to a collecting society who in turn licenses on behalf of all its members. Collective bargaining agreements are not unusual between broadcasters and unions representing a certain category of programme contributors. Furthermore, broadcasters may use standard terms and conditions for particular categories of right holders.

In certain situations the first right owner of a work may be determined by law. National law may also provide a so-called legal presumption that where an employee creates a work in the course of employment, the economic rights are owned by the employer.

Things become further complicated in cases where the initial right owner transfers his/her intellectual property.

- The right owner can opt for an assignment (full or partial transfer of ownership to the assignee). The assignment can be limited in time or to a certain territory, it can be for a fixed sum or against royalties. The assignee, in turn, can transfer the rights (or parts) that it holds.

- The right owner can opt for a licence. A licence does not transfer ownership of the right, but gives permission to the licensee to carry out certain acts and for a certain period of time. A licence can be exclusive (where the copyright owner agrees not to authorise any other party to carry out the licensed activity) or *non-exclusive* (where the copyright owner may authorise others to carry out the same acts). The non-exclusive licensee cannot license in turn, whereas the exclusive licensee can (unless otherwise agreed).

- The right holder's exclusive rights, as any form of property, will be part of the inheritance left to the successors.

The person you need to deal with can be the author (or successors), the employer, the entity or person holding part of the right(s) after transfer or exclusive licensing, or, as is often the case for music, the collection society.

OBTAINING PERMISSION FROM ALL CONTRIBUTORS

Putting together the daily schedule of radio and television programmes for one or several channels requires the skills of many different contributors, such as actors, extras, musicians, singers, scriptwriters, composers, directors, designers, journalists, photographers, researchers and presenters. Where these contributors are considered authors or performers, they are right owners. The director, composer, scriptwriter, set designer can be considered authors of their literary, musical, audiovisual or artistic work. Actors, singers, musicians, dancers and other persons who perform a literary or artistic work are *performers* and enjoy protection by a related right in their performance.

Contributors who are employed by the broadcasting organisation and contributors to audiovisual works will be subject to specific regimes under copyright that determine who ends up holding the rights in the creative contribution. Since copyright contract law is not harmonised across the eu, it is only possible to offer some general observations.

EMPLOYEES AND FREELANCERS

Most national copyright laws have some form of legal presumption that certain intellectual property rights will be transferred from the **employee** to the employer if they come into existence in the course of employment. While helpful for a broadcaster, such a presumption is often not sufficient and the employment contract should clearly specify the exact scope of the rights the broadcaster Is acquiring from its employee. For most employees a transfer of all the economic rights in any copyright work would be required, and the contract should therefore provide for an assignment of all such rights.

Freelance contributors, unlike employees, work on a non-exclusive basis; hence, there is no legal presumption of transfer. In contrast to employees, they are initial right owners and it is therefore important to ensure by contract that the necessary rights are transferred to the broadcaster, thereby allowing the broadcaster to provide all its services.

AUDIOVISUAL CONTRIBUTIONS AND COMMISSIONED MATERIAL

For audiovisual works, such as films or tv series, rights clearance is a particularly difficult challenge, as a large number of different right holders – up to 50 or even 100 persons - may be involved in a single production, and each contributor may own certain rights in his/her contribution. That is the reason why, for audiovisual works copyright law will normally have rules that attribute certain rights to the film producer, in particular via legal presumptions. However, this does not make the need for contractual arrangements obsolete.

Such legal presumptions may also apply to material (or even complete productions) that the broadcaster commissions from third parties. Such a rule could state that the commissioning party is considered to be the owner of certain rights in the commissioned work, unless expressly Agreed otherwise. You should not rely entirely on such a rule, as it could leave room for ambivalent interpretations, for example whether it includes rights for future types of uses that are unknown today. A comprehensive contractual arrangement is far more preferable to secure the necessary legal certainty for the envisaged (and possible future) use.

PERMISSION FOR USE, ON ALL MEDIA PLATFORMS

Broadcasters are faced today with audiences demanding their programmes to be easily accessible at any time and on any type of device. This means that permission must be sought by the broadcaster for the use of its programmes on many different media platforms and in a wide variety of services, including for on-demand use (such as catch-up services). If "broadcasting" under your national law is defined narrowly in a technical sense and may cause a limited interpretation of the above mentioned legal presumptions, it is even more important that the extent of the rights to be acquired by the broadcasters are clarified by contractual arrangements.

Copyright contracts will always have to be aligned with, and adapted to, the national legal provisions on copyright (and other) contract law. Therefore,

the various uses mentioned in the checklist below are merely illustrative, as they may be used or even defined differently in your country (e.G. One notion could cover a combination of uses).

CHECKLIST

Contracts with employees, freelancers and other contributors

Transfer to the broadcaster of all rights which may arise:

- from the work carried out in the exercise of his/her professional activity and in fulfilment of contractual obligations (employee);
- from the specific tasks for which he/she is engaged (freelance).

The rights transfer should cover every method of exploitation in the widest sense including, in particular:

- transmission on any type of television or radio system by any technical means (e.g. by satellite, wire or cable systems, including on-demand delivery systems, on closed circuit, free or encoded) in the broadcaster's country or abroad, for public and private viewing;
- reproduction, including synchronisation (transfer to vision or sound);
- adaptation or other alteration in accordance with programming requirements and use in whole or in form of extracts;
- any form of public performance (including at festivals or in cinemas);
- translation into other languages (including dubbing and subtitling);
- production, reproduction, distribution and merchandising of DVDs, CDs, CD-ROMs, books, written articles, scores, photographs and other material, printed or otherwise associated with broadcast programmes; production, reproduction, distribution of promotional and informational material, including for educational purposes;
- any of the abovementioned uses of archived material.

ORPHAN WORKS

If you are unable to find one of the right holders, then it will be impossible to obtain all the necessary permissions to use the work.

Eu law provides that member states must implement (by 29 october 2014) a solution for certain specific beneficiaries (including public service broadcasters) regarding these so-called orphan works. National legislation will have to provide for an exception to the right of reproduction and the right of making available to the public, to ensure that organisations are permitted to use orphan works contained in their collections for on-demand services. Unfortunately, this is not a genuine solution because in order to benefit from the exception you need to have carried out a diligent search for the potential right holder. It is evident that this requirement reduces neither the administrative burden nor the related costs.

CLEARING RIGHTS IN MUSIC

Broadcasters use music in nearly all of their programmes, and on a massive scale, especially in radio. For example, a large broadcaster may use up to 200,000 musical extracts per week. Commercially available music (CDs, etc) is most commonly used, but the so-called grands droits works (such as operas and ballets) and new, i.e. specially commissioned, music also deserve attention.

MUSIC ON SOUND RECORDINGS

There is no doubt that musical works are protected by copyright. In addition the sound recording (phonogram) of a musical work is protected by a related right held by the record producer and the performer(s).

It would obviously not be feasible for broadcasters to clear music rights individually for the thousands of pieces of music they use every day. Broadcasters therefore rely on the collective management of the rights involved in commercially available music. In the eu they pay more than eur 1 billion per year to music collecting societies.

COLLECTIVE RIGHTS MANAGEMENT OF MUSIC IN PRACTICE

Music authors enjoy the exclusive right to authorise the communication to the public, which includes broadcasting. When used by broadcasters in their programmes and managed collectively by collecting societies, they are referred to as petits droits1 (in contrast to the individually managed *grands droits*).

The collecting society for musical authors acquires these rights by assignment from its members. By this means, the national collecting society becomes the trustee of the relevant rights of those members and is entitled to grant licences to users.

Performers and record producers are merely entitled to a single fair remuneration in respect of the broadcast use of commercial phonograms. It is usual that these remuneration rights are collectively administered on behalf of both categories of right owners and that, similar to the licences for the *petits droits*, a broadcaster obtains a so-called *blanket licence* covering all use of the sound recordings contained in the repertoire of the collecting society and the performances embodied in these recordings.

MUSICAL WORKS *(PETITS DROITS)*[1]

Mandate of society includes brief extracts, and non-dramatic performances of arias and songs, from grands droits works (operas and ballets). Blanket licence covering worldwide repertoire of protected works via reciprocity agreements for

- Broadcasting including simulcasting
- Making available on-demand
- Mechanical rights (separate society in some countries)

COMMERCIAL PHONOGRAMS

Normally one society represents both record producers and performers (to receive the single equitable remuneration). Blanket licence covering worldwide repertoire of protected commercial phonograms via reciprocity agreements for

- Broadcasting including simulcasting
- Making available on-demand (possibly subject to limitations)

The notion of petits droits is derived from the fact that it concerns a "seco

Both types of national collecting societies have reciprocal agreements with their sister societies in other countries in order to grant, on their behalf, licences to users for their combined repertoires. Reciprocal agreements between all collecting societies worldwide allow broadcasters to obtain from a single society (a *one-stop-shop*) a blanket licence to use the worldwide repertoire.

For any use of the phonogram that is not covered by the agreement with the collecting society you may still need to negotiate directly with the relevant right owner(s), for instance, if you wish to issue a programme on a dvd.

AGREEMENTS WITH COLLECTING SOCIETIES

Parties agree on the level of payment, usually after free negotiations, but there are countries where the tariff-setting is subject to an official approval process.

The actual payments to the relevant collecting societies for use of musical works and commercial phonograms are often negotiated lump sums.

In several countries remuneration is still linked to a certain percentage of the public licence fee and/ or advertising or sponsorship revenue.

Both methods of determining the payment level have their advantages and disadvantages. Using a percentage of the broadcaster's income for the calculation can largely be explained by historical reasons and is easy to apply. However, this method does not allow to differentiate between the types of programmes in order to reflect the actual number of music hours used by the broadcaster. After all, a public service broadcaster must use the income from a public licence fee for all genres Of programming, including those without music, e.G. Sports and news, as well as for purely technical activities, such as the digitisation of its archives or the adaptation of television programmes for visually or audibly impaired persons.

Therefore, in negotiations, one of the most relevant criteria to determine the appropriate level of remuneration should be actual use. Another important criterion is actual audience.

Not surprisingly, the issue of "equitable" level of remuneration is the most contentious point between broadcasters and collecting societies and has therefore been subject to several court and/or arbitration proceedings in a number of countries.

Broadcasters have the obligation to report their use to the collecting society which means providing accurate information about the music included in broadcasts. The information will enable the collecting society to fairly distribute the collected money to its own members as well as to its sister societies in other countries.

USE ON OTHER MEDIA PLATFORMS

Whether additional fees will be charged for the broadcasters' use of its programmes containing music on other platforms, such as the internet, depends on whether or not the collecting society has been mandated to license these rights and on the results of negotiations between the broadcasting organisation and the collecting society.

Ideally, from a broadcaster's perspective, the existing collective agreements should cover online and on-demand use, as the internet is just another standard platform used by broadcasters for distributing their programmes and related material. Without such collective solutions, the risk of fragmentation of online music rights or repertoires among different collecting societies would make it very difficult for broadcasters to offer their audiences online programming incorporating the worldwide music repertoire (see "music online" below).

SYNCHRONISATION RIGHTS AND MECHANICAL RIGHTS

The current technical standard in broadcasting necessitates that a broadcaster make a copy (reproduction) of the musical tracks before the actual broadcast or other use of the programme in which the music is integrated (such as the incorporation into the soundtracks of radio and Tv productions for broadcasting, the so-called **synchronisation** of the music with the moving images). Such reproduction is indispensable to

enable broadcasting, but the right of reproduction as such can be distinguished from the act of broadcasting. In most cases the payment to the music collecting society covers both rights at the same time.

In the field of music broadcasting, the rights of reproduction that need to take place before the actual broadcast are also referred to as **mechanical rights**. In some countries, these rights Held by the authors are administered by a different collecting society than the one licensing the broadcasting rights, and in such cases there is a separate agreement on, and payment of, those rights.

With respect to a broadcaster's use of commercially available music recordings, record producers and music performers generally only have a shared right to remuneration. In that case, the authorisation to the broadcaster to use commercial phonograms for broadcasts is not obtained via contract, but granted by law. That right includes a right to make a copy before the broadcast. Broadcasters do not need the prior permission from these related right holders, though of course an agreement with the relevant collecting society is needed to establish the level of payment.

SOUNDTRACKS

You should approach music specifically composed for a film with particular caution. Even where the soundtrack of a film is separately available on cd, national laws can differ. Some legislators take the position that the film soundtrack remains film: this means is that if a film soundtrack is licensed to a record company for commercial release, the resulting product will continue to exist from a legal point of view as part of the film. In that case the soundtrack is treated as part of a film for which the film rights owner has an exclusive right to prohibit the broadcast use.

CHECKLIST

Main negotiating points for agreements with music collecting societies

Payment

Lump sum, or in exceptional cases, percentage of broadcaster's income or revenue.
Amount determined by referring to criteria:

- Actual audience/Market share;
- Actual use on different channels and intensity of music use;
- Use of protected music and phonograms.

Duration

e.g. 1 or 2 years.

Scope

- Is the member list or the repertoire of the society broad enough? Do their contracts of mutual representation with societies in other countries cover the same works or phonograms?
- Does it cover the reproduction (mechanical) rights?
- Technological neutrality: are all means of delivery allowed, for example, to what extent are "streaming audio" and on-demand uses via the Internet, hybrid TVs or mobile networks included?
- Are commercial uses (e.g. sales of programmes on DVDs or via VOD platforms) also covered?
- Warranties: does the society hold you harmless against claims by third parties?

Flexibility

Does the contract allow periodic adjustments (e.g. every year) with respect to the actual use and/or actual audience?

Reporting

Agree on time-efficient reporting methods.
Particularly with respect to the licence offered by the petits droits societies:

- Does it cover rights in extracts from grands droits works?
- Does it cover the necessary period for storage and re-use?

GRANDS DROITS WORKS

The rights which are controlled directly by music publishers are known as "*grand droits*" (*grand rights*) and sometimes the works themselves (operas, operettas, musicals, and ballets) are referred to as grand right works. Apart from the right to authorise the broadcast of such works in their entirety, music publishers also retain control of the broadcast of substantial extracts of such works, e.g. Extracts going beyond 20 or 25 minutes.

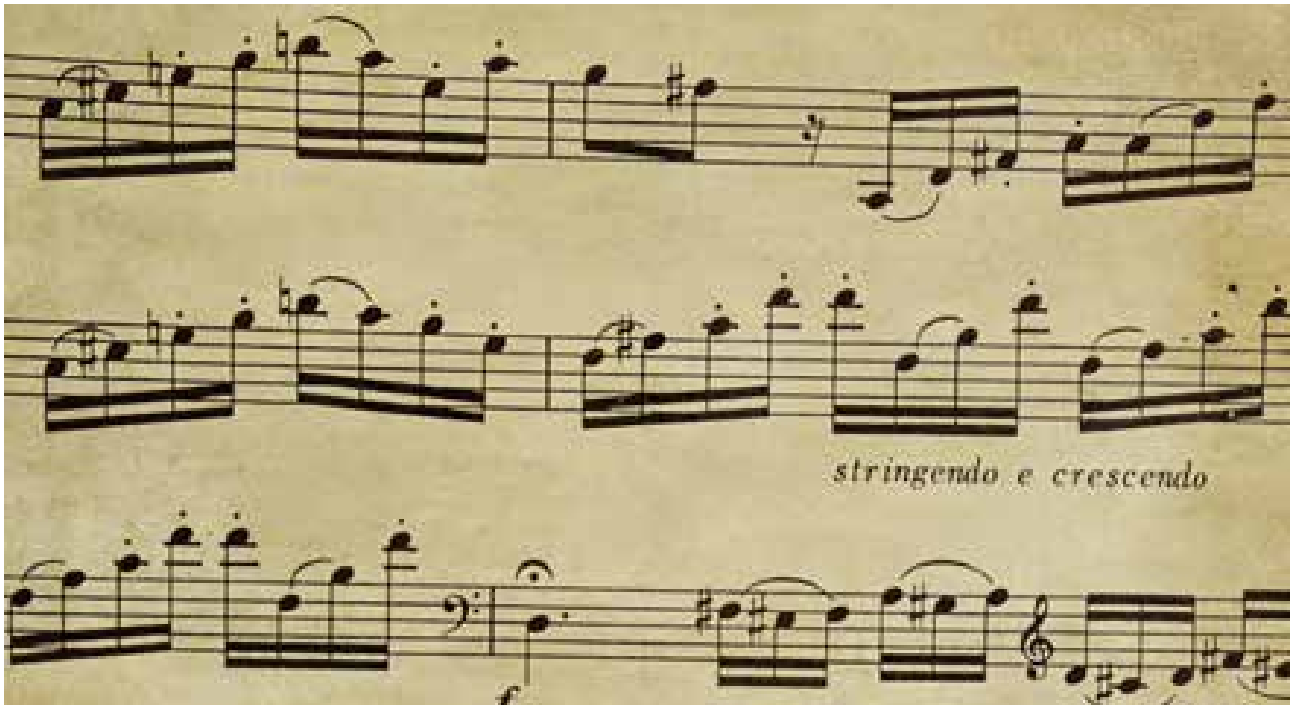
The exact dividing line between *grands droits* and *petits droits* is drawn in the membership agreements of the collecting societies and should also be spelled out in detail in the licence granted by the national collecting society to the broadcasting organisation. Unfortunately, a large disparity exists between countries' licensing practices.

If you wish to broadcast a live performance of an opera, you will have to negotiate with the music publisher and will probably be asked to pay a certain rate per minute for the right to give one or two broadcasts only. If you wish to broadcast the recording of the same performance of the opera at a later date as well, then your contract with the music publisher should clarify that you have the permission for the additional broadcast.

In some countries the musical notes (the instrumental and vocal parts) are not freely available for sale but only for hire from the music publisher. In such cases, for live recordings of grands droits works you will not only pay the music publisher a licence fee in respect of the copyright, but also a **supplementary hire fee** for the right to use the hired material during the live recording.

This notion has nothing to do with copyright. It emerged in the 1960s, in order to provide financial assistance from broadcasters towards publishers' huge printing costs. These payments are generally the subject of national agreements between the public service broadcaster and the national publishers' association.

No supplementary hire fees are paid for the broadcast of a commercial phonogram (CD).



NEW MUSIC

When you commission new music for your television programmes, e.G. As an opening tune for an in-house series, the commissioning agreement with the composer needs to specify who will own the rights to the new music.

The terms of this agreement will depend on the purpose (or prominence) of the musical composition as well as the extent to which the composer him/herself can grant any rights to the commissioning broadcaster. A professional composer will normally be a member of the local collecting society and this will limit his/her ability to grant rights, although the agreement with the collecting society should allow him/her to deal with the broadcaster directly for music for programmetitlesorforso-called*signaturetunes.*

Where you commission the *title music* of a particular television series (as opposed to mere background or integrated music), you will have an interest in maintaining a certain control over the third-party use of the composition, for instance to avoid the same music being used by another broadcaster for a similar type of programme without permission. This is especially true for signature tunes, where the music is intended to be used exclusively with a specific channel or programme item (e.G. The news). Ideally the commissioning agreement should address which rights need to be acquired on an exclusive basis and which ones on a non-exclusive basis.

The commissioning agreement will need to specify the ways in which the broadcaster can use the music (e.G. Issue on dvd or as a commercial record), and how the composer is to be credited (one possibility is to refer to some code of practice to which the broadcaster adheres and Which is acceptable to the composer or has been accepted by a representative organisation of composers). The agreement also needs to address the method of payment, given that certain types of rights (broadcasting and public performance rights) are typically managed by the collecting society. The terms may also be influenced by the question whether the broadcaster has an in-house music publishing arm or whether it prefers to engage independent publishing companies for such activities.

Music can be the combination of a musical composition (notes) and text (lyrics). In cases where the lyrics and the music are created by two different authors, national laws vary: some may consider it as a work of joint authorship, and others, as two separate works. This aspect is important in cases where you commission new music, to determine whether the relationship is Governed by two separate agreements or just one. The difference in approach will also impact the duration of protection, because for the work of joint authorship, the term of protection for both co-authors is guided by the longest-living co-author.

DISPUTE RESOLUTION

Collecting societies are usually subject to some form of supervision by national authorities. The rules on supervision should include a mechanism for situations where the collecting society is demanding a level of payment that you consider unjustified. It is in the interest of all parties that disputes over licence schemes and fees are handled quickly and efficiently and therefore this calls for special arbitration or dispute resolution with a specialised body of decision-makers. This body should cover all matters concerning the exercise of activities by collecting societies to ensure consistency in decisions. The law applicable to dispute resolution should be the law of the disputing user's country of establishment.

If you are convinced that your offer for remuneration to the collecting society was adequate, but rejected because considered too low, you must realise that by not paying the requested fee and proceeding to use the rights, you put your organisation in an awkward situation, since that entitles the collecting society to sue for infringement. It is helpful if the national system allows for the possibility of making a deposit for the remuneration offered (or for a fee between the asked and offered payments) in cases where such disputes arise.

CLEARING RIGHTS IN ARCHIVES

Television and radio archives have a double function. They form part of the national audiovisual heritage and broadcasters have the responsibility to protect these for posterity, for example by transferring them from old physical carriers which deteriorate with time (e.G. Celluloid or magnetic tape), to digital carriers. However their major function for broadcasters and also the decisive difference from any paper-based archives is that they are a living source of programme material: archive material is used every day in other programmes.

Many broadcasting organisations, which are owners of the archive material, are the copyright owners of this material. Nevertheless, in many cases they will have to renegotiate certain rights with individual contributors to the production, who at that time may have only granted limited broadcasting rights (e.G. Only for a period of ten years) or who could successfully claim today that the rights which they assigned originally do not cover uses non-existent at the time, such as on-demand use via the internet.

EBU Members have an enormous wealth of audiovisual (which includes radio) archives. Within the EU there is an estimated 28 million hours of archived public service programming.

The clearance of rights in broadcasters' archive productions is time consuming and extremely costly. As an indication, the german broadcaster zdf estimated the number of contracts related to all its archives at 3 million (making individual renegotiation practically impossible) while in the uk, the bbc has calculated that clearing rights for all its archives would amount to gbp 72 million in staff costs alone.

To the extent that collecting societies or other representative bodies actually possess the relevant rights, it is apparent that rights clearance, or the adjustment of the fee, can take place through contractual negotiation. However, in many countries collecting societies do not exist at all or have only been formed after the date of the productions in question. And even when all rights are cleared with the relevant collecting societies, the production still cannot be lawfully used if a single (non- associated) right holder cannot be traced or refuses to cooperate on a reasonable basis.

Copyright issues related to broadcasters' use of their own archive productions[2]

It is virtually impossible to identify, trace and negotiate with all individual programme contributors or their heirs.

The administrative effort involved is way out of proportion to the benefits expected from the clearance of rights and thus economically prohibitive.

The remuneration fixed under old contracts was in relation to the national audience as a whole and is far too high for today's fragmented audience.

Recognising these difficulties, some countries have implemented legislation offering solutions for exploiting the archives of public service broadcasters. An attractive solution lies in the application of the extended collective licensing (ecl) system to rights included in the archives of broadcasting organisations, a system which has proven to work well in nordic countries. In such cases the underlying rights (i.E. Those not held by the broadcaster itself) are cleared via a special

2 Either in-house productions or productions commissioned by the broadcaster under its own financial and editorial control.

collective licensing scheme, with the exception of those right holders – not represented by the collecting society – who decide to opt out from that agreement. However, it must be noted that this solution requires that the ecl system is indeed available in your national copyright law.

SPECIFIC PROGRAMMES

DIFFERENT WAYS OF CREATING A RADIO OR TV PROGRAMME

The programmes created by or for a broadcaster can be own productions (in-house), co-productions, commissioned productions and acquired material. The distinction between these types is not strict and the contractual arrangements may have several common provisions.

Most copyright questions will arise during the creation of **in-house productions**. As a general rule, you should strive to retain the freedom to make all possible uses of your own productions on any platform or service.

Commissioned programmes are made specifically for a certain broadcaster by a production company. The commission agreement should specify what rights the production company is to obtain from contributors (e.G. The scriptwriter, any performers, the composer of specially commissioned music, the director) and ought to allow exploitation of the programme without restriction, in all forms and on all platforms. The guiding principle in negotiations with independent producers will be that "rights should follow the risk": the distribution of rights should as far as possible reflect the financial contribution of each party.

Co-productions are joint undertakings whereby the parties agree to share the costs and will be entitled to rights in the programme, allocated in advance in the co-production agreement. In a co- production one broadcaster will usually act as the lead partner, while the other broadcasters will make agreed financial contributions and be entitled to broadcast the programme a certain number of times in their countries.

Acquired programmes are those made by other broadcasters or producers and licensed for broadcast. This is quite similar to acquiring the right to broadcast a feature film (see below). Most often you will obtain only a limited licence for your own territory.

DIFFERENT TYPES OF PROGRAMMES

NEWSPROGRAMMESANDDOCUMENTARIES

Traditionally, **news programmes** are the flagships of public service broadcasters and news services are one of the most prominent features of their websites.

Where a broadcaster produces its own news coverage, the principle is the same as for all other programmes: it needs to make sure that it has obtained all necessary permissions. The solution is usually contractual (e.G. In the employment contract, or contract with the freelancer). It is common practice for broadcasters to deal with the rights of journalists, either by means of a standard contract or through a collective agreement with the national union.

Note that for public figures who take part in studio interviews, as for people featuring in news stories you will assume implied consent from their presence in the studio or in front of the camera (it would not be possible in practice to obtain a signed agreement by each individual appearing, sometimes for just milliseconds, on screen).

Most national copyright laws will include appropriate exceptions to allow a broadcasting organisation the ability to use short excerpts for reporting on current events. However, in practice the exception can be problematic, notably where the interpretation of this exception is too restrictive or too vague for news programmes, and in particular when the work itself is the event.

In general, for foreign news coverage a broadcaster will rely on other broadcasters and news agencies. Access to such material will be governed by contractual agreements that will set out the conditions of use. In cases where national broadcasters facilitate access to each other's news coverage, the broadcaster providing the news coverage will generally request an on-screen credit. A code of agreed practice between national broadcasters can be useful to avoid disagreement and litigation. For news exchanges between ebu members, such rules have been in place for many decades.

The production of **documentaries** is governed by the same rights clearance considerations that apply to any other in-house or commissioned programme. As documentaries are more akin to news programmes and include more non-copyright protected material, such as interviews, you should be aware of the local standards for defamation, privacy protection, and sensitive (religious and political) content. Also, documentaries use past news-based or archive-based material more frequently than fictional programmes. The exception for quotations plays a dominant role, allowing you to use relatively more footage than for fiction.

Since privacy laws can be ambiguous, you should seek permission to film individuals, or at least inform them that filming will be taking place. An actual contract (consent agreement) is the most effective tool available to eliminate the potential for legal complaints. Ideally, the consent should include the right to use the documentary itself and any of its parts without restriction in any media. If you intend to include the individual person in any advertising, marketing, or publicity for the documentary, then you should include an express consent for that purpose as well.

SHOWING A FEATURE FILM

Feature films are protected by copyright and related rights. The economic rights in audiovisual works (including the online, or on-demand, right) are normally transferred from authors and performers to the producer, by law and by contract. This enables the producer to license most of the rights directly and is also advantageous for the broadcaster, which can expect that all rights for the material will be directly cleared with the film producer, and no additional payments to other film contributors will be required. Contracts should make that point

very clear and include express warranties by the distributor that the distribution company is the owner of the rights which are being licensed to the broadcaster. They should also include a provision that the distributor will indemnify the broadcaster for any costs of proceedings and subsequent damages caused by third party claims.

The business model for film productions is traditionally based upon exclusive release arrangements. The aim is to maximise revenue by staggering the film's release on the various media platforms (*release windows*). Such windows differ from country to country, but the usual order of releases would be cinema release, video (DVD/Blu-ray), video-on-demand, pay-tv and finally free-to-air TV. In the vast majority of countries, right holders and distributors agree on the chronology as well as length of each release window by contract, though some countries have national regulatory measures with regard to release windows.

Today's consumers expect to be able to watch programmes anywhere, anytime, and on any device. These developments are putting pressure on current business models. One important consequence is that distributors are likely to be willing to offer only a limited licence (maximum number of broadcasts, specified language version and within a specified time period). Given the popularity of catch-up services, you should arrange for the contract to cover the possibility of including the film into these services as well.

SPORTS COVERAGE

Sports events, particularly popular sports involving national teams, attract huge audiences to the broadcaster's channels. Sports events as such, however, are not protected under copyright. They are not original in the sense of being an author's own intellectual creation. Football matches, for instance, are subject to rules of the game, leaving no room for creative freedom. However, individual parts of a sports event may enjoy separate protection, such as the music used to introduce a match.

Clubs and associations successfully protect sports events by restricting access. They are able to control the number of broadcasters admitted to the grounds and provided with facilities to cover the events (commentator box, access to players for interviews, positions for cameras, etc.) And these so-called sports rights are put up for sale.

The actual coverage of the event may be a radio commentary or an audiovisual production. In some countries the question remains unresolved, whether the choices made by the television director in covering a live event result in a work protected by copyright. You may generally assume that the higher the number of cameras being used to show the event on a TV screen, the more likely it is that the director had to make editorial choices which are typical for the creation of an audiovisual work. For this reason, a tv programme consisting of a broadcaster's coverage of an event should qualify for protection as a copyright work (especially taking into account the low originality threshold described above), but the legal position remains unclear.


PANORAMA
EUROPE
BLACK N BLOND
KLIK

CREATING FOR THE INTERNET

Broadcasters provide a variety of online services which are increasingly expected to be an integral part of the broadcasters' offer to the general public.

Online services offered by broadcasters

Simulcasting is the simultaneous Internet transmission of a broadcast on radio or television, while **webcasting** is the use of programmes that are specifically designed for the Internet. Webcasting may involve both streaming and/or download services. Audio or video **on-demand** services, including radio or television programmes, can be offered on the Internet via **streaming** only, or for temporary or permanent downloads (**podcasts**). Broadcasting on the Internet can also take place via peer-to-peer technology (**peercasting**). **Catch-up services** allow audiences to enjoy programmes for a limited time after they have been broadcast.

Hybrid systems (smart TV and connected TV or radio) allow viewers to enjoy both traditional broadcasting and on-demand or time-delayed programming (e.g. catch-up television) and a host of interactive and personalised services as well as easy access to Internet services, all on one screen.

Copyright protection applies to the internet as it applies to any other platform. This means that if you wish to use copyright protected material online and you cannot rely on an exception, you will need to ensure that you have the necessary permission.

ARCHIVE MATERIAL AND MUSIC ONLINE

ARCHIVES ONLINE

You should not assume that you are automatically entitled to re-use old radio or tv programmes on new platforms. As for any use of archived material, you need to clear the rights. The specific Difficulty that broadcasters face in putting their archives online lies in the fact that there are different rights involved. Uploading content to the internet involves the *reproduction right* (as copies are stored on servers) and the making available (*on-demand*) right. The latter right did not officially exist before december 1996 when it was introduced by an international treaty. Consequently, for the online use of archive material the new right needs to be cleared (unless already covered by the initial contract).

Some national legislations have implemented solutions for exploiting archive productions of public service broadcasters, including the use for online and on demand services (see "clearing rights in archives" above).

MUSIC ONLINE

Obtaining rights to music (and to musical recordings) for broadcasters is practicable only on the basis of a *one-stop-shop* for rights clearance covering the worldwide musical repertoire. This observation is equally valid where programmes are made available on the internet.

As music rights are licensed to broadcasters on the basis of collective licensing, the agreements in place should include on-demand media services.

In practice, the agreements with collecting societies (for the *petits droits* and the use of commercial phonograms) will often cover some form of internet use. However, the exact scope of such use can vary widely depending on the agreement. Simulcasting, and to a lesser extent webcasting, are likely to be regarded as covered by the payment made for broadcasting. Other uses (such as podcasting and downloads) may require further payment, and in some cases additional agreements with record producers (or their associations, e.g. IFPI) may be necessary for certain specific uses over the internet.

Your licence for the use of music may be subject to conditions, for example, you may not be authorised to use grands droits works on the internet, a maximum length for downloads of musical works may be defined or the period of availability can be limited.

COPYRIGHT AND INTERNET TECHNOLOGY

HYPERLINKING AND FRAMING

Hyperlinking happens where the website operator provides a link that, when clicked upon, directs the internet user to another website. Hyperlinks allow the user to surf seamlessly from one site to another. *Deep linking* is a form of hyperlinking leading directly to a specific (but

generally searchable) content on a website, rather than to the home page of that website. In both cases, the user leaves the linking website to visit the original website that is publicly accessible.

Framing or *embedding* content happens where the website operator integrates a video containing copyright-protected content publicly available on another website, into his own website, giving the impression to the internet user that the material is actually residing on the embedding website. Clicking on a link retrieves the video in question, which is then played from the original website, e.G. Youtube.

Some of these basic internet operations are being examined by the highest court in the eu and the outcome of the cases could have a major impact on rights clearance for online use. The question raised is whether putting a hyperlink on a website constitutes a copyright-relevant communication to the public, and whether it requires the permission of the right holder of the content to which the link directs.

We believe that hyperlinking is not a communication (or transmission) but simply the identification of a website address, and thus not relevant for copyright. Hyperlinking merely refers a website visitor to the place where the work in question can be found. This does not imply that all hyperlinks are harmless, for instance, the link should not deliberately circumvent an access-limited (e.G. Payment- based) online service or lead to material that is blatantly infringing.

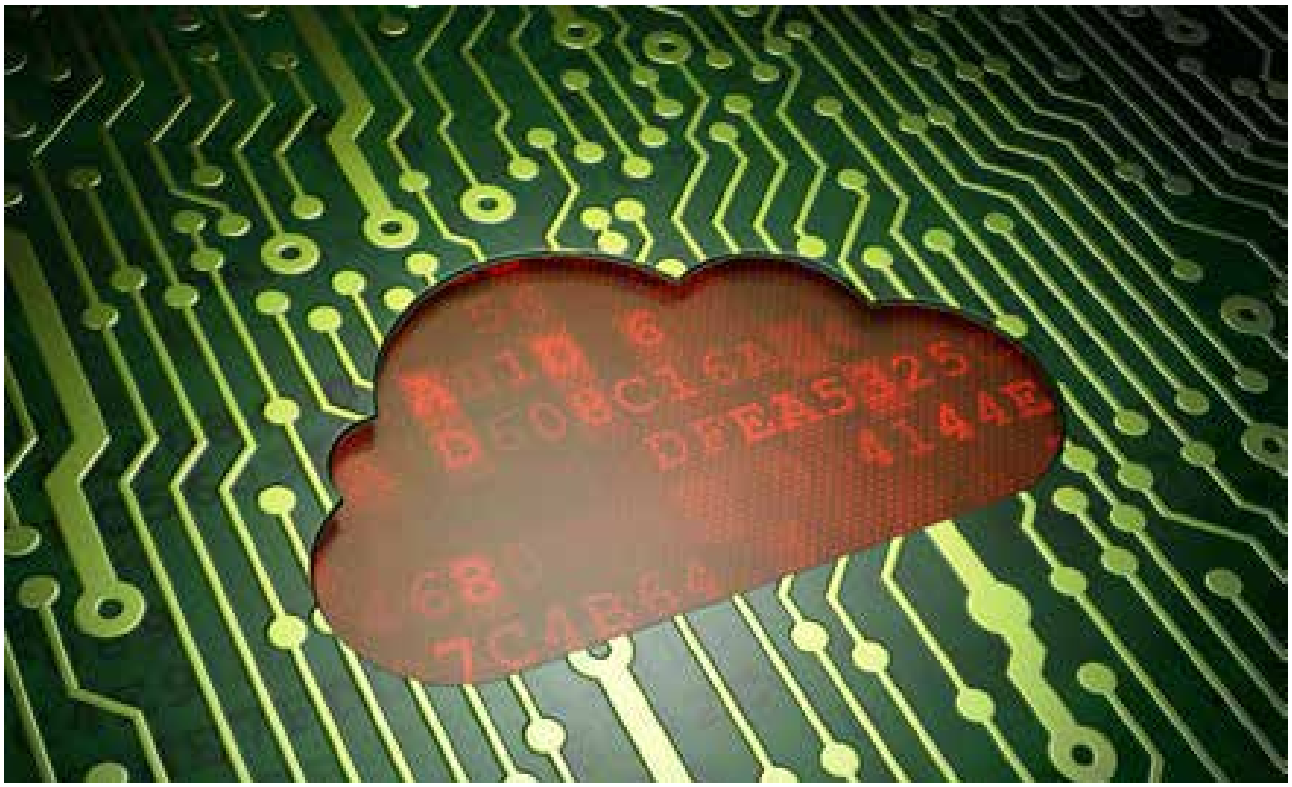
Framing is different, since the user does not leave the website (contrary to the case of hyperlinks) and gives the impression that the material is actually residing on the embedding website. Framing also gives the possibility to insert advertising and such a practice would likely be considered to be of a profit-making nature. The question of the lawfulness of framing may well be relevant for copyright but should also be analysed under national legislation on *unfair competition*.

LINK WITH CARE

DO NOT link to content which you know (or should reasonably know) is unlawfully uploaded material.

DO NOT *deep link* to content requiring the person who clicks on the link to bypass technological protection measures of subscription or registration-based websites.

ACT WITH CAUTION when you frame content from other websites: frame only what is needed for your intended purpose and make sure that you describe clearly to your website's visitors the origin of the framed content.



YOUR CONTENT IN THE CLOUD

Cloud services are conveniently accessible throughout the world from any computer or device providing internet access.

Broadcasters may sometimes wish to use a cloud service in order to provide their audience with access to certain stored parts of their programmes, directly via the cloud. You need to be aware that such practices could raise copyright issues with respect to applicable law and jurisdiction.

Uploading your content to the cloud is not likely to be problematic because in principle, the broadcast or web-based online transmission originates in your country of residence, so the applicable law should be the same.

Downloading will prove to be more complicated as it raises the question of where the act of making available takes place. Since the cloud service specifically targets your original audience with Internet-based access to programme material wherever in the world they may be, the applicable law should be that of your residence, applying the country-of-origin principle.

SOCIAL MEDIA AND USER GENERATED CONTENT

Social networks provide broadcasters with opportunities as well as challenges. You may use such networks to promote your programmes or discover interesting so-called user generated content that you wish to include in your own productions. However these same social networks may be hosting content that is infringing on your rights.

Each social media platform is governed by specific terms of service which must be taken into account when uploading or using material, or when seeking its removal.

OWN CONTENT ON SOCIAL MEDIA PLATFORMS

Broadcasters can conclude specific contractual arrangements with certain service providers to be present on these popular platforms (e.G. Specific channels under the broadcaster's brand on youtube). In these situations, special attention should be given to each party's responsibilities in Terms of rights clearance. Not surprisingly this will be the most contentious issue, particularly as the social network operator wants to obtain broad usage rights from the broadcaster. Rights controlled by third parties, such as to sports events or feature films, raise the most difficulties.

Social networks themselves should clear the rights in music because broadcasters' ability to sublicense any such rights may be severely limited by their agreements with music collecting societies.

USE OF THIRD PARTY CONTENT FROM SOCIAL NETWORKS

User generated content (ugc) is the general term used for content produced by individual internet users. There are several types of content, text, photographs and images, music and audio, video and film, which are found on blogs, wikis and social media sites such as youtube or facebook.

UGC does not enjoy a special copyright status, but many UGC works will be protected by national copyright law. Therefore, if the ugc is the individual's own original creation, that individual will have exclusive rights. Use of the UGC without permission will be a copyright infringement unless the use falls within an exception. Creators of UGC may opt for different licensing schemes, such as the *Creative Commons licence* (see below).

Obviously, if the UGC work is based on pre-existing protected material, the person who creates such content needs to respect the exclusive rights that exist in the original material.

UGC can be an interesting source for broadcasters for use on websites or even in regular programming. In such cases you will need to obtain permission, unless the use falls within an exception. The terms of service of the site hosting the ugc will clarify whose permission is needed. These platforms usually grant users who upload content the right to retain copyright in their work. Users customarily agree that they have given the site a licence to use the content, most often free of payment.

If you wish to share UGC with other broadcasters, your organisation should have clear terms of use for this type of content that allow you and other broadcasters to use it on any medium.

Some creators make their content "freely" available on the internet under a **Creative Commons** (CC) licence (e.g. On websites such as flickr.com). It is important to remember that these works are not *free of copyright* and their use incurs at the very least an obligation of attribution. The cc concept allows authors to make their works available to the public on terms which do not require payment and are subject only to a limited range of restrictions (*some rights reserved*). Creative Commons licences are non-revocable and non-exclusive and cannot be sublicensed.

If you wish to use CC licensed works for your programmes or website, you should avoid using content made available under the *non-commercial* licences since in principle your use as a broadcaster would not be considered non-commercial in the sense of the cc licence. You should also be aware that cc licensed material cannot be sublicensed, which could present an obstacle for sharing this material, e.G. With other broadcasters.

If you wish to make your own productions available as cc works, bear in mind that you remain liable for ensuring that the permission of all right holders has been obtained. Creative Commons licences are irrevocable. From the moment you make the work available under a cc licence, you can no longer modify or withdraw the licence.

REMOVAL OF INFRINGING CONTENT

When you discover that a social network hosts material that is infringing on your rights, you may want to take steps to ensure that this content is taken down.

It is important to note that in the eu, the hosting service provider will be not be held liable in cases where its role is neutral. This implies that the service provider has neither knowledge of, nor control over, the information which is transmitted or stored. In order to benefit from this limitation of liability, the service provider must, as soon as it becomes aware of illegal activities, act quickly to remove or disable access to the material in question.

Social network operators have developed so-called **notice and take-down procedures** giving instructions and tools to notify the service provider of infringing content. You will have to indicate where the alleged illegal content can be found and provide a detailed description of the illegal nature of the content.

Broadcasters' experience with such procedures has, in general, not been very positive. The relevant pages and tools to notify are not always easy to find, notification procedures differ greatly from one website to another and the response time is often not guaranteed. The experience can be all the more frustrating since it does not prevent the uploading of the same or similar content shortly after the infringing material was removed. In addition, the uploading person is usually given the opportunity to claim that such blocking was unjustified, requiring a case-by-case assessment of whether the content was indeed unlawfully uploaded before you can demand that the material be taken down permanently.

Practical example: YouTube

The use of YouTube is governed by its own terms (http://www.youtube.com/t/terms).

The uploader retains all rights in the uploaded content (§7.2), but is required to grant to YouTube a worldwide, non-exclusive, royalty-free, transferable licence (with right to sub-license) to use, reproduce, distribute, prepare derivative works, display and perform (§8.1).

YouTube puts the obligation on the uploader to ensure that he or she has (and will continue to have) "all necessary licences, rights, consents, and permissions which are required" (§7.4) and the uploader agrees that the content will not contain any third party copyright material, unless where the uploader has a formal licence or permission from the rightful owner, or is otherwise legally entitled, to post the material in question (§7.7).

YouTube's prior written consent is needed for any use that is not just a personal and noncommercial use (such as copy, reproduce, distribute, transmit, broadcast, display, sell, license, or otherwise exploit (§5.1(M)). Copyright infringement notifications can only be submitted by the copyright owner or an agent authorised to act on the owner's behalf. The fastest and easiest way to notify YouTube of alleged infringement is (according to YouTube) via their webform, although such notifications can also be submitted by e-mail, fax or post.

COMMERCIALISING PROGRAMMES

Every broadcaster includes its radio and tv programmes in its broadcasting schedule and makes all or parts of it available on its website, via webcasting, catch-up, podcast or video-on-demand services. In addition to these primary uses, for each production a broadcaster will want to assess how to get the best return on investment and look for other ways of commercialising the production.

Ways for broadcasters to commercialise their productions

- Retransmission by cable;
- Retransmission by third parties over other platforms;
- Subscription services (e.g. long-term catch-up TV);
- Programme licensing (to broadcasters or VOD platforms);
- Public screening;
- Sales (e.g. of clips) to social platforms or mobile phone networks;
- Licensing of formats and characters;
- Publishing (books, magazines, DVDs/CDs etc);
- Merchandising.

RETRANSMISSION

RETRANSMISSION BY CABLE

A cable operator that wishes to pick up a broadcaster's signal and re-transmit its channel simultaneously and unchanged to its subscribers will have to acquire a *retransmission right* since the cable operator's activity constitutes a new communication to the public compared to the initial broadcasting of the work or channel.

Since 1993 a *simplified licensing system* for acquiring the rights for the simultaneous, unchanged and complete retransmission by cable was introduced within the EU. Under this system, the exclusive right of authors and right holders to license or prohibit retransmission of a broadcast by cable may only be exercised by a collecting society. Indeed, individual rights clearance would be practically impossible: the programme output of a single day can easily involve many thousands of right holders. This *mandatory collective* licensing gives greater legal security to cable retransmission companies with regard to the acquisition of rights. Although legally this rule applies only to cross- border situations, the same licensing system is available to cable retransmission taking place within each country.

You should be aware that the obligation to use collective licensing does not apply to the rights held by broadcasting organisations themselves in their own programmes. This is because the cable Operators can easily obtain these rights individually from the limited number of broadcasters whose services are to be retransmitted.

In some eu member states, certain cable companies or telecom operators are required to carry certain channels where a significant number of consumers use the platform as their principal means to receive radio or tv broadcasts. This is referred to as a must-carry obligation. It is important to note that from a copyright perspective, unless the law expressly stipulates otherwise, the cable operator remains liable for the copyright clearance of these channels.

RETRANSMISSION BY THIRD PARTIES OVER OTHER PLATFORMS

Since the special licensing system for cable was introduced, similar programme retransmission services have been developed. Cable operators are no longer the only players in the broadcast retransmission market. Digital satellite operators and providers of DSL, IPTV, mobile telephone networks and other digital platforms are also active in this market, and often operate according To the exact same business model (namely subscription or registration which is offered to domestic customers only).

In several countries the rules for cable retransmission are either explicitly extended To retransmissions over other networks or are interpreted in a technologically neutral manner, meaning they can also apply to other platforms. In those countries, the other-than-cable operators who retransmit third-party broadcasts to local subscribers via their content distribution service can benefit from the special procedure for rights clearance. In other territories, for example the Nordic countries, the extended collective licensing allows for the same result, based on a contractual arrangement between broadcasters and collecting societies. Elsewhere rights clearance for
The retransmission of broadcast programmes via these other platforms remains complex, and sometimes impossible. This creates a market distortion to the advantage of cable operators.

LICENSING OF SPECIFIC CONTENT AND SERVICES

PUBLIC SCREENING

Parts of a broadcaster's television programme output can be shown on screens in public, freely-accessible places, such as vehicles (aeroplanes, trains, and buses), public transport locations (airports, train/bus stations), shopping malls, or restaurants. Entertainment programmes such as the Eurovision Song Contest and big sporting events are ideal candidates for public screening.

The *public viewing right* (in europe also called the *right to public performance*) is legally different from the broadcasting right, and copyright laws sometimes subject this right to a form of collective licensing. Depending on the situation in your country, you may need to clear third-party rights on the material that your organisation uses for such services.

LICENSING OF ON-DEMAND SERVICES

In an increasing number of countries, there is a growing demand, from both platform operators and consumers, that broadcasters' on-demand services be available on various platforms. The on-demand consumption of broadcast programmes (such as catch-up services) is quickly becoming common practice and can be offered either by the broadcaster itself or by third parties. Another example are *start-over services,* where providers of digital broadcast services give viewers and listeners the possibility to jump to the beginning of a programme or pause, rewind, and fast forward a programme while watching. Cable and other digital platform operators want to offer these services alongside the regular programmes in their own territory.

A broadcaster can easily license its own rights for on-demand services, but the rights of the *underlying* programmes also need to be addressed. The most effective way to do this is on a collective basis. As with the licensing of retransmission rights, you need to distinguish between the on-demand rights held by the broadcaster itself in respect of its initial transmission, which the third party would need to clear individually (with the relevant broadcaster) and the on-demand rights held by other right holders in the contributions to the programmes (and not held by the broadcaster) which are most easily cleared with the relevant collecting societies.

Here too, the system of *extended collective licensing* offers a solution. In such cases the underlying on-demand programme rights (which are not held by the broadcaster itself) are cleared via a voluntary collective licensing scheme. This system has already allowed the development of subscription-based online services which provide wide access to programmes from both domestic and foreign broadcasters. However, this solution requires that the ecl system is indeed available in your national copyright law.

LICENSING PROGRAMMES, FORMATS AND CHARACTERS

LICENSING PROGRAMMES AND CLIPS

Licensing in-house productions (or parts of these productions) to other media entities is relatively straightforward. With respect to co-productions or commissioned programmes, it is important that the commissioning agreement defines the exact scope of the broadcaster's rights in its home territory, to avoid the possibility of the programme being offered to another broadcaster or cable operator in the same territory or, particularly in cases of the same language, to a satellite service whose footprint includes the commissioning broadcaster's home territory.

LICENSING FORMATS

The notion of tv format is not legally defined. It is generally understood as the underlying concept or pattern, i.E. The skeleton, of the programme. However, copyright law does not protect a mere idea and as a result tv formats present a difficulty for copyright protection. This lack of protection has not stopped the tv format market from booming, as demonstrated by the abundance of formats (quiz shows, talent shows, cooking contests, etc) on european television screens.

The legal protection and ownership of the format is determined by several legal concepts, and in particular copyright, unfair competition law and contract law. The lack of a consistent method of protection can make it difficult to determine the ownership of the format rights. It is also useful to remember that protection applies without the need for registration or deposit of such format.

As a general rule, you can assume that the more elaborate the format, the greater its eligibility for protection. Therefore, format creators try to increase the chances of copyright protection by developing an extremely detailed production manual (production bible).

If you actively participated in the creation of a format, you should ensure that you obtain the necessary rights. It appears that difficulties to obtain those rights arise more often in cases where broadcasters are working with big multinationals, which tend to impose more limitations than local production companies.

Aspects to clarify when creating or co-developing a format

- broadcast territory,
- duration of use,
- number of runs per episode,
- language(s),
- distribution on physical carriers,
- merchandising,
- rights to make the formatted production available on the Internet,
- development of versions for new platforms (e.g. apps, mobile video).

LICENSING CHARACTERS

Scriptwriters sometimes come up with memorable characters that create genuine opportunities for licensing. Legal scholars however are still debating whether characters can be protected as such.

In light of this legal uncertainty, you should contractually ensure that any rights for characters are transferred, because you need to retain the possibility to integrate this character into a new series (possibly with different writers). A provision can be included in scriptwriters' agreements, obliging them to permit further use by other writers of any characters they introduce.

PUBLISHING AND MERCHANDISING

Publishing and merchandising are all part of ancillary exploitation rights. These also include multimedia rights, separate audio rights, rights to produce video or computer games, as well as rights to use the elements of a programme for promotions or other tie-ins. A broadcaster needs to control these rights for in-house or commissioned productions, as it enables increased exposure of the television programme's elements with positive effects on the licensing projects.

You need to think about the publishing and merchandising possibilities as soon as possible. If not, someone else may exploit them, with the risk of your organisation's reputation being damaged. You can ensure control through the acquisition and ownership of the appropriate rights and subsequent willingness to enforce them against any unauthorised exploitation.

The commercial potential of television programmes for merchandising is not limited to animation, science fiction or action series, but can extend to comedy and drama. In this context, it is useful to clarify in contracts that the actors of a television programme grant their merchandising rights *in character*, but remain free to exploit their own (out-of-character) personality or publicity rights.

You should schedule merchandising campaigns well in advance, in particular when the television programme is new or the licensing strategy is still being developed. The merchandising goods need to be on the relevant market shelves when the television programme is showing, and therefore the relevant contracts must be ready long beforehand.

For adequate protection against counterfeiters do not rely on copyright alone: other intellectual property rights, such as trademarks, must be secured as well.

COPYRIGHT ENFORCEMENT

As any other right holder, a broadcaster will need to ensure that its rights are protected and that infringements to its copyright are stopped. It is obvious that any decision to enforce rights before a national court requires close consultation of the broadcaster's legal department to assess all facts, the chances of a positive outcome and the feasibility of alternative remedies. In enforcing your rights, you should consider the effectiveness of court procedures, but also the adequacy and speed of civil remedies and criminal sanctions.

When you are faced with infringement of your own production, ask yourself the following:

- When did or will the infringement take place?
- Who can ask for a legal remedy?
- How best to prepare the court case?

The outcome of any dispute on possible copyright infringement always depends on the available evidence. It is of utmost importance for you to assemble as much hard evidence as possible, such as the date, time and place of the infringement; the full identity and address of the infringer; and the actual circumstances of the infringing use (including, for example, whether any advertising was added or the language used).

It is essential to determine the actual right holder, particularly for large sports events where there may be several broadcast signals involved, namely that of the host broadcaster and those of relaying organisations. A broadcaster's logo, visible on screen, could provide a clear indication.

CHECK LIST
Cease and desist letters

- Do not simply assume that there is necessarily a legal basis to your position, as often claims are based on insufficient information.
- As a first step, raise the user's awareness of the infringing activity. Describe the actual use and explain your own position and rights. If the entity fails to give a valid reason for not having asked for permission, you can conclude that such use is an infringement and demand that the infringing use stop immediately.
- Include a declaration of cessation to be signed and sent back by the user, as well as an announcement of the intention to start court proceedings at a given deadline if you do not receive that declaration.
- Be well prepared for this type of situation where timing may be critical, for instance in cases where the infringement is likely to take place in the very near future and a judge needs to decide quickly. You may, for example, want to have on hand a translation of the relevant contract(s), or at least of the most important clauses.

For **online infringements** the reasoning is basically the same, but since websites can be modified swiftly, in these cases it is even more important to assemble hard copies of the evidence (e.G. Print copies of website impressions).

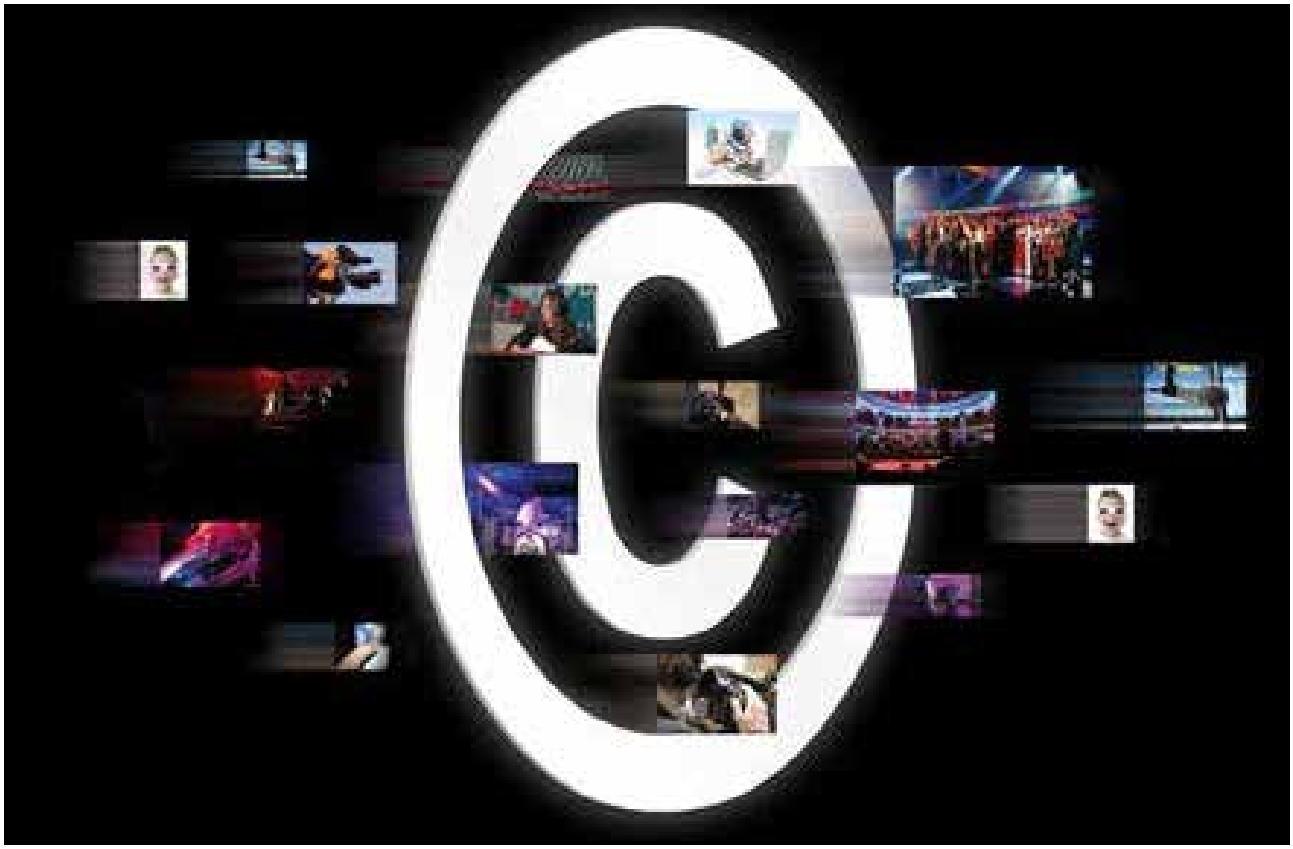
Broadcasters, like other right holders, suffer from the circulation on the internet of numerous illicit copies of their works and broadcasts. Piracy does not stop at borders. On a worldwide level, as matters currently stand, legal remedies to prevent the unauthorised exploitation of broadcasts are inadequate, leaving broadcasters unarmed in face of cross-border piracy.

THE NEED FOR COPYRIGHT REFORM AT THE EU LEVEL

This Guide shows just how important rights clearance and rights management are for broadcasters. As new technologies enable Europe's citizens to access audiovisual content through a range of platforms, citizens nowadays demand that broadcasters too, offer their services through on-demand delivery, such as podcasts and video-on-demand streaming (e.G. Catch-up services). At both the pan-European and national levels, however, rights clearance systems have become increasingly complex in the digital environment and are not well-suited for multi-platform use.

The lack of efficient rights clearance procedures inevitably limits the availability of diverse, high-quality and, most importantly, legal on-demand offers. Much of the broadcast piracy on the internet concerns material that, for reasons of burdensome rights clearance, the broadcaster itself could not provide in a lawful manner. This is an unacceptable situation. If rights clearance processes can be streamlined, more funds will become available for investment in yet more original european content. Better access to existing works, such as archive productions, will also contribute to increased remuneration for right holders.

That is why the ebu is convinced that copyright licensing is in urgent need of modernisation. Copyright law should be future-proof and technologically neutral. In 2010 the ebu proposed a number of concrete measures in its white paper modern copyright for digital media. Further background information, including details of the various reasons for the measures proposed by the ebu, can be found at www.ebu.ch/copyright.



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EUROPEAN BROADCASTING UNION
L'Ancienne-Route 17A
CH-1218 Le Grand-Saconnex
Switzerland
+41 22 717 21 11
ebu@ebu.ch

Brussels office
56 Avenue des Arts
1000 Brussels, Belgium
T +32 2 286 91 15
brussels@ebu.ch

Discover more about the EBU on www.ebu.ch

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FOR FURTHER INFORMATION

Anne-Sarah Skrebers
Head of Intellectual Property

skrebers@ebu.ch
T +41 22 717 20 81