



Europe

**GSMA Europe Response to the European Commission  
Public Consultation on the “Green Paper on the online  
distribution of audiovisual works in the European Union:  
opportunities and challenges towards a digital single market”**

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## About the GSMA

The GSMA represents the interests of mobile operators worldwide. Spanning 219 countries, the GSMA unites nearly 800 of the world's mobile operators, as well as more than 200 companies in the broader mobile ecosystem, including handset makers, software companies, equipment providers, Internet companies, and media and entertainment organisations. The GSMA also produces industry-leading events such as the Mobile World Congress and Mobile Asia Congress.

For more information, please visit Mobile World Live, the online portal for the mobile communications industry, at [www.mobileworldlive.com](http://www.mobileworldlive.com) or the GSMA corporate website at [www.gsmworld.com](http://www.gsmworld.com).

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In the European Union the GSMA represents over 100 operators providing more than 600 million subscriber connections across the region.

[www.gsmworld.com/gsma\\_europe](http://www.gsmworld.com/gsma_europe)

## Introduction

The emerging digital technologies, distribution channels and consumption models have opened up a window of opportunity for a wider range of audiovisual works to reach an ever wider audience. Following this development in accessible distribution technologies European consumers are expecting to enjoy audiovisual works anywhere, anytime and on any device. GSMA Europe members embrace the European Commission's initiative to contribute to the development of a digital single market by encouraging innovative offers for consumers to access content. GSMA welcomes the opportunity to express its opinion on the green paper concerning online distribution of audiovisual works in the European Union.<sup>1</sup>

GSMA members are enablers of digital content, providing convenient and attractive ways for digital content to be distributed to customers by using operators' mobile networks.<sup>2</sup> Some GSMA members are also providers of digital content themselves.<sup>3</sup> Mobile operators have, primarily through close cooperation's with new innovative businesses, been at the forefront of the legal content market, and our customers have shown that if they are offered convenient ways to access and pay for content, they will.<sup>4</sup>

The European Commission states in the Green paper that the internet provides opportunities for the audiovisual sector to augment its potential. The European Commission also states that new attractive audiovisual media services, which are available cross borders, should increase revenues for rights holders and, alongside with appropriate measures to address infringement, help to address piracy observed in the audiovisual sector.<sup>5</sup> GSMA Europe members agree with the European Commission's assessment and underline that, in our opinion, the best way to deal with the concerns of rights holders over illegal file sharing and other types of piracy is to make available legitimate and attractive digital content offers. At the same time we believe it is focal, in order to secure and protect cultural works, that right holders are being fairly compensated.

It is furthermore essential, in our opinion, that prior to introducing new measures to address infringement on an EU level, the effects of different infringement measures introduced in some Member States (such as the Hadopi Law in France) are evaluated. Such an evaluation shall preferably be done with an holistic approach, meaning that it shall also include an assessment of how legal and user friendly digital services in different Member States, or on other markets with developed legal offers, have affected the level of piracy.

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<sup>1</sup> Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market, Brussels, COM (2011) 427/4 (hereafter referred to as the "Green paper").

<sup>2</sup> Examples of such offers are Telenor's partnership with WiMP, Orange's partnership with Deezer, TeliaSonera's partnership with Spotify.

<sup>3</sup> For example TDC Play and Telefónica's Pixbox.

<sup>4</sup> This is shown in the Telenor and TNS Gallup study – Status and development Broadband and TV survey, 2011 and on European Audiovisual Observatory study – Video on demand and catch-up television in Europe, 2009 .

<sup>5</sup> Green paper, page 4.

Many GSMA Europe members operate in more than one Member State, and see a great opportunity in multi-territory offers due to economy of scale.<sup>6</sup> However, since digital content providers are required to clear rights on a national basis, clearing has in many cases been too costly and time consuming for launching multinational offers on the respective operator's footprint.

The core business of GSMA Europe Members is providing mobile telephony (including mobile data connections) to European consumers and businesses. Data subscriptions for mobile phones and other portable devices such as laptop computers, game consoles and tablets are becoming increasingly important for our members. Mobile operators are contributing with large investments into fast internet access using wireless technologies. The availability of attractive legal digital content is essential for these new fast wireless internet services to flourish and for meaningful investment to take place in building the digital infrastructure. It is therefore fundamental for mobile operators that European consumers and businesses are provided with easy access to legal and attractive digital content services.

In regards to creating a digital single market for audiovisual content, GSMA Europe members consider the following areas to be main priorities:

- Facilitate the possibility for multi-territory and pan-European licensing of audiovisual works and encourage effective competition of collective management organizations within the EU/EEA by enabling choice for creators and users of rights, particularly by enabling creators and rights holders to license their rights on a non-exclusive basis to collective management organizations. Users of rights should have the choice between either pan-European licenses from a reasonable number of collective management organizations or territorial restricted licenses in the world repertoire.
- With respect to a pan-European licensing system, promotion of a reasonable number of collective management organizations which together license all rights in the world repertoire on a European basis.
- Transparency and governance rules for collective management organisations - to ensure that the rights are administered in the most efficient manner and to establish effective competition between organizations.
- Transparency for collective rights management organizations is also needed for commercial users to time and cost efficiently establish where to clear a right. In regards to establishing from whom to clear a right, the need for a worldwide database shall be carefully examined.
- Promotion of a technological neutrality (including the transmission over the Internet) of the transmission right and the respective licensing (i.e. to ensure simplification for distributors offering their services cross-border). The creation of more flexible and shorter release windows should be supported to ensure that legal audiovisual content is able to compete with illegal content.<sup>7</sup>

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<sup>6</sup> For example advertising costs would have decreased since the same campaign could have been used in many Member States (only the language would needed to be different).

## Responses to Green paper questions

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

Many GSMA Europe members operate in more than one Member State, and see a great opportunity in launching multi-territorial digital offers. However, due to the complexity of rights clearance process, such services have often been regarded as too costly and time consuming to provide.

The main legal obstacle impeding the digital single market is the lack of transparency and clear legal framework for clearing licenses for digital content to be distributed in various distribution channels. The key priority for the revision should be modernising and clarifying European licensing structures and decreasing transaction costs for licensing content on both multi-territory and pan-EU basis.

Concerning audiovisual content, as stated in the Green paper, most economic rights in audiovisual works are transferred to the producer and the producer, or someone representing him, can agree on a sublicensing agreement with content distributors. Such a sublicensing however takes place mostly on a national basis. GSMA Europe members suggest that if sublicensing of an audiovisual work (i.e. clearance of rights that have been transferred to the producer) has taken place in one Member State it shall not be legitimate in contracts to prohibit distribution of that content by the user who have cleared the right solely based on the location of the viewer, as long as the viewer of the content is within the EEA. We do recognize that this model of “one state clearance” may lead to increased costs for clearing audiovisual rights, since the current reimbursement model is constructed on the basis of national territory.

There is furthermore a need to promote technology neutral regulation which is not linked to any specific method of transmission, both regarding how to clear rights and regarding the judicial application of copyright law. In order to facilitate cross-border distribution it is important to simplify the process of clearing and to promote a method that ensures that users of rights only need to clear, especially musical rights with one copyright management organisation (CMO) rather than in every Member State where a viewer can get access to a specific audiovisual service.

GSMA also recognises that for legal digital content to be able to challenge piracy there is a need for the European Commission to support flexible and shorter release windows.

Furthermore, musical rights which also need to be cleared for audiovisual works are still dealt with separately by national CMOs. For musical rights GSMA Europe urges the European Commission to consider the following priority areas:

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<sup>7</sup> France Telecom Orange is unable to fully support all the positions developed by GSMA in response to this consultation.

- Fostering transparency and governance rules for CMO's to ensure the most efficient administration of rights and to promote competition between European based CMOs.
- Facilitating the pan-European licensing of musical rights particularly by enabling rights holders to license their rights on a non-exclusive basis to collective management entities.

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

Audiovisual media services providers face a fragmented market that lacks predictability and balance between right holders and users. The varying interpretation on regulation and policies regarding e.g. transmission and retransmission, use of diverse distribution technologies, extent of private copying, and copyright levies cause uncertainty which has led to reluctance or inability to provide services that meet the demand in the market. The complexity of rights clearance and the lack of common understanding on fundamental questions related to licensing of copyright, has resulted in extended negotiations and disputes between users and CMOs. Musical rights are specifically affected and the problems arise for both a single territory and multi-territory licensing, but the challenges obviously multiply in complexity in multi-territory operations.

For video on demand services the lagging release windows are one of the major obstacles for providing services that meet the customer expectation.

GSMA Europe members believe that the solutions for this lie in promoting competition between CMO. This could be achieved by having a sufficient number of competing "one-stop-shops". This competition would already in itself lead to more efficiency and transparency – a regime that would benefit both rights holders and users of rights.

In the current situation the new types of business models cannot be applied in all member states due to the fact that national CMO use fee structures that are not applicable to these new models. Transparency and competition amongst CMOs would likely provide better ground for new business models and ensure flexibility in the current fee structure so that it would not hinder new types of services to be launched.

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

The territorial audiovisual market is a challenge especially in the online environment. Promoting competition between CMO and facilitating the provision of multi-territory and pan-European licensing options would support the development of audiovisual online services.

Furthermore, right holders should be required to permit several collecting societies to represent their rights, thereby creating competition. Competition between collecting societies would lead to better negotiation possibilities, quality of service and adaption of new business models. To make sure that users of rights are able to easily locate needed rights there is also a need for a worldwide database for musical rights.

Furthermore there is a need for transparency and good governance for collecting societies.

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

European consumers are expecting to be able to utilize audiovisual work irrespective of their location. The technological measures (such as cloud computing, water stamps, identification mechanisms for users and works, streaming, encryption) can be used for "borderless" services to be provided and this should then create greater demand for pan-European licensing models of audiovisual works.

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

Due to the development in distribution technologies the "country of origin" is becoming ever more artificial and it is challenging to determine reasonable and balanced prerequisites for "country of origin" in respect to online transmissions. For GSMA Europe members the focal point is that even if the country of origin principle is extended, it shall not hinder users of rights to be able to clear rights with the CMO that offers the best services, even if that CMO is not located in the country where the user of right is located, i.e. the principle shall not be used in a way that hinders competition amongst CMO's.

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

It should be clarified on a European level, that "retransmission" comprehends all transmissions and distribution of broadcasting programs, irrespective of the inserted techniques and the transmission vehicles. The mandatory collective licensing rules should apply to all simultaneous, unaltered and unabridged transmission by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public. I.e. GSMA Europe supports a solution where users of rights only have to clear a right from one CMO (i.e. musical rights) regardless if the broadcast of an audiovisual service can be viewed in more than one Member State. Furthermore we support a solution where the clearing of rights is treated equally regardless of distribution technologies.

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

The general reply to this question is no. However in regards to user produced content, hosting providers of such service have a responsibility to ensure that the content uploaded on their webpages is legal and in line with what is stated in their terms of usage. This can be done by using simple report mechanisms.

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

The technological development (such as cloud computing, water stamps, identification mechanisms for users and works, streaming, encryption) enable the provision of individual services regardless of customers' location and will likely lead to an increase in customer demand. Cloud computing is also affordable, flexible and environmentally friendly and will make it possible for consumers to create and manage their private copies. Cloud computing may lead to new copyright requirements why it is important that any alteration to the current regime is done in a technique neutral manner.

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

A centralised database for audiovisual works and rights ownership would facilitate the clearing of rights.

*10. Are the current models of film financing and distribution, based on staggered platform and territorial release options, still relevant in the context of online audiovisual services? What is the best means to facilitate older films which are no longer under an exclusivity agreement being released for online distribution across the EU?*

A centralised database for audiovisual works and rights ownership would facilitate the clearing of rights of older/orphan works.

*11. Should Member States be prohibited from maintaining or introducing legally binding release windows in the context of state funding for film production?*

Yes.

*12. What measures should be taken to ensure the share and/or prominence of European works in the catalogue of programmes offered by on-demand audiovisual media service providers?*

Possibility to opt for multi-territory or pan-European license and levelled release windows would support the standing of European works in the on-demand services.

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

A harmonized copyright framework in the EEA would increase transparency and make cross border copyright clearance easier. For example the notion of country of origin would likely not be a problem since all Member States would be using the same copyright regime.

At the other hand as this would require a long term process, at this stage, efforts should rather be directed for developing transparent licensing practices.

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

*15. Is the harmonisation of the notion of authorship and/or the transfer of rights in audiovisual productions required in order to facilitate the cross border licensing of audiovisual works in the EU?*

The harmonisation of the notion of authorship and/or the transfer of rights in audiovisual productions would be an important component in order to facilitate audiovisual works in the EU.

*16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?*

An unwaivable right to remuneration for audiovisual authors would likely stiffen, not facilitate, the open and transparent market practices for licensing of audiovisual works. Compulsory administration of such right by collecting societies would require firm requirements for transparency and effectiveness. The production chain from authors to producers as well as direct licensing to the end-users should be encouraged.

*18. Is an unwaivable right to remuneration required at European level for audiovisual performers to guarantee proportional remuneration for online uses of their performances after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?*

An unwaivable right to remuneration for online uses of their performances for audiovisual performers would likely stiffen, not facilitate, the open and transparent market practices for licensing of audiovisual works. Compulsory administration of such right by collecting societies would require firm requirements for transparency and effectiveness. The production chain from authors to producers as well as direct licensing to the end-users should be encouraged.

*20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?*

The minimum level of remunerations could be ensured by collective negotiations (collective agreements covered by labor legislation).

*26. What other actions should be explored to increase the availability of accessible content across Europe?*

Subtitling databases: Given the fact of the linguistic fragmentation within the EU the EU needs to (at least during a transitional phase) assist with translation to enable that European audiovisual works can be viewed by citizens in other Member states than where the movie was produced.

In the long run demand for EU produced movies will hopefully be high enough for many audiovisual providers to be able to bear the translation cost without the need of extra funding.