

HOTREC¹ reply to the European Commission green paper on the online distribution of audiovisual works (COM(2011) 427 final)

The European hospitality industry welcomes the Commission's intention to take up the challenges of modern distribution channels for audiovisual content.

Hotels and restaurants have always been intensive users of copyrighted works. As the world grows closer together and the guest structure in the hospitality industry becomes more and more international, hospitality businesses offer an increasing number of international audiovisual works to their guests. Moreover, because of the technological evolution and of the change in consumers' expectations and demands, it is likely that hospitality businesses will be providing increasing access to their guests to online audiovisual works, including through making available video-on-demand services, in addition to or perhaps even instead of the television set in the guest bedroom.

For these reasons, the European hospitality industry is genuinely interested in this Commission initiative and would like to give a general comment about the issues contained in the Green Paper and to reply more specifically to its questions 13 to 19.

Introduction - HOTREC General comments on the distribution of copyrighted audiovisual works

As a user of copyright works and/or as an entity which enables the consumption of copyright works by guests, hotels and guesthouses are primarily interested in efficient and cost-effective systems to acquire licenses for the distribution of audiovisual works, while ensuring the most efficient and streamlined access to works.

As stated above, hospitality businesses will be providing increasing access to their guests to online audiovisual works, including through making available. Nevertheless, many audiovisual works are currently made accessible to hotel guests through more traditional offline access (satellite and broadcasting). **For this reason, HOTREC stresses that the the problems faced in the distribution of copyrighted audiovisual works should not be looked at exclusively from an online perspective, but rather as a whole, including both online and offline exploitation.**

¹ HOTREC represents the hotel, restaurant and café industry at European level. The sector counts 1.7 million businesses, with almost 92% of them being micro enterprises employing less than 10 people. The micro and small enterprises (having less than 50 employees) represent more than 99,5% of businesses and make up some 62% of value added. The industry provides some 9,5 million jobs in the EU alone. HOTREC brings together 43 National Associations representing the interest of the industry in 26 different European countries.

Moreover, hospitality businesses across Europe are experiencing numerous difficulties in relation to the distribution of audiovisual works, because of:

- The multiplicity of the existing rights and of the right-holders, which makes extremely difficult the possibility to negotiate licenses for the distribution of audiovisual works (both offline and online) in a context where one-stop-shops are usually not available;
- Disagreements over the way right management is often practiced in Europe.

These issues are unfortunately not addressed in the Green Paper, and HOTREC considers that they should be included in any future legislative or political proposal from the Commission, when addressing the distribution of copyrighted audiovisual works.

In particular, HOTREC considers that the following options should be considered:

- **The upcoming Commission proposal on the collective management of rights should also address those rights managed for audiovisual works.** It should contain binding principles of “*Good governance*”, “*Transparency*”, “*External and independent authorisation and control*”, “*Efficiency*”, “*Fair dispute resolution mechanisms*” and “*Stakeholders involvement*”.
- **A central invoicing system combined with a cap on the maximum amount of fees a hospitality establishment must pay for the use of protected audiovisual works should be established at national level,** in order to make possible the acquiring of licenses that cover all relevant right holders while providing legal certainty on the tariffs for the use of all audiovisual works being accessed to.

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

HOTREC considers that a comprehensive Copyright code would help bring more transparency in copyright law in Europe. A harmonised, single text is always helpful to determine the extent and ambit of the harmonised right. The advantage for users like the hospitality industry is that the industry has a single reference guide to the applicable rights, and the protection given to authors and artists is identical across the EU. Moreover, a comprehensive Copyright Code would offer the possibility to remove possible contradictory provisions contained in different Directives dealing with the extent of the rights².

However, the appropriate level of a further harmonization would be extremely difficult to strike, as this would necessarily lead to a situation where:

- Either some existing national rights and protections would be reduced or revoked in order to achieve harmonization;
- Or the harmonization is based on a “highest common denominator” approach (i.e. harmonising to take into account all possible rights currently existing in each EU member state), which would inevitably increase tremendously the costs to all copyright users. Such a situation would not be welcome.

² For instance, the on-going ECJ case C-162/10 reveals that Directive 2001/29 and Directive 2006/115/EC could be subject to different and contradictory interpretations as far as the extent of neighbouring rights for certain type of work and communication to the public are concerned.

Question 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?

HOTREC considers that a unitary EU Copyright Title would enhance the transparency for the user to choose which rights they can use at which level. From a user's perspective, a single unitary title may be very helpful, particularly for international or pan-European hotel groups who may prefer to negotiate all-in deals to use copyright works across their hotel networks.

Any unitary Title should permit specified uses of the work on a pan-European basis available from a single source, and should possibly override parallel national rights which exist in the work. Of course, there is perhaps a helpful precedent for the introduction of a parallel Copyright Title in relation to the introduction of the Community Trade Mark and Community Design, albeit that these are registered rights. It may be helpful that any unitary Title should be the subject of a registration, even though registration might be very difficult having in mind the numerous works, especially often with the same titles, and the difficulty to distinguish between adaptations and new works.

Question 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?

HOTREC considers that, from a users perspective (and particularly for users operating on a pan-European basis), such harmonization of the definitions and unification of the transfer of rights may be useful and could potentially increase certainty in the rights to be addressed/licensed and (possibly) in the fees to be paid. According to the current situation, it is not clear, whether a film can be regarded as one work, or a composition of film and music. Furthermore, clarification is needed with regard to the definition of an author, which is not necessarily the same in the different Member States³.

However, the harmonization of definitions and unification of the transfer of rights may not be the only concepts that should be regulated and harmonized at EU level. For the user of audiovisual works, it is important to know who can claim the fees and at which costs one can use them. In that regard, not merely the conditions of entitlement may be regulated on a unitary basis but also the legal consequences.

Question 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?

Question 17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the crossborder licensing of audiovisual works?

From HOTREC's point of view both questions can be answered in one. From the hotel and guesthouse user's perspective, such an additional right would be inappropriate, as this would only serve to increase tremendously costs for them as users of these works. Very often, audiovisual authors tend to be paid for their contribution of their work at the start of development of the audiovisual project, and this transfer is usually expressed broadly enough to include not only their making available right

³ For instance, in some countries (e.g. Germany, France) all people who had any creative input can be regarded as authors, while it is not necessary that clear in others (e.g. in Austria - can actors in a film be regarded as authors?).

(including in terms of the making available of their work online) but also any future possible use of their work whether then contemplated or not contemplated. If authors of audiovisual works consider that additional remuneration is to be obtained, it should rather be a contract matter discussed with producers.

Furthermore, such additional remuneration right for online exploitation would only make the acquiring of rights by users more complicated. Copyright users already face difficulties to clear all the relevant rights for the use of audiovisual works, due to the multiplicity of the rights and the absence of effective one-stop shops. Such a new right would only complicate further the matter, increase uncertainty and transaction costs.

In addition, it would be preferable for the hotel/guesthouse user to be able to have access to a central invoicing system combined with a cap on the maximum amount of fees a hospitality establishment must pay for the use of protected audiovisual works, in order to make possible the acquiring of licenses that cover all relevant right holders while providing legal certainty on the tariffs for the use of all those audiovisual works being accessed to. For instance, one option, among others, would be to include within the fee they pay to the service provider (i.e. the entity who provides access to the relevant audiovisual work to the hotel/guesthouse) any background copyright fees/royalties (including for any making available of the audiovisual work to their guests). This would clearly allow avoiding situation of legal uncertainties in which, due to the high number of rightholders, there can be anytime new claims from further rightholders vis-à-vis the users.

Moreover, often it can not be taken for granted whether the collecting society is a rightholder of an audiovisual work⁴. If it is not the case, there are still some remaining rights (e.g. introductory films, graphics, hymns), however that might result in a very much reduced portfolio of rights and finally payments. Therefore, it should be centralised to judge which rightholders are holding effectively the relevant rights.

Question 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 be administered by collecting societies?

Question 19. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers?

HOTREC's answer is the same here as for Questions 16 and 17 above. The grant of a right to further equitable remuneration to performers after they transfer their rights at the outset of development of the audiovisual work would only serve to increase costs to users and is not welcome. As with authors, the transfer provisions in performers' contracts tend to be broad enough to cover the making available of their performances online and any future contemplated or un-contemplated uses. If performers in audiovisual works consider that additional remuneration is to be obtained, it should rather be a contract matter discussed with producers.

Moreover, as for question 16 and 17, such additional remuneration right for online exploitation would only make the acquiring of rights by users more complicated. Copyright users already face difficulties to clear all the relevant rights for the use of audiovisual works, due to the multiplicity of those rights and the absence of effective one-stop shops. Such a new right would only complicate further the matter, increase uncertainty and transaction costs.

⁴ E.g. in the case of the UEFA when obtaining licences for the live coverage of matches.

Again, in relation to performers' rights, it would be preferable for the hotel/guesthouse to be able to have access to a central invoicing system combined with a cap on the maximum amount of fees a hospitality establishment must pay for the use of protected audiovisual works, in order to make possible the acquiring of licenses that cover all relevant right holders while providing legal certainty on the tariffs for the use of all those audiovisual works being accessed to. For instance, one option, among others, would be to include within the fee they pay to the service provider (i.e. the entity who provides access to the relevant audiovisual work to the hotel/guesthouse) any background copyright fees/royalties (including for any making available of the audiovisual work to their guests). This would clearly allow avoiding situation of legal uncertainties in which, due to the high number of rightholders, there can be anytime new claims from further rightholders vis-à-vis the users.

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