

European Copyright Society

**Response to the
European Commission's
Public Consultation on the
Review of the
EU Satellite and Cable Directive**

15 November 2015

I. Assessment of the current provisions of the Satellite and Cable Directive

1. The principle of country of origin for the communication to the public by satellite

For satellite broadcasting, the Directive establishes (Article 1.2) that the copyright relevant act takes place "*solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth*" (often referred to as "the country of origin" principle). So, rights only need to be cleared for the "country of origin" of the broadcast (and not for the country/ies of reception, i.e. the countries where the signals are received[1]).¹ The Directive indicates that in determining the licence fee for the right of communication to the public "*the parties should take account of all aspects of the broadcast such as the actual audience, the potential audience and the language version*" (Recital 17).

¹ There is no case-law from the Court of Justice of the European Union regarding the interpretation of Article 1.2 of the Directive.

1. Has the principle of "country of origin" for the act of communication to the public by satellite under the Directive facilitated the clearance of copyright and related rights for cross-border satellite broadcasts?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

1.1. If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news).

Art. 1(2)(b) of the Directive precludes that right owners divide the right of communication to the public by satellite into territorially fragmented parts. However, parties have remained free to contractually agree on obligations to apply encryption or other technical means so as to avoid reception by the general public of programme-carrying signals in countries for which the broadcast is not intended. Thus territorial exclusivity and fragmentation can still be achieved, notwithstanding the aim of the Directive to create an internal market for trans-frontier satellite broadcasting. This is the Achilles heel of the Directive, as the Commission already admitted in the 2002 review of the Directive.

2. Has the principle of "country of origin" for the act of communication to the public by satellite increased consumers' access to satellite broadcasting services across borders?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

2.1. Please explain and indicate (using exact figures if possible) what is, to your knowledge, the share (%) of audiences from Member States other than the country of origin in the total audience of satellite broadcasting services.

2.2. If you consider that problems remain, describe them and indicate, if relevant, whether they

relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, advertising based, content specific channels) or other reasons.

Territorial blocking occurs mostly with regard to satellite television services. Radio services are much less affected. Audio-visual content most likely to be blocked includes sports, films and television series.

3. Are there obstacles (other than copyright related) that impede the cross-border provision of broadcasting services via satellite?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

3.1. Please explain and indicate which type of obstacles.

Another reason for blocking cross-border satellite broadcasts may relate to broadcasting law: the remit of public broadcasters is sometimes limited to services offered to national viewers. Another reason may be that for purely commercial reasons including the higher license fees they would have to pay for a broader audience certain (commercial) satellite broadcasters do not wish to target EU-wide audiences, but prefer to restrict their services to audiences in one or a limited number of Member States.

4. Are there obstacles (other than copyright related) that impede the cross-border access by consumers to broadcasting services via satellite?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

4.1. Please explain and indicate which type of obstacles.

See 3.1.

5. Are there problems in determining where an act of communication to the public by satellite takes place?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

5.1. Please explain.

To our knowledge no case concerning this issue has ever been brought before a national court in the EU. The country of “uplink” can be easily identified.

6. Are there problems in determining the licence fee for the act of communication to the public by satellite across borders, including as regards the applicable tariffs?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

6.1. Please explain.

In view of the application of the “country of origin” principle, the Directive harmonised the rights of authors to authorise or prohibit the communication to the public by satellite (Recital 21, Article 2), established a minimum level of harmonisation as regards the authorship of a cinematographic or audiovisual work (Article 1.5) and as regards the rights of performers, phonogram producers and broadcasting organisations (Recital 21, Articles 4 to 6).

7. Is the level of harmonisation established by the Directive (or other applicable EU Directives) sufficient to ensure that the application of the "country of origin" principle does not lead to a lower level of protection of authors or neighbouring right holders?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

7.1. Please explain. If you consider that the existing level of harmonisation is not sufficient, please indicate why and as regards which type of right holders/rights.

For the purposes of evaluating the current EU rules, the Commission should assess the costs and relevance, coherence and EU added value of EU legislation. These aspects are covered by questions 8-9 below.

8. Has the application of the “country of origin” principle under the Directive resulted in any specific costs (e.g. administrative)?

- Yes
- No
- No opinion

8.1. Please explain.

9. With regard to the relevance, coherence and EU added value, please provide your views on the following:

9.1. Relevance: is EU action in this area still necessary?

Yes

No

No opinion

9.2. Coherence: is this action coherent with other EU actions?

- Yes
- No
- No opinion

9.3. EU added value: did EU action provide clear added value as compared to an action taken at the Member State level?

- Yes
- No
- No opinion

9.4. Please explain.

The country of origin rule enshrined in the Directive was aimed at facilitating rights clearance for cross-border satellite broadcasters. This is clearly something that can only be achieved by EU action.

2. The management of cable retransmission rights

The Directive provides a double track copyright clearing process for the simultaneous retransmission by a cable operator of an initial transmission from another Member State (by wire or over the air, including by satellite) of TV or radio programmes (Article 1.3). Broadcasters can license to cable operators the rights exercised by them in respect of their own transmission, irrespective of whether the rights concerned are broadcasters' own or have been transferred to them by other copyright owners and/or holders of related rights (Article 10). However, according to Article 9, all other rights (of authors and neighbouring right holders) necessary for the cable retransmission of a specific programme can only be exercised through a collecting society. Finally, Articles 11 and 12 introduce negotiation and mediation mechanisms for dispute resolution concerning the licensing of the cable retransmission rights.

10. Has the system of management of rights under the Directive facilitated the clearance of copyright and related rights for the simultaneous retransmission by cable of programmes broadcast from other Member States?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

10.1. Please explain. If you consider that problems remain, please describe them (e.g. if there are problems related to the concept of “cable”; to the different manner of managing rights held by broadcasters and rights held by other right holders; to the lack of clarity as to whether rights are held by broadcasters or collective management organisations).

The present rules have left several important questions unanswered. (1) What is a 'cable system' and how to distinguish it from other wired infrastructures, such as the internet? (2) Does cable 'retransmission' presuppose that the 'initial transmission' is receivable by the general public? Note that while the Dutch Supreme Court has ruled out application of the Directive to the (re)transmission of television programmes of programme-carrying signals that are injected through a 'media gateway' directly into the cable networks (Norma/NLKabel), the situation in other Member States, such as Belgium, is unclear; a reference from Belgium is currently pending before the CJEU . (3) What exactly are the 'rights exercised by a broadcasting organization' (art. 10)? Do these include rights licensed, exclusively or not, to the broadcasters? Do the rules of mandatory collective management still apply in the case of ARI (All-Rights-Included) contracts with the broadcasters? (4) Are national rules that grant unwaivable rights to remuneration for cable retransmission for authors and performers, such as provided in certain Member States (e.g. Germany, Belgium, the Netherlands and Spain), compatible with the current structure of the Directive? Should such rights be subject to future harmonization?

11. Has the system of management of rights under the Directive resulted in consumers having more access to broadcasting services across borders?

- Yes
- To a large extent
- To a limited extent
- No
- No opinion

11.1. Please explain. If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, advertising based, content specific channels) or other reasons.

12. Have you used the negotiation and mediation mechanisms established under the Directive?

- Yes, often
- Yes, occasionally
- Never
- Not applicable

12.1. If yes, please describe your experience (e.g. whether you managed to reach a satisfactory outcome) and your assessment of the functioning of these mechanisms.

12.2. If not, please explain the reasons why, in particular whether this was due to any obstacles to the practical application of these mechanisms.

For the purposes of evaluating the current EU rules, the Commission should assess the costs as well as the relevance, coherence and EU added value of EU legislation. These aspects are

covered by questions 13-14 below.

13. Has the application of the system of management of cable retransmission rights under the Directive resulted in any specific costs (e.g. administrative)?

- Yes
- No
- No opinion

13.1. Please explain your answer.

14. With regard to the relevance, coherence and EU added value, please provide your views on the following:

14.1. Relevance: is EU action in this area still

necessary?

Yes

No

No opinion

14.2. Coherence: is this action coherent with other EU

actions?

Yes

No

No opinion

14.3. EU added value: did EU action provide clear added value when compared to an action taken at Member State level?

Yes

No

No opinion

14.4. Please explain your answers.

The system of mandatory collective management of cable retransmission rights has greatly facilitated trans-border access to radio and television programmes.

III. Assessment of the need for the extension of the Directive

The principles set out in the Directive are applicable only with respect to satellite broadcasting and cable retransmissions.² They do not apply to transmissions of TV and radio programmes by other means than satellite or to retransmissions by other means than cable. Notably these principles do not apply to online transmissions or retransmissions.

Until relatively recently, broadcasters' activities mainly consisted of non-interactive transmissions over the air, satellite or cable and broadcasters needed to clear the broadcasting/communication to the public rights of authors, performers and producers. However, the availability of broadcasters' programmes on an on-demand basis after the initial broadcast (e.g. catch-up TV services) is on the increase. Providing such services requires broadcasters to clear a different set of rights than those required for the initial broadcast, namely the reproduction right and the making available right. Forms of transmission such as direct injection in cable networks or transmissions over the internet (e.g. webcasting) are also increasing. Digital platforms also enable programmes to be retransmitted simultaneously across networks other than cable (e.g. IPTV, DTT, simulcasting).

² The concept of retransmission is generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator.

1. The extension of the principle of country of origin

15. Please explain what would be the impact of extending the "country of origin" principle, as applied to satellite broadcasting under the Directive, to the rights of authors and neighbouring right holders relevant for:

15.1. TV and radio transmissions by other means than satellite (e.g. by IPTV, webcasting).

See below.

15.2. Online services ancillary to initial broadcasts (e.g. simulcasting, catch-up TV).

See below.

15.3. Any online services provided by broadcasters (e.g. video on demand services).

See below.

15.4. Any online content services provided by any service provider, including broadcasters.

If copyright licenses for online services only need to be cleared in the country of origin, right holders will no longer be in the position to assign or exclusively license online rights in audio-visual or other content on a country-by-country basis. This might affect current contractual practices in the audio-visual sector. Granting exclusive rights to film distributors per territory is an important tool for right holders to secure film financing, particularly at the pre-production stage. Note however that for the time being in the audio-visual realm the proceeds from online film distribution will remain relatively small as compared to revenues deriving from traditional media such as cinema and television broadcasting. In other words, the negative impact on film financing would probably be limited.

16. Would such an extension of the "country of origin" principle result in more cross border accessibility of online services for consumers?

Probably yes.

Note however that an extended country of origin rule would apply only to the versions of audio-visual works originally licensed at source. Exclusive rights in dubbed or subtitled versions owned by local distributors would not be affected.

16.1. If not, what other measures would be necessary to achieve this?

A problem with extending the 'satellite' rule to the Internet is that transmissions over digital networks usually involve not only acts of communication to the public, but also acts of reproduction. This concerns not only the initial act of uploading a work to a server, but also various subsequent acts of temporary or transient copying, as well as acts of downloading works on the users' end. Presumably, the mandatory transient copying exception of art. 5(1) of the Information Society Directive would preclude downstream copyright claims by local holders of reproduction rights, but the language of art. 5(1), which is phrased as an exception or limitation, is not very clear. As to the reproduction rights involved in the act of uploading works to the Internet, no need to subject these rights to a country of origin rule seems to exist, since the act of uploading is a local act that (normally) does not occur in multiple jurisdictions. By contrast, an 'extended' country of origin rule would need to accommodate acts of reproduction on the end users' side, or else local right holders in individual Member States could invoke their reproduction rights to restrict downloading of content (legally) offered by a foreign content provider – thus frustrating the entire operation of a country of origin rule.

One way to solve this problem would be to introduce a mandatory exception permitting lawful users of (audiovisual) services offered online to download and view the content thus offered. Another solution would be to extend the country of origin rule to any rights of reproduction directly ancillary to the use by end users of the works communicated to the public by (qualified) service providers.

An extended rule should also ensure that other technical acts that are necessary to enable the lawful transmission or use of the online service not qualify as (subsequent) restricted acts of communication to the public. Here, the Directive's current rules on the 'uninterrupted chain' might serve as a model.

Extending the Directive's country of origin model to online audiovisual services will work effectively only in combination with certain flanking measures, such as rules conditioning (or prohibiting) territorial licensing and/or geo-blocking. Such rules could be based on art. 18 TFEU and might take the form of 'black' and 'grey' lists setting out what kind of geographical restrictions are or are not permitted.

17. What would be the impact of extending the "country of origin" principle on the collective management of rights of authors and neighbouring right holders (including any practical arrangements in place or under preparation to facilitate multi territorial licensing of online rights)?

Extending the country of origin principle to audiovisual services offered online would have an impact on collective rights management. Most CMO's presently manage rights granted or entrusted to them on a national, territorial basis. An extension of this rule would therefore have as a consequence that CMO's in other countries than the country of origin of the online service would no longer be entitled to grant licenses on behalf of authors and performers. On the other hand, CMO's could perhaps agree on mutually and fairly redistributing license fees received for the online services. Collecting societies currently charged in some Member States with collecting unwaivable rights of fair remuneration for online uses would similarly be affected.

A related concern on the part of the CMO's is that the proceeds from the collective management of rights flow not only to entitled right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. The CJEU has validated these practices in Case C-521/11 (Amazon). Removing the territorial aspect of communication rights would probably affect these de facto cultural subsidies.

Another fear on the part of the CMOs, and the authors and performers they represent, is that an extension of the country of origin rule to the online realm might result in a 'race to the bottom' between national CMO's competing for union-wide online licenses. Note however, that with the adoption of the Collective Rights Management Directive, collecting societies are already obliged to collaborate in offering multi-territorial licensing schemes. So a more likely future scenario seems to be that a relatively small number of large pan-European CMO's will compete for the online licensing market – rather than a multitude of small national CMO's.

18. How would the "country of origin" be determined in case of an online transmission? Please explain.

The present Directive locates the place of the relevant act of communication to the public by satellite “in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth” (art. 1(2)(b)). Transforming this satellite-specific rule into a more general country of origin rule that would apply to all audiovisual services, including those offered online, is not an easy task. Whereas with satellite broadcasting, the locus of the ‘uplink’ that designates the Member States where the ‘uplink’ right is to be cleared, can relatively easily be identified, determining the ‘place of upload’ of an Internet-based service is by no means a straightforward task, and would probably require a set of more complex – possibly highly technical – rules of attachment.

Alternatively, one could imagine replacing the present ‘place of uplink’ approach by a rule solely focusing on the place of establishment of the entity ‘under the control and responsibility’ of which the online communication occurs. The country of origin rule would thus be available only to service providers that are duly established in one of the Member States of the EU. Such a rule of application based on place of establishment of the responsible content provider rather than on the locus of ‘uplink’ would also make redundant a special rule for content services originating from outside the European Union, as is currently laid down – in a rather complicated fashion – in art. 1(2)(d) of the Directive. Indeed, art. 1(2)(d)(ii) effectively incorporates a rule based on place of establishment of the broadcasting organization in case no ‘uplink station’ in a Member State is being used.

19. Would the extension of the "country of origin" principle affect the current level of copyright protection in the EU?

An extended country of origin rule would not negatively affect current levels of copyright protection in the EU, since art. 3 of the Information Society Directive already provides for full harmonization of the right of communication to the public, which includes a right of making works available to the public online; this general right has by now been implemented by all Member States. Also, all Member States have for several years implemented the EU Enforcement Directive of 2004 that establishes minimum standards of enforcement of IP rights, including copyright and neighbouring rights, throughout the Union. The current EU legislative framework thus rules out the existence within the EU of ‘copyright havens’ where online content providers seeking lower levels of copyright protection might seek refuge.

Note however that limitations and exceptions applicable to audio-visual services are at present insufficiently harmonized. See 19.1.

19.1. If so, would the level of EU copyright harmonisation need to be increased and if so in which areas?

Exceptions and limitations that apply locally to works made available online may differ significantly from Member State to Member State. For example, fragments of copyright protected audio-visual content posted on YouTube might qualify as legitimate 'quotations' in one Member State, while being held illegal in others. Note that art. 5 of the Information Society has failed to provide for full harmonization in this respect. An extension of the country of origin rule to audio-visual services offered online should therefore ideally coincide with full harmonization of those limitations and exceptions most relevant to such services. Note that in our [response to the Commission's consultation on the review of the EU copyright rules](#) the European Copyright Society has argued for making more limitations and exceptions mandatory.

Other disparities at the national level that need to be taken into account when extending the country-of-origin rule to services offered online are rules guaranteeing fair remuneration for authors and performers for online uses, even when rights of exploitation in audio-visual works are (presumed to be) transferred to producers or intermediaries. The EU legislature should consider harmonizing these rules in a future initiative, in order to guarantee fair remuneration for authors and performers and to create a level playing field for online service providers.

2. The extension of the system of management of cable retransmission rights

20. According to your knowledge or experience, how are the rights of authors and neighbouring right holders relevant for the simultaneous retransmissions of TV and radio programmes by players other than cable operators currently licensed (e.g. simulcasting or satellite retransmissions)?

These rights are mostly licensed at source, i.e. the broadcasters acquire the necessary rights directly from the right holders. However, copyrights and neighbouring rights in broadcast musical works and phonograms are usually licensed from CMO's.

20.1. Are there any particular problems when licensing or clearing rights for such services?

Licensing at source often results in broadcasters (or audio-visual producers commissioned by broadcasters) contractually forcing authors and performers to transfer retransmission rights for little or no additional payment.

21. How are the rights of authors and neighbouring right holders relevant for the transmission of broadcasters' services via direct injection in cable network currently licensed?

These rights are mostly licensed at source, i.e. the broadcasters acquire the necessary cable transmission rights directly from the right holders.

21.1. Are there any particular problems when licensing or clearing rights for such services?

See 20.1.

Note that the Dutch Supreme Court has ruled out application of the Directive's system of mandatory collective management to the (re)transmission of television programmes of programme-carrying signals that are injected through a 'media gateway' directly into the cable networks (Norma/NLKabel). Invoking this argument, cable operators have for many years refused to pay retransmission royalties to authors and performers. Similar problems have arisen in Belgium and other Member States, which would justify further EU clarification of the notion of direct injection, cable retransmission and the application of these notions to new digital configurations.

22. How are the rights of authors and neighbouring right holders relevant for non-interactive broadcasters' services over the internet (simulcasting/ linear webcasting) currently licensed?

These rights are mostly licensed at source, i.e. the broadcasters acquire the necessary rights directly from the right holders.

22.1. Are there any particular problems when licensing or clearing rights for such services?

See 20.1.

23. How are the rights of authors and neighbouring right holders relevant for interactive broadcasters' services currently licensed (e.g. catch-up TV, video on demand services)?

These rights are mostly licensed at source, i.e. the broadcasters acquire the necessary rights directly from the right holders.

23.1. Are there any particular problems when licensing or clearing rights for such services?

See 20.1.

24. What would be the impact of extending the copyright clearance system applicable for cable retransmission (mandatory collective licensing regime) to:

24.1. the simultaneous retransmission³ of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

³ Understood as the simultaneous transmission of the broadcast by a different entity than the broadcaster (see footnote 2).

Extending this legal mechanism to platforms comparable to cable, such as satellite and IPTV platforms, is likely to facilitate rights clearance and would create a level playing field between these platforms. Moreover, due to the mandatory intervention of the CMOs representing them, it would probably lead to better remuneration for authors and performers, since licensing at source often results in broadcasters or audio-visual producers contractually forcing authors and performers to transfer retransmission rights for little or no additional payment. As with cable retransmission, this would however require that the role of CMOs in collectively managing the rights of authors and performers in audio-visual works is legally acknowledged and made effective, and cannot be ignored by intermediaries arguing that all relevant rights have been transferred to producers.

24.2. the simultaneous transmission^[4] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

[4] Understood as the simultaneous transmission of the broadcast by the broadcaster itself.

See 24.1.

25. In case of such an extension, should the different treatment of rights held by broadcasting organisations (Article 10 of the Directive) be maintained?

This rule should best be narrowed down to rights originating with the broadcasting organizations.

26. Would such an extension result in greater cross border accessibility of online services? Please explain.

Probably yes.

27. Given the difference in the geographical reach of distribution of programmes over the internet (i.e. not limited by geographical boundaries) in comparison to cable (limited nationally), should any extension be limited to "closed environments" (e.g. IPTV) or also cover open simultaneous retransmissions and/or transmissions (simulcasting) over the internet?

Such technical distinctions will probably easily become moot.

28. Would extending the mandatory collective licensing regime raise questions on the EU compliance with international copyright obligations (1996 WIPO copyright treaties and TRIPS)?

No. Art. 11bis (2) BC seems to leave the EU broad discretion to do this.

29. What would be the impact of introducing a system of extended collective licencing for the simultaneous retransmission and/or the simultaneous transmission of TV and radio programmes on platforms other than cable, instead of the mandatory collective licensing regime?

30. Would such a system of extended collective licensing result in greater cross border accessibility of online services?

3. The extension of the mediation system and the obligation to negotiate

31. Could the current mechanisms of negotiation and mediation in Articles 11 and 12 of the Directive be used to facilitate the cross border availability of online services when no agreement is concluded regarding the authorisation of the rights required for an online transmission?

32. Are there any other measures which could facilitate contractual solutions and ensure that all parties concerned conduct negotiations in good faith and do not obstruct negotiations without justification?

IV. Other issues

33. These questions aim to provide a comprehensive consultation on the main themes relating to the functioning and possible extension of the Directive. Please indicate if there are other issues that should be considered. Also, please share any quantitative data reports or studies to support your views.

Extending the Directive's country of origin rule is an important step towards full unification of copyright and neighbouring rights law in the EU. In its [letter of 19 December 2014 to Mr Günther Oettinger](#),

Commissioner for Digital Economy and Society, the European Copyright Society has forcefully argued for initiating such comprehensive unification. We, once again, invite the Commission to do so.

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