



Society of Audiovisual Authors  
Société des Auteurs Audiovisuels

## **SAA comments on the EC's proposal for a Regulation<sup>1</sup> on the retransmissions of TV and radio programmes and certain online transmissions of broadcasters, 14 September 2016**

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The Society of Audiovisual Authors (SAA) is the association of European collective management organisations representing audiovisual authors. Its 29 members in 22 countries manage rights for over 120,000 film, television and multimedia European screenwriters and directors. The organisation's objectives are: 1) to defend and strengthen the economic and moral rights of audiovisual authors; 2) to secure fair remuneration for audiovisual authors for every use of their works; 3) to develop, promote and facilitate the management of rights by member societies.

The retransmission of TV and radio programmes is a very important market for audiovisual authors because it has developed in a collective management context thanks to the 93/83/EEC Directive. Today, very often, retransmission royalties are with private copying the only remuneration audiovisual authors receive when their works are exploited abroad.

SAA members' collections for cable, satellite and IPTV retransmissions of TV and radio programmes amounted to €106m in 2014, around 21.6% of their combined audiovisual collections. In many European countries, cable retransmission royalties represent more than 40% of the collections of SAA member audiovisual authors' CMOs (e.g. in Austria, Croatia, Czech Republic, Estonia, Finland, Hungary, Portugal, Romania, Slovakia, Slovenia, Netherlands, UK). In these countries, cable retransmission royalties are the authors' main revenue generated from the use of their works, in particular from foreign countries<sup>2</sup>.

SAA therefore welcomes the provisions of the proposal for a Regulation which extend the system of mandatory collective management for cable retransmissions of TV and radio broadcasts provided in Directive 93/83/EEC. SAA has called for this technology neutral application of the mandatory collective management system to similar services and is happy to see it included in the Commission's proposal.

However, the retransmission market has recently faced new challenges such as the "direct injection" doctrine which questions the applicability of Directive 93/83/EEC. Some cable operators claim that they are not covered by the mandatory collective management system of Directive 93/83/EEC because the programmes they retransmit are received via a new technical process (a point-to-point signal rather than a free-to-air signal), whereas their activity is still the same (retransmitting a TV signal to subscribers). This issue of direct injection, which has a huge impact on the market with authors missing out a substantial part of the collections they used to receive in some countries, is not addressed by the proposed Regulation. In the same spirit as the technology neutral application of Directive 93/83/EEC, it must also be clarified that direct injection is covered by the mandatory collective management system of Directive 93/83/EEC.

In addition, SAA is concerned about the erosion of the territorial licensing system in Europe through the extension of the satellite country of origin principle to certain online services offered by broadcasters, as also included in the proposed Regulation. This additional derogation to

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<sup>1</sup> [Proposal for a Regulation](#) laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes COM(2016) 594.

<sup>2</sup> SAA [white paper](#) on audiovisual authors' rights and remuneration in Europe, 2<sup>nd</sup> edition 2015.

the territoriality principle could undermine the sales and financing of audiovisual works and should therefore be strictly limited.

SAA comments will therefore focus on two aspects:

- [Strengthening the collective management of the retransmission right](#)
- [Preserving the territorial exploitation and financing of audiovisual works](#)

## 1. STRENGTHENING THE COLLECTIVE MANAGEMENT OF THE RETRANSMISSION RIGHT

For this proposed Regulation to have a real impact, the welcome extension of the mandatory collective management system to operators of retransmission services other than cable operators should include two clarifications as to the interpretation of Directive 93/83/EEC, so that authors are not left with no remuneration for the retransmission of TV and radio programmes.

### a) Exercise of the authors' retransmission right by their CMOs

The exception to exercising the retransmission right through CMOs which benefits broadcasting organisations (Art 10 of Directive 93/83/EEC and proposed Art 4 of the Regulation) is too often used by cable and other retransmission operators to refuse any negotiation with CMOs representing audiovisual authors. To do this they argue that authors have transferred their rights to producers (through the presumption of transfer of rights that exists in some countries), who in turn have transferred the rights to broadcasters (all-rights-included model), meaning that the broadcasters' authorisation would cover all the rights involved in the programmes and be sufficient.

Such an interpretation should be rejected once and for all as it would undermine the whole purpose of building the collective rights management model for the retransmission right and is contrary to the principle laid down in recital 29 of Directive 93/83/EEC stating that the exemption provided for in Art 10 should not limit the choice of holders of rights to transfer their rights to a CMO and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission. In addition, such an interpretation would be incompatible with the observation mentioned in the impact assessment<sup>3</sup> accompanying the proposal that "a relatively small right holder (e.g. AV script writer) might not be getting revenue from the retransmission rights at all and, therefore, would benefit from the introduction of mandatory collective management" (page 48).

There is therefore a need to further clarify the exercise of the authors' retransmission right by their CMOs via a new paragraph 1a in Art 3 along the lines of the German, Belgian and Dutch legislations on this matter<sup>4</sup>. The new paragraph would provide for an unwaivable right to obtain an equitable remuneration for audiovisual authors through collective management when an audiovisual author has transferred his right to retransmission to a producer. In addition, it should be clarified in a recital that the exemption for broadcasting organisations' own transmissions (Art 4) should not limit rightholders' choice to transfer their rights to a CMO, thereby ensuring that they have a direct share in the remuneration paid by operators of retransmission services.

### b) Direct injection

Several courts in the Netherlands, Belgium and Norway have interpreted the technical process of "direct injection" between broadcasters and cable operators as having an impact on the legal qualification of retransmission and on who performs an act of communication to the public. This "direct injection" doctrine has had devastating consequences on the remuneration of

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<sup>3</sup> <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

<sup>4</sup> For more details, see [SAA contribution](#) to the public consultation on the review of the Satellite and Cable Directive, December 2015.

audiovisual authors as both broadcasters and cable operators are invoking it in an effort to avoid payments to audiovisual authors' CMOs.

- **Retransmission act**

On the one hand, some national courts assume that the transmission to a retransmission operator should qualify as a (separate) communication to the public in order for the retransmission by the operator to be subject to mandatory collective management.

One of the consequences is that these national courts concluded on the basis of this incorrect interpretation that the rule of mandatory collective management would not apply in case of direct injection.

So far, the issue whether Art 9 of Directive 93/83/EEC applies to cable retransmission of a point-to-point signal (both where the point-to-point signal is picked up by one distributor as well as by a multitude of distributors) has not been brought before the CJEU. The legal uncertainty is exacerbated by the various language versions of the Directive<sup>5</sup>.

There is therefore an urgent need to clarify that the notion of "cable retransmission" in Art 1(3) of Directive 93/83/EEC and the notion of "retransmission" in the proposed Regulation apply to retransmission operators' acts of communication to the public, regardless of whether the transmission of the TV signal used by the operator qualifies as a communication to the public.

- **Communication to the public**

On the other hand, certain broadcasters have started interpreting the CJEU [SBS Belgium v. SABAM](#) judgement of 19 November 2015 (C-325/14) in a way that they no longer perform any act of communication to the public when they transmit their signal to cable operators. As a result they believe they should not pay audiovisual authors' CMOs for this in the countries where broadcasting rights are collectively managed.

Consequently, on both sides of the chain, both broadcasters and retransmission operators are denying that they are performing acts of communication to the public, whereas the CJEU indicated in its [Airfield](#) judgement of 13 October 2011 (C-431/09 and C-432/09) that they can perform an act of communication to the public jointly.

We therefore propose to define the two-step technical process of "direct injection" and to emphasize the technology neutral interpretation of Directive 93/83/EEC so that the collective management system applies in a direct injection context. In addition, it should be clarified, according to the [Airfield](#) judgement, that both broadcasters and operators of retransmission services have to obtain separate authorisations from rightholders for the act of communication to the public they perform jointly. Indeed, each entity is responsible towards rightholders for its own intervention.

## **2. PRESERVING THE TERRITORIALITY OF EXPLOITATION AND THE FINANCING OF AUDIOVISUAL WORKS**

SAA is concerned about the erosion of the territorial licensing system in Europe through the extension of the satellite country of origin principle to certain online services of broadcasters as provided by the proposed Regulation. While this is a limited extension to simulcasting and catch-up services of broadcasters (and no other online services), it is nonetheless an additional derogation<sup>6</sup> to the territoriality principle which could undermine the sales and financing of audiovisual works.

We understand that the proposed Regulation aims at facilitating the rights' clearance of the high number of news, political, current affairs and entertainment programmes that broadcasters would be willing to make available online across Europe, at the same time as the original broadcast, or just after, for a limited period of time. However, 1) we doubt that the country of origin principle is the solution to that licensing problem and 2) the undifferentiated

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<sup>5</sup> The German, Italian, Spanish and Dutch versions of Directive 93/83/EEC refer to a "first/initial broadcast" while the English and French versions refer to an "initial transmission".

<sup>6</sup> After the proposal for a Regulation on ensuring the cross-border portability of online content services in the internal market of 9 December 2015 COM(2015)627.

application of the country of origin principle to all TV programmes, including programmes not produced by broadcasters but bought from independent producers, would impinge on the potential sales of premium content such as films, documentaries and TV series to other broadcasters across Europe.

It is therefore essential that, as a minimum, the country of origin principle does not apply to programmes which have such a potential (cinematographic works, documentaries, films and series) as it seriously risks damaging the financing and circulation of these audiovisual works. These programmes should continue to be licensed on a territory by territory basis in order to maximize their potential circulation across Europe and reach the widest possible audience.