Society of Audiovisual Authors
Société des Auteurs Audiovisuels

Summary of SAA contribution to the public consultation on the review of the Satellite and Cable Directive

December 2015

Headlines

Any revision of the Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (hereafter Satellite and Cable Directive) must take the following directions and actions:

The country of origin principle is not the solution for online transmissions/retransmissions

- The country of origin principle is a legal anomaly in the copyright field. It runs contrary to the territoriality principle and the objective of a high level of protection of intellectual property rights by encouraging forum shopping. It has been expressly rejected for the copyright field by subsequent Directives.
- It did not help develop direct satellite broadcasting so has not demonstrated any benefit to the European audiovisual industry.
- It has no impact on rights clearance.

The mandatory collective management of the cable retransmission right is the solution for online transmissions/retransmissions

- It simplifies clearance of rights and has greatly facilitated the development of the cable industry in Europe and the retransmission of TV channels across Member States.
- It guarantees that audiovisual authors actually receive the remuneration they are due for the retransmission of their works and help the circulation and accessibility of European works across borders.

Some clarifications are required

- Reaffirming the technological neutrality of the Satellite and Cable Directive would ensure equality of treatment and legal certainty for all similar cases of TV programme distribution as well as reflect the take-up of other transmission technologies and technological convergence in the audiovisual sector.
- The Directive shall ensure that audiovisual authors should be able to freely dispose of their rights and entrust them to a CMO representing their interests. In too many countries, audiovisual authors' CMOs have had to challenge in court leading US-owned cable operators who tried to bypass them using different doctrines such as the all-rights-included contracts model or direct injection.

Why is the country of origin not a good solution?

The country of origin principle is a legal anomaly in the copyright field and a derogatory rule to the general principle of territoriality. The country of origin principle equals an exhaustion of rights and has been expressly rejected for the copyright field by subsequent Directives such as the 2000/21/EC Directive on Electronic Commerce and the 2001/29/EC Directive on Copyright in the Information Society. Fortunately, it only applies to a very limited method of exploitation which in addition did not develop in terms of access model and market.

The practical use of the country of origin principle for online transmissions would result in a **'race to the bottom' by Member States** offering lower levels of copyright protection and/or enforcement to attract service providers which would chose to operate from Member States where the copyright regime is more lenient ("forum shopping"). This would result in **discrimination of local service providers/distributors and have a negative economic impact on rightholders as it would jeopardize the value of authors' rights.**

Introducing the country of origin principle for the making available right would require the **modification of subsequent European Directives in addition to the 93/83/EEC Directive (2001/29/EC, 2000/31/ EC) and their national implementing laws**, and would probably **run against international treaties** as it would deprive authors from an essential element of their exclusive making available right.

A principle which failed to boost the direct satellite broadcasting market - Satellite broadcasting as addressed by the Satellite and Cable Directive is very limited and does not cover satellite package services such as Sky or CanalSat, which are much more developed in terms of audience and market in a number of European countries. To our knowledge, the direct satellite broadcasting addressed by the Directive and which can use the country of origin principle is not a very developed model for providing European citizens with access to European TV programmes, so its audience is in general very limited. Europeans mainly access TV through free-to-air services, satellite package services as well as cable operators. Both satellite packages and cable subscription services offer a great number of European foreign channels.

It has no impact on rights clearance. Contrary to the mandatory collective management of the cable retransmission right, the country of origin principle does not provide for any rights clearance mechanism which would facilitate the access to and the availability of programmes. It only impacts on the applicable law as it limits the application of national laws to the one of the country of origin for cross-border satellite broadcasts. The only effective tool to facilitate rights clearance is collective rights management, which is only made possible, but not mandatory, by Article 3.2 of the Directive. Whether mandatory, voluntary or extended, collective licences have developed in the broadcasting field irrespective of the determination of the applicable law.

Audiovisual authors' collective management organisations (CMOs) like SAA members offer collective licensing solutions to broadcasters in a number of countries (e.g. in Belgium, France, Italy, Netherlands, Poland, Portugal, Slovakia, Spain) which facilitate rights' clearance and may cover broadcasters' different modes of exploitation (free to air broadcasting, satellite broadcasting, web stream, replay, etc.). It is only the development of those collective agreements all over Europe that would facilitate rights' clearance.

Why is the model of mandatory collective management of the cable retransmission right the solution for online transmissions?

The cable retransmission model with its mandatory collective management of exclusive rights is a much more interesting solution to help the circulation and accessibility of European works across borders. Coupled with stricter rules on the promotion of European works by online services (provided in the Audiovisual Media Services Directive), it would ensure that European citizens are offered a wide variety of European works, including non-national ones.

This model simplifies the clearance of rights. This rights clearance mechanism of mandatory collective management for the cable retransmission right has greatly facilitated the development of the cable industry in Europe and the retransmission of TV channels across Member States. It was introduced to simplify rights clearance and avoid black-outs in retransmitted broadcasts. It is, in itself, a success: cable and satellite operators generally offer a great number of foreign channels in their packages and therefore generate broadcasting services across borders which consumers have access to.

Collective management provides a mutual benefit and a win-win solution for both cable operators and rightholders. The licensing costs resulting from the collective management of the cable retransmission rights are much lower than if each individual rightholder had to negotiate with each cable operator.

Creating a genuine level-playing field online - Applying mandatory collective licensing for the online transmissions of broadcasters and other operators across Europe would clarify the situation for audiovisual authors' rights by harmonising this model. It would allow CMOs to offer pan-European licences and develop reciprocal agreements to get the remuneration due for the online use of their author members' works on foreign platforms. SAA believes that such a proposal should cover all audiovisual media services, not limited to broadcasters, who make audiovisual works available to the public (online).

Guaranteeing that audiovisual authors actually receive the remuneration they are due for the retransmission of their works - The introduction of the system of mandatory collective administration of the cable retransmission rights in the Satellite and Cable Directive meant audiovisual authors started receiving remuneration for the cable retransmission of their works in all EU Member States. Action at EU level, rather than only at Member State level, means that all audiovisual authors, throughout the EU, are guaranteed remuneration for the cable retransmission of their works. 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.

The take-up of online services in general, whether operated by broadcasters or other operators, highlights the **need for collective management solutions** to be developed for the making available right, as proposed by the SAA in its white paper. Directive 2014/26/EU on collective rights management now establishes a European legal framework for CMOs which secures collective rights management as a future-proof solution which can be relied upon to enhance cross-border access to works by extending the system of management of cable retransmission rights to the online world.

Needed clarifications of the Directive

Technology neutrality - The cable retransmission is defined by the Directive as 'the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public'. SAA believes that this definition is technology neutral but it has not been understood as such in all Member States when the Directive was transposed. In certain Member States, the Directive principles are applied to traditional cable operators only and other operators are left aside.

The Directive's principles on authorisation and remuneration towards rights owners should apply to other operators than cable operators, such as IPTV service providers and satellite platforms which simultaneously distribute TV programmes. Broadcasters' catch-up services and video-on-demand offerings should also be caught when these services are included in the packages offered by the cable operators to their subscribers. **Unified application of technological neutrality of the retransmission right would end inequality of treatment between operators offering the same service** and discrepancies between Member States' rules in that regard. It would also increase the availability of European creative content on all platforms, including mobile platforms, for the benefit of platform operators, broadcasters, rightholders and EU consumers.

In addition, it would be useful to clarify that the retransmission right collective management mechanism applies to all retransmissions of channels, not only to transmissions from other Member States. A single

licensing mechanism would cover all retransmissions. In most countries, it would only be the recognition of the actual application of collective licensing mechanisms.

Exercise of the authors' retransmission right by their representative CMOs – The Directive should be clarified to ensure that authors get remunerated for the retransmission of their works within the EU through their representative CMOs. Too often, audiovisual authors' CMOs had to go to court (e.g in Belgium, Netherlands, Czech Republic) to impose on cable operators the need to negotiate with them collective agreements for the remuneration of audiovisual authors for their retransmission rights. Some cable operators have used recital 28, which says that the author's cable retransmission right can be assigned, in combination with Article 10, which provides that collective management does not apply to the rights exercised by broadcasting organisations, to argue that authors have transferred their rights to producers who in turn have transferred the rights to broadcasters (all-rights-included model) so that the authorisation of the broadcasting organisation would cover all the rights involved in the programmes and be sufficient.

Such an interpretation should be rejected once and for all (it would make it useless to have built the mandatory collective management of rights) through clarification of the Directive along the lines of national laws which have already solved this problem: Germany provides for an unwaivable remuneration right to the author in case the cable retransmission right has been transferred to the producer, which can only be administered by a CMO; the same applies in Spain for the right of communication to the public in general. Belgian and Dutch laws were recently changed to address this particular problem: Belgian law now provides that when an author has transferred his cable retransmission exclusive right to a producer, he shall retain the unwaivable right to obtain a remuneration for cable retransmission which can only be exercised by a CMO representing authors. In the Netherlands, the same scheme applies to the right of communication to the public in general.

Direct injection - Divergent interpretations by Member States' national courts of the technical process of 'direct injection'[1] risks bringing back situations which the Satellite and Cable Directive was created to prevent. For example, in the Netherlands, the Supreme Court in the NORMA case supported cable operators' argument that the delivery of broadcasting signals to the cable operators through a media gateway is not a communication to the public, so the communication to the public by cable operators is not a retransmission and the mandatory scheme of the Directive does not apply. Whereas in the Belgian Telenet case, the Antwerp Court of appeal concluded in 2013 that the direct injection is a cable retransmission and that rightholders' consent/remuneration is required because there was a "simultaneous, unaltered and unabridged transmission" of a first broadcast.

SAA therefore requests **clarification that the cable retransmission right qualification applies to cable operators' act of communication to the public, whatever the technical system of signal delivery between broadcasters and cable operators**. The important criteria for a retransmission is that the signal is being delivered and commercialised to the public by another party than the broadcaster. The cable operator is indeed developing a business of TV channel access by selling subscription services so must acquire the necessary licences along the lines of Directive 93/83/EEC.

The CJEU is trying to provide clarifications but the questions referred have so far been too limited in scope to encompass all problematic aspects (e.g. the C-325/14 SBS v SABAM ruling on 19 November 2015).

[1] A two-step process by which a broadcasting organisation transmits its programme-carrying signals 'point to point' via a private line to its distributors. At that stage, the signals are not accessible to the general public. The distributors then send the signals, which may or may not be encrypted, to their subscribers so that the latter can view the programmes on their TV sets, whether or not with the help of a decoder made available by the distributor.