Public consultation on the review of the Television Without Frontiers Directive

Written contribution on

Discussion paper 1 – Access to events of major importance to society

Natali Helberger[1]

Institute for Information Law, University of Amsterdam

In the framework of the public consultation process, the European Commission has put forward a number of questions concerning Article 3a of the Television Without Frontiers Directive (hereafter referred to as 'Article 3a'), which addresses access to events of major importance to society. The questions concern, for example, the adequacy and effectiveness of the 'list of major events' concept to deal with the phenomenon of electronic access control in broadcasting (such as in pay-TV services) and the possible consequences for the general public as regards the availability and accessibility of certain information. More precisely, the Commission has asked whether Article 3a achieves its objectives and is an appropriate tool to balance the different interests involved. It is this question that I would like to comment on.

There is no clarity about the concrete objectives of Article 3a. Obviously, the driving motive behind this article is related to the trend among pay-TV operators to secure broadcasting rights in contents of particular interest to the public, which can be then transmitted on an exclusive basis and for an additional payment. Although the Commission should be commended for its awareness of the problems that are inevitably linked to an increased use of electronic access control, it remains totally unclear whether it feels that there is a need for action because a) Member States should be able to ensure that certain information can be received 'free' and, closely related to that, the aspect of a general conflict with the freedom of expression as protected under Article 10 ECHR is perceived; b) a majority of the population should not be prevented from receiving certain contents because they are technically unable to do so; or c) there is a need to control further commodification of information by means of electronic access control.

[1] Contact details: Natali Helberger, Institute for Information Law (IViR), University of Amsterdam, Rokin 84, 1012 KX Amsterdam, The Netherlands, helberge@jur.uva.nl, Tel.: (3120) 525 3646, www.ivir.nl .

'Free' access to information

In the process of implementing Article 3a into national lists of important events it became apparent that there is no consensus about what 'free' access to information actually means, that is, whether this notion refers to free in the sense of free from additional costs or free in the sense of transmissions that are not encrypted and can be received by means of normal television equipment.[2] The latter aspect touches upon the one of technical availability that will be discussed below. In this context, it is worth noticing that in some Member States even public broadcasters – that is, 'cost-free' broadcasters – encrypt their transmissions (for copyright reasons) and thus are not 'free'.

If the provision is aimed at free access in the sense of cost-free access, one may wonder where the justification for this motive stems from. It is very disputable whether something like a 'free ticket' to information exists under Article 10 ECHR or any other constitutional provision. This is illustrated by the fact that nobody seriously argues in favour of such a right as regards, for example, newspapers. The production of information services is costly, as is the broadcasting of sporting events. Access to free-to-air broadcasting or free websites is not free, either, but entails a number of costs (e.g. ISP subscription, broadcasting fees, cable subscription, purchase of television set, PC, telephone costs, satellite dish, higher prices for advertised products).

The list concept is understandable if it is merely for political reasons that access to certain events should not exceed a certain socially/politically acceptable price. However, it is unclear whether the EC has the competence to deal with this matter. Moreover, one can also doubt whether a list concept is an adequate instrument to increase public welfare and realise public interest objectives. Is it adequate to force the entire audience to pay[3] for programming that only a certain percentage of them are interested in watching? Against this background, solutions more oriented towards target groups would probably be more adequate; such a solution could be, for example, to subsidise subscription contracts for those who cannot afford access to important events that are provided in encrypted television, and where, however, the state feels a responsibility to make these contents available (just as, for example, financially weaker groups receive subsidised train tickets). Price caps on pay-TV programmes or an

[2] Natali Helberger, Brot und Spiele – Die Umsetzung der Listenregelung des Artikel 3a der Fernsehrichtlinie, Zeitschrift für Medien- und Kommunikationsrecht (AfP), 4/2002, p. 292.

obligation to implement cost-orientation, similar to that in communications law, might solve the problem of factual control over information access and/or hidden costs more broadly and more efficiently than the list concept.

Technical availability

The exercise of exclusive rights could disadvantage consumers if, as is presently the case, only a fraction of the population of European countries is technically able to receive certain pay-TV services. However, the fact that only a few households own the necessary equipment is not necessarily something for which pay-TV providers can be held responsible. One could even reverse the argument and wonder whether it is an acceptable situation that – at the dawn of digitisation – the majority of the population will be excluded from the reception of not only pay-TV services but also digital broadcasting in general. What could – or should – Member States do to change this situation? In Germany and Italy, for example, there are discussions concerning the extent to which it must be considered a public task to promote the distribution of the necessary decoders and so on in order to make the digital switchover.

Another question is whether the fact that an operator can exercise technical control over information access raises serious questions as regards privacy, anonymity and other legitimate consumer interests. The present solution – that is, no encryption use for certain programmes – is too narrow to offer a principal solution to this fundamental problem.

Freedom of expression

It would exceed the frame of this consultation to discuss what the general relation between electronic access control and freedom of expression is. Probably, it is primarily a matter of equal opportunities to communicate that is at stake where private controllers of information platforms, such as pay-TV platforms, can exclude a) consumers from accessing certain information and b) competing service operators from accessing the audience (not to mention the numerous competition law concerns involved). Secondly, it concerns the access controller who is in a position to identify individual consumers and determine terms and conditions of access to information. Under the present legal regime, access controllers are more or less able to establish these conditions and choose with whom they wish to negotiate. In the light of freedom of expression, this can lead to very problematic situations. Article 3a is not able to

[3] In the form of increased broadcasting fees or reduced welfare from contents that cannot be produced because of the need to make large investments in programme rights.

solve such conflicts. Finally, it is obviously not in the spirit of Article 10 ECHR to reduce freedom of expression to a 'right to sport'.

Commodification/commercialisation of information

One can interpret Article 3a as an attempt to limit the ongoing commodification/commercialisation of information, and to prevent a further erosion of the public domain. From this perspective, Article 3a must be – and indeed has been – warmly welcomed as a signal that information policy will not allow the unconditional commercialisation of and private control over information. But upon closer inspection, one realises that Article 3a evades the problem by ruling that certain events may not be shown exclusively in pay-TV. To make the situation even more pressing, the Conditional Access Directive[4] affords virtually unlimited protection to users of electronic access control against circumvention activities – a clear signal in favour of conditional access use. Also, it is unclear why the regulation concentrates in the first place on sporting events – at least this is the way most member states have interpreted the provision? Is the commodification of 'information of public interest' such as news reports, public announcements, interviews and talk shows with politicians about topics in the public interest, reports about catastrophes and missions to Mars, the presentation of the five newly discovered pages from Anne Frank's diary, and so on – namely, information that is of equal if not greater interest to the public – a less pressing problem than the availability of sporting events?

If none of the aforementioned objectives applies, then it was probably political motives that inspired Article 3a, beginning with the realisation of public interest objectives and leading to a revival of the classical *panem et circensem* concept.[5] In this case, it is again debatable whether the EC had the competence to adopt such a regulation – not to mention the further-going guiding principles as mentioned in question 4 of the consultation paper. Also, it is unclear to what extent information access is in the public interest, and, no less important, who should decide on this matter. There was a deplorable lack of those for whom the information is intended – viz. the audience – in the process of structuring most drafting commissions and of

[4] Directive 98/84/EEC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, OJE L 320, 28.11.1998, p. 54.
[5] The possible motives for government involvement with the media are discussed in: N.A.N.M Van Eijk, Omroepvrijheid en overheidsbemoeienis: Een vergelijkende studie naar de Nederlandse, Franse en Europese regels met betrekking tot toegangscriteria en programmavoorschriften voor de omroep, Otto Cramwinckel, Amsterdam, 1992.

drafting most national lists.[6] Is it really to the benefit of the audience if public broadcasting fees are used to pay the increasingly horrendous prices for making sporting events available in free-TV? Because, in praxis, it is often so that public broadcasters, not commercial broadcasters, will purchase the respective broadcasting rights, or only public broadcasters can afford do to so. The effect is that public broadcasters cannot pay as much attention to under-represented sectors with less mass appeal: other contents of importance to the public cannot be produced/broadcast because the budget of public broadcasters has been involuntarily exhausted.

Actually, it is not even clear what the real extent of loss of user benefit is if a programme is encrypted and therefore cannot be received by those who are unable or unwilling to pay for it. One may doubt whether the encrypted transmission of soccer games is indeed an unbearable loss for the population, provided that the competition for transmission rights functions and there are time-deferred possibilities of cheaper ways to watch the programme.

To conclude, one may doubt whether Article 3a Television Without Frontiers Directive achieves its objectives and is an appropriate tool to balance the different interests involved, or whether Article 3a can cure only the symptoms rather than the cause of the problem. What is needed is a far more fundamental discussion of the extent to which the factual monopolisation and commercialisation of information by means of technological measures is desirable, and of where it conflicts with legitimate individual and public interest objectives – an issue that is being heatedly discussed in the field of intellectual property rights (which makes it even more difficult to understand why it has been neglected for so long in relation to electronic access control techniques outside intellectual property law).[7]

Tackling the problem at its roots

Today, access to information depends more than ever on the entity that controls the electronic transmission process and less than ever on broadcasters and regulatory authorities. The controller of electronic access control – or 'conditional access' – can exclude unauthorised parties from accessing information and can dictate terms and conditions of access to information, including such contents that are of particular interest to the public or national

[6] See Helberger, footnote 2.
[7] For example, during the drafting process of the Conditional Access Directive, and also in context with Article 3a Television Without Frontiers Directive that addresses the issue only very narrowly.

information policy. Against this background, the problem is not that the audience/consumers do not have the necessary equipment to receive certain contents, or that they have to pay for information; rather, the problem is that electronic access control can be used as a tool to create and strengthen factual information monopolies, irrespective of existing intellectual property rights regimes, media law and all the other instruments that have been developed to balance the interests of all parties involved. What must be of concern is the possible abuse of dominant positions that result from ownership in popular programming and can be exercised to the disadvantage of the consumer. This problem is not restricted to broadcasting, which is why in the following I refer more generally to information service providers, including broadcasters.

The influence of electronic access control on modern information markets and the established order as a guarantor of balance in information markets cannot be understood without taking into account the general factors that influence the position conditional access controllers take in information markets. Such factors are:

- The increase in prices for attractive and public interest programming, prices that reach a level which some commercial operators can no longer afford;
- The strong position of information controllers is intensified in market situations with a high level of vertical integration between the infrastructure and the service level;
- Due to their exclusive character and economic mechanisms (dominant standards, network effects, etc.), access-controlled service platforms (e.g. pay-TV, portals, database services on the Internet) can exclude not only consumers from accessing information, but also competing information providers from accessing consumers;
- The use of electronic access control strengthens the negotiating position of information service providers in relation to consumers who wish to access certain contents;
- Additional legal protection (Conditional Access Directive) shifts the negotiating power further towards conditional access controllers.

This is not to say that conditional access itself is not a legitimate and necessary answer to a number of challenges posed by the information society in the fields of, for example, youth protection, intellectual property rights, communications secrecy, data protection, etc. The technique can even form the basis for a number of new information services and for more

diverse contents which previously were not possible and/or economically viable. However, its arrival requires a rebalancing of the interests of the parties involved, that is, between information service providers, the audience/consumers, and competing information service providers – and it is very questionable whether lists of important (sporting) events can do this.

In particular, it is the position of the consumer that must be strengthened: consumers are no longer passive receptors but active participants in a negotiation process in an increasingly commodified information environment. The smaller the extent to which consumers can negotiate conditions individually with the provider of the service, the more serious the concerns regarding the adequacy of access conditions, as they do not reflect a fair agreement[8] but only a 'take it or leave it' choice. The danger is that subscription or similar service contracts will be used by providers of access-controlled services/service platforms to establish an alternative legal order that is most favourable to their own needs and interests, thereby circumventing the established order that guaranteed a fair balance. In combination with contracting, electronic access control can be used to modify the existing property schemes of exclusive rights and exceptions, and to override the legitimate interests of the users of copyrighted material in fair use,[9] as well as freedom of expression and other consumer interests such as privacy and economic rights.

Obviously, there are situations in which the interests of the consumers to receive certain services must be valued higher than those economic or other interests to *use* electronic access control. This can be because of the particular character of information, for example, information of particular interest to the public (notably in a situation where broad sections of the public would not otherwise be able to receive the information), and the particular role Article 10 plays as regards democracy, society and personal development. Arguably, this must influence the conditions and circumstances under which access is offered. What is needed is consumer protection law that forbids access control 'at any price' and that regulate the way electronic access control may be used, in order to ensure that consumers can access information of individual as well as of public interest under fair, affordable and non-discriminatory conditions.

[8] Usually, in the case of electronic access control the possibilities to negotiate contract conditions individually are very limited. Pay-TV subscription contracts are usually mass-form contracts, similar to the situation on the Internet.

[9] Lucie Guibault, pp. 291-304, in: Lucie Guibault, Copyright Limitations and Contracts – An Analysis of the Contractual Overridability of Limitations on Copyright, Information Law Series, Vol. 9, Kluwer Law International, London / The Hague / Boston, 2002.