ACT response to Public Consultation on the Review of the EU Satellite and Cable Directive

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TYPE OF RESPONDENT : Representative of commercial broadcasters

Introduction

The Association of Commercial Television in Europe represents the interests of leading commercial broadcasters in 37 European countries. The ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. At ACT we believe that the healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.

Commercial television broadcasters are indeed a key contributor to the development of a high-quality and innovative digital platform and economy, contributing to the benefit for all European citizens. Europe's commercial television sector entertains and informs over 500 million citizens, and no other media has reached this number so far.

Our businesses were early adopters of digital technology and we help power the European digital economy. Central to the lives of Europe's citizens, our TV channels reach over 200 million European households in 28 EU member states and beyond. More specifically, our online TV services are available in over 150 million European homes connected to the internet, and are central to Europe's broadband story. Europe's commercial TV's path to digitalization already started 10 years ago, and we are now distributing TV according to our customers' preferences, whether that is digital terrestrial, digital satellite, cable or online. Moreover, we operate more diverse digital business models than the global technology sector to deliver unparalleled customer choice, varying from free-to-air advertising models to subscription on demand. Therefore, just like the Commission, ACT recognises the opportunity online distribution has to offer for the European digital economy.

The ACT is fully committed to effectively contribute to the overarching goals set out by the Digital Single Market strategy, namely to "strengthen Europe's competitiveness and stimulate investment for the purpose of job creation"[1] and ensure that "copyright underpins creativity and the cultural industry in Europe"[2].

However, ACT is concerned with the Commission's means to achieve this objective, and is concerned that these means could generate serious unintended consequences instead of the 'win-win' scenario the Commission envisaged. [3]

ACT members do not believe that a revision of Cable and Satellite Directive ("the Directive") would lead to more cross-border availability of content. On the contrary, there is a real concern that a revision might have negative consequences on European production, financing and distribution.

Three key features of the Directive must be retained at all costs: country of origin for satellite distribution, contractual freedom and the broadcaster's Article 10 exemption from the obligation to exercise its own or its acquired rights via collective management.

It is of the utmost importance that any regulatory change works for the best possible result for all different kinds of funding models, i.e. also covering fundamental prerequisites for broadcasters who need to secure the financing of their content via commercial value.

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[1] Political Guidelines for the next European Commission : http://ec.europa.eu/priorities/docs/pg_en.pdf

[2] A Digital Single Market Strategy for Europe, COM(2015) 192 final

[3] See ACT position on territorial licensing http://www.acte.be/mediaroom/download/88/document/act-position-on-territorial-licensing---final-2.pdf

II. 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]). 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?

ACT member companies are among the stakeholders most affected by the Directive. We are simultaneously major right holders, owning our own rights as broadcasters and producers, distributors of our own and third party content and mass users of third party music rights.

The object of the Directive, with the definition of the notion of communication to the public by satellite at Community level, was to put an end to the legal uncertainty regarding the rights to be acquired, by specifying the place where the act of communication occurs and the copyright legislation applicable to contractual relations regarding the transfer of rights. In that regard, we think the principle of "country of origin" has indeed achieved its goal.

When it comes to the actual facilitation of rights clearance «country of origin» is only relevant for collective licensing. In practice, it mainly concerns the rights in musical works[4] that are traditionally managed by Collective Management Organisations ("CMO's"). As a result of the application of the principle of "country of origin", broadcasters can clear music rights in audiovisual works for satellite broadcasting for the entire footprint of the signal, with one single CMO, which has clearly partly facilitated rights clearance.

When rights are managed on an individual basis, on the other hand, which is mostly the case for audiovisual rights, the principle of «country of origin» has had no impact on the clearance of rights. Audiovisual producers indeed rely on the consolidation of exclusive rights and the satellite transmission right is licensed on the basis of direct commercial negotiations.

[4] Depending of the territory CMO's collectively manage either only the "public performance" rights in musical works or also the reproduction right needed for the synchronisation of the musical work in the audiovisual work.

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).

Our members do not encounter any problems in the clearance of audiovisual rights, which is, as explained under our answers to Q1 and Q2, subject to straightforward commercial negotiations.

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, as explained under our answer to Q1, the principle of "country of origin" has facilitated the clearance of music rights, which did have an incidence on the access to satellite broadcasting services across borders. However, the principle had no incidence on the clearance of audiovisual rights, because of the reasons explained here.

Contractual freedom as basis of the Directive

Recital 16 of the Directive indeed recognises that the Directive is based on the principle of contractual freedom, which made it possible to continue limiting the exploitation of rights to certain territories.

In practice, and as recognised in the Commission report of 2002[5], producers and broadcasters have continued to limit the territorial scope of the agreed licenses to those territories in which the broadcaster had a commercial appetite to address an audience and encrypt the signal as a consequence.

In addition, the Commission Report concluded that *'the encryption of programs is a factor in favour of fairer remuneration for rightholders, to the extent that a decoder has to be made available to the viewer (whether a subscription has been paid or not), which makes it possible to check very accurately the size of the actual audience'*.[6] The ability to target the size of the audience, in combination with the practice of encryption, strongly protects the value of authors' works and the associated copyright. Looking back at the Proposal of the Directive, strengthening copyright and encouraging investments were some of the central aims of the Directive.[7]

Focusing on their home territory allows broadcasters to develop and exploit specialist market knowledge and deliver brands, infrastructure, marketing, customer support that best serves national/regional consumers. Exclusive territorial distribution indeed allows broadcasters to tailor channels to the audience (keeping into account local language, content that most appeals to the market, locally commissioned content, targeted advertising). Advertisement is also national, taking into account the language of advertisements and national trends. Channels not targeted at national markets are therefore hardly valuable to some advertisers.

[5] Report from the Commission on the Application of Council Directive 93/83/EEC on the «country of origin»rdination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission'. 2002, p. 7

[6] Ibid., p. 8

[7] Commission of the European Communities: 'Proposal for a Council Directive on the «country of origin»rdination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission'. 11 September 1991, p. 5

The cultural, economic and creative value of territorial licensing has also been recognised by both the European Parliament[8] and the Charles River's Associate's study commissioned by the European Commission[9], which concluded that territorial licensing was a crucial asset in raising investments for European audiovisual productions.

Lack of consumer demand and cultural preferences

The main reason why broadcasters are not interested in distributing their signal on a pan-European or cross border basis is the lack of demonstrable and monetisable consumer demand for accessing audiovisual content from another Member State, as shown by the recent study from the European Commission on cross border access to online content.[10] The report shows that only 5% of internet users have tried to access audiovisual content through online services meant for another member state,[11] which is mostly due to lack of interest or sufficient choice in the consumer's own Member State[12]. The Plum Study[13] of 2012 commissioned by DG MARKT also provides good evidence of consumer's lack of interests. The study shows that the total demand for transfrontier audiovisual services is very low, representing only 0.7% of the EU television market and uneven. On the other hand, the study shows that, where cross-border demand is present (often because of a large presence of an expat group in a certain Member State or because of a shared language), such demand has been met by commercial broadcasters.

No mandatory pan-EU licenses

The general lack of consumer demand is mostly due to the fact that audiovisual works are language-specific in value and most broadcasters focus primarily on a national audience, or on common language groups. Taste in genres and content also vary due to cultural specificities. Within this framework, the Directive had the purpose of *enabling,* but not *mandating* pan-European licenses, which is clearly reflected in the Directive.

The Commission has always been aware of the fact that mandating pan-European licenses would have a very negative effect on the market and also on the availability of content to consumers (see also our answer to Q 15).

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[8] European Parliament resolution of 9 July 2015 on harmonisation of certain aspects of copyright and related rights, paragraph 13 : *Points out that the financing, production and co-production of films and television content depend to a great extent on exclusive territorial licences granted to local distributers on a range of platforms reflecting the cultural specificities of the various markets in Europe; that being so, emphasises that the ability, under the principle of freedom of contract, to select the extent of territorial coverage and the type of distribution platform encourages investment in films and television content and promotes cultural diversity; calls on the Commission to ensure that any initiative to modernise copyright is preceded by a wide-ranging study of its likely impact on the production, financing and distribution of films and television content, and also on cultural diversity;*

[9] Economic Analysis of the Territoriality of the Making Available Right in the EU

[10] 'cross-border access to online content; report'. Flash Eurobarometer 411, August 2015.

[11] Ibid., p. 93

[12] Ibid., p. 103

[13] TNS opinion, Plum, the futures company, March 2012.
Link: http://ec.europa.eu/internal_market/media/docs/elecplay/plum_tns_fina_en.pdf

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.

We are not in the possession of this information.

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, adverting based, content specific channels) or other reasons.

Please see our answer to Q1.1

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

3.1. Please explain and indicate which type of obstacles.

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

4.1. Please explain and indicate which type of obstacles.

Answer to Q 3 and 4

As explained under our answer to Q2 copyright law does not stand in the way of the provision of cross-border satellite services. The most important impediment to more cross-border availability of satellite broadcasting services is the lack of economically viable consumer demand.

The decision to offer cross-border satellite distribution also depends on other factors, such as the nature of the already existing distribution infrastructure in the domestic market (i.e. satellite vs. other distribution technologies such as cable and terrestrial), whether there are communities abroad which share linguistic or cultural affinities, costs related to SD/HD transmissions, etc.

Since public service broadcasters, pay TV and free-to-air commercial broadcasters have different refinancing methods/business models, they will face different business decisions when considering whether to provide cross-border broadcasting services via satellite. From a free-to-air commercial broadcasting perspective, it is typically advantageous to focus on the relevant advertising market(s) rather than on pan-European satellite distribution.

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

The country of origin principle is not properly understood in some countries – or is being interpreted in different ways in different countries, and ways in which we do not believe it was intended by the Directive. For example, in Sweden CMO STIM claims the music rights in satellite broadcasts should be cleared where the UPLINK takes place, rather than where the channel 'enters into the chain of communication', i.e. the initial broadcast transmission centre. We would stress however that this is a national issue, rather than one which needs to be addressed at European level in the context of the current review.

5.1. Please explain.

Satellite broadcasters have their broadcasting equipment located in a certain country, which makes the determination of the «country of origin» a straightforward issue. The determination of the «country of origin» would be more problematic however for communication to the public/making available of content online (see also our answer to Q18).

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?

To a certain extend.

6.1. Please explain.

With regard to direct licensing of audiovisual right the license fee is determined by taking into account the relevant public, and is freely negotiated between the relevant parties. Licence fees may be calculated on a cost per subscriber basis or can be a flat fee. In relation to the latter, it is important to know the size of the addressable public when determining the value of the fees. Where licence fees include a premium for exclusive access to those rights, the licence fee could be undermined if there were inroads to exclusivity, e.g. due to cross border supply.

On the other hand, fees of CMO's with regard to collective licensing of music rights are often unilaterally imposed on the broadcaster by the CMO. This is problematic because many CMO's don't take into account the relevant public when determining those tariffs. The license fee is usually a % of revenue of the broadcaster, including revenue that has no link with the exploitation (e.g. including cable revenue even if it is for a satellite licence). We would stress however that this is a national issue, rather than one which needs to be addressed at European level in the context of the current review

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.

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.

We are not aware of any problems in this regard. However, extending the principle of «country of origin» to online exploitations might be problematic when it comes to enforcing the rights (see our answer to Q 19 – 19.1).

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)?

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?

As explained in our answer to Q1, the introduction of the "Country of Origin" principle at EU level has facilitated clearance of music rights on a collective basis.

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

We don't see any contradiction with other EU actions.

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

Very limited and only in so far as it concerns the clearance of music rights (see our answer to Q1).

9.4. Please explain.

See above.

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?

Mandatory collective management for cross-border cable retransmission has been successful in avoiding the specific situation whereby right holders in parts of broadcasting programmes who are not represented by collective agreements or a CMO, could exercise their exclusive rights individually vis-a-vis cable operators, thereby causing 'black-outs' ('*network operators can never be sure that outsiders will not claim individually a right to authorize the retransmission (the "outsider problem")*'.)[14]

The exclusion of mandatory collective management for broadcasters' own rights or the rights transferred to them in Article 10 is however crucial and goes to the essence of broadcasters' business strategies. As pointed out by Professor Hugenholtz:

"this exceptional status is wholly justified. Broadcasting organisations are easily identifiable, so no need for channelling their copyright claims through a collecting society has ever arisen"[15]

By specifically excluding the broadcasting right from those rights subject to mandatory collective licensing, Article 10 of makes clear that broadcasters retain control over their signal and have the right to determine where, and by whom, this signal can be re-transmitted. This is not an academic point – broadcasters spend much of their time in negotiations with platform operators to determine which platforms may carry their programme services. Such negotiations are, in many countries, influenced by other, non-copyright, legal considerations at both the national and EU level (must-offer, must-carry, competition law).

It is essential for the strategic development of the broadcasting/audiovisual industry that broadcasters retain control over the distribution of their programme services. It is through the individual viewer's identification of a particular programme service, and the character of a particular offering, that the broadcasting industry maintains and grows its market share. Any move away from the Article 10 protection – and, even if this is not the intention of the European Commission, we can expect that other stakeholders will call Article 10 into question – would have the effect of transforming broadcast content from a valuable commercial property into something resembling a mere "utility". Attempts to regard content as a utility underestimate the added value which is provided by an exclusive media partner, particularly in terms of marketing the content and ensuring it is scheduled and promoted in a manner which is regarded as appropriate by the rightsholder and, where relevant, the original creators. Broadcasters invest almost half of their revenue back into original content and the Article 10 exemption is one of the prerequisites for this virtuous circle for consumers.

Additionally, the fact that a channel can be received via a terrestrial signal does not automatically mean that it should be freely available on other distribution networks such as encrypted DTT, cable and IPTV. In these networks there is a third party operator involved who benefits commercially by charging a subscription fee to its end users or who may sell other services such as telephony, broadband or other television services. It is not reasonable that an operator should be able to build a business using content that it obtains from broadcasters for free or with a fee that is not negotiated directly with the broadcaster or its agent.

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[14] Commission of the European Communities: 'Proposal for a Council Directive on the «country of origin»rdination of certain rules concerning copyright and neighbouring rights applicable to satellite broadcasting and cable retransmission'. 11 September 1991, p. 24

[15] « Convergence, Copyrights and Transfrontier Television », IRIS Plus/European Audiovisual Observatory, August 2009

Another point relevant to keeping Article 10 intact is technical security and better protection from piracy. It is vital that broadcasters control the distribution of a channel and its content in order to prevent piracy. The rightsholders (particularly the large studios) from whom broadcasters license content require a high level of content protection to be met and the broadcasters generally support such controls. Most rightsholders require operators to have in place sufficient Digital Rights Management (DRM) or encryption technology to enable them to control and restrict the access to content to authorised subscribers; copy generation management systems which implement copy protection technology to prevent high quality copies being made unlawfully. Such provisions are passed on to operators only contractually, when the broadcasters have exclusivity on their signal and the ability to negotiate freely on the carriage of their channels.

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).

As explained in our answer to Q10 the current system works correctly and the exemption in Article 10 is wholly justified.

The exemption is article 10 remains wholly justified but some problems however exist in the application of this provision at national level. In both Norway and Denmark CMO's have asserted their right to license all rights collectively, regardless of whether those rights have been transferred to the broadcaster or not. In other words, cable rights in audiovisual works are acquired by the broadcaster, but still the cable operators have to pay for such rights when they retransmit the channels, resulting in double payments. We would stress however that this is a national issue, rather than one which needs to be addressed at European level in the context of the current review.

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

Yes, but only when there is sufficient consumer demand (see our answer to Q2). It should be noted that it is (locally established) cable operators who, on the basis of existing consumer demand, determine which TV channels they would like to include in their services in order to make them attractive in their markets.

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.

ACT members do not encounter problems related to the clearance of rights to get their channels retransmitted via any platform. Any disagreements which may arise is better, faster and more smoothly dealt with via negotiations.

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

We are not aware of any use of the negotiation and mediation mechanisms established under the Directive.

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)?

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?

No opinion.

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

No opinion.

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

No opinion.

14.4. Please explain your answers.

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).

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

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

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

General remarks

The importance of contractual freedom

Extending the principle of «country of origin» to the making available right would have a serious detrimental impact on every relevant stakeholder as the value of exclusive rights would be undermined and the crucial principle of contractual freedom might be questioned, which would force the market into pan-European licenses and would have serious unintended consequences:

- Faced with a series of lower-fee non-exclusive pan-EU deals with a host of national platforms, rights owners to high-value content (sport, films, high-end drama and entertainment) will either sell rights on a pan-EU basis, which smaller national platforms will be unable to pay or withhold content from online distribution until exclusive national windows have expired across the EU (resulting in less content being available online in Europe). The removal of the prohibition of the right to agree on exclusivity within one territory would most likely result in significant overall increases in the pricing of content supply given that a territorial extension would also increase the number of potential viewers of such content.

- If rights move to a pan-EU model they are unlikely to be acquired by local domestic operators. Instead the main beneficiaries will be larger content aggregators who have a potentially world-wide geographical reach, who offer content in the main European languages, particularly English and who have the negotiation power enabling them to acquire exclusive licenses for the entire EU territory. There is a real risk that smaller markets and less-widely spoken languages will be marginalised, leading to a reduction in consumer choice online as their consumers are serviced increasingly by pan-EU international platforms. National online offerings would be impoverished, only being able to secure content rights with no wider international appeal – digital innovation will decline as online rights become harder to secure. Worldwide operating aggregators can capitalize content rights without any territorial restrictions. In contrast, local broadcasters do not have the resources to operate profitably outside their home territories and there is comparatively less demand for its locally produced content on a pan-EU basis given the distinctive language base of their locally produced content. A removal of territorial restrictions would at the same time lead to local broadcasters having to increase the amount of own-produced content significantly to stay relevant to a local audience. This would require significant investments into local marketing and technical operation. However, decreasing revenues (from high-value content) are to be expected in the event that pan-EU or worldwide licenses were required. Consequently, local broadcasters would have to raise prices for viewers to amortise unrestricted rights. Such development would on the long term also impair the requirements of a fair competition and lead to a diminished consumer choice.

- Further, the business model of advertising funded online services would be substantially harmed to the detriment of the consumers. One of the most important drivers for commercial free television production, distribution and platform development and services is the exclusivity of content for the relevant territory. Advertising clients generally only wish to target audiences in distinct EU territories, based on local cultural preferences and languages. Likewise, territorial licensing allows local broadcasters to acquire rights to content which they require based on such local cultural preferences and languages. It is therefore imperative that the exclusivity is maintained for content online. If a series of non-exclusive pan-EU or worldwide licenses for the same content was available to multiple content aggregators/broadcasters, this would be far less attractive to local broadcasters' advertising clients as that same content could be made available in their respective territories by (possibly many) other content providers. It would be less valuable to those advertisers and less valuable to local broadcasters as consumers would simply watch the same content on another provider's service. The consequence of such devaluation would be a reduction in the revenues broadcasters can generate from such content which in turn would negatively impact on the prices that local broadcasters can pay to the producers of content. They would also be unlikely to be able to recoup their investment in such content given such lower revenues. This would negatively impact on the availability of advertising-funded content to the consumer since producers would be incentivised to not licence advertising funded online rights in order to safeguard their much more valuable television business. As a consequence, more content, in particular high-value content, would be moved behind the paywall which results in higher costs to the consumers to view such content.

- As rights are increasingly sold to pan-EU platforms for pan-EU distribution, multi-territory funding for European production will decline. This will mean fewer European productions and a greater market share for large-scale, global content produced outside of the EU.

In particular, the ACT member companies observe the following risks, should the «country of origin» principle be applied to online services as well.

At risk: EU drama production. As TV production values have risen to cinematic quality, broadcasters have sought to spread the risk via either co-productions or pre-sales in different EU markets. Pan-EU distribution would make such European productions very difficult to finance, as the pre-finance market relies on a broadcaster being able to secure exclusivity to distribute in their home market. ITV Studios' *Titanic* illustrates the dual role of presales and co-funding in financing content: it was co-funded by, and presold to ITV Studios and 7 other European broadcasters.

At risk: compelling online content services. Broadcasters are able to offer their viewers a full range of programmes through national online catch-up services. If pan-EU distribution becomes compulsory then premium content, such as high-end drama and sports rights, is likely to be withdrawn from these services in order to preserve revenues from broadcast distribution in other European markets.

At risk: news and local programming. News and local programming is expensive to produce and is financed thanks to the return that broadcasters get from high-value content. In a scenario where only larger content aggregators would be able to acquire rights to high-value content, the ability for local broadcasters to invest in news and local programming will be seriously affected.

At risk: EU-wide availability of football. Currently European football leagues licence their rights in their home country and also across the EU, at different prices which reflects different levels of demand: the result is the widespread availability of matches across the EU.

Legal obstacles

According to two recent studies commissioned by the European Commission which conducted research on the making available right and the reproduction right, significant legal and practical obstacles exist regarding the extension of the principle of «country of origin» to the making available right. In the initial *De Wolf Study on the Application of the Copyright Directive*, which was primarily aimed at assessing the application of the Copyright Directive, concerns were raised with regard to legal mechanisms (such as the" country of origin" principle) 'localising' the making available right. Specific concerns were raised on the potential impact such application could have on matters relating to enforcement and copyright (such as authorship, initial ownership of copyright, transfer of rights and infringement matters).[16] In particular, the report warned that potential issues could arise with regard to the interaction between the making available right and the reproduction right, and pointed out to the possible scenario where the reproduction right would occur in the country of destination which would still trigger multiple authorisations by rightholders.[17] With regards to enforcement, the extension of the country of origin principle would mean that rightholders would only be able to obtain an injunction in the country of origin. Infringers would have an incentive to establish themselves in the Member States with the lowest level of copyright protection and/or

[16] De Wolf and Partners: 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society'. October 2013 p. 176 + 179
[17] Ibid., p. 181

enforcement which would result in a '*lower overall level of protection in case of infringement*.[18]' Site blocking injunctions already occur frequently and have proved to be more efficient in certain Member States than in others.

At the request of the Commission, a further study was conducted by De Wolf to give advice on '*possible accompanying legislative measures (…in particular with regard to further harmonization at EU level with regard to authorship and ownership, transfer of rights….) that are needed if one of the policy options in the initial study were to be followed*. In this regard, De Wolf was also told to consider if (and whether) specific measures might be needed to *"mitigate negative outcomes for rightholders"*.[19]

The subsequent study by De Wolf (*Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions*) confirmed that due to the characteristics of the relationship between the making available right and the reproduction right in relation to '*licensing and infringements of rights',* significant barriers would emerge. Subjecting the making available right to the country of origin would risk that this right is '*undermined by the existence and localisation of reproductions directly associated to the act of making available to the public. Especially "downstream" reproductions may take place in any Member State where the work is accessed (temporary copy or permanent download).*'[20] The study advised the Commission, on the basis of the principles of Better Regulation, not to extend the scope of the country of origin principle to exclusive rights which enjoy protection under the European and international copyright regime.

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

No it wouldn't. Quite the contrary, such an approach might provoke a series of unintended consequences leading to less content being available to the consumer. See our answer to Q 15 in this regard.

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

First of all it is important to point out that the majority of broadcasters' content is already accessible online across borders. The Commission recognises this in its staff working document accompanying the DSM strategy and stated that broadcasters mainly geo-block US content, international sports and music events, but that the vast majority of all broadcasters' online content (65%) is available across borders:

> *"Cross-border accessibility of online content services varies, with many services available at national level only. For example, in May 2011, about 35% of broadcasters offering long-form video content on their websites (e.g. through catch-up TV services) used geo-localisation to restrict access to certain types of content, especially US content, international sports and music events, which suggests that national content is more broadly available."*

This is also confirmed by the recent Eurobarometer survey[21], in which a majority of respondents indicated that they didn't have any problems accessing online content across borders.

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[18] Ibid., p. 179
[19] Ibid., p. 6
[20] 'study on the making available right and its relationship with the reproduction right in cross-border digital transmissions'. De Wolf & Partners, December 2014, p. 79
[21] 'cross-border access to online content; report'. Flash Eurobarometer 411, August 2015.

The amount of content that is available online across borders depends on consumers' interest and demand, which is still very low and hardly ever an economically viable business case (see our answer to Q2).

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)?

The impact would be very limited for audiovisual rights, but might be relevant for music rights, which are more generally subject to collective management. See our answer to Q1 in this regard.

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

This would be very problematic. Unlike for satellite broadcasting an online transmission is difficult to locate.

In analogy with satellite broadcasting (see also our answer to Q5.1) the communication to the public/act of making available could be located where the servers are located, but case law of the CJEU locates the copyright relevant acts "at least in the member state targeted"[22], but also in the place where the webservers are located.

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

Yes, especially with regard to the enforcement of copyright. As explained in our answer to Q15 the extension of the "country of origin" principle would mean that rightholders would only be able to obtain an injunction in the country of origin (which would be difficult to determine as explained in our answer to Q18). Infringers would have an incentive to establish themselves in the Member States with the lowest level of copyright protection and/or enforcement which would result in a '*lower overall level of protection in case of infringement*.[23]' Site blocking injunctions already occur frequently and have proved to be more efficient in certain Member States than in others.

If, in addition, an extension of the "country of origin" principle would affect rightholders commercial and/or contractual freedom this would lead to a general lowering of the level of protection of broadcasters and right holders (see also our answer to Q 15).

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

Instead of harmonising EU copyright, the EU should refrain from applying the principle of "country of origin" to the making available right. As explained in the De Wolf studies and in our answer to Q15, the legal obstacles are immense and the effect on investment and innovation would be negative.

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[22] *Football Dataco, Ltd. v. Sportradar, GmbH*, Case C-173/11

[23] De Wolf and Partners: 'Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society'. October 2013 p. 176 + 179 p. 179

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)?

Authors and neighbouring rights are licensed in agreements with audiovisual producers, who centralise all rights, which facilitates clearance of rights on all platforms. Music rights are generally cleared through collective management.

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

Not at all, our members' channels are retransmitted by a myriad of other platforms (online, satellite retransmission,…) and rights clearance has not been problematic in this regard.

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?

The question of whether in case of "direct injection in the cable network" the act of communication to the public is undertaken by the broadcaster, cable operator or both, has given rise to some discussion and national case law and is currently pending before the CJEU in Case C-325/14, *SBS Belgium*.

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

See our answer to Q21.

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?

Authors and neighbouring rights are licensed in agreements with audiovisual producers, who centralise all rights, which facilitates clearance of rights on all platforms.

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

No.

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)?

Authors and neighbouring rights are licensed in agreements with audiovisual producers, who centralise all rights, which facilitates clearance of rights on all platforms. Music rights are generally cleared through collective management.

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

No.

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 retransmission[3] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)? Understood as the simultaneous transmission of the broadcast by a different entity than the broadcaster (see footnote 2).

This would be an unnecessary limitation on exclusive rights that would be non-compliant with international norms (see our answer to Q28).

Broadcasters' programmes are licensed today on all mentioned platforms under the current legislative framework.

24.2. the simultaneous transmission[4] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)? Understood as the simultaneous transmission of the broadcast by the broadcaster itself.

See response to Q24.1

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 would be absolutely crucial (see our answer to Q10).

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

No, on the contrary. The market for online services has developed very well, facilitated by the Communication to the Public Right enshrined in article 3 of the 2002 Copyright directive, without the existence of mandatory collective licensing. Any further expropriation of right holders' rights and/or ability to have exclusive rights in a certain territory would be a disincentive for investment in audiovisual works and online services (see also our answer to Q15 "importance of contractual freedom").

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?

No, we do not consider that the cable retransmission regime under the Directive should be extended to any other form of transmission.

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

Current legal academia generally agree that extending the mandatory collective licensing regime to the making available right would not comply with the above-mentioned international copyright obligations.

The relevant WIPO treaties, namely the WIPO Copyright Treaty (WCT) and the WIPO Phonograms and Performances Treaty (WPPT), in addition to the TRIPS agreement, are binding on the European institutions, since the EU, along with its Member States, are Contracting Parties to these international legal instruments. Since the TRIPS agreement and the WCT incorporate the substantive

provisions of the Berne Convention, the Commission must also take into account the international norms provided for by this convention.[24]

In order to impose a mandatory collective management regime on an exclusive right, an explicit authorization to do so must be provided for by international norms.[25] Also *'where the international copyright norms and/or the acquis communautaire provide for an exclusive right which can be exercised individually and the relevant norms do not allow for the prescription of conditions for its exercise (nor permit its limitation to a mere right to remuneration), it would be in conflict with those norms to subject the exercise of such a right to the condition that it may only be exercised through collective management'* (own emphasis).

This view is generally confirmed in leading legal doctrine:

> *'where the international copyright norms and/or the rules of the acquis communautaire provide for an exclusive right and do not allow the prescription of conditions of its exercise (nor permit its limitation to a mere right to remuneration), it is in conflict with those norms to submit the exercise of such a right that it may only be exercised through collective management. For example, no provision on mandatory collective management is allowed under the international copyright norms (and the acquis communautaire) in the case of the right to public performance, the right to public recitation or the right of "making available to the public."'* [26]

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?

The application of extended collective licencing (ECL) at national level - as an opt-in option should be decided at national level and developed through a market-led process. We don't see any justification for EU-action in this regard.

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

No (see also our answer to Q29 and Q26).

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?

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[24] See art. 9.1 of the TRIPS agreement and art. 1(4) of the WCT.

[25] Dr. Mihaly Fiscor: '*Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it remain voluntary or may it be "extended" or made mandatory?*'. Dr. Mihaly Fiscor, October 2003

[26] 'Intellectual Property Law and Policy, volume 12'. 2013, p.360-363

As explained in our answer to Q12, the ACT has no experience with these mechanisms.

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?

As explained throughout the questionnaire, the ACT is convinced that the market has well developed based on commercial negotiations. We are not supportive of any intervention in this contractual freedom which is best adapted to foster investment in audiovisual productions and innovative online services. Contractual freedom creates the necessary conditions for being fast and adaptable to changes in market and consumer demand.

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.