ITV Consultation Response

Public Consultation on the Review of the EU Satellite and Cable Directive

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Type of RESPONDENT: Commercial Broadcaster

Introduction and Executive Summary

ITV welcomes the opportunity to respond to the European Commission's consultation on the EU Satellite and Cable Directive (SATCAB). As a traditional broadcaster (with public service obligations) and as a significant content producer, ITV is a major rights holder, owning our own rights as well as being a mass user of third party rights and as such copyright and rights payments are highly significant to ITV. ITV is a major contributor to the UK creative industries, spending approximately £1billion per annum on content, a material part of which is expenditure on various forms of rights.

As the primary purpose of this Directive has been to facilitate the acquisition and clearing of such rights for cable and satellite transmission, ITV has a very keen interest in seeing that it continues to provide legal certainty and remains fit for purpose in the new era of convergence. In doing so, however, a balance must be struck between the territoriality of copyright and the functioning of a modern internal market with respect to TV channels and audiovisual co978406813345-95978406813345-95ntent.

We consider that two broad objectives of the SATCAB Directive – providing legal certainty through the establishment of the country of origin principle for satellite transmission and streamlining rights clearance with the introduction of a compulsory collective management of underlying rights for cable retransmission – have been realised. The Directive can therefore be said to have been broadly successful in these respects. That success, however, rests on the Directive having been set up as an "enabling measure" that has complemented and facilitated market developments where these made business sense, recognising the underlying importance of commercial negotiations between market players. As such ITV has only had to have recourse to the SATCAB Directive in a limited number of circumstances, primarily in Ireland with regard to satellite transmissions.

The key driving force behind take-up of content from different Member States has been, and will continue to be, growing consumer demand for high-quality productions. ITV productions are now broadcast in all 28 Member States, with new shows including Mr Selfridge, Aquarius and Jekyll and Hyde sold this year, alongside original formats such as Come Dine with Me and Hell's Kitchen. These shows are broadcast on both linear and non-linear platforms. Most commonly their success rests on the commercial partnerships with other broadcasters and platforms who often tailor these programmes to suit their specific audience, adapting to different cultural and linguistic needs. This partnership is also the bedrock for both pre-sales and co-financing arrangements that sit at the heart of the sustainable funding model for high-quality AV content production where production costs are, in the main, increasing. For example Falcón, a recent ITV Mammoth Screen production (acquired by ITV) was co--financed with both ZDF and Canal Plus, who then received the exclusive broadcasting rights to broadcast that show in Germany and Spain.

We are therefore not convinced that an extension or adaptation of country of origin principle, for example to online VOD, would result in the creation of an internal market for audiovisual content any more than that aim has been realised in satellite broadcasting (which is to a very limited extent). Merely establishing the law applicable to rights acquisition will not, in our view, create a digital single market. Nor do we believe that there is a credible case for extending the scope to online VOD as there is little evidence that consumer demand is not being met. As the Commission's own study illustrates, a mere 5% of internet users have tried to access audiovisual content through online services meant for another Member State. This is because of both the sufficient choice in the consumer's own Member State and lack of interest in accessing these services. What extending the

scope will do however is (potentially) pave the way for pan-European licensing benefitting only the large content aggregators who will offer content in the main European languages (primarily English), as well jeopardise a great many European productions that rely on pan-European distribution and multi-territorial funding premised in territorial exclusivity. This would lead to less investment in European drama, less news and local programming and less consumer choice overall.

On the extension of the system of management of cable transmission rights to online, it is our view that there is nothing currently stopping broadcasters from acquiring and clearing these rights as the law stands today, and this is something we currently do. As a general principle, rights holders should also be allowed to determine how, when and where their rights are to be used and on which platforms. This is especially critical for broadcasters themselves where the value invested and at risk through distribution of content has to be recouped through direct commercial negotiations with the distributors who extract substantial value from that content. Any form of moderation or collective acquisition of the broadcasters right on cable or online would destroy the incentives to content investment. However we do recognise some of the challenges that fellow broadcasters face as the simultaneous character of these transmissions can make it more challenging to clear the rights in time.

In conclusion, we believe that the Directive has worked well to date and, in many respects is future-proof given that it recognises the underlying importance of commercial negotiations. With the broadcasters veto and acceptance of important technical measure (such as satellite encryption) the Directive gives appropriate reassurances to right-holders that their work can and will be protected in accordance with copyright agreements, as well as enabling broadcasters to protect and retain control over their signal. These two aspects are key to sustaining the EU's flourishing audiovisual sector particularly in this new globally competitive market. We believe that opening the Directive to review could see these vital elements watered down, possibly removed with very worrying consequences for both our business and the sector overall.

Fields marked with * are mandatory.

I. General information on respondents

* I'm responding as:

- ○ An individual in my personal capacity
- ○ **A representative of an organisation/company/institution**

* What is your nationality?

- ○ Austria
- ○ Belgium
- ○ Bulgaria
- ○ Croatia
- ○ Cyprus
- ○ Czech Republic
- ○ Denmark
- ○ Estonia
- ○ Finland
- ○ France
- ○ Germany
- ○ Greece
- ○ Hungary

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- ◯ Italy
- ◯ Ireland
- ◯ Latvia
- ◯ Lithuania
- ◯ Luxembourg
- ◯ Malta
- ◯ Netherlands
- ◯ Poland
- ◯ Portugal
- ◯ Romania
- ◯ Slovakia
- ◯ Slovenia
- ◯ Spain
- ◯ Sweden
- ◯ **United Kingdom**
- ◯ Other

If other, please specify

* What is your name?

Roxanne Carter, Head of EU Policy & Regulatory Affairs

What is your e-mail address?

Roxanne.carter@itv.com

* Is your organisation registered in the Transparency Register of the European Commission and the European Parliament?

- ◯ **Yes**
- ◯ No
- ◯ Not applicable (I am replying as an individual in my personal capacity)

Please indicate your organisation's registration number in the Transparency Register.

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If you are an entity not registered in the Transparency Register, please register in the Transparency Register before answering this questionnaire. If your entity responds without being registered, the Commission will consider its input as that of an individual and as such, will publish it separately.

Please chose the reply that applies to your organisation and sector.

- ◯ Member State
- ◯ Public authority
- ◯ End user/consumer (or representative of)
- ◯ Public service broadcaster (or representative of)
- ◯ **Commercial broadcaster (or representative of)**

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- ◯ Authors (or representative of)
- ◯ Performers (or representative of)
- ◯ Film/AV producer (or representative of)
- ◯ Phonogram producer (or representative of)
- ◯ Publisher (or representative of)
- ◯ Collective management organisation (or representative of)
- ◯ TV/radio aggregators (or representative of)
- ◯ VOD (video on demand) operators (or representative of)
- ◯ ISPs (internet service providers) (or representative of)
- ◯ IPTV (internet protocol television) operators (or representative of)
- ◯ DTT (digital terrestrial television) providers/DTT bouquet providers (or representative of)
- ◯ Cable operators (or representative of)
- ◯ Other

If other, please specify

My institution/organisation/business operates in:

- ☐ Austria
- ☐ Belgium
- ☐ Bulgaria
- ☐ Croatia
- ☐ Cyprus
- ☐ Czech Republic
- ☐ Denmark
- ☐ Estonia
- ☐ Finland
- ☐ France
- ☐ Germany
- ☐ Greece
- ☐ Hungary
- ☐ Italy
- ☐ Ireland
- ☐ Latvia
- ☐ Lithuania
- ☐ Luxembourg
- ☐ Malta
- ☐ Netherlands
- ☐ Poland
- ☐ Portugal
- ☐ Romania

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- [ ] Slovakia
- [ ] Slovenia
- [ ] Spain
- [ ] Sweden
- [ ] **United Kingdom**
- [ ] Other

If other, please specify

Please enter the name of your institution/organisation/business.

ITV

Please enter your address, telephone and email.

The London Television Centre, Upper Ground, London SE1 9LT, UK

What is the primary place of establishment of the entity you represent?

The London Television Centre, Upper Ground, London SE1 9LT, UK

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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?

- ( ) Yes
- ( ) To a large extent
- ( ) **To a limited extent**
- ( ) No

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No opinion

- ITV transmits broadcasts via satellite, cable, terrestrial and, increasingly, online. With respect to satellite transmission – through Freesat and Sky – ITV channels are delivered via Astra who upgraded their satellite capabilities in summer 2015. The new satellites deliver higher power over the UK, and consequently the updated UK spot-beam drops in strength very rapidly beyond the UK. As such while early satellite TV signals could well blanket part of the continent, new updated technology has seen the satellite footprint shrink, and as such the scale of the spill-over previously experienced has reduced.

- We believe that the 1993 Satellite and Cable (SATCAB) Directive has performed well, complementing both the former Television Without Frontiers Directive and more recently updated AVMSD in paving the way for cross-border provision of television services insofar as this can be achieved under existing copyright rules and inline with market and technological developments.

- A key objective of the SATCAB Directive was to provide greater legal clarity regarding the rights to be acquired for the purposes of communication to the public by satellite at Community level through the establishment the country of origin principle. In this respect we believe the Directive has achieved this goal.

- The Directive has also facilitated the rights clearance for collective licensing – in effect mainly the rights in musical works that have been traditionally managed by Collective Management Organisations (CMOs). As such application of the country of origin for music rights in audiovisual programmes has allowed broadcasters to clear the satellite broadcast of the entire footprint of the signal with one CMO in the originating country. However it is worth highlighting that music rights, are increasingly sold on a pan-European basis. As such we have far less of an issue with cross-border access as they already have permission to stream songs in the different Member States. This is not the case for audio-visual content, where broadcasters negotiate and acquire rights on a multiplatform but territorial basis. In this way broadcasters are able to localise content as well as ensure a sustainable funding model for new content.

- When rights are managed on an individual basis, 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 rely on the consolidation of exclusive rights and the satellite transmission right is licensed on the basis of direct commercial negotiations.

- As a broadcaster, a significant buyer and user of rights, ITV often has to respect two sometimes contradictory aims – adherence to the "country of origin" principle for the act of a communication to the public by satellite on the one hand, and territorial exclusivity of those rights on the other. To allow us to do this, the Directive's recognition of "contractual freedoms" has been critical, as has its recognition of the use of technical measures such as satellite encryption. As such, this *enabling* Directive has encouraged trans-frontier pan-EU satellite broadcasting services where it has been possible to do so, while respecting copyright. By striking this balance it has ensured that content producers are able to meet consumer demand, for example by selling their rights to broadcasters across the EU who tailor this content to specific national audiences. Technological developments, such as updated spot-beams have allowed us to continue reassure rights-holders that our broadcasts are in compliance with obligations around territoriality and use of those rights.

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).

- As legislators recognised that contractual freedoms must be underlying principle this has, in effect, future-proofed this Directive. Given this flexibility, despite significant market changes

since the adoption of this instrument, we have not experienced any problems with the clearance of audiovisual rights as these are pursued through 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
- ◯ To a large extent
- ◯ To a limited extent
- ◯ No
- ◯ **No opinion**

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

- As explained in our response to Q1, our satellite footprint has decreased in recent years. We do not have details to date on what the current share of audience from other Member States is, in particular since the satellite upgrade. The "spill-over" we so have now is concentrated in northern France and Ireland.

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.

- ITV has not experienced any problems with the clearance of audiovisual rights as these are pursued through straightforward commercial negotiations.

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

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

- No. Where there is obvious consumer demand a well-functioning market – such as we have in the AV sector – will see that such demand is well served.

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

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

4.1. Please explain and indicate which type of obstacles.

- No. Where there is obvious consumer demand a well-functioning market – such as we have in the AV sector – will see that such demand is well served.

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

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

5.1. Please explain.

- In the context of the country of origin principle we believe the relevant provision (Art 1(2)(b)) is clear, precise and unambiguous, setting out "*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*". As the relevant physical infrastructure required will be based in one certain country, the determination of where an act of communication to the public has taken place is straightforward.

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

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

6.1. Please explain.

- While right holders consent is only required in the original country of the satellite broadcast, the EU has made clear that remuneration should be calculated taking into account both the actual and potential audience, both in the Member State of broadcast and in any Member State of reception (recital 17). While instructive, we believe that market negotiations already ensure, and deliver, the appropriate market price and level of remuneration for right holders. For this to continue the EU must consider how best to maintain this delicate ecosystem within its Digital Single Market strategy.

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

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

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

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

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

- ○ Yes
- ○ **No**
- ○ No opinion

8.1. Please explain.

- Providing legal certainty through the country of origin principle has limited the potential costs that ITV may have had to pay resulting from any "unintended" broadcasts outside the UK.

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

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

- ○ **Yes**
- ○ No
- ○ No opinion

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

- ○ Yes
- ○ No
- ○ **No opinion**

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

- ○ **Yes**
- ○ No
- ○ No opinion

9.4. Please explain.

- At the time of this Directive's introduction there was a fundamental need to provide legal certainty setting out that the territorial reach of the satellite broadcast. Given the cross-border, potentially pan-European, nature of satellite broadcasts, such action was only ever going to be possible at the European level.

2. The management of cable retransmission rights

The Directive provides a double track copyright clearing process for the simultaneous retransmission by a cable operator of an initial transmission from another Member State (by wire or over the air, including by satellite) of TV or radio programmes (Article 1.3). Broadcasters can license to cable operators the rights exercised by them in respect of their own transmission, irrespective of whether the rights concerned are broadcasters' own or have been transferred to them by other copyright owners and/or holders of related rights (Article 10). However, according to Article 9, all other rights (of authors and neighbouring right holders) necessary for

the cable retransmission of a specific programme can only be exercised through a collecting society. Finally, Articles 11 and 12 introduce negotiation and mediation mechanisms for dispute resolution concerning the licensing of the cable retransmission rights.

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

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

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

- The regime established through the Satellite and Cable Directive allows for cable operators to deliver the "simultaneous, unaltered and unabridged" retransmission of broadcasts. By introducing a mandatory collective management for cable retransmission the EU put in place a system to avoid "black-outs" – where right-holders in parts of a broadcasting programme, not represented by collective agreement of a CMO, could exercise their exclusive rights individually. However a fundamental exception was made for broadcasters, who have been given the option to exercise rights individually in regard to cable retransmission.

- The broadcasters veto has, in ITV's view, been absolutely critical in delivering and protecting the very high levels of investment broadcasters make into the production of European content. The value invested by broadcasters has to be recouped through direct commercial negotiations with the distributors who extract substantial value from that content.

- Finally, the veto enables broadcasters to retain control over our signal and determine where and by whom this signal can be re-transmitted. This is essential both in terms of adhering to our negotiated commercial agreements with platform operators as well as respecting our agreements with rights-holders over how we distribute their content. As such the veto principally gives us the ability and indeed flexibility required to fund, and produce valuable content, and to block where necessary new operators who seek to free ride on and exploit our content.

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

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

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

- ITV has not experienced any problems relating to the clearance of rights to get our channels retransmitted on any platform.

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

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

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

- While never using the processes under the Directive, ITV has had cause to use the Copyright Tribunal to protect itself from the monopoly power of the Collective Management Organisations. It believes that the continued existence of such checks on CMO market power remains important and would therefore wish to see those processes continue.

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.

- Use of this particular recourse has not been necessary because we have been able to, and indeed have preferred to, use commercial negotiations.

For the purposes of evaluating the current EU rules, the Commission should assess the costs as well as the relevance, coherence and EU added value of EU legislation. These aspects are covered by questions 13-14 below.

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

- ◯ Yes
- ◯ No
- ◯ **No opinion**

13.1. Please explain your answer.

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

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

- ◯ Yes
- ◯ No
- ◯ **No opinion**

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

- Yes
- No
- **No opinion**

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

- Yes
- No
- **No opinion**

14.4. Please explain your answers.

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.

- We fear that any extension of scope would have quite substantial and detrimental consequence across the board – for broadcasters, rights-holders and ultimately EU consumers. Certainly from our perspective any extension of the Directive to online risks the act of making available in one Member State undermining the exploitation of the work in other Member States. This could well lead to:
  - a gradual but inexorable move to pan-European licensing whilst putting at risk the underlying principle of “contractual freedom” which maximises investment in original European content and delivers choice for EU consumers
  - legal uncertainty and practical difficulties (including how to determine country of origin, as well as how to tackle copyright infringements and piracy).

- Any country of origin issue beyond satellite is either about direct injection for linear or about making available the right, which in either case is about Article 3 InfoSoc Directive. It would therefore not be appropriate to deal with it in review of this Directive. Moreover, we believe this would be inconsistent with CJEU jurisprudence of the Sportradar case (C173/11).

- ACT, the Association of Commercial Television in Europe – of which ITV is a member – clearly sets out the risks and consequences any extension could have on the audiovisual sector. We refer you to their submission for a more detailed answer to this question.

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

- No – indeed, such an extension could see consumers offered less choice both in terms national and cross-border offerings (see introductory remarks and answer to Q15).

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

- As set out in our introduction a great majority of our content (over 960 titles) is currently available across the EU, in all 28 Member States available both through traditional linear broadcasts and online For the small minority that wish to access online services across Member States, we support efforts by the Commission to realise a scheme of portability for paid services. However we have to take care that we do not mandate cross-border access to all content for all EU consumers. This would have very severe consequences for both the availability and production of original content as already set out, ultimately resulting is less choice for consumers in the medium term.

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)?

- As set out above, any extension of the country of origin principle to online transmissions and retransmissions, would mean that right holders (content producers) would be unable to prevent online access to their copyright works across the entire territory of the EU once rights have been cleared in the first (country of origin) Member State.

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

- When considering the possible problems and pitfalls in this area we believe it is important to flag arguments made in the Commission's own accompanying Staff Working Document to the Communication on Creative Content Online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008, which notes that:

  While internet streaming and indeed simulcasting may indeed be structurally similar to broadcasting, this is less true for a host of 'on-demand' services and 'online retail' of music or film. In the case of online purchases, legal doctrine has established that the relevant act under copyright laws takes place in the country where the consumer has access to the relevant services. In depth analysis will be needed before considering the extension of a technology specific solution. The application of the country of transmission [principle] was introduced by the Satellite and Cable Directive in view of an overspill that could not be avoided in the context of a specific broadcasting technology. In the case of online services, the issue is the accessibility of content services at European level.

  Furthermore, the extension of the country of origin principle raises a number of concerns, such as the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and licence were to be applied to the

whole Internal Market, or of a 'race to the bottom' both regarding the emergence of the protection and the scope of the protection. Hence, the question of whether or not the Satellite and Cable Directive (93/83/EEC) should be made technologically neutral by extending the country-of-origin principle to online services should be addressed through a review of this Directive."[1]

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

- We believe it would yes, both in terms of current levels of copyright protection rights holders enjoy and their meaningful enforcement. As we are seeing with the country of origin principle within AVMS, there are growing concerns in certain Member States that media service providers are purposefully trying to circumvent regulatory restrictions by establishing themselves in more "lenient" Member States. However proving circumvention can be difficult at best if not impossible. Our concern with an extension of this principle under the SATCAB directive is that it would incentivise infringers to relocate to Member States with the lowest level of copyright protection and/or enforcement which would be a) difficult to prove vis-à-vis circumvention and b) could consequently see a lowering of the overall level and standard of protection in cases of infringements across the EU.

- The country of origin is a fundamental principle of the EU in facilitating a single market. However how it is used and deployed must be decided carefully. Given these risks, the lack of evidence suggesting there is a discernable problem requiring legislative action, and market developments already in place to meet consumer demand we do not think the case has been made for an extension in this content.

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

- Should the Commission decide to review the SATCAB Directive with the aim of extending the country of origin principle online, we believe the level of copyright harmonisation and indeed protection will need to be reviewed in parallel. However, this in itself is problematic given the very diverse range of stakeholders' views, Member States competence and issues around proportionality and the overall complexity of copyright law across the EU. In particular, Article 3 of the Copyright In the Information Society Directive (InfoSoc Directive) is engaged by a number of the proposals in this section III.

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

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

- These rights are licensed through commercial negotiations, in the same way that rights are licensed for cable retransmission of TV and radio programmes. In many instances broadcasters and audiovisual producers, like ITV, will centralise all relevant rights to facilitate their clearance for use on different platforms.

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

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[1] Commission staff working document - Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008,

- No

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 "direct injection in the cable network" is an act of communication to the public by the broadcaster, cable operator or both is currently unclear. However this question is raised by Case C-325/14 SBS Belgium that is currently before the CJEU.

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

- Not that we are aware of, no.

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

- These rights are licensed through commercial negotiations, in the same way that rights are licensed for cable retransmission of TV and radio programmes. In many instances broadcasters and audiovisual producers, like ITV, will centralise all relevant rights to facilitate their clearance for use on different 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)?

- These rights are licensed through commercial negotiations, in the same way that rights are licensed for cable retransmission of TV and radio programmes. In many instances broadcasters and audiovisual producers, like ITV, will centralise all relevant rights to facilitate their clearance for use on different platforms.

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)?

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

- We understand that a key reason for an extension of scope here could be to help make it easier and quicker to clear rights needed given the simultaneous character of online transmissions. We do not believe there are any obstacles per se to the clearance of these rights – this extension might help to create a modest saving on administration for some players. On the other hand, the risk of the proposal is to place unnecessary and indeed unwarranted limitations on exclusive rights and how right holders determine the use and distribution of their works across the EU. Were the Commission to go ahead and seek such an extension it would have to be very clear that it would not override historic and existing contracts concluded for grants of specific rights.

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

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

- Same as above (24.1)

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

- Yes. As pointed out by Prof. P. Bernt Hugenholtz in his paper SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive

  " *Broadcasters are allowed to individually exercise their cable rights with respect to their own broadcasts, including rights licensed or transferred to them (Art. 10 of the Directive). 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*".

- This exemption also ensures that broadcasters' retains control over their signal, with the right to determine where, and by whom, this signal can be retransmitted. This is paramount not least given the variety of overlapping considerations that influence which platforms can carry which programmes (must carry, must offer, competition law etc). But crucially this veto is a prerequisite for the virtuous circle of investment which sees broadcasters, such as ITV, (re)invest over £1billion per annum in original audiovisual content. This is especially critical for broadcasters themselves where the value invested, and at risk through distribution of content, has to be recouped through direct commercial negotiations with the distributors who extract substantial value from that content. Any form of moderation or collective acquisition of the broadcasters right on cable or online would destroy the incentives to content investment.

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

- We don't believe that extending mandatory collective licensing to online will see a greater uptake in cross-border accessibility of online services. Rather this could weaken the underlying principle of contractual freedom which, may well led to less investment, less availability and less choice cross border and in individual Member States overall.

- We refer to ACT's response which reads "*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*".

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 since the distinction between closed and open is blurring.

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

- We would like to refer you to ACTs submission on this point.

Which reads: 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 BERNCE Convention, the Commission must also take into account the international norms provided for by this conventions.

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. 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 norm and/or 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 of remuneration), it is in conflict with those norms to submit the exercise of such a right that it may only be exercised trough 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"*

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?

- An extended collective licensing (ECL) regime would be preferable to a mandatory one, given its voluntary nature (allowing right-holders to opt out of the collectively agreed contracts). However we are not yet convinced that a case has been made for this intervention and such action is indeed justified.

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

- No, nor do we see any justification for EU-action in this regard (see response to 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?

- No opinion

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?

- Over the past decades this sector has developed and, in many instances, flourished given the

commercial freedoms enjoyed by all market players. Rather than seeking to influence commercial negotiations – which are better able to adapt to market developments and address changing consumer demand – we believe the EU's focus should be on supporting competitive markets and encouraging greater levels of investment so that the virtuous cycle for high-quality original, European audiovisual content is maintained. As such, we do not believe that new measures are required in this area.

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.

None