CONSULTATION
on Directive 2010/13/EU on audiovisual media services (AVMSD)
A media framework for the 21st century

Questionnaire

I. General information on respondents

I'm responding as:

- An individual in my personal capacity
  - The representative of an organisation/company/institution

What is your nationality?

- Austria
- Belgium
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Germany
- Greece
- Hungary
- Italy
- Ireland
- Latvia
- Lithuania
- Luxembourg
- Malta
- Netherlands
- Poland
○ Portugal
○ Romania
○ Slovakia
○ Slovenia
○ Spain
○ Sweden
○ United Kingdom
○ Other

What is your name? Frédéric Young
Please your email: fyoung@maisondesauteurs.be

I’m responding as:

○ An individual in my personal capacity.
○ The representative of an organisation/company.

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

○ Yes
○ No

Please indicate your organisation's registration number in the Transparency Register.
111683113219-24

Please register in the Transparency Register before answering this questionnaire. If your organisation/institution responds without being registered, the Commission will consider its input as that of an individual and as such, will publish it separately.

Please tick the box that applies to your organisation and sector.

○ National administration
○ National regulator
○ Regional authority
○ Public service broadcasters
○ Non-governmental organisation
○ Small or medium-sized business
○ Micro-business
○ Commercial broadcasters & thematic channels
○ Pay TV aggregators
○ Free and pay VOD operators
○ IPTV, ISPs, cable operators including telcos
○ European-level representative platform or association
  • National representative association
  Research body/academia
○ Press or other
○ Other

My institution/organisation/business operates in:
○ Austria
○ Belgium
○ Bulgaria
○ Czech Republic
○ Croatia
○ Cyprus
○ Denmark
○ Estonia
○ France
○ Finland
○ Germany
○ Greece
○ Hungary
○ Italy
○ Ireland
○ Latvia
○ Lithuania
○ Luxembourg
○ Malta
○ Netherlands
○ Poland
○ Portugal
○ Romania
○ Spain
○ Slovenia
○ Slovakia
○ Sweden
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 received¹). 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 / No opinion

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).

The country of origin principle for the communication to the public by satellite under Directive 93/83/EEC means that the act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth (Article 1.2a). It therefore specifies where the act of communication takes place to avoid the cumulative application of several national laws to one single act of broadcasting (recital 14).

However, it does not provide for any mandatory rights’ clearance mechanisms for the authors’ exclusive right to authorise the communication to the public by satellite, which may be acquired only by agreement. Article 3 allows Member States to provide for extended collective licensing for some category of works (except cinematographic works) provided that the unrepresented rightholders shall, at any time, have the possibility of excluding the extension of the collective agreement to their works (Art 3.2).

The country of origin principle for the act of communication to the public by satellite has therefore no impact on the clearance of rights. It only impacts on the applicable law as it limits the application of national laws to the one of the country of origin for cross-border satellite broadcasts. The only effective tool to facilitate rights clearance is collective rights management, which is only made possible, but not mandatory, by Article 3.2.

Whether mandatory, voluntary or extended, collective licences have developed in the broadcasting field irrespective of the determination of the applicable law. Audiovisual authors’ collective management organisations (CMOs offer collective licensing solutions to broadcasters in a number of countries (Belgium, France, Italy, Netherlands, Poland, Portugal, Slovakia, Spain) which facilitate rights’ clearance and may cover broadcasters’ different modes of exploitation (free to air broadcasting, satellite broadcasting, web stream, replay, etc.). It is only the development of those collective agreements all over Europe that would facilitate rights’ clearance.

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 /

On the whole, consumers are more inclined or advised to choose media services on cable and IPTV, often integrated in multiplay offers with fixed/mobile phone and internet.

Television satellite direct free on air services seems to be more used by big Eu members media public services of (UK, France, Spain, … that wand to widen their offers to non linear services linked to basic
services such as catch up tv. Their audiences stay low outside the country of origin or at least outside same linguistic or geographical zones.

The question of the distribution of tv programs bundles is far more crucial.

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.

Almost '0' in Belgium

The 90% of the audience use cable distribution services.

Very low sat audiences (less than 1%) can be found in two types of services :

- TV sat (7M) satellite paying bouquets (see airfield CJE decision) is so far not complying to (all) authors rights obligations. The targeted public is people with week-end residencies;

- Ethnics groups from Turkey, or Mediterranean Countries (Marroco / Tunisia) which cannot have enough access to specifics tv programs bundles in the offers of media services distributors.

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.

We consider that the main problem with this part of the Directive is that it establishes the country of origin principle for direct satellite broadcasting. The country of origin principle is a legal anomaly in the copyright field and a derogatory rule to the general principle of territoriality. The country of origin principle equals an exhaustion of rights and has been expressly rejected for the copyright field by subsequent Directives such as the 2000/21/EC Directive on electronic commerce and the 2001/29/EC Directive on copyright in the information society. Fortunately, it only applies to a very limited method of exploitation which in addition did not develop in terms of access model and market.

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 /

Some Members States have too weak regulations and controls mechanisms. It is crucial to update the AVMSD directive to enforce copyright and cultural diversity objectives.

Author's and producers should legitimately be reluctant to deal with such services.

3.1. Please explain and indicate which type of obstacles.

Author and neighbouring rights are not an obstacle to the development of any service but a facilitator for the licensing of services providing protected works.
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 /

4.1. Please explain and indicate which type of obstacles.

Authors’ right are not an obstacle to the development of any service but a facilitator for the licensing of services providing protected works.

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.

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

Sometimes the broadcasters do not communicate relevant information needed to calculate the remuneration of the rightholders.

Article 17 of the new directive 2014/26/EU on collective management will help if all national states implement this provision in their legislation. The enforcement of this article has to be specially monitored by the EU Commission.

6.1. Please explain.

Recital 17 of the Directive is very clear: it provides that all aspects of the broadcast, such as the actual audience, the potential audience and the language version, should be taken into account when determining the licence fee.

However, in practice, the determination of the appropriate fee is sometimes complicated by the lack of transparency of the information provided by some users. Directive 93/83/EEC does not provide any obligation for users in this respect as it is the case in Article 17 of Directive 2014/26/EU on Collective Rights Management.

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 / To a large extent / To a limited extent / No / No opinion

It is of course much more complex and expansive for a small CMOs to act in the country of origin if needed. That could lead to a lowered level of protection specially if the courts of the country of origin do not understand the chain of value or the chain of rights of other EU countries.

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.

It is true that the country of origin principle can only work if there is a sufficient degree of harmonisation in the coordinated field. A good example is the 2010/13/EU Directive on the Audiovisual Media Services (AVMS) which does not deal with copyright but with some aspects of audiovisual media services provided across frontiers (incitement to hatred, commercial communications, short news reports, promotion of European works, etc.). It provides that each Member State shall ensure that all audiovisual media services transmitted by providers under its jurisdiction comply with the rules of the applicable law in that Member State. In this context, Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by the Directive.

Member States being deprived of their right to act in these fields, it is essential to ensure that the rules being coordinated in these fields by the Directive are the same for everybody. Otherwise, the cumulative application of the country of origin principle and defective harmonisation lead to discrimination and unfair competition between service providers. These discrepancies encourage forum shopping by service providers to establish in the least regulated country and a race to the bottom by Member States to attract these service providers. We are of the opinion that the provisions of the AVMS Directive on the promotion of European works on on-demand services are not harmonised enough and therefore create the above-mentioned problems. We addressed this issue in our contribution to the consultation on the AVMS Directive which closed on 30 September 2015 and hope that it will be addressed in the review of this Directive next year.

In the copyright field, we consider that full harmonisation is not the ultimate goal as it would run against the cultural diversity of the EU. The country of origin principle is therefore not a model we recommend. Harmonisation has to be targeted to address internal market problems only. There is no reason and no need for full harmonisation in the copyright field.

As an example, we do not think it is necessary to harmonise the authorship of audiovisual works further than what has been done by Directive 93/83/EEC and Directive 93/98/EEC which designate the principal director of a cinematographic or audiovisual work as its author or one of its authors. These provisions addressed a real problem of differences across Europe where in the UK and Ireland, the director was not considered an author of the audiovisual work, but left Member States free to designate other co-authors. As long as the 3 main authors (screenwriter, director and composer of the original music) are recognised, we do not see any practical problem in having other differences rooted in legal and cultural traditions.

On the other hand, there is a need for further harmonisation in the field of copyright to ensure that audiovisual authors get remunerated for the use of their works, wherever in Europe. Contractual freedom and the lack of European legal mechanisms to ensure proper remuneration has led to important differences between Member States where authors are often deprived of their legitimate
interest in being associated to the revenue generated by the exploitation of their works. This is a matter for further harmonisation and we recommend the Commission tackles it in its forthcoming initiative on copyright by introducing an unwaivable right to equitable remuneration for the making available of their works which would be payable by platforms and collectively managed (see SAA white paper on audiovisual authors’ rights and remuneration in Europe, March 2015).

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.

The costs of the country of origin principle under the Directive are huge from a legal and political perspective as the Directive might give the impression that the country of origin principle could be a model to follow, while it is a legal anomaly in the copyright field. It runs contrary to the territoriality principle and the objective of a high level of protection of intellectual property.

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.

As explained in previous answers, the application of the country of origin principle to direct satellite broadcasting did not help develop this method of exploitation and so has not demonstrated any benefit to the European audiovisual industry. This model has clearly been rejected by further EU actions such as the 2000/21/EC Directive on electronic commerce and the 2001/29/EC Directive on copyright in the information society which reaffirmed the territoriality principle for copyright and non-exhaustion of the right of communication to the public.

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

The system of clearance and management of rights is extremely efficient when respected by the different parties.

A single contract or a single bouquets of contracts is enough to licence the use of countless audiovisual and radio works and performances by distributors of media services bundles (radio and TV).

This neutral system allows a constant evolution of technologies used (i.e from analogic to digital, to 20 different channels to more than 100, to technical segmentation of encrypted bundles to address specific audiences, to fight piracy) and commercial business models (re multiplex subscriptions, or linear/non linear mix of services)

The level of remuneration is fair while the final price for consumers staid largely under the US level.

In Belgium, more than 90 % of the consumers have chosen e a “cable” distribution offer to get access to their media services. More and more are choosing multiplex offers.

The average revenue per user declared by Cable Europe has increased 200% between 2005 and 2014.

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).

Article 9 of Directive 93/83/EEC provides that Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society. This system simplifies the clearance of rights for cable operators and guarantees that audiovisual authors actually receive the remuneration they are due for the cable retransmission of their works. According to Prof. Hugenholtz, “the system of compulsory collective management was introduced in 1993 to avoid the

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2 http://www.cable-europe.eu/industry-data/
nightmare scenario of myriads of individual rightholders besieging cable operators with copyright claims, and causing black-outs in retransmitted broadcasts.”

This rights clearance mechanism of mandatory collective management for the cable retransmission right has greatly facilitated the development of the cable industry in Europe and the retransmission of TV channels across Member States. Cable Europe reports 56.75 million cable TV customers in the EU in 2013 (with Member States’ disparities in terms of penetration\(^4\)) and € 32 billion of revenue for TV subscription (cable operators today also provide broadband internet and telephony services).

This mandatory rights clearance mechanism prompted the development of collective management organisations (CMOs) for audiovisual authors all around Europe, to get a direct share in the remuneration paid by cable operators for cable retransmission. In many European countries, cable retransmission royalties represent more than 40% of the collections of audiovisual authors’ CMOs (Austria, Croatia, Czech Republic, Estonia, Finland, Hungary, Portugal, Romania, Slovakia, Slovenia, The Netherlands and the UK). In these countries, cable retransmission royalties are the authors’ main revenue generated from the use of their works, in particular from foreign countries.

The collective management of the cable retransmission right is an important security for authors that the remuneration they are due for the cable retransmission of their works is paid. However, the Directive contains loopholes/grey areas that are exploited by leading cable operators, such as the US owned Liberty Global group to try to bypass European audiovisual authors’ CMOs.

The author’s cable retransmission can be assigned

First, the Directive regulates the exercise of the cable retransmission right by imposing its collective management, but recital 28 provides that the right to authorise a cable retransmission can still be assigned. Taking into account the (rebuttable) presumption of transfer of right to the producer that exists in a number of Member States, some cable operators argue that they would only need to conclude agreements with producers as assignees of the authors’ retransmission right.

That is not in conformity with the high level of protection of authors required by Directive 93/83/EEC as well as Directive 2001/29/EC and is contrary to the principle recognized in amongst others the Luksan ruling of the European Court of Justice that audiovisual authors should be able to freely dispose of their rights. An author must have the choice to transfer his rights to a CMO in order to safeguard his interests, as also recognized by recital 29 of Directive 93/83/EEC, in order to protect himself against the practice of buy-out contracts.

Rights exercised by broadcasters are excluded from the mandatory collective management

Second, Article 10 provides that collective management does not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights. This exemption is sometimes over exploited by cable operators to try to impose an “all-rights-included model” by which the authorisation of the broadcasting organisations would cover all the authors’ rights involved in the programmes and be sufficient, whether or not the rights of authors, artists and producers have been acquired or reserved by their counterparts. It does

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\(^4\) More than 50% of the households are cable customers in Belgium, Denmark, Estonia, Finland, Hungary, Luxembourg, Malta, Netherlands, Poland Romania and Sweden.
furthermore violate a principle of civil law that nobody can assign more rights that it has acquired in a aggressive and unfair attitude that operators, such, as a US owned cable operator have adopted

Fortunately, recital 29 provides that the exemption provided in Article 10 should not limit the choice of holders of rights to transfer their rights to a collecting society and thereby have a direct share in the remuneration paid by the cable distributor for cable retransmission. This recital provides for a vital argument for CMOs to advocate for necessary collective agreements with them, in response to the two above mentioned problems. However, in some court cases, the courts have imposed on CMOs to prove that authors have transferred them the right (LIRA/ZIGGO case, district court of Amsterdam, August 2014) or that individual contracts between authors and producers reserve the cable retransmission from any transfer to the producer. In the end, CMOs have usually managed to prove in court that they benefit from valid transfers of rights, but it is very burdensome, costly and time-consuming.

To end these lengthy court actions caused by the refusal of operators, such as a US owned cable operator, to pay audiovisual authors’ CMOs, Belgian and Dutch laws were recently changed. New Article XI.225 of the Belgian Economic Code which codifies the copyright law provides that when an author has transferred his cable retransmission exclusive right to a producer, he shall retain the right to obtain a remuneration for cable retransmission. This right cannot be waived and its management can only be exercised by CMOs representing authors (this provision entered into force on 1st January 2015).

In the Netherlands, new Article 45d which entered into force on 1st July 2015 provides that anyone who broadcasts the film work or who communicates it to the public in any other manner, whether by wired or wireless connection owes the principal director and the screenplay writer of the film work who has assigned these rights to the producer, proportional fair compensation. The right to fair compensation cannot be waived and can only be exercised by representative legal persons which, according to their bylaws, aim to represent the interests of principal directors or screenplay writers through the exercise of that right.

In similar terms, the Spanish Copyright law recognizes a remuneration right to the authors of an audiovisual work that have assigned their rights to the producer, for the communication to the public of their work. This right cannot we waived and can only be exercised through collective management.

The Directive should be clarified along the lines of these two recent national laws to ensure that authors get remunerated for the cable retransmission of their works through their CMOs.

Furthermore, to avoid further conflicts of construction of the law, it shall be clarified that this article covers only the neighbouring rights of the broadcasters on their signals, the rights of the others rightholders being managed by their own CMO’s.

Additional problems relate to the direct injection doctrine and the absence of a technology-neutral application of the Directive in some Member States, both of which also need clarification.

The direct injection doctrine

\( ^5 \text{nemo plus iuris in alium transferre potest quam ipse habet} \)
In the Netherlands, US owned operator has argued that point-to-point delivery of broadcasting signals to the cable operators’ media gateway with no delivery to the public (direct injection) is not a communication to the public. If there is no primary communication to the public, there can be no secondary communication to the public (retransmission), so the mandatory collective management of Directive 93/83/EEC does not apply. This doctrine was supported by the Supreme Court in the NORMA case on 28 March 2014 which said that the system of compulsory collective rights management as per Directive 93/83/EEC is not applicable in situations of direct injection of the program signals (which the court assumes is the only means of transmission after the analogue switch-off in 2006).

On the opposite side, in Belgium, in the Telenet case, which a cable company owned by the same US cable operator, the Antwerp Court of appeal adopted a diametrically different approach and concluded in 2013 that the direct injection is a cable retransmission and that the rightholders’ consent/remuneration is required because there was a “simultaneous, unaltered and unabridged transmission” of a first broadcast.

This theory was brought before several EU States and non Eu States Tribunals in order to change the Directive through a new construction of the Directive, when Cable Europe failed to obtained a modification of the directive itself in 2002.

Three reasons to reject the theory of direct injection and the implied refusal to acquire rights of rightholders:

**Objective of the directive**

In the De Wolf study on the application of the Copyright Directive (pp.227-228), the author E. Traple concluded against a restrictive interpretation of the term “retransmission” which “leads to a significant limitation of the level of protection of rightholders” contrary to the objective of the Directive which he recalled is “to create legal certainty for the cable operators as to the acquisition of rights and to ensure a high level of protection for the authors and rightholders”. Consequently, the more the system of mandatory collective management applies, the better protected rightholders as well as platform operators will be.

**Legal fundamentals :**

Directive 93/83/EEC provides :

Article 1.3. of the of Directive 93/83/EEC provides :

“3. For the purposes of this Directive, 'cable retransmission' means the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.” (we underscore)

The very definition provides of the retransmission by cable does not require that the programs of the broadcasters are communicated to a public but are just intended for reception by the public.

Berne convention :

This definition is in line with article 11bis of the Berne Convention that provides a key element to the fact that cable operators must acquire the rights as an organization other than the original one;
Article 11bis

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
- (ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;

(we underscore)

Economic fundamentals:

Furthermore the doctrine of direct injection tries to hide the economic model of the cable retransmission applied since the 80’s:

Authors must be paid a remuneration calculated on any revenue produced by the various exploitations of their works by the broadcasters and any third entity that commercialises the communication (re the retransmission) of their programs to the public:

1. Broadcasters generate revenues through public funds and others incomes for a wide communication of works which encompass not only the cable retransmissions but also the communication of program on internet whether broadcasted or on demand.

2. On the other hand, cable operators and other third parties generate revenues by selling actively to consumers set top box and the accesses to a various and wide offers of programmes most of the time included in bundles. Furthermore, new economic models applied by them involve the sale of space for commercials inserted in the programmes.

The model was well explained by the EUCJ in the case Airfield, the description of the economic model of Airfield being the same as the one applied by cable operator:

“78. In this context, it is to be pointed out that a satellite package provider, first, encrypts the communication concerned or supplies access keys for the communication to the broadcasting organisations so that its subscribers can decode it and, second, provides the corresponding decoding devices to those subscribers, these operations thus enabling the link to be established between the communication introduced by the broadcasting organisation and those subscribers.

79. Such activity is not to be confused with mere provision of physical facilities in order to ensure or improve reception of the original broadcast in its catchment area, which falls within the cases referred to in paragraph 74 of the present judgment, but constitutes an intervention without which those subscribers would not be able to enjoy the works broadcast, although physically within that area. Thus, those persons form part of the public targeted by the satellite package provider itself, which, by its intervention in the course of the satellite communication in question, makes the protected works accessible to a public which is additional to the public targeted by the broadcasting organisation concerned.
Moreover, the satellite package provider’s intervention amounts to the supply of an autonomous service performed with the aim of making a profit, the subscription fee being paid by those persons not to the broadcasting organisation but to the satellite package provider. It is undisputed that that fee is payable not for any technical services, but for access to the communication by satellite and therefore to the works or other protected subject-matter.

Finally, it is to be noted that the satellite package provider does not enable its subscribers to access the communication of a single broadcasting organisation, but brings together a number of channels from various broadcasting organisations in a new audiovisual product, the satellite package provider deciding upon the composition of the package thereby created. (we underscore)

“...

Since the vote of the Directive, the cable market lives a sustainable growth:

The cable market of the main cable operators in Europe has substantially increased:

2010 : Telenet: 3.326,9  
      Numéricable 1.274,6  
      Kabel Deutschland Holding : 1.611,2

2011 Telenet: 3.164,4  
      Numéricable 1.350,2  
      Kabel Deutschland Holding : 1.711,8

2012 Telenet: 3.609,7  
      Numéricable 1.305,6  
      Kabel Deutschland Holding: 1.842,5

2013 Telenet: 4.310,4  
      Numéricable 1.319,6  
      Kabel Deutschland Holding: 1.911,3

2013 Telenet: 4.931,6  
      Numéricable 2.170,0  
      Kabel Deutschland Holding: 2.021,00

A increase of 148% for Telenet, 170.2% for Numericable and 125% for Kabel Deutschland Holding

An other example of the income evolution of the cable market in Flanders Belgium:

The Cable market income in the Flanders has substantially increased:

- 1995: 182,4 million Euro;  
- 2000: 197,1 million Euro (+ 8 % more than 1995);  
- 2006: 247,6 million Euro (+35 % more than 1995);  
- 2011: 350 miljoen Euro (+92% more than 1995).

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6 http://yearbook.obs.coe.int/features

7 Estimate based upon 61% of Belgian subscriptions.
1. The evolution of the price (including VAT) of the basis cable bundle confirms this trend:
   - 1995: around 85.5 Euro/year (average price billed by cable operators);
   - 2000: 86.76 à 91 Euro/year (average price billed by cable operators);
   - 2009: 113.77 Euro/year (TELENET);
   - 2011: 179.24 Euro (TELENET)
   - 2015: 192 Euro (Telenet)

Those prices includes a provision for author and neighbouring rights. This provision is billed separately.

The provisions for author and neighbouring rights paid by consumers has been the following:

   - 1995: 27.7 million Euro (established);
   - 2000: 29.7 million Euro (estimate);
   - 2009: 66.9 million Euro (2.304.000 subscribers X 29.04 Euro).

This evolution of the amount paid by subscribers confirms this progress:

   - 1995: provision 12.44 Euro (average price billed by cable operators);
   - 2000: provision 13-15 Euro (average price billed by cable operators);
   - 2007: provision 22.37 Euro (price including VAT billed by TELENET);
   - 2000: provision 29.04 Euro (price including VAT billed by TELENET);  
   - 2011: provision 35 Euro (price including VAT billed by TELENET);
   - 2012: provision 38.19 Euro (price including VAT billed by TELENET)

A substantial share of the provision for author and other broadcasters is paid to broadcasters

We therefore request clarification that the cable retransmission right qualification applies to cable operators’ act of communication to the public, whatever the system of signal delivery between broadcasters and cable operators. Indeed, as set in the definition of cable retransmission by the Directive what is important here is not whether there is a primary communication to the public by broadcasters for the cable operators’ communication to the public to be considered a retransmission. The important criteria for a retransmission is that the signal is being delivered and commercialised to the public by another party than the broadcaster. This party, the cable operator, is indeed developing a business of TV channel access by selling subscription services. The cable operator has to acquire the necessary licences along the lines of Directive 93/83/EEC. This is in line with the definition given by the Commission in chapter III of this consultation: “the concept of retransmission is generally understood as the simultaneous transmission of a broadcast by a different entity such as cable operator.”

Technological neutrality
As the SAA, La Maison des Auteurs strongly believes that Directive 93/83/EEC is technology neutral. The SAA and EBU sent the Commission a joint letter on 24 June 2014 urging the Commission to clarify that the rights clearance system for the simultaneous, unabridged and unchanged retransmission of broadcasters’ programmes of Directive 93/83/EEC is to be applied in a technologically neutral way. This means that other operators than cable operators, such as IPTV service providers and satellite platforms which simultaneously distribute TV programmes shall also be subject to the principles laid down in the Directive regarding authorisation and remuneration towards rights owners. Equality of treatment and legal certainty justify a technologically neutral application of this system to similar cases of TV programme distribution.

This is already recognised in several Member States such as Austria, Belgium, Denmark, France, Hungary, Sweden or the UK but not everywhere in the EU. In certain Member States, the Directive principles are applied to traditional cable operators only and other operators are left aside.

In light of these discrepancies, clarification is needed at EU level to reflect the take-up of other transmission technologies since the adoption of Directive 93/83/EEC, as well as technological convergence in the audiovisual sector as described in the European Commission Green Paper ‘Preparing for a Fully Converged Audiovisual World: Growth, Creation and Values’ of 24 April 2013.

Unified application of technological neutrality of the retransmission right would not only bring an end to inequality of treatment between operators offering the same service and discrepancies between Member States’ rules in that regard. It would also increase the availability of European creative content on all platforms for the benefit of platform operators, broadcasters, rightholders and EU consumers.

Offers from cable operators and IPTV distributors are identical and competing services providing the same or identical TV and radio programs, bundles, commercial offers through different technologies.

In addition, it would be useful to clarify that the retransmission right collective management mechanism applies not only to transmissions from other Member States, but to all retransmissions of channels. A single licensing mechanism would cover all retransmissions. In most countries, it would only be the recognition of the actual application of collective licensing mechanisms.

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

In Belgium, for instance, Telenet has increased the number of TV programs in its basic bundle programs:

50 programs in 2006
70 programs in 2011,
64 programs in 2012
75 programs in 2015.

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.

The system of cable retransmission rights subject to mandatory collective management was introduced to simplify rights clearance and avoid black-outs in retransmitted broadcasts. It is, in itself, a success: cable and satellite operators generally offer a great number of foreign channels in their packages (bouquets) and therefore generate broadcasting services across borders which consumers have access to. Taking into account that an average of 57% of TV households in Europe have subscribed to pay TV services and that satellite and cable are the two biggest sources of pay TV revenues in Europe, it is established that they are the main sources of access to broadcasting services across borders.

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.

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.

The Directive 93/83/EEC allows the mediators to submit proposals, furthermore, in a non confidential mode. That process hinders any discussions in good faith and the needed building trust among parties.

Modern mediation processes does not allow mediators to submit proposals to parties. By allowing such possibility, and giving “softpower” to mediators to arbitrate the conflict, parties are coming to mediation to plead their cases and certainly not to negotiate a agreement in good faith, given the fact that a third party, the mediator may make proposals based upon statement.

In 2008 the EU Parliament adopted DIRECTIVE 2008/52/CE on certain aspects of mediation in civil and commercial matters which provide a safer process allowing parties to reach an agreement. Among others it does guarantee confidentiality which is a cornerstone to any mediation

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.

The licensing costs resulting from the collective management of the cable retransmission rights are much lower than if each individual rightholder had to negotiate with each cable operator. On the cable operators’ side, it is an obvious assessment. On the rightholders’ side, these costs are absorbed
by CMOs and reflected in the management fees they take on the royalties distributed. The collective management system therefore provides a mutual benefit and a real win-win situation for both cable operators and rightholders.

Furthermore, the question of costs has to be related to the new directive 2014/26/EU on collective management which has for goals to control and limit the costs of functioning of CMO, under severe control systems.

Note: grey area in the directive (see above) opens field for legal contestations and trials with huge costs for authors owners organisations.

We have seen cable operators using legal proceedings in order to change the legal system or its construction. Those proceedings take years to achieve the process (from first level to CJEU). During the process the said cable operator do not pay royalties to authors’ CMO, (giving it an unfair competition advantage against other cable distributor).

Furthermore, in Belgium, in this situation the CMO’s have to pay VAT for unpaid royalties in advance when billing the right (a legal obligation) and not be able of collecting it.

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.

The introduction of the system of mandatory collective administration of the cable retransmission rights in the SatCab Directive in 1993 was beneficial to audiovisual authors who started receiving remuneration for the cable retransmission of their works in all EU Member States. In some Member States, like in Germany, this was not the case before they transposed the Directive into their national law. Action at EU level, rather than only at Member State level, means that all audiovisual authors, throughout the EU, are guaranteed remuneration for the cable retransmission of their works.

In addition, as explained in our replies to questions 10 and 11, clarifications of various aspects of the cable retransmission right are necessary so a form of EU action is required to ensure that obligations in the SatCab Directive are not bypassed by digital players.

EU action is coherent in this field in terms of providing the necessary clarifications, alongside other EU actions like the many consultations the Commission has or is currently carrying out in the context of the Digital Single Market Strategy to assess whether certain legislative instruments like the Copyright Directive and the AVMS Directive are fit for the digital age.
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. 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).

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.

For all these options, the impact of applying the country of origin principle would be very negative. The practical use of the country of origin principle would result in a ‘race to the bottom’ by Member States offering lower levels of copyright protection and/or enforcement to attract service providers which would chose to operate from Member States where the copyright regime is more lenient (“forum shopping”). This would result in discrimination of local service providers/distributors and have a negative economic impact on rightholders as it would jeopardize the value of authors’ rights.

As explained in the assessment of the country of origin principle applied to direct satellite broadcasting, the country of origin principle is a legal anomaly in the copyright field which, in addition, has not demonstrated any benefit. Contrary to the mandatory collective management of the cable retransmission right, it does not provide for any rights clearance mechanism which would facilitate the access to and the availability of programmes. It is certainly not a model to follow for online services.

Online services of broadcasters (simulcasting, catch-up or video-on-demand of the programmes, including cross border), operated by the broadcasters themselves, can be addressed in their initial agreements with rightholders. In countries where broadcasters already have collective agreements in

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8 The concept of retransmission is generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator.
place with authors’ CMOs, these collective agreements are the best place to deal with the licensing of these online services.

The same applies to online content services provided by any service operator: they have to negotiate the use of the protected works with rightholders for the geographical scope of the service. The application of the country of origin principle would have no impact on this licensing mechanism and therefore would not be of any help. What is needed is a simplified rights clearance mechanism such as collective licensing.

The take-up of online services in general, whether operated by broadcasters or other operators, highlights the need for collective management solutions to be developed for the making available right, as proposed by the SAA in its white paper.

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

Applying the country of origin principle to online services might result in more cross-border accessibility in the short run but would, in the long run, destroy the European audiovisual industry and transform the EU into an area of US content consumption against the principles set by the UNESCO Convention of 2005 on cultural diversity.

The country of origin principle runs contrary to the territoriality principle which is at the core of the European copyright framework and the audiovisual industry. Territoriality, as the possibility to sell exclusive rights on a country by country basis to different operators, generates an important part of the financing of the production of audiovisual works and guarantees that the operators who buy rights will exploit them because they have to recoup their investment.

In terms of accessibility of foreign works, it is a much better model as local operators editorialise the content for their audience and have a financial interest in making it a success. No European operator has the market power to deliver content across the EU in such a way. Getting rid of territoriality could cut financial possibilities in a context where the audiovisual industry is already struggling to access financing. The production sector as well as the distribution sector would be affected and cultural diversity severely reduced.

This is therefore not a good proposal for the future and certainly not in the mandate of the European Commission, unless it seeks to undermine the European audiovisual industry.

In addition, from a legal perspective, introducing the country of origin principle for the making available right (which would equal an exhaustion of the right) would not only require the modification of subsequent European directives in addition to the 93/83/EEC Directive (2001/29/EC, 2000/31/EC) and their national implementing laws, but it would probably run against international treaties as it would deprive authors from an essential element of their exclusive making available right. What was acceptable for satellite broadcasting in 1993 and still nowadays due to its limited impact, would override basic principles of copyright protection when it comes to online transmissions as they become an increasingly important mode of transmission of works.

16.1. If not, what other measures would be necessary to achieve this?
The cable retransmission model with its mandatory collective management of rights is a much more interesting solution to help the circulation and accessibility of European works across borders. Coupled with stricter rules on the promotion of European works by online services (provided in the AVMS Directive), it would ensure that European citizens are offered a wide variety of European works, including non-national ones.

Initiatives shall also take place in the field of:

- Measures against Tax forum shopping undertaken by global major players that create unfair competition against local operators, whether broadcasters, content provider and cable-operator.
- Measures against forum shopping avoiding rules on imposed EU works undertaken also by global major players that impede EU cultural diversity.
- Vertical concentration of audiovisual players from producers to cable operator which impede proper remuneration of Authors and a transparent content market.
- Level playing field between cable operators and telecom operators as part of the neutral technology principle as mentioned in question 10.1.

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 application of the country of origin principle to online services would have no impact on collective rights management as it does not deal with or impose any specific model for licensing rights. It therefore would not facilitate or impede collective rights licensing. What is more important to say, is that collective management would not solve the problems that the country of origin principle would create.

In the countries and sectors where collective rights licensing is in place, CMOs can license the service providers established in these countries for pan-European coverage, but only for their own direct repertoire. To license the repertoire of sister societies, they need their express agreement. In the audiovisual sector, contrary to the music sector, only a group of CMOs in a limited number of territories can offer multi-territorial licences for online rights (see the SAA FRAME project).

In the music sector where collective rights management is fully developed, Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use has developed a specific model for the online licensing of musical works which provides that music CMOs mandate other CMOs to grant multi-territorial licences for the online rights in musical works in their own repertoire on a non-exclusive basis (Article 29). This is only possible because all music CMOs in Europe manage the online rights of the authors they represent. This model however has a caveat for the online music rights required for radio and television programmes. It does not apply when CMOs grant a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate and make available to the public its radio and television programmes simultaneously with or after their initial broadcast as well as any online material which is ancillary to the initial broadcast of its radio or television programme (Article 32).
18. How would the "country of origin" be determined in case of an online transmission? Please explain.

We reject the application of the country of origin principle in case of online transmissions. This has been expressly rejected by Directive 2000/31/EC and Directive 2001/29/EC and it would run against international treaties as it would deprive authors from an essential element of their exclusive making available right. As already explained, the country of origin principle goes against the principle of copyright territoriality and is therefore incompatible with the audiovisual sector and the way in which it functions and is financed. There is therefore no interest in exploring this option further.

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

Yes, negatively. As per our reply to question 15.4, the practical use of the country of origin principle would result in a ‘race to the bottom’ by Member States offering lower levels of copyright protection and/or enforcement for pan-European services to attract service providers which would chose to operate from Member States where the copyright regime is more lenient (“forum shopping”). This would result in discrimination of local service providers/distributors and have a negative economic impact on rightholders.

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

Irrespective of any extension of the country of origin principle (that is not desired), further harmonisation of EU copyright is needed in the area of the remuneration of audiovisual authors to achieve a digital single market that works for these authors. Today, audiovisual authors do not benefit from a European system of remuneration that would guarantee them payment for the use of their works across Europe. The SAA proposed in its white paper that an unwaivable right to remuneration be accorded to audiovisual authors, when they transfer their making available right to the producer, that they would exercise through their CMOs directly with platforms that make works available to the public. This would ensure audiovisual authors a level playing field across Europe and better recognition of their authors’ rights in their creation.

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)?

As this question, as well as questions 21, 22 and 23, is ill-formulated, we were told by SAA that has sought clarification from the Commission on its meaning and it has been told to read it this way: “how are the rights of authors and neighbouring right holders currently licensed for the simultaneous retransmission of TV and radio programmes by players other than cable operators?”

This question addresses the technology-neutral application of Directive 93/83/EEC which was already discussed in our answer to question 10.1.
In a number of countries, the simultaneous retransmission of TV and radio programmes by players other than cable operators, including satellite operators, is licensed according to the same model as for cable operators, i.e. by CMOs. These countries apply Directive 93/83/EEC in a technologically neutral way, considering that it should apply to any simultaneous transmission of a broadcast by any entity other than the broadcaster itself. The mandatory collective management of rights is therefore applied to satellite operators, IPTV (simulcasting), etc.

However, there are countries who have implemented the Directive in a very restrictive manner and have limited it to traditional cable operators, which in practice makes it difficult for CMOs to apply the collective management model on a voluntary basis and creates discriminatory treatments for similar operators conducting the same activity of retransmission. Some CMOs have challenged this discriminatory treatment in courts. In the Czech Republic, UPC offers practically the same service and the same package of channels by two technologically different means: via cable and via satellite (UPC Direct). Whereas it pays the remuneration for the cable retransmission to DILIA, the audiovisual authors’ CMO, it denies paying any remuneration for the retransmission via satellite and claims that it has acquired all rights from the broadcasters. DILIA started litigation against UPC but lost in first instance. The same happens in Slovakia where operators claim that the scope of the definition of the cable retransmission does not cover the simultaneous, unaltered and unabridged retransmission by satellite.

These examples illustrate the need for clarification that Directive 93/83/EEC applies in a technologically neutral way to any operator that undertakes simultaneous retransmissions of broadcasts.

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

As explained above, problems relate to the refusal to apply the collective rights management model of Directive 93/83/EEC. This refusal comes from operators (especially the main US owned cable operator) other than cable operators (or for retransmissions other than via cable) who retransmit broadcasts simultaneously. In a number of countries, they exploit a restrictive implementation of the Directive which does not respect technology neutrality nor the usual interpretation of the directive which provide for a high level protection of authors and a fair remuneration model.

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?

Direct injection is not a law concept, not even a technical one based upon technical facts. The Cable operator is not a mere carrier of the broadcaster unchanged signals. It does transform and bundle the tv and radio signals of the broadcasters into modified coded signals sent to its subscribers. Therefore, one shall use the expression direct injection with caution without implying legal consequences.

This question should read: “how are the rights of authors and neighbouring right holders currently licensed for the retransmission of broadcasters’ services via direct injection in the cable network?”

This question discusses the direct injection doctrine which was already answered in our response to question 10.1.
Although not justify by technical grounds, the doctrine of direct injection is promoted by US owned cable operators to avoid negotiating collective agreements with CMOs, alongside arguments that they would only need authorisation from broadcasters to transmit the TV programmes.

It was mainly developed in The Netherlands and Belgium where it was the subject of litigation with different outcomes (see answer to question 10.1)

On opposite side this theory is related to preliminary ruling by the CJEU in the C-325/14 SBS Belgium v SABAM case for which judgment is awaited. Although having neither technical nor legal grounds, the direct injection doctrine tries to create the uncertainty regarding who makes the communication to the public when directly injecting content into the cable network. The rights holders claim that SBS Belgium is indeed responsible for participating in themaking a communication to the public, and their consent is required. SBS Belgium - which now is a daughter society of Telenet - deny that they are making a communication to the public so no consent is required, and no payment is due.

There is a need to clarify that the cable retransmission right qualification applies to all cable /IPTV (and any other techniques) operators’ act of communication to the public, whatever the system of signal delivery between broadcasters and cable operators. Indeed, what is important here is not whether a primary communication to the public by broadcasters is necessary for the cable operators’ communication to the public to be considered a retransmission. The important criteria for a retransmission is that the signal is being delivered and commercialised to the public by a third party than the broadcaster.

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

Yes, there are. Although they are collecting masses fees (and royalties for author and neighbouring rights billed separately in Belgium by the operators) for the exploitation of programmes through their cable services to consumers, cable operators (mainly the US owned cable operator) claim the direct injection doctrine to avoid payments to audiovisual authors. Through this doctrine, they try to avoid the application of Directive 93/83/EEC and the mandatory collective management model for the retransmission right. As an example, in the Netherlands this has resulted in significant financial losses for audiovisual authors whose CMOs were not only not paid over a number of years, but also required to engage in very costly procedures through the courts and ultimately the Parliament to resolve the issue.

The problem has been partially solved through new legislation both in Belgium and in the Netherlands where the all-right included doctrine can no longer be used by cable operators to avoid payment to audiovisual authors through their CMOs.

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?

This question should read: “how are the rights of authors and neighbouring right holders currently licensed for non-interactive broadcasters’ services over the internet (simulcasting/linear webcasting)?

The use of audiovisual works on these online services of broadcasters, operated by the broadcasters themselves, could be addressed in their initial agreements with rightholders such as producers. In
countries where broadcasters already have collective agreements in place with audiovisual authors’ CMOs, these collective agreements usually deal with the licensing of these online services.

This is the model the SAA would like to develop in all countries of the EU: the collective management of online authors’ rights by audiovisual authors’ CMOs. This is a mutually beneficial model both for broadcasters and audiovisual authors, cost-effective and comprehensive as it can be developed on a pan-European basis.

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

Problems emerge when there is no collective rights management. If the online rights of audiovisual authors are transferred to producers with no remuneration right in exchange that can be exercised by their CMOs towards online platforms, authors usually receive no payment for the exploitation of their works online as surveys demonstrate it.

This is why the SAA has proposed the generalisation of an unwaivable right to remuneration to be exercised by audiovisual authors’ CMOs towards online platforms, including online services of broadcasters (see SAA white paper).

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)?

The question should read: “how are the rights of authors and neighbouring right holders currently licensed for broadcasters’ interactive services (catch-up TV, video-on-demand services)?

According to our knowledge, broadcasters’ interactive services (catch-up TV, video-on-demand services) are licensed according to the same principles as non-interactive services, i.e. in broadcasters’ agreements with CMO or rightholders. The nature of the exploitation is different so the calculation method for the remuneration might also be, but they are additional exploitations that, as non-interactive exploitation, have to be authorised.

As far as audiovisual authors’ rights are concerned, as already mentioned in answer to question 22, we favour mandatory collective rights management to ensure that these additional exploitations translate into additional remuneration.

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

See our reply to question 22.1.

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 retransmission⁹ of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

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⁹ Understood as the simultaneous transmission of the broadcast by a different entity than the broadcaster (see footnote 2).
As far as it is needed, extending the mandatory collective licensing regime of the cable retransmission to other simultaneous transmissions would be highly welcome as it would confirm the technology-neutral application of this regime of the Directive, ensure a level playing field among operators carrying out the same activities and remove discriminatory practices in certain countries and at EU level among these operators. It would also encourage the uptake of innovative services enabling wider access to Europe’s cultural diversity.

24.2. the simultaneous transmission\(^{10}\) of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

Extending the mandatory collective licensing regime of the cable retransmission to the simultaneous broadcasting of TV and radio programmes on satellite (direct satellite broadcasting) and on the internet (simulcasting) by broadcasters themselves would also be more than welcome. It would ensure that audiovisual authors’ rights translate into remuneration for additional online exploitations.

This is what we would like to achieve in a more general way with the SAA proposal of an unwaivable remuneration right for audiovisual authors to be exercised by their CMOs with online platforms, including broadcasters’ simulcasting.

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

The answer to this question is different for simultaneous retransmission by operators other than broadcasters (question 24.1) and for simulcasting of their TV programmes by broadcasters themselves (question 24.2). Indeed, Article 10 is not applicable to the simulcasting of TV programmes by the broadcasters themselves as there is no third party to authorise.

As far as simultaneous retransmission by third parties is concerned, whatever the technology used by third parties, it should be clarified, as requested in our answer to question 10.1, that Article 10 of the Directive should not be interpreted in a way that allows third party platforms to escape the mandatory collective management of authors’ rights by their CMOs.

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

Yes. Confirming the technology-neutral application of the mandatory collective licensing regime of the retransmission right of the Directive and confirming its application to simultaneous transmissions on satellite and on the internet by broadcasters themselves would certainly develop further the accessibility of TV and radio programmes across Europe as it did for cable, by multiplying the platforms and technologies through which these programmes are accessible. It would also encourage the uptake of innovative new services enabling wider access to Europe’s cultural diversity.

\(^{10}\) Understood as the simultaneous transmission of the broadcast by the broadcaster itself.
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?

As written earlier, IPTV and cable distribution of TV and radio programs provides same services to subscribers and shall be equally treated in the Directive. Whatever the provisions of the contracts signed between cable and IPTV operators and broadcasters, the first ones are both responsible exactly in the same way of the communication of the public of the programs through their offers.

It is true that the application of the mandatory collective licensing regime to cable-like operators and to broadcasters’ own transmissions online would have different impacts, but this is not related to the geographical reach of distribution.

For cable-like operators, this simply equals a technology neutral application of the Directive. Cable operators, like satellite package operators and IPTV operators, all offer subscription-based services of national and foreign TV programmes in a territory. It is therefore fair that the cable collective licensing regime applies equally to all those who offer similar services. In a certain number of countries, this is already the case: audiovisual authors’ CMOs license all these operators. In the other countries, the CMOs who already license cable operators are ready and willing to license these operators too. The so called “extension” of the Directive would ensure that the same system applies across Europe and would allow audiovisual authors’ CMOs to sign reciprocal agreements and receive royalties for the use of their authors’ programmes abroad by all cable-like operators.

We believed that the Directive does cover any type of retransmission done by cable operators and IPTV operators.

As far as broadcasters’ own online transmissions are concerned, it would be a “real” extension. It would not be a matter of interpretation of the Directive. Being a “real” extension does not however mean that collective rights management today never applies to online transmissions of broadcasters. In 2014, 68% of the SAA membership11 managed some online uses for their members on the basis of the making available right. Most of these collective agreements for online rights started with the inclusion of these online uses in the existing collective agreements in place with broadcasters which initially dealt with the broadcasting rights of audiovisual authors.

Applying a mandatory collective licensing for the online transmissions of broadcasters across Europe would clarify the situation for audiovisual authors’ rights by harmonising it and thus creating a genuine level playing field. This harmonised collective licensing regime for audiovisual authors’ online rights would allow audiovisual CMOs to offer pan-European licences and develop reciprocal agreements to get the remuneration due for the online use of their author members’ works on foreign platforms.

This is very close to what the SAA proposes in its white paper, except that we do not limit the mandatory collective management of online rights to the online transmissions of broadcasters. We consider that such a proposal should cover all audiovisual media services who make audiovisual works available to the public (online).

Our proposal also addresses the loopholes of the mandatory collective licensing as provided by Directive 93/83/EEC which have been exploited by some cable operators to avoid payments to

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11 17 societies out of 25. Table page 25 of the SAA white paper.
audiovisual authors’ CMOs as described in our answer to question 10.1 (presumption of transfer of rights to the producer, all rights included model, etc.). We have formulated it this way:

1. When an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration through his CMO.

2. This right to obtain an equitable remuneration for the making available of the author’s work(s) cannot be waived.

3. The administration of this right to obtain an equitable remuneration for the making available of the author’s work(s) shall be entrusted to collective management organisations representing audiovisual authors, unless other collective agreements already guarantee such remuneration to audiovisual authors for their making available right.

4. Authors’ collective management organisations shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

We therefore recommend that the extension of the mandatory collective licensing regime also covers online transmissions of audiovisual works by all audiovisual media services and is not limited to broadcasters.

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

No. The mandatory collective licensing regime aims at ensuring a high level of protection of authors by guaranteeing that they get remunerated when their works are exploited. It is important to note that we do not advocate for the extension to cover all right holders’ rights. We only talk on behalf of audiovisual authors whose other European organisations (FERA and FSE) support SAA’s proposal.

It is indeed important to say here that broadening the use of collective management for audiovisual authors’ remuneration does not challenge the fact that the producer controls the commercial exploitation of the work. The producer can, within the limits set by the law, continue to exploit or license the works in its catalogue as it chooses. As a result, the remuneration of authors via their CMOs does not prejudice the role of the producer. On top of this, the collection and distribution of royalties by CMOs reduce the burden on producers and acts as a guarantee against any legal claims by authors for exploitation covered by the remuneration right. Collective management also enables increased transparency of the exploitation on the platforms and the revenues they generate (subject to the agreement of all parties).

In addition, such harmonisation would avoid platforms taking advantage of differences in protection levels in the EU by relocating activities to the detriment of audiovisual authors.

At last, the recent Directive on CMO’s provided extensive provisions and tools on transparency, quality of management, fair negotiations of the CMO’s and ensure a high level of quality of right’s management.
29. What would be the impact of introducing a system of extended collective licensing 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 decision of whether to opt for mandatory collective licensing (MCL) or extended collective licensing (ECL) should be left to the discretion of the Member States. ECL was introduced in the copyright laws of Nordic countries in the 60’s and is accepted and recognised by Recital 18 of the 2001/29 EU Directive. ‘It is a typical Nordic way of finding copyright solutions to otherwise difficult situations of mass use of protected works’ and works well in these countries due to a culture of close cooperation between the different representative organisations and CMOs and to the fact ‘that the “copyright market” is well organised and disciplined’.

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

Extended collective licensing could not have the same effect on cross-border accessibility as mandatory collective licensing, given the fact that is more than expected that possible opt out provision would be allow rightholders the right to manage on their own their repertoires.

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?

To our knowledge, Articles 11 and 12 have not been very useful for the cable retransmission right. As far as audiovisual authors’ rights are concerned, of the representative CMOs who have struggled with cable operators, most have had to go to court to have their members’ authors’ rights respected.

In Belgium the us owned dominant cable company Liberty Global, sued producers and authors CMO in order to promote by lawsuit the direct injection and the all right included theories. After 7 years of courts cases, no evidence of “all right included” chaine of right was submitted to the courts. Technical analyse demonstrates that the broadcaster signal is never directly transmitted to consumer.

It is to be expected that an extension of Articles 11 and 12 to online transmissions would produce the same limited result.


13 Ditto.
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?

It is important that cable operators, other distributors of TV programmes, broadcasters and other online platforms which make audiovisual works available to the public, conduct negotiations in good faith with audiovisual authors’ CMOs for the use of their works and do not obstruct negotiations by challenging the ability of CMOs to represent audiovisual authors. This potential problem has to be addressed in the Directive by clarifying that the authors’ rights concerned shall only be exercised by their representative CMOs.

Directive 2014/26/EU on collective management of copyright and related rights offers guarantees that CMOs are managed in a sound and appropriate manner which protects the interests of their members and also provides for dispute resolution mechanisms with users. No additional measures seem necessary.

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.

In 1993, Directive 93/83/EEC established that the authors’ right to grant or refuse authorisation for the retransmission of a programme can only be exercised by a CMO (Article 9). The Directive enabled the development of CMOs for audiovisual authors across Europe. In certain Member States, the cable retransmission right is the only exploitation-based remuneration that audiovisual authors receive.

In a number of countries, the implementation of the Directive has been difficult for two main reasons. First, its grey areas have been exploited by leading cable operators to try to bypass audiovisual authors’ CMOs and thus avoiding payments to these authors. Second, it has been implemented in a very restrictive way which left operators conducting similar businesses as cable operators out of the mandatory collective licensing regime.

Any revision of the Directive should address these issues to strengthen its performance and relevance in today’s digital environment. It should also be the opportunity to update its mechanisms taking due account of the evolutions of the audiovisual sector.

Firstly, it should abandon the country of origin principle for direct satellite broadcasting as this mode of exploitation has not developed and the country of origin principle has been rejected by subsequent directives dealing with copyright (Directive 2000/31/EC and Directive 2001/29/EC).

Secondly, it should develop the collective licensing regime for authors’ rights for the online transmissions of works, whether by broadcasters or any other audiovisual media services making works available to the public in Europe. As explained above, this is the best proposal to develop the digital single market for European creations and its authors.

Based on their experience of the cable retransmission right around Europe and the other rights they manage at national level, audiovisual authors’ CMOs have proved valuable and should be entrusted to develop their services for the online exploitation of their author members.
During the discussions on Directive 2014/26/EU, audiovisual authors’ CMOs explained the specifics of their sector compared to the music sector in order for the Directive to take them into account and be fit for all CMOs. Directive 2014/26/EU now establishes a European legal framework for CMOs which secures collective rights management as a future-proof tool which can be relied upon to enhance cross-border access to works by extending the system of management of cable retransmission rights to the online world.

Details on the SAA proposal in this respect and up-to-date information on the collective management of audiovisual authors’ rights can be found in SAA’s 2nd edition white paper on audiovisual authors’ rights and remuneration in Europe published in March 2015.