

AGICOA URHEBERRECHTSSCHUTZ GmbH



BILD-KUNST



Verwertungsgesellschaft für
Nutzungsrechte an Filmwerken mbH

VG WORT



Answers to the Public Consultation on the Review of the EU Satellite and Cable Directive, concerning the management of cable retransmission rights and the extension of the system of management of cable retransmission rights

This is a consolidated statement of eight German collecting societies (AGICOA, GÜFA, VG Bild-Kunst, VFF, VGF, VG Wort, TWF and GEMA), which represent a unified point of view regarding cable-retransmission-topics in the consultation. Therefore the statement focuses on the questions 10 to 14.4, 20 to 22.1 and 24 to 29.

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

* What is your name?

Dr. Julia Niebler

What is your e-mail address?

* 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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* 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)
- 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

This is a **consolidated statement** of eight German collecting societies (AGICOA, GÜFA, VG Bild-Kunst, VFF, VGF, VG Wort, TWF and GEMA)

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
- Slovakia
- Slovenia
- Spain
- Sweden
- United Kingdom
- Other

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II. Assessment of the current provisions of the Satellite and Cable Directive

The management of 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

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 Directive’s provisions led to a confirmation and stabilization of the act of cable retransmission which has to be authorized by right holders. Nevertheless, there are still remaining uncertainties due to the historical and technical restrictive understanding of the means of retransmission, namely ‘cable’ and ‘microwave system’. It is not quite clear in which way these terms address wireless services (e. g. ‘Mobile TV’) and services by other technical means (e. g. ‘over-the-top’).

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

To a large extent

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.

Due to the confirmation and stabilization of the act of cable retransmission under the Directive’s provisions consumers are having more access to broadcasting services across borders. A positive effect is also noticeable in so far as the German legislator even extended the mandatory collective licensing regime to cable retransmissions of national broadcasts.

There remain, however, ambiguities as regards the question whether programs which are broadcasted as ‘Free TV’ in their country of origin (country A) but domestically (e.g. country B) marketed encoded as ‘Pay TV’ by the cable network operator can be qualified as cable retransmission or not.

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

Yes

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.

We have positive experiences with these mechanisms. They lead to satisfactory results, making possible licensing under appropriate conditions.

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.

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

No

13.1. Please explain your answer.

The system of management of cable retransmission rights provided by the Directive was already practiced on a domestic level.

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

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

No opinion

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

Yes

14.4. Please explain your answers.

EU action is still necessary in order to confirm the significance of the act of retransmission as a relevant act that has to be authorised by right holders, regardless of the technical infrastructure (see answer 10.1). Besides, there still remain ambiguities as regards the question whether programs which are broadcasted as 'Free TV' in their country of origin (country A) but domestically (e.g. country B) marketed encoded as 'Pay TV' by the cable network operator can be qualified as cable retransmission or not (see answer 11.1).

An EU added value can be seen in the equal treatment of multinational, affiliated cable operators, who are operating on an EU wide scale (e.g. Liberty Global).

III. Assessment of the need for the extension of the Directive

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)?

Rights of authors and neighbouring right holders are highly relevant in this field. Due to the still advancing convergence of technical infrastructures more and more different “players” are able to retransmit TV and radio programmes by cable or wireless means, in a simultaneous, unaltered and unabridged way. That leads to a multiplicity of retransmission services which are comparable to the services of ‘classical’ broadband cable operators.

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

There are difficulties caused by the historical and technical restrictive understanding of the means of retransmission, namely ‘cable’ and ‘microwave system’. It is not quite clear if these terms also address wireless services (e. g. ‘MobileTV’) or services by other technical means (e. g. ‘over-the-top’) even if they are comparable to the services of cable network operators. There are different approaches to interpret from the legal point of view which leads to an unclear legal situation relating the clearance of rights regarding these new types of retransmissions.

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?

There has to be distinguished to constellations of ‘direct injection’. In constellation A the broadcasting signals of the programmes are delivered directly from the broadcaster to a head-end of a cable network operator, but the same programme is broadcasted via satellite or terrestrial means. Constellation B is to be understood as the sole transmission of programs via a cable network without any other parallel broadcast via other infrastructures (e.g. satellite).

With regard to constellation A, in Germany the act of distribution done by the cable network operator is treated as a cable retransmission, since there exists an initial parallel broadcast, namely the satellite broadcast. In this respect it is not decisive, whether the signals used for the retransmission are delivered directly to the cable network operator or if the operator uses the satellite programme-carrying signal for cable retransmission.

Regarding constellation B see the separate statements of the collecting societies.

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

Regarding constellation A (broadcasting signals of the programmes are delivered directly from the broadcaster to a head-end of a cable network operator, but the same programme is broadcasted via satellite or terrestrial means) there are no particular problems, see answer to question 21.

With regard to constellation B (the sole transmission of programs via a cable network without any other parallel broadcast via other infrastructures) see the separate statements of the collecting societies.

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?

To our common understanding the service of 'simulcasting' only includes the acts of transmission via internet made by the broadcasting companies themselves, parallel to the regular live-broadcast via other technical means. 'Webcasting' is understood as the sole transmission via internet, without any simultaneous terrestrial-, cable- or satellite-broadcast. From our point of view both transmissions (simulcasting and linear webcast) are treated as primary broadcasts, not as a (cable) retransmission. In consequence, collecting societies license (primary) broadcasting rights for simulcast- and linear webcast-transmissions.

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

No, see answer above.

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

Extending the mandatory collective licensing regime to cases of simultaneous retransmission on platforms other than cable would significantly contribute to the creation of legal certainty, by simplifying the clearance of rights, the licensing process and, in consequence, the access of consumers to broadcasting services. In addition, such extension would guarantee a reasonable remuneration for right holders for the use of their respective rights on all comparable platform-services.

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

Such extension would concern the licensing of initial broadcasting rights (and not retransmission rights). There is no need to include these kinds of simultaneous transmissions under the mandatory collective licensing regime as collection societies are capable of providing the necessary rights clearance together with or in addition to the original broadcast licence (please see our answer to question 22).

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

There is no need for a change.

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

See answer to question 27.

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?

First of all it has to be stressed that the facilitation of cross boarder accessibility of services and programs, intended by the Directive, is already part of today's licensing practice in Germany, namely in licensing of foreign-language programs, originally transmitted in other countries, for the domestic territory.

That being said any extension of the mandatory collective licensing regime should cover the licensing acts of retransmission via closed environments as well as simultaneous retransmissions over the 'open internet'. Nevertheless such an extension should be limited to national issues and services due to the fact that there exists an established licensing system which meets certain but different needs of users in every single territory. Otherwise there will be the risk of unequal treatment of 'classical' cable operators whose cable networks are conventionally limited to national territories and which are not able to retransmit beyond any geographical boundaries. Ultimately, that kind of system guarantees possibilities of control and enforcement of rights, necessary to provide an indispensable quality-level to the exercising of rights and reasonable participation in relevant revenues to the right holders.

According to the already mentioned understanding of simulcasting being covered by initial broadcasting rights (see question 22), transmissions / simulcasts should remain unaffected by any extension.

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

An extension of the mandatory collective licensing regime will not raise questions of compliance:

- Art. 11^{bis} (1) (ii) of Berne Convention covers '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 is to be considered' and
- Art. 8 of WIPO Copyright Treaty states that authors 'shall enjoy the exclusive right of authorizing any communication to the public of their works', but 'without prejudice to the provisions of Art. 11 (1) (ii), 11^{bis} (1) (i) and (ii) of the Berne Convention'.

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?

Although the introduction of a system of extended collective licensing would be a step towards a collective licensing system, simplifying and improving the retransmission rights management, it is important to mention that with the mandatory licensing regime there is an existing and established regime which proved it's applicability for cable retransmission licensing. With regard to the similarity between cable retransmission and retransmission on platforms other than cable, it would be appropriate to extend that regime, preferably combined with a technically neutral approach on the definition of cable retransmission. Otherwise, consequence would be a discrimination of platforms other than cable compared to cable operators, which would still profit from mandatory collective licensing.