



Sky's response to the European Commission's consultation on the review of the EU Satellite and Cable Directive

Introduction to Sky

1. Sky plc ("Sky") is Europe's leading entertainment company with over 21 million customers across five countries: Italy, Germany, Austria, the UK and Ireland. Sky offers the best and broadest range of content, delivers market-leading customer service and uses innovative new technology to give customers a better TV experience. Sky is also the UK's second largest broadband and telephony provider.¹
2. Sky has annual revenues of over €15 billion and is Europe's leading investor in television content with a combined programming budget of over €6.5 billion. The company employs 31,000 people and is listed on the London Stock Exchange.
3. In 2014, Sky brought together the businesses of Sky UK Limited, Sky Italia and Sky Deutschland². By consolidating these three businesses, Sky shares strengths and expertise from across the group to serve customers better, accelerate innovation and grow faster. Sky is built on a shared ethos of always pushing forward to provide customers with more choice, better content and a superior TV experience.
4. Through its wholly-owned subsidiaries, Sky offers various channels and content via satellite in the United Kingdom, Ireland, Germany, Austria and Italy. In addition to satellite, Sky also offers various channels and content over the internet in the United Kingdom, Ireland, Germany, Austria and Italy³ and in the majority of these via cable, IPTV, mobile and terrestrial networks. Whilst the footprint of cable, mobile and terrestrial networks is intrinsically regional or national in scope⁴, satellite and Internet delivery mechanisms are by their very nature transnational⁵.
5. Sky welcomes this opportunity to respond to the Commission's consultation on the review of the Satellite and Cable (SatCab) Directive⁶. According to the "Explanatory Memorandum" to the Commission's original SatCab proposal, the main goal of the SatCab Directive was to *"take account of the need to maintain a balance between the various interests involved and*

¹ Sky plc is a registered company under the EU Transparency Register. Our ID number is 62536168216-12. See <http://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=62536168216-12> for further information.

² Sky plc completed the acquisition of the remaining minority shareholdings in Sky Deutschland AG on 15 September 2015.

³ Sky Italia transmits also by means of IPTV.

⁴ There is a degree of cross-border overspill in the case of terrestrial television.

⁵ Satellite networks have a pan-European footprint, and the Internet's reach is global.

⁶ Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ 1993 L 248, p. 15).

facilitate the management of copyright and related or neighbouring rights on a European scale”, whilst ensuring *“that protection is as effective as possible and that authors and neighbouring right owners are fully remunerated in all Member States”*.⁷ In addition, the Commission hoped that the Directive would enable cross-border broadcasting in Europe *“by minimising the associated risks, to the extent that they derive from uncertainty as to the law or heterogeneous national rules”*, whilst also *“encouraging investment in promoting creativity”*.⁸ In our view the SatCab Directive has facilitated the management of copyright for satellite broadcasts (albeit with limited relevance in practice) whilst maintaining an appropriate balance between promoting creativity and enabling cross-border broadcasting.

6. The Commission’s current review of the SatCab Directive forms part of its broader digital single market (DSM) strategy, revealed on 6th May 2015⁹. In its DSM paper, the Commission explains that it *“will review the satellite and cable directive to assess the need to enlarge its scope to broadcasters’ online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters’ services in Europe”*.¹⁰
7. The Commission’s interest in reviewing the Directive therefore appears to be twofold: the Commission would like to satisfy a political imperative of facilitating cross-border access to broadcasters’ services in Europe (as was originally the case in 1993) and would also like to widen the Directive’s scope to include online content services (something the Commission considered (and duly rejected) in its 2002 implementation Report on the Directive¹¹).
8. In this respect the Commission is consulting on whether to (i) apply the “country of origin” principle applicable to satellite broadcasting to online content services, (ii) remove broadcasters’ right to exercise their cable rights individually¹² and (iii) extend the mandatory collective-management regime applicable to cable retransmissions to other categories of retransmissions. It is unclear whether such changes would be applied on an individual or cumulative basis (or a combination thereof).
9. Sky is concerned that the SatCab Directive review, which did not originally form part of the DSM strategy, was included in the strategy at the very last minute, with no prior impact assessment. In our view the Commission’s plans for possible reform (as described above) represent a significant incursion into rights owners and broadcasters’ freedom to exploit their intellectual property rights which in turn could have adverse and wide ranging impacts on the whole broadcasting ecology.
10. There is a tension between the late inclusion of the SatCab Directive review in the DSM strategy and previous public statements from the Commission, such as Commission Vice President Ansip’s statement that: *“we are not planning to change territoriality or existing business models”*¹³, and the recognition, in the Commission’s draft Communication on

⁷ European Commission Explanatory Memorandum to the Proposal for a Council Directive on the coordination of certain rules concerning copyright and neighboring rights applicable to satellite broadcasting and cable retransmission, COM(91) 276 Final, p.7.

⁸ See footnote 5.

⁹ Commission Communication “A digital Single Market For Europe”, COM(2015) 192 Final, http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf

¹⁰ DSM Communication, p.7.

¹¹ Commission Report 2002, COM(2002) 430 Final.

¹² This right is underpinned by article 10 of the SatCab Directive, which provides: *“Exercise of the cable retransmission right by broadcasting organizations : Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization 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”*.

¹³ Exchange of views, European Parliament, Strasbourg, 27th April 2015.

Copyright, that “the financing of new productions in the audio-visual sector relies largely on territorial licensing combined with territorial exclusivity granted to individual distributors or service providers”.¹⁴

11. Bearing in mind the Commission’s desire not to change territoriality or existing business models, and its recognition that exclusivity is central to financing new productions, Sky considers it crucial that content producers / rights owners retain the freedom to choose the basis upon which they licence their content – whether that be on an exclusive basis or not. Sky is deeply concerned that the Commission’s plans for possible reform could lead to a situation where content producers / rights owners would only be able to license their rights on a pan-European basis.
 12. In this response, we explain how the SatCab Directive has facilitated the management of copyright for satellite broadcasts (albeit with limited relevance in practice) whilst maintaining an appropriate balance between promoting creativity and encouraging cross-border broadcasting (Section I, below). We then outline why the Commission’s plans for possible reform could have adverse and wide ranging impacts and must be avoided (Section II, below). Our answers to specific questions put by the Commission are in the annex to this document.
- I. The SatCab Directive has facilitated the management of copyright for satellite broadcasts whilst maintaining an appropriate balance between promoting creativity and encouraging cross-border broadcasting**

13. Sky considers that the Directive has facilitated the management of rights clearance (albeit with limited relevance in practice) whilst maintaining an appropriate balance between promoting creativity and encouraging cross-border broadcasting.

The Directive has facilitated the management of copyright for satellite broadcasts, but this has limited relevance in practice

14. Sky understands that the intention behind the application of the country of origin principle to satellite broadcasts was to facilitate the management of copyright for satellite broadcasts with a view to enabling the provision of cross-border television.
15. In Sky’s view, the Directive has been successful in clarifying where and when and how satellite broadcasting involves copyright (and in particular has assisted in establishing a licensing regime for music rights). This in turn has increased legal certainty and reduced the significant costs of having to comply with multiple copyright regimes. This is helpful not only to broadcasters wishing to transmit their programmes by satellite but also to rights holders who wish to exploit their rights by way of satellite broadcasting.
16. In practice, however, broadcasters do not rely on the application of the country of origin principle for their satellite broadcasts (other than in connection with music rights). This is because broadcasters acquire the rights they need to distribute their services by satellite through direct negotiations with rights owners, whether for domestic or cross-border distribution.

The Directive preserves the fundamental need to promote creativity whilst it provides a framework for enabling cross-border activity

17. From the outset, the Directive’s aim of encouraging cross-border broadcasting was balanced by the need to “encourage investment in promoting creativity”.¹⁵ The importance of

¹⁴ Draft Communication from the Commission “Towards a modern, more European copyright framework” (2015).

maintaining a balance between these competing interests is as relevant today as it was when the Directive was adopted in 1993, and is explicitly recognised by the Commission in its Digital Single Market Strategy Paper.¹⁶

18. The fundamental value of the SatCab Directive is that it promotes creativity by enshrining the principle of contractual freedom. Recital 16 of the Directive authorises exclusive licensing of content¹⁷, which underpins the broadcasting ecology. Broadcasters, whether pay TV or free to air, are competing to attract viewers and/or subscribers and all do so by offering channels and services that are in some way differentiated from those offered by other providers. The price paid by broadcasters to license the content on the channels reflects the value of the content to the broadcaster. The less effective the content is as a differentiator, the less the broadcaster will value and pay for it.
19. Exclusivity therefore has a significant impact on the value of audio-visual rights and generates benefits which are of fundamental importance to the broader ecosystem. If a licensee did not have exclusivity it wouldn't be prepared to invest, or at least not to anything like the same degree, in promoting and distributing content, as it could not point to that content as a differentiating aspect of its service and it would fear free-riding by competitors.
20. Moreover, the Directive provides additional protection to authors and neighbouring rights owners by allowing exclusive contractual licensing practices to be reinforced by the application of signal encryption techniques. As the Commission points out in its implementation Report, encryption also favours "fairer remuneration of rights holders" and "facilitates audience measurement".¹⁸
21. By granting broadcasters the exclusive right to exercise their cable rights individually (article 10), the SatCab Directive reasserts broadcasters' freedom to exploit their intellectual property rights.

Whilst the Directive does enable cross-border broadcasting, the fact that this has not happened on a greater scale is not grounds for reform

22. Even if broadcasters did rely on the country of origin principle for their satellite broadcasts (which they do not, as explained above), we do not believe that the Directive would have led to multi-territory distribution on a greater scale. The Commission has found in many cases that, for a number of reasons, markets in the broadcasting sector are national or, at their broadest, cover linguistically homogenous areas¹⁹.

¹⁵ See footnote 5.

¹⁶ In its DSM Communication p.7, the Commission states: "Europe needs a more harmonised copyright regime which provides incentives to create and invest while allowing transmission and consumption of content across borders, building on our rich cultural diversity. To this end, the Commission will propose solutions which maximise the offers available to users and open up new opportunities for content creators, while preserving the financing of EU media and innovative content."

¹⁷ Recital 16 of the SatCab Directive provides: "Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned".

¹⁸ Commission Report 2002, p.8.

¹⁹ See for example: Case COMP/M.2876 *Newscorp/Telepiù*, Commission decision of 2 April 2003, paragraph 62; Case COMP/M.5932 *News Corp/BskyB* paragraphs 73 to 75 and 110; Case COMP/M.6880 *Liberty Global/Virgin Media*, Commission decision of 15 April 2013, paragraphs 23 and 51 to 54; Case COMP/M.6866 *Time Warner/CME*, Commission decision of 14 June 2014, paragraph 31; and Case COMP/M.5734 *Liberty Global Europe/Unitymedia*, Commission decision of 25 January 2010, paragraphs 40 and 43.

23. For example, the Commission found in its own recent clearance decision in *BSkyB/Sky Deutschland/Sky Italia*²⁰, that pay TV providers generally do not operate on a multi-territory basis because:

- there are linguistic differences between countries;
- the rights to broadcast TV channels are obtained for the whole of a national territory;
- the appeal of audiovisual content depends on national tastes, culture and preferences;
- advertising on channels is not sold on a multiterritory basis;
- marketing, promotion and advertising of channels tends to take account of national differences and consumer preferences and tends to be executed nationally;
- channels negotiate carriage fees separately for each country; and
- national preferences are very important in relation to content and this affects the value of TV channels and marketing and promotion strategy.

24. This specificity of the audio-visual sector is well understood by academia. Writing in a European Audiovisual Observatory publication in 2009, Professor Hugenholtz observed that:

*“the main problem here is that the ideal of a pan-European television market and the reality of the market simply do not match up. Film distributors rarely allow the licensing of broadcasts of their films on the pan-European level, but cherish the principle that national markets within the European Union have their own dynamics, depending on national cultural characteristics and audience preferences. Consequently, movies are released at varying times and television broadcasts occur in “windows” that differ from country to country. Preservation of this so-called media chronology appears to be an almost sacred principle of the film industry”.*²¹

25. Multi-territory distribution is also reliant on demonstrable (and monetisable) consumer demand. As Professor Hugenholtz puts it:

*“a true pan-European television broadcasting market will occur only if there is sufficient supply and demand in the first place, as is emphasised by the FIAPF’s Legal Committee, in response to the Commission’s report: “The Commission’s concern seems to stem from a vision of the broadcast sector’s development that is at least ten years out of date. It is clear that the main inhibitory factor to the growth of pan-European broadcasters is not so much the right holders’ lack of willingness [...] to license for multiple territories, as the conclusion drawn by leading broadcasting organisations that pan-European services only make economic sense in very narrow segments of the TV market. It is baffling to think that an issue that seems of concern to no one in the industry itself, should thus be selected as a high priority by the Commission.”*²²

26. Under the SatCab Directive (and the wider EU copyright “acquis”) content delivery across Europe is very dynamic, with companies constantly experimenting with new business models and launching innovative new content services. Consumers today have more choice than they have ever had before, whether in terms of pluralistic information or culturally diverse content, which they can consume via an ever increasing number of platforms and devices. Intervention must be considered carefully to ensure it doesn’t undermine these positive market developments. Indeed, Sky anticipates further entry into other territories by

²⁰ COMP/M.7332.

²¹ Professor Hugenholtz in “Convergence, Copyrights and Transfrontier Television”, IRIS Plus, 2009-8, p11.

²² See footnote 21.

television operators, such entry being made possible via direct negotiations rather than through use of or extension of the SatCab Directive.

II. The Commission's plans for possible reform could have adverse and wide ranging impacts

27. The Commission's plans for possible reform represent a significant incursion into rights owners' and broadcasters' freedom to exploit their intellectual property rights which in turn could have adverse and wide ranging impacts on the whole broadcasting ecology

Extending the "country of origin" principle to online content services would undermine rights owners' exclusive right to authorise communications to the public of their works

28. Sky notes the Commission's interest in extending the "country of origin" principle, as applied to satellite broadcasting under the SatCab Directive, to online audiovisual content services. The "country of origin" principle under the SatCab Directive applies to distribution via satellite; it does not apply to online transmissions, for which a fresh copyright authorisation is required to make content available outside the licensed territory²³.
29. In its 2002 Report the Commission looked at extending the "country of origin" principle to online transmissions but rejected this option on the basis that the Copyright directive²⁴, which Member States were in the process of implementing at the time, provided an adequate legal framework for the distribution of broadcasters' content online.²⁵
30. In Sky's view the reasoning behind the Commission's decision to not extend the country of origin principle was sound and remains as pertinent today as it was in 2002²⁶. To protect copyrighted works, the Copyright directive expressly grants rights owners the exclusive right to authorise communications to the public of their works²⁷. This is what enables rights owners to (directly) grant exclusive rights to broadcasters for their online transmissions. Implicit in this is the right for rights owners to grant territorial licences. Any attempt to undermine the application of the Copyright directive in relation to broadcasters' online transmissions, which works well in practice, would neither be necessary nor proportionate, and could result in unintended consequences for the whole broadcasting ecology.
31. Moreover, even if the country of origin principle were extended to online content services, it would be erroneous on the Commission's part to assume that this would lead to higher demand for online content or greater supply of online content by service providers across Europe, for the reasons explained in Section I above.

A proposal depriving broadcasters of their right to exercise their cable rights individually would undermine broadcasters' freedom to exploit their intellectual property rights

32. A proposal depriving broadcasters of their right to exercise their cable rights individually would undermine rights owners' freedom to exploit their intellectual property rights. Such

²³ Murphy judgment, paragraph 257.

²⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10, corrigendum at OJ 2002 L 6, p. 70)

²⁵ In its 2002 Report, the Commission stated: "Since certain principles and conditions have been laid down for retransmission via the Internet by Directives 2000/31/EC14 and 2001/92/EC, the Commission considers it more appropriate to reflect on how to administer the copyright and related rights for this form of retransmission in the framework already established by these two Directives".

²⁶ Note that this does not imply that Sky supports a country of destination principle for music licensing.

²⁷ Copyright Directive, Article 3.

incursions into rights holders' fundamental rights must be carefully considered. Intervention in a firm's freedom to exploit its intellectual property rights is an extreme form of regulatory intervention to be undertaken only in exceptional circumstances.²⁸ In this regard, Sky notes:

- Recital 10 to the Copyright Directive recognises that *"Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of [an appropriate] reward and provide the opportunity for satisfactory returns on this investment"*;
- Article 17 of the Charter of Fundamental Rights states that *"Intellectual property shall be protected"* and everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions (except in cases of public interest and regulation under law that is necessary for the general interest);
- Article 52 of the Charter of Fundamental Rights states that limitations on the exercise of the rights and freedoms recognised in the Charter may be made only if they are *"necessary and genuinely meet objectives of general interest recognised by the Union"*; and
- Article 1 of Protocol 1 of the European Convention on Human Rights provides for peaceful enjoyment of possessions and requires that *"No one shall be deprived of his possessions except in the public interest"*.

33. Copyright is a type of intellectual property right particularly worthy of protection since it is intrinsic to the intellectual creation itself. In the recitals to the Copyright Directive, the European Parliament and Council of the EU have expressly recognised that:

- *"copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large"*;
- *"A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers"*; and
- *"Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article [167 TFEU] requires the Community to take cultural aspects into account in its action"*.

34. It is clear, therefore, that the copyright regime is intended to establish a high level of protection for rights owners to afford them adequate opportunity to receive a satisfactory return on investment, as well as protecting European cultural creativity and production. A proposal depriving broadcasters of their right to exercise their cable rights individually would lack any appreciation of the importance of broadcasters' intellectual property rights, and fall foul of the SatCab Directive's original aim of ensuring *"that protection is as effective as possible and that authors and neighbouring right owners are fully remunerated in all Member States"*.²⁹ Indeed, any such proposal would need to be carefully weighed and assessed in an impact assessment and, given the clear detriment, any such benefits would need to be both

²⁸ The ECJ has recognised that incursions into the exclusivity afforded to a holder of intellectual property rights should only arise in *"exceptional circumstances"*. See Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569, paragraph 26, where the ECJ stated: *"as the Court expressly held in Magill, an obligation to contract, to which an undertaking holding a dominant position would be subject, can be based on Article [102 TFEU] only in exceptional circumstances"*. See further: Cases C-241/91 P and 242/91 P, *RTE and ITP v Commission* (the *"Magill"* case), EU:C:1995:98, paragraph 50; Case C-418/01, *IMS Health v Commission*, EU:C:2004:257, paragraph 35; and the Commission Communication, *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings*, paragraph 78.

²⁹ See footnote 5.

very clear and very significant to outweigh the detriment. It is unclear to Sky that such benefits exist.

Applying mandatory collective rights management to platforms other than cable would turn content into a commodity and deprive rights owners of their ability to negotiate a market price for their content

35. A proposal to apply mandatory collective rights management to platforms other than cable would neither be appropriate nor proportionate. This was explicitly recognised by the Commission in its 2002 Report: *“to impose the principle of collective management on retransmission activities [across all platforms] would amount to limiting considerably the freedom of rightholders, who would no longer be able to object to the retransmissions in question”*.³⁰ The Commission also recognised in its report that:

*“a limitation on the exercise of exclusive rights would jeopardise [media chronology in the context of packages broadcast by satellite] and thus, to a certain extent, the potential remuneration in respect of a work. The Commission does not therefore consider it appropriate, at this stage, to extend the mandatory collective-management regime to other categories of retransmissions.”*³¹

36. Moreover, by extending the concept of mandatory collective licensing to all forms of distribution, content would no longer be able to be used as a differentiator of a service. As a result, content would become a “commodity” which is bought at a fixed price by all distributors. Such a scenario would invariably deprive rights owners of their ability to negotiate a market price for their content (which is not possible with mandatory collective licensing), and prevent broadcasters from being able to differentiate their services using content which is unique, attractive and purchased in a competitive market. For television operators like Sky, investment in content requires a return, which necessitates differentiating our content services from those of our competitors with distinctive and attractive content.
37. If Sky’s exclusivities were impacted by any of the forms of legislative change envisaged above this would not only fundamentally undermine Sky’s business model but also impact rights owners’ revenues from the licensing of content. Indeed, Sky would be unwilling to pay the same rates for rights which were de facto no longer exclusive to Sky and, with the removal of its product differentiation, Sky’s promotional efforts and in turn Sky’s subscriber volumes would reduce. Although rights owners would still receive remuneration through mandatory collective licensing, the reduction in rates paid by broadcasters due to loss of exclusivity would reduce the overall return to the rights owners for investment in production. The important balancing act between providing incentives to create and invest while allowing transmission and consumption of content across borders (recognised by the Commission in its Digital Single Market Strategy Paper) would be undermined.
38. In the areas in which Sky operates we have seen no evidence to suggest that legislative change would provide a better outcome than stability and certainty in the existing SatCab regime, within which commercial solutions generate considerable consumer benefits. Indeed changes to the SatCab Directive would reduce certainty and undermine growth, without providing any counterbalancing benefits.
39. Moreover, mandating collective rights management for online distribution of audiovisual content would effectively take control from the hands of rights owners and put it the hands of collecting societies. This would undermine the contractual freedom laid down in the

³⁰ Commission Report 2002, p.15.

³¹ See footnote 30.

European copyright “acquis”, and negate the delicate balance that the SatCab Directive provides between promoting creativity and enabling cross-border broadcasting.

40. Certainty in the copyright regime and in the value of intellectual property rights acquired under it provides the environment in which rights owners and broadcasters are incentivised to invest. The huge range and quality of content, services and technology that such investment has and is delivering bears testimony to this.
41. Assuming the SatCab regime (and wider copyright framework) remains stable, the potential for future growth is significant. Over 60 million households do not currently subscribe to pay TV across the five territories in which Sky operates, and there is also substantial opportunity to launch new services and bring additional products to more customers in existing and new European territories.
42. To conclude, the current review of the Directive should not be approached with a pre-determined view that it is in need of significant revision, be it to “*enlarge its scope to broadcasters’ online transmissions*” or to ensure “*enhanced cross border access to broadcasters services in Europe*”. On the contrary, Sky considers that the guiding principle of review should be that the Directive has facilitated the management of rights clearance whilst maintaining the right balance between promoting creativity and encouraging cross-border broadcasting and does not require reform.

SKY

November 2015

ANNEX

Sky's response to specific Commission questions

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

Fields marked with * are mandatory.

I. General information on respondents

*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
- If other, please specify

Sky plc ("Sky") is Europe's leading entertainment company with operations in five countries: Italy, Germany, Austria, the UK and Ireland. The company is listed on the London Stock Exchange.

* What is your name?

Philip Pilcher

What is your e-mail address?

philip.pilcher@sky.uk

* 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.

62536168216-12

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

Please choose 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

Through its wholly-owned subsidiaries, Sky offers various channels and content via satellite in the United Kingdom, Ireland, Germany, Austria and Italy. In addition to satellite, Sky also offers various channels and content over the internet in the United Kingdom, Ireland, Germany, Austria and Italy³² and in the majority of these via cable, mobile and terrestrial networks.

My institution/organisation/business operates in:

Austria ✓

Belgium

Bulgaria

Croatia

Cyprus

Czech Republic

Denmark

Estonia

Finland

France

Germany ✓

Greece

³² Sky Italia transmits also by means of IPTV.

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

If other, please specify

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

Please enter your address, telephone and email.

https://corporate.sky.com/"/>

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

Received contributions, together with the identity of the contributor, will be published on the internet, unless the contributor objects to publication of the personal data on the grounds that such publication would harm his or her legitimate interests. In this case the contribution may be published in anonymous form. Otherwise the contribution will not be published nor will, in principle, its content be taken into account.

Please read the Privacy Statement on how we deal with your personal data and contribution.

If you object to publication of the personal data on the grounds that such publication would harm your legitimate interests, please indicate this below and provide the reasons of such objection.

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

1. The principle of country of origin for the communication to the public by satellite

For satellite broadcasting, the Directive establishes (Article 1.2) that the copyright relevant act takes place *"solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth"* (often referred to as "the country of origin" principle). So, rights only need to be cleared for the "country of origin" of the broadcast (and not for the country/ies

of reception, i.e. the countries where the signals are received [1]). The Directive indicates that in determining the licence fee for the right of communication to the public "*the parties should take account of all aspects of the broadcast such as the actual audience, the potential audience and the language version*" (Recital 17).

[1] There is no case-law from the Court of Justice of the European Union regarding the interpretation of Article 1.2 of the Directive.

1. Has the principle of "country of origin" for the act of communication to the public by satellite under the Directive facilitated the clearance of copyright and related rights for cross-border satellite broadcasts?

- Yes
- To a large extent
- To a limited extent ✓
- No
- 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).

Sky understands that the intention behind the application of the country of broadcasts was to facilitate the management of copyright for satellite broadcasts with a view to enabling the provision of cross border television.

In Sky's view, the Directive has been successful in clarifying where and when and how satellite broadcasting involves copyright (and in particular has assisted in establishing a licensing regime for music rights). This in turn has increased legal certainty and reduced the significant costs of having to comply with multiple copyright regimes. This is helpful not only to broadcasters wishing to transmit their programmes by satellite but also to rights holders who wish to exploit their rights by way of satellite broadcasting.

In practice, however, broadcasters do not rely on the application of the country of origin principle for their satellite broadcasts (other than in connection with music rights). This is because broadcasters acquire the rights they need to distribute their services by satellite through direct negotiations with rights owners, whether for domestic or cross-border distribution.

2. Has the principle of "country of origin" for the act of communication to the public by satellite increased consumers' access to satellite broadcasting services across borders?

- Yes
- To a large extent
- To a limited extent ✓
- No
- No opinion

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

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

See Sky's response to question 1.1 above.

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

- Yes ✓
 To a large extent
 To a limited extent
 No
 No opinion

3.1. Please explain and indicate which type of obstacles.

Even if broadcasters did rely on the country of origin principle for their satellite broadcasts (which they do not), we do not believe that the Directive would have led to multi-territory distribution on a greater scale. The Commission has found in many cases that, for a number of reasons, markets in the broadcasting sector are national or, at their broadest, cover linguistically homogenous areas³³.

For example, the Commission found in its own recent clearance decision in *BSkyB/Sky Deutschland/Sky Italia*³⁴, that pay TV providers do not operate on a multi-territory basis because:

- there are linguistic differences between countries;
- the rights to broadcast TV channels are obtained for the whole of a national territory;
- the appeal of audiovisual content depends on national tastes, culture and preferences;
- advertising on channels is not sold on a multiterritory basis;
- marketing, promotion and advertising of channels tends to take account of national differences and consumer preferences and tends to be executed nationally ;
- channels negotiate carriage fees separately for each country; and
- national preferences are very important in relation to content and this affects the value of TV channels and marketing and promotion strategy.

Multi-territory distribution is also reliant on demonstrable (and monetisable) consumer demand.

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

- Yes ✓
 To a large extent
 To a limited extent
 No
 No opinion

4.1. Please explain and indicate which type of obstacles.

See our response to question 3.1 above.

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

³³ See for example: Case COMP/M.2876 *Newscorp/Telepiù*, Commission decision of 2 April 2003, paragraph 62; Case COMP/M.5932 *News Corp/BskyB* paragraphs 73 to 75 and 110; Case COMP/M.6880 *Liberty Global/Virgin Media*, Commission decision of 15 April 2013, paragraphs 23 and 51 to 54; Case COMP/M.6866 *Time Warner/CME*, Commission decision of 14 June 2014, paragraph 31; and Case COMP/M.5734 *Liberty Global Europe/Unitymedia*, Commission decision of 25 January 2010, paragraphs 40 and 43.

³⁴ COMP/M.7332.

5.1. Please explain.

In Sky's view, the Directive has been successful in clarifying where and when and how satellite broadcasting involves copyright (and in particular has assisted in establishing a licensing regime for music rights).

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

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

6.1. Please explain.

As explained above, in practice, broadcasters do not rely on the application of the country of origin principle for their satellite broadcasts (other than in connection with music rights). This is because broadcasters acquire the rights they need to distribute their services by satellite through direct negotiations with rights owners, whether for domestic or cross-border distribution.

This system of direct licensing works well in practice (and does not give rise to particular remuneration issues): it allows rights owners to negotiate a market price for their content and broadcasters to differentiate their services using content which is unique, attractive and purchased in a competitive market. For television operators like Sky, investment in content requires a return, which necessitates differentiating our content services from those of our competitors with distinctive and attractive content.

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

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.

Sky considers that the SatCab regime establishes an adequate level of protection for rights owners, allowing them to receive a satisfactory return on investment. In so doing, the Directive protects European cultural creativity and production.

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.

As explained above, in practice, broadcasters do not rely on the application of the country of origin principle for their satellite broadcasts (other than in connection with music rights). This is because broadcasters acquire the rights they need to distribute their services by satellite through direct negotiations with rights owners, whether for domestic or cross-border distribution. We are therefore unable to comment on whether the application of the country of origin principle has resulted in any specific costs.

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 opinión

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

- Yes ✓
- No
- No opinión

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 opinión

9.4. Please explain.

In Sky's view the current review of the Directive should not be approached with a pre-determined view that it is in need of significant revision, be it to "*enlarge its scope to broadcasters' online transmissions*" or to ensure "*enhanced cross border access to broadcasters services in Europe*". On the contrary, Sky considers that the guiding principle of review should be that the Directive has facilitated the management of rights clearance whilst maintaining the right balance between promoting creativity and encouraging cross-border broadcasting and does not require reform.

2. The management of cable retransmission rights

The Directive provides a double track copyright clearing process for the simultaneous retransmission by a cable operator of an initial transmission from another Member State (by wire or over the air, including by satellite) of TV or radio programmes (Article 1.3). Broadcasters can license to cable operators the rights exercised by them in respect of their own transmission, irrespective of whether the rights concerned are broadcasters' own or have been transferred to them by other copyright owners and/or holders of related rights (Article 10). However, according to Article 9, all other rights (of authors and neighbouring right holders) necessary for the cable retransmission of a specific programme can only be exercised through a collecting society. Finally, Articles 11 and 12 introduce negotiation and mediation mechanisms for dispute resolution concerning the licensing of the cable retransmission rights.

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

- Yes ✓
- To a large extent
- To a limited extent
- No
- No opinion

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

In Sky's view the Directive has brought an assurance of rights clearance for cable operators whilst allowing broadcasters to exercise their cable rights individually (article 10). In so doing, the Directive has struck the right balance between the exercise of exclusive rights and the legal certainty that cable operators require for their operations.

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

- Yes
- To a large extent
- To a limited extent
- No ✓
- No opinion

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

See Sky's response to question 3.1 above.

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.

Not applicable.

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.

Not applicable.

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

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

- Yes
- No
- No opinion ✓

13.1. Please explain your answer.

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

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

- Yes
- No ✓
- No opinión

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

- Yes ✓
- No
- No opinión

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 opinión

14.4. Please explain your answers.

See our response to question 9.4 above.

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

The principles set out in the Directive are applicable only with respect to satellite broadcasting and cable retransmissions [2]. They do not apply to transmissions of TV and radio programmes by other means than satellite or to retransmissions by other means than cable. Notably these principles do not apply to online transmissions or retransmissions.

Until relatively recently, broadcasters' activities mainly consisted of non-interactive transmissions over the air, satellite or cable and broadcasters needed to clear the broadcasting/communication to the public rights of authors, performers and producers. However, the availability of broadcasters' programmes on an on-demand basis after the initial broadcast (e.g. catch-up TV services) is on the increase. Providing such services requires broadcasters to clear a different set of rights than those required for the initial broadcast, namely the reproduction right and the making available right. Forms of transmission such as direct injection in cable networks or transmissions over the internet (e.g. webcasting) are also increasing. Digital platforms also enable programmes to be retransmitted simultaneously across networks other than cable (e.g. IPTV, DTT, simulcasting).

[2] The concept of retransmission is generally understood as the simultaneous transmission of a broadcast by a different entity such as a cable operator.

1. The extension of the principle of country of origin

15. Please explain what would be the impact of extending the "country of origin" principle, as applied to satellite broadcasting under the Directive, to the rights of authors and neighbouring right holders relevant for:

15.1. TV and radio transmissions by other means than satellite (e.g. by IPTV, webcasting).

Sky notes the Commission's interest in extending the "country of origin" principle, as applied to satellite broadcasting under the SatCab Directive, to online audiovisual content services. The "country of origin" principle under the SatCab Directive applies to distribution via satellite; it does not apply to online transmissions, for which a fresh copyright authorisation is required to make content available outside the licensed territory³⁵.

In its 2002 Report the Commission looked at extending the "country of origin" principle to online transmissions but rejected this option on the basis that the Copyright directive³⁶, which Member States were in the process of implementing at the time, provided an adequate legal framework for the distribution of broadcasters' content online.³⁷

In Sky's view the reasoning behind the Commission's decision to not extend the country of origin principle was sound and remains as pertinent today as it was in 2002³⁸. To protect copyrighted works, the Copyright directive expressly grants rights owners the exclusive right to authorise communications to the public of their works³⁹. This is what enables rights owners to (directly) grant exclusive rights to broadcasters for their online transmissions. Implicit in this is the right for rights owners to grant territorial licences. Any attempt to undermine the application of the Copyright directive in relation to broadcasters' online transmissions, which works well in practice, would neither be necessary nor proportionate, and could result in unintended consequences for the whole broadcasting ecology.

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

See our response to question 15.1 above.

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

See our response to question 15.1 above.

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

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

If the country of origin principle were extended to online content services, it would be erroneous on the Commission's part to assume that this would lead to higher demand for online content or greater supply

³⁵ Murphy judgment, paragraph 257.

³⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10, corrigendum at OJ 2002 L 6, p. 70)

³⁷ In its 2002 Report, the Commission stated: "Since certain principles and conditions have been laid down for retransmission via the Internet by Directives 2000/31/EC14 and 2001/92/EC, the Commission considers it more appropriate to reflect on how to administer the copyright and related rights for this form of retransmission in the framework already established by these two Directives",

³⁸ For the avoidance of doubt this does not imply that Sky supports a country of destination principle for music licensing.

³⁹ Copyright Directive, Article 3.

of online content by service providers across Europe, for the reasons explained in our response to question 3.1 above.

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

Under the SatCab Directive (and the wider EU copyright "acquis") content delivery across Europe is very dynamic, with companies constantly experimenting with new business models and launching innovative new content services. Consumers today have more choice than they have ever had before, whether in terms of pluralistic information or culturally diverse content, which they can consume via an ever increasing number of platforms and devices. Intervention must be considered carefully to ensure it doesn't undermine these positive market developments. Indeed, Sky anticipates further entry into other territories by television operators, such entry being made possible via direct negotiations rather than through use of or extension of the SatCab Directive.

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)?

If Sky's exclusivities were impacted by this or any other of the forms of legislative change envisaged by the Commission in relation to the SatCab Directive this would not only fundamentally undermine Sky's business model but also impact rights owners revenues from the licensing of content. Indeed, Sky would be unwilling to pay the same rates for rights which were de facto no longer exclusive to Sky and, with the removal of its product differentiation, Sky's promotional efforts and in turn Sky's subscriber volumes would reduce. Although rights owners would still receive remuneration through mandatory collective licensing, the reduction in rates paid by broadcasters due to loss of exclusivity would reduce the overall return to the rights owners for investment in production. The important balancing act between providing incentives to create and invest while allowing transmission and consumption of content across borders (recognised by the Commission in its Digital Single Market Strategy Paper) would be undermined.

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

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

See our response to question 17 above.

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

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)?

Broadcasters acquire the rights they need to distribute their services through direct negotiations with rights owners, whether for domestic or cross-border distribution.

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

No.

21. How are the rights of authors and neighbouring right holders relevant for the transmission of broadcasters' services via direct injection in cable network currently licensed?

See our response to question 20 above.

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

No.

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

See our response to question 20 above.

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

No.

23. How are the rights of authors and neighbouring right holders relevant for interactive broadcasters' services currently licensed (e.g. catch-up TV, video on demand services)?

See our response to question 20 above.

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

No.

24. What would be the impact of extending the copyright clearance system applicable for cable retransmission (mandatory collective licensing regime) to?

24.1. The simultaneous retransmission [3] of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

A proposal to apply mandatory collective rights management to platforms other than cable would neither be appropriate nor proportionate. This was explicitly recognised by the Commission in its 2002 Report: *“to impose the principle of collective management on retransmission activities [across all platforms] would amount to limiting considerably the freedom of rightholders, who would no longer be able to object to the retransmissions in question”*⁴⁰.

The Commission also recognised in its Report that *“a limitation on the exercise of exclusive rights would jeopardise [media chronology in the context of packages broadcast by satellite] and thus, to a certain extent, the potential remuneration in respect of a work. The Commission does not therefore consider it appropriate, at this stage, to extend the mandatory collective-management regime to other categories of retransmissions.”*⁴¹

Moreover, by extending the concept of mandatory collective licensing to all forms of distribution, content would no longer be able to be used as a differentiator of a service. As a result, content would become a “commodity” which is bought at a fixed price by all distributors. Such a scenario would invariably deprive rights owners of their ability to negotiate a market price for their content (which is not possible with mandatory collective licensing), and prevent broadcasters from being able to differentiate their services using content which is unique, attractive and purchased in a competitive market. For television operators like Sky, investment in content requires a return, which necessitates differentiating our content services from those of our competitors with distinctive and attractive content.

If Sky's exclusivities were impacted by this or any other of the forms of legislative change envisaged by the Commission in relation to the SatCab Directive this would not only fundamentally undermine Sky's business model but also impact rights owners' revenues from the licensing of content. Indeed, Sky would be unwilling to pay the same rates for rights which were de facto no longer exclusive to Sky and, with the

⁴⁰ Commission Report 2002, p.15.

⁴¹ See footnote 23.

removal of its product differentiation, Sky's promotional efforts and in turn Sky's subscriber volumes would reduce. Although rights owners would still receive remuneration through mandatory collective licensing, the reduction in rates paid by broadcasters due to loss of exclusivity would reduce the overall return to the rights owners for investment in production. The important balancing act between providing incentives to create and invest while allowing transmission and consumption of content across borders (recognised by the Commission in its Digital Single Market Strategy Paper) would be undermined.

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

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

See our response to question 24.1 above.

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

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

As explained in our response to question 24.1 above, a proposal to apply mandatory collective rights management to platforms other than cable would neither be appropriate nor proportionate.

Moreover, a proposal depriving broadcasters of their right to exercise their cable rights individually would undermine rights owners' freedom to exploit their intellectual property rights. Such incursions into rights holders' fundamental rights must be carefully considered. Intervention in a firm's freedom to exploit its intellectual property rights is an extreme form of regulatory intervention to be undertaken only in exceptional circumstances.⁴² In this regard, Sky notes:

- Recital 10 to the Copyright Directive recognises that "Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of [an appropriate] reward and provide the opportunity for satisfactory returns on this investment";
- Article 17 of the Charter of Fundamental Rights states that "Intellectual property shall be protected" and everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions (except in cases of public interest and regulation under law that is necessary for the general interest);
- Article 52 of the Charter of Fundamental Rights states that limitations on the exercise of the rights and freedoms recognised in the Charter may be made only if they are "necessary and genuinely meet objectives of general interest recognised by the Union"; and
- Article 1 of Protocol 1 of the European Convention on Human Rights provides for peaceful enjoyment of possessions and requires that "No one shall be deprived of his possessions except in the public interest".

Copyright is a type of intellectual property right particularly worthy of protection since it is intrinsic to the intellectual creation itself. In the recitals to the Copyright directive, the European Parliament and Council of the EU have expressly recognised that:

- "*copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large*";
- "*A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers*"; and

⁴² The ECJ has recognised that incursions into the exclusivity afforded to a holder of intellectual property rights should only arise in "exceptional circumstances". See Case C-7/97 *Oscar Bronner v Mediaprint*, EU:C:1998:569, paragraph 26, where the ECJ stated: "as the Court expressly held in *Magill*, an obligation to contract, to which an undertaking holding a dominant position would be subject, can be based on Article [102 TFEU] only in exceptional circumstances". See further: Cases C-241/91 P and 242/91 P, *RTE and ITP v Commission* (the "Magill" case), EU:C:1995:98, paragraph 50; Case C-418/01, *IMS Health v Commission*, EU:C:2004:257, paragraph 35; and the Commission Communication, *Guidance on the Commission's enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings*, paragraph 78.

- "Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article [167 TFEU] requires the Community to take cultural aspects into account in its action".

It is clear, therefore, that the copyright regime is intended to establish a high level of protection for rights owners to afford them adequate opportunity to receive a satisfactory return on investment, as well as protecting European cultural creativity and production. A proposal depriving broadcasters of their right to exercise their cable rights individually would lack any appreciation of the importance of broadcaster's intellectual property rights, and fall foul of the SatCab Directive's original aim of ensuring "that protection is as effective as possible and that authors and neighbouring right owners are fully remunerated in all Member States".⁴³ Indeed, any such proposal would need to be carefully weighed and assessed in an impact assessment and, given the clear detriment, any such benefits would need to be both very clear and very significant to outweigh the detriment. It is unclear to Sky that such benefits exist.

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

No. See our response to question 3.1 above.

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 explained in our response to question 24.1 above, a proposal to apply mandatory collective rights management to platforms other than cable would neither be appropriate nor proportionate.

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

As explained in our response to question 24.1 above, a proposal to apply mandatory collective rights management to platforms other than cable would neither be appropriate nor proportionate. Such a proposal may also contravene the EU's international copyright obligations.

29. What would be the impact of introducing a system of extended collective licencing for the simultaneous retransmission and/or the simultaneous transmission of TV and radio programmes on platforms other than cable, instead of the mandatory collective licensing regime?

The impact would be similar to the one described in our response to question 24.1 above.

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

No. See our response to question 3.1 above.

3. The extension of the mediation system and the obligation to negotiate

31. Could the current mechanisms of negotiation and mediation in Articles 11 and 12 of the Directive be used to facilitate the cross border availability of online services when no agreement is concluded regarding the authorisation of the rights required for an online transmission?

No. Sky anticipates further entry into other territories by television operators, such entry being made possible via direct negotiations rather than through use of or extension of the SatCab Directive.

⁴³ See footnote 5.

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?

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.

Sky is concerned that the SatCab Directive review, which did not originally form part of the DSM strategy, was included in the strategy at the very last minute, with no prior impact assessment. In our view the Commission's plans for possible reform (as described above) represent a significant incursion into rights owners and broadcasters' freedom to exploit their intellectual property rights which in turn could have adverse and wide ranging impacts on the whole broadcasting ecology.

There is a tension between the late inclusion of the SatCab Directive review in the DSM strategy and previous public statements from the Commission, such as Commission Vice President Ansip's statement that: *"we are not planning to change territoriality or existing business models"*⁴⁴, and the recognition, in the Commission's draft Communication on Copyright, that *"the financing of new productions in the audio-visual sector relies largely on territorial licensing combined with territorial exclusivity granted to individual distributors or service providers"*⁴⁵.

The fundamental value of the SatCab Directive is that it promotes creativity by enshrining the principle of contractual freedom. Recital 16 of the Directive authorises exclusive licensing of content⁴⁶, which underpins the broadcasting ecology. Broadcasters, whether pay TV or free to air, are competing to attract viewers and/or subscribers and all do so by offering channels and services that are in some way differentiated from those offered by other providers. The price paid by broadcasters to license the content on the channels reflects the value of the content to the broadcaster. The less effective the content is as a differentiator, the less the broadcaster will value and pay for it.

Exclusivity therefore has a significant impact on the value of audio-visual rights and generates benefits which are of fundamental importance to the broader ecosystem. If a licensee did not have exclusivity it wouldn't be prepared to invest, or at least not to anything like the same degree, in promoting and distributing content, as it could not point to that content as a differentiating aspect of its service and it would fear free-riding by competitors.

Moreover, the Directive provides additional protection to authors and neighbouring rights owners by allowing exclusive contractual licensing practices to be reinforced by the application of signal encryption techniques. As the Commission points out in its implementation Report, encryption also favours *"fairer remuneration of rights holders"* and *"facilitates audience measurement"*.⁴⁷

By granting broadcasters the exclusive right to exercise their cable rights individually (article 10), the SatCab Directive reasserts broadcasters' freedom to exploit their intellectual property rights.

Please see our additional comments in attachment.

⁴⁴ Exchange of views, European Parliament, Strasbourg, 27th April 2015.

⁴⁵ Draft Communication from the Commission "Towards a modern, more European copyright framework" (2015)

⁴⁶ Recital 16 of the SatCab Directive provides: *"Whereas the principle of contractual freedom on which this Directive is based will make it possible to continue limiting the exploitation of these rights, especially as far as certain technical means of transmission or certain language versions are concerned"*.

⁴⁷ Commission Report 2002, p.8.