

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

## 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?

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- Germany
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- 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

My institution/organisation/business operates in:

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

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

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

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### 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<sup>[1]</sup>). 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?

X To a limited extent

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" (CoO) principle introduced by the Satellite and Cable Directive (SatCab Dir) has only to a limited extent facilitated clearance of authors' rights for cross-border broadcasts.

It is to be noted in this respect that, as soon as multi-territorial exploitation of musical works started to be carried out through satellite, the authors' societies organised themselves in order to be able to grant satellite broadcasters the necessary authorisation (i.e. multi-territorial licence covering the satellite footprint) without waiting for the SatCab Dir.

Therefore, where there was such satellite exploitation, GEMA offered the licences that broadcasters required for their satellite transmission.

This being said, GEMA as well as other authors' societies representing musical works have encountered

certain problems, which are the following:

- difficulties regarding the determination of where the act of communication to the public by satellite takes place in certain cases. The determination of the relevant country of origin is dependent on different circumstances and actions (e.g. the creation of specific content, the relevant satellite uplink) which can take place in separate territories due to various technical arrangements. It is challenging to assess from the outside, where the relevant actions technically take place. The collective management societies need to rely on facts and elements provided by the broadcasters and are in a difficult position to properly verify such information;
- determination of the licensing fees in some instances, especially where in practice some broadcasters hide certain commercial aspects of their broadcasts targeted to their territory(ies) of destination (e.g. different language feeds or different advertisements according to the country of destination, or additional channels and services that are not reflected in the licence)

However, GEMA believes that such problems do not justify a review of the satellite related provisions of the SatCab Dir and that the Commission could deal with the outstanding issues, as outlined above, through interpretative guidelines and/or stricter implementation of rules regarding the transparency of information to be provided from the satellite broadcasters. In this respect, it can also be noted that the Directive on collective management (CRM Dir) provides in its Articles 16 and 17 an obligation for commercial users to provide to the collective management societies the information necessary for the grant of licenses. Such provisions should be transposed in such a way as to address the issues outlined above.

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?

No answer

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.

This would be extremely difficult to establish with certainty for authors' societies. The broadcasters are in a better position to answer.

However, it should be noted that some broadcasters target their broadcasts towards the audience of a single Member State other than the one in which the broadcaster is established. In this scenario, the audience from "a Member State other than the country of origin" is 100% from that one single Member State, and not the country from which the broadcaster is broadcasting.

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.

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

No answer

3.1. Please explain and indicate which type of obstacles.

GEMA would like to use this opportunity to state that it firmly believes that copyright is not an obstacle that impedes provision of broadcasting services via satellite. On the contrary, it is there to facilitate, promote and ensure legal access to creative works. Copyright law and contracts provide the necessary legal framework to provide the access to works and thus are at the centre of the sustainable development of the cultural and creative sectors that rely on such rights to create and build their markets in the most efficient and meaningful manner for consumers and European citizens in general.

Where required and appropriate, CMOs representing musical works grant multi-territorial licences. That is not necessarily the case for film distributors and broadcasters who may have specific constraints, and therefore legitimate reasons for acting differently. Thus, for example, the various national markets have their own dynamic and logic which needs to be respected for an optimal exploitation of the films: This can justify a different timing for the release of the films. National broadcasters can also be reluctant to invest in pan-European rights when their activity is mainly national.

Therefore, the lack of a pan-European satellite market is not the result of copyright law, it is more related to the characteristics of the market (especially differing languages).

In addition, the somewhat unclear scope of the SatCab Dir can also be seen as a kind of "obstacle". As shown by the ECJ's ruling in "*Lagadère Active Broadcast*" (C-192/04), there are cases where it is hard to determine if the scope of the SatCab Dir is affected, particularly in the context of "satellite broadcasting" of encrypted television programs to platform providers. While the court's obiter dictum clarified that an encrypted transmission was not intended for reception by the "public" and thus could not be qualified as "communication to the public by satellite", the legal framework of the SatCab Dir still raises further questions, e.g. with regard to the responsibility of the satellite operator which is not governed in a sufficient manner yet.

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

No answer

4.1. Please explain and indicate which type of obstacles.

Please see our answer to question 3.1.

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

X To a limited extent

5.1. Please explain.

It may happen that the location of the act of communication to the public by satellite is considered

differently due to differing interpretations of the wording of Article 1(2)(a) of the SatCab Dir. The determination of the relevant country of origin is dependent on different circumstances and actions (e.g. the preparation of programming, technical arrangement relating to the relevant satellite uplink) which can take place in separate territories. It is challenging to assess, from the outside, where the relevant actions technically take place. The collecting societies have to rely on the facts and elements provided by the broadcasters and are in a difficult position to properly verify such information. In a way, this allows broadcasters almost “free choice” as regards the “country of origin” and can lead to uncertainty in licensing, “forum shopping” and in certain instances even avoidance of relevant licences by certain services.

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?

X To a large extent

6.1. Please explain.

The lack of information provided by users can make calculation of appropriate licensing fees very challenging.

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?

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.

As stated in answers to questions 5.1. and 6.1., the practice of certain broadcasters led to lower remuneration for rights holders.

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)?

X No

8.1. Please explain.

As stated in our answers to questions 5.1. and 6.1., the practice of certain broadcasters led to lower remuneration for rights holders. Although there are no 'specific' costs which can definitely be allocated to the application of the CoO principle, it cannot be excluded either that regular administrative costs for CMOs increased because of the implementation of the SatCab Dir (e.g. in the context of the examination of the Directive and its consequences, the case law of CJEU, etc.)

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?

X No

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

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

9.4. Please explain.

GEMA believes that there is no need to review the satellite provisions of the SatCab Dir and that the Commission could deal with the outstanding issues, as outlined above in answer to question 1.1., through interpretative guidelines and/or stricter implementation of rules regarding the transparency of information to be provided from the satellite broadcasters. In this respect, it can be noted that the CRM Dir provides in its Articles 16 and 17 an obligation for commercial users to provide to the collective management societies the information necessary for the grant of licenses. Such provisions should be transposed in such a way as to address such issues. It needs to be added that the extension of these provisions to online exploitations would also not be desired (please see our answers in Section III).

## 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?

X 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 the same type of retransmission services when they are offered via wireless means (e. g. 'Mobile TV') or provided by other technical means (e. g. 'over-the-top' on the open internet environment).

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

X 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?

X 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.

n/a

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)?

X 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?

X Yes

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

X No opinion

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

X 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 (please see our answer to question 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 (please see our answer to question 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

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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:

With regard to questions 15.1. to 15.4., GEMA underlines strongly that an extension of the CoO principle beyond the current scope of the provisions of the SatCab Dir has to be rejected. This principle has been introduced as a "lex specialis" intended to cover particular requirements of satellite broadcasting (such as satellite "over-spill" effects, please see our answer to question 15.3. below), and cannot be transferred to other distribution channels. This applies in particular to online distribution services: An extension of the CoO principle to such services would encourage digital service providers to start "forum shopping" and would ultimately lead to an essentially lower level of protection of authors' rights.

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

As a preliminary remark in answer to questions 15.1 and 15.2, GEMA notes that the EU has launched this consultation within the framework of its reflection to find the most appropriate way to facilitate more and wider cross-border access to broadcast programmes in particular and online services in general. In this perspective, GEMA would like to stress that the extension or introduction of the CoO principle itself would not help achieve such an objective, since the CoO principle only establishes where the relevant act of transmission takes place and what the applicable law is. This principle does not address the main issues at stake concerning multi-territorial online exploitations, which are the fragmentation of repertoires, the economic and cultural realities of the market and the necessary freedom of rights holders to determine the geographical scope of their authorizations.

As regards question 15.1, the examples given above are confusing and misleading as to what exactly is being referred to:

Indeed, IPTV services are *retransmission* services and not *transmission* services in our view (except as regards the so-called cable and satellite channels) whereas webcasting services are *transmission* services.

Where *retransmission* services are concerned, an extension of the CoO principle makes no sense at all.

As regards *transmission* services, GEMA believes that there are already appropriate licensing schemes in place to answer market needs and therefore no further legislative action is required (please see our answer to question 22.).

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

In order to support the facilitation of more cross-border access to ‘broadcast-like services’, Art 32 of the CRM Dir provides a legal framework “*on the basis of the voluntary aggregation of the required rights, in compliance with the competition rules under Articles 101 and 102 TFEU*” and sets out that for “*a multi-territorial licence for the online rights in musical works required by a broadcaster to communicate or make available to the public its radio or television programmes simultaneously with or after their initial broadcast as well as any online material, including previews, produced by or for the broadcaster which is ancillary to the initial broadcast of its radio or television programme*”, a CMO would not be required to fulfil all the conditions under its Title III. This means that such licences can be obtained by broadcasters, where they so request and based on voluntary aggregation of the relevant rights, from the CMOs, together with or in addition to their original broadcast licences.

This provision is based on voluntary re-aggregation and is limited to broadcast-like ancillary services of the broadcasting organisations in order not to create a competitive advantage for broadcasters vis-à-vis other online service providers. In this respect, GEMA enables already such re-aggregation of repertoire, when required by broadcasters (excluding ‘simulcasting’, please see our answer to question 22.).

This framework for the facilitation of the grant of the necessary licences is based on market realities and parties’ willingness to deliver wider access; in this respect such provisions apply regardless of where the relevant act is considered to take place. Therefore, there is no necessity to consider any further legislative measure to extend the CoO principle to achieve the said objectives.

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

Regarding questions 15.3. and 15.4., GEMA believes that it makes no difference at all whether on demand services are provided by broadcasters or “standalone” online service providers. There is neither a reason nor room in the legal framework to justify such distinction. Therefore, online services should be classified based on their type of service, not on the type of company operating the service. In GEMA’s opinion, the CoO principle can under no circumstances be accepted for on demand services. Regarding the special case of online services ancillary to initial broadcasts, please see our answer to question 15.2.

Turning to the matter in hand, potential considerations regarding an extension of the CoO principle to on-demand online services can in no way be brought in accordance with the de facto global technical reach of online services. The far-reaching possibilities for end users to receive and access on-demand content irrespective of national borders are virtually diametrically opposed to any tendencies to extend the CoO principle in this field. In light of their global reach, the regime created under the SatCab Dir cannot be readily applied to online services: Satellite broadcasters and online services are not comparable, as the establishment of a satellite station is a project requiring significant financial effort owing to the necessary technical installations and the frequency assignment stipulated by law. The number of respective providers is quite limited for this reason. In addition, the implementation of the CoO principle on an EU

scale had been primarily motivated by a need to solve the (technical) issue of unintended satellite “over-spill” due to technical reasons, which is characteristic for satellite broadcasting but does not allow for a comparison to the – intentional – global accessibility of online services. In consideration of these fundamentally different underlying facts, the *lex specialis* of the CoO principle cannot be transferred from satellite broadcasting to online services.

Last but not least, an extension of the CoO principle to online services would not only have a negative impact on the voluntary re-aggregation of repertoires, but also pose the risk of even further repertoire fragmentation. Both the balance that has recently (and according to Gema’s opinion excellently) been struck by the CRM directive and the existing system of reciprocal agreements between collective management societies would be at stake.

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

As already explained above in our answer to question 15.3., an extension of the CoO principle is, for various reasons, not acceptable for on-demand services of any kind and would clearly be contrary to the impact direction of the CRM directive.

In particular, such an extension would completely disregard the vast development of the online licensing market, especially in recent times (please see our answer to question 16.1. below).

Moreover, in case of an extension of the CoO principle, GEMA sees a tangible risk of large international online service providers starting “forum shopping”, i.e. deliberately migrating towards licensing environments with particularly low protection levels: As online service providers can easily change location, “forum shopping” for the most favourable exploitation environment – being the location offering the greatest economic advantages and the lowest level of legal protection – would be actively encouraged. “Low-price” and/or “low-protection” territories would have a similar high appeal to online service providers as “tax havens” currently already have. This could ultimately result in a downward trend, also in terms of licensing fees and thus remuneration for right holders, and a “race to the bottom” to the economic disadvantage of all right holders.

Such risk has also been underlined by the *De Wolf Study* prepared for the European Commission, which had found that the CoO principle is fundamentally detrimental to right holders, and can therefore not be approved by them, in that it encourages “forum shopping”: a service provider can choose the country where it will benefit from the most favourable conditions to exploit a work.

GEMA would like to note that such criticism is incurred whatever the retained criterion: location of the server, location of the economic residence, location of the person uploading. Such location can very easily be changed. The criterion is also deceptively simple in particular as regards companies with a complex and diversified structure and/or operations, e.g. if several servers are used in different countries.

Such criterion is therefore totally unsatisfactory and we also note that copyright was excluded from the general principle of the country of origin in the E-commerce directive as well.

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

In GEMA’s opinion, an extension of the CoO principle would not be a suitable action to enhance cross-border accessibility of online services for consumers.

Quite the contrary, it is to be feared that such an extension would have further negative impact on the repertoire situation within the European Union as it almost certainly leads to “forum shopping” (please see our answer to question 15.3. above). A migration of online service providers towards “low-price” territories, however, would most probably result in less voluntary aggregation and possibly even more

fragmentation of repertoires. These major negative implications would constitute serious obstacles for the further development of the Digital Single Market, as both new and existing cross-border services would be facing additional challenges in the rights clearing process. In the view of the above and considering the new legal framework of the CRM directive, it is not to be expected that an extension of the CoO principle could achieve the overarching goal of more cross-border accessibility.

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

In order to enhance cross-border accessibility, efforts should be undertaken to create a healthy environment for the European digital market, so that online services are actually able to develop their full potential. GEMA and its 69,000 members represented would explicitly appreciate a higher cross-border demand of their creative works, which would create more and additional revenues.

Therefore, first of all, cross-border online services need appropriate licenses to operate successfully on a pan-European basis. With regards to multi-territorial licensing of online rights in musical works the CRM directive recently established a detailed, specific legal framework, which has yet to be transposed into national law by the Member States.

In compliance with this set of rules, for example, PRS for music, STIM and GEMA just formed a joint venture, which will be the world's first fully integrated multi-territory music licensing and processing hub covering European territories. Designed to drive growth in the digital music market and seeking to address the market demands, this new hub will assist and benefit both music right holders and multi-territory digital service providers. Simplified licensing negotiations will reduce barriers for innovative new online services and the ability to include additional repertoires into the hub's core license has the potential to make a major contribution to online cultural diversity.

Against this background and considering the recent developments in the online licencing market, GEMA believes it would be most reasonable to let these strategic initiatives run their course before considering any new actions that could disturb the balance recently struck by the CRM directive. In light of the legal framework of the CRM directive and the increasing spread of multi-territory licenses as an answer to market demands, it is worth mentioning that a fair amount of online services nevertheless prefer to launch and operate their offers on a country-by-country basis.

In any case, the most important problem in the digital environment preventing a healthy, competitive and strong market in Europe actually is the so-called "transfer of value" in favour of certain online service providers that carry out copyright protected acts but hide behind the safe harbour regime of the E-commerce directive to avoid having to seek the rights holders' consent and to pay them a remuneration. Cultural content is no longer exclusively available from DSPs that license and pay for the content they provide on a national or pan-European basis, such as Spotify, iTunes, Netflix or Deezer. Today, such content is mostly available and shared through platform-based services that claim online intermediary status, like YouTube, Dailymotion, SoundCloud, Facebook, Google Search, Snapchat, TuneIn etc. Such services do not create or invest in cultural content, yet they aggregate it and make it available from other websites or individual users. Most of them provide content through sophisticated platforms (content aggregation services, video sharing platforms, UGC sites, social media, etc.) on which they actively communicate protected works to the public. These activities are often monetised and generate vast revenues through the use of cultural content. These services however claim to be exempt from copyright/authors' right, in order to avoid sharing their revenues with content creators. Most of them refuse to get a license and pay for the cultural content they provide.

Many of these self-proclaimed online intermediaries are the primary point of access to cultural content for users. A large part of the turnover generated by such services in Europe depends on cultural content; according to the recent Roland Berger Study, more than 66% of YouTube's revenues are directly related to the use of cultural content on their platform.

This transfer of value is going from content creators to large self-proclaimed online intermediaries. Such services, when they are contacted by authors' societies, claim "safe harbour", contend that their activities are not copyright relevant and/or argue that they only host content uploaded by others to refuse creators' requests for appropriate remuneration. Thereby, they deprive creators of fair value and undermine the existence and emergence of innovative legitimate digital service providers who compete against these players. It also makes the market entry and cross-border roll-out of new online services much more challenging, since those services that refuse any liability are leading the market for consumers' access to creative works, without investing in the creative works they benefit from, by refusing licensing request of rights holders or by offering take it or leave it conditions to lower the value of creative works.

Addressing this "transfer of value" would be crucial for i) authors to get a share of the revenue their content generates, ii) fans and users to benefit from the innovation which a fairer online market can offer and to know that their favourite creators are fairly remunerated, iii) digital service providers and start-ups to finally have access to a level playing field. This would eventually yield a more vibrant and sustainable digital market place, where both the legitimate services and rights holders can rely on consumers' demand to develop better offers that include widest possible repertoire, streamlined rights clearance and appropriate remuneration of creators.

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)?

Extending the CoO principle would not help in solving the main problem that exists as regards multi-territorial licensing of rights in musical works for online use: The vast fragmentation of repertoires which is a result of the Recommendation of 18 October 2005 on the management of online rights in musical works. As far as this Recommendation resulted in the withdrawal from the network of representation agreements of the mechanical reproduction rights for the online use of the Anglo-American publishers, the efforts undertaken by the authors' societies and the legal framework of the CRM directive (which has yet to be transposed into national law), aim at developing, as much as possible, solutions to address such problem.

An extension of the CoO principle, however, would not only have a negative impact on the voluntary aggregation of repertoires, but also pose the risk of even further repertoire fragmentation as the balance recently struck by the CRM directive and possibly even reciprocal agreements between collective management societies would be at stake. Therefore, it must be stressed that it is not be expected that an extension of the CoO principle could achieve the overarching goal of more cross-border accessibility (please see also our answer to question 16./ 16.1 above).

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

In our opinion, an extension of the CoO principle to online services can in no way be brought in accordance with the de facto global technical reach and accessibility of online services (please see our answer to question 15.3. above).

Therefore, considering the threat of "forum shopping" (please see our answer to question 15.4.), the determination of the country of origin would lead to difficulties, regardless of which criterion (location of the server, location of the economic residence, location of the person uploading, etc.) would be decisive.

International companies with a complex and diversified structure and/or operations can easily change any of these elements taken as a criterion in order to migrate towards licensing environments with particularly low protection levels or even circumvent the licensing obligations at all. "Low-price" and/or

“low-protection” territories would have a similar high appeal to online service providers as “tax havens”. These difficulties were also clearly stated in the *De Wolf Study* where the risk of the service providers’ forum shopping to find the most favourable regime was underlined.

Therefore, in order to prevent a “race to the bottom” to the detriment of authors and rights holders, the country of origin principle should not be extended to online transmissions. In this context, it is worth noting that copyright was excluded from the general principle of the CoO in the E-commerce directive as well.

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

Yes, an extension of the country of origin principle would have a negative impact on the level of copyright protection in the EU and thus, ultimately, on right holders. Please see our answers to questions 15. to 18. 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)?

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.

As regards the examples given in the question, it needs to be noted that simulcasting is not a retransmission, in our view (please also see our answer to question 22. below).

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 retransmission services when they are offered via wireless means (e. g. ‘MobileTV’) or provided by other technical means (e. g. ‘over-the-top’ on the open internet environment), even if such services are comparable to the services of cable network operators. There are different approaches to interpret the aforementioned terms from a legal point of view which leads to an unclear legal situation relating the clearance of rights regarding these new types of retransmission services.

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 have to be distinguished two 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 an initial parallel broadcast exists, 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 it has to be noted that this kind of service is not very common in the German broadcasting market so far. Such services are currently only provided on a smaller scale, on a local or regional level.

This technique, however, might become more relevant in the future. Therefore it is necessary to point out that such direct injection in cable networks significantly increases the risk that the use of relevant rights of authors will not be adequately remunerated in comparison to today's standard: It is conceivable that cable network operators will try to avoid responsibility by arguing that their role is not more than providing physical facility for the transmission of the programme-carrying signals to the public and that their services do not result in a simultaneous 'retransmission' if the broadcast is directly injected into their cable network without any other initial transmission to the public. Considering that the cable network operators will still generate significant revenues, it has to be secured that authors and neighbouring right holders will be in the position to claim remuneration of the cable operators. A solution can be found in the "*Airfield*" ruling of the CJEU: The CJEU established the principle of the liability of two different parties for a single communication to the public right provided that the intervention of the operator is not limited to the mere provision of physical facilities for enabling or making the communication under Rec 27 of the InfoSoc Dir. In its ruling, the CJEU also underlined the role and responsibility of persons who trigger the communication and who intervene in the communication so the works become accessible to a public different from the one that was originally taken into account when licensing the person who triggers the communication (paragraph 72). Although the "*Airfield*" solution does not expressly apply to a cable network operator it can be applied to direct injections as defined above.

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 (please see our 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), there are no particular problems at the moment either, because direct injection is currently not very common in Germany as mentioned above (please see our answer to question 21.). If that changes, however, the consequences and the solution mentioned in our answer to question 21 above will become relevant.

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?

In the context of retransmission rights, we would like to clarify our understanding of the services referred

to in this question as follows:

To the common understanding of the German collecting societies licensing cable retransmission rights, the service of 'simulcasting' only includes acts of transmission via the internet carried out by the broadcasting companies themselves, in parallel to their regular live-broadcast via other technical means (e.g. satellite or terrestrial transmission).

The service of 'webcasting', on the other hand, is understood as the sole transmission of programs via the internet, without any simultaneous terrestrial-, cable- or satellite-broadcast.

From our point of view, both transmissions (simulcasting and linear webcast) have to be treated as initial broadcasts, not as (cable) retransmissions. In consequence, collecting societies license (initial) broadcasting rights for simulcast- and linear webcast-transmissions.

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

No, please see our answer to question 22. above.

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 broadcasters' interactive services involve both an act of communication to the public and an act of reproduction.

With regard to the withdrawal of Anglo-American mechanical rights from the network of representation agreements by so-called option 3 publishers, authors' societies currently can only offer the rights that they manage and re-aggregate on a territorial scope. GEMA as a local society thus plays a key role in the licensing process. Therefore, it is GEMA's effort to re-aggregate these rights on a voluntary basis in order to provide broadcasters with national blanket licenses for their online services. In order to support the facilitation of more cross-border access to 'broadcast-like services', Art. 32 of the CRM directive provides a legal framework for a voluntary aggregation on a multi-territorial basis (please see our respective answer to question 15.2.).

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

No answer

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<sup>[3]</sup> of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

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

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<sup>[4]</sup> of TV and radio programmes on platforms other than cable (e.g. satellite, IPTV, internet)?

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

Such extension would concern, in our view, 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?

No answer

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

Please see our 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, as 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 with regard to acts of retransmission in "closed environments" as well as simultaneous retransmissions over the "open internet". However, due to the fact that there already exists an established licensing system which meets market-specific needs of users in every single territory, such an extension should be territorially limited to national services. Otherwise there will be a risk of unequal treatment of 'classical' cable operators whose cable networks are conventionally limited to national territories and who are therefore not able to retransmit beyond geographical boundaries. Ultimately, a territorially limited extension of the licensing system for retransmission rights guarantees the possibility to control and enforce relevant rights, which is necessary to provide for an indispensable quality-level to the exercising of rights and for a reasonable participation of the right holders in relevant revenues.

In accordance with our understanding of simulcasting being a transmission and thus being covered by initial broadcasting rights (as explained in our answer to question 22. above), such transmissions/simulcasts should remain unaffected by an 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 with aforementioned international copyright obligations:

- Art. 11bis (1) (ii) of the 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 (...)'* and
- Art. 8 of the 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), 11bis (1) (i) and (ii) of the Berne Convention'*.

Therefore, the mandatory collective licensing regime that is already available under SatCab Dir can also be applied to (online) retransmissions which are covered by Art. 11bis (1) (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 for such simultaneous retransmissions would be a step towards a collective licensing system, thus simplifying and improving the retransmission rights management, it is important to note that the mandatory licensing regime as already existing under the SatCab Dir is well established and proved it's applicability and functionality for cable retransmission licensing. With regard to the similarity between cable retransmission and retransmissions on platforms other than cable as mentioned above, it would be more appropriate to extend the existing regime with a technically neutral approach on the definition of cable retransmission as such.

Otherwise, the consequence would be a discrimination of platforms other than cable compared to cable operators (who would still profit from the mandatory collective licensing system).

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

Please see our answer to question 29.

### 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?

Please see GEMA's combined answer to questions 31 and 32:

The CRM Dir has already provided relevant provisions in this respect as regards the activities of CMOs and their licensees. Therefore, GEMA believes that there is no need to use such system for disputes in any other area, including online services.

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

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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.