

WE ARE SHAPING THE INTERNET.
YESTERDAY. TODAY. BEYOND TOMORROW.



DRAFT POSITION PAPER

Proposal by the EU Commission for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016) 594 final)

Berlin/Brussels, 12.12.2016

Copyright, as part of the Digital Single Market, is one of Jean-Claude Juncker's 10 priorities, which were published in the beginning of this term¹. In December 2015, the EU Commission presented an action plan to modernise the copyright in the European Union.²

The proposal for a regulation on ensuring the cross-border portability of online content services in the internal market was a first step.³ In March 2016, a public consultation on freedom of panorama and related rights was started. The results were published on 14 September 2016.⁴

1. Basic Content

On the same day, the Commission published its proposal for a regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (hereinafter *the proposal*). The objective is to foster the cross-border distribution of TV and radio programmes and ease licencing of copyright for online and retransmission services.

For this purpose, the terms "ancillary online services" and "retransmission" are defined (Art. 1), the principle of "country of origin" (to facilitate clarification and acquisition of rights for ancillary online services, Art. 2) and the system of mandatory collective rights management (to facilitate clarification and acquisition of rights for retransmission services, Art. 3) are established.

2. eco position

Extension of the principle of "country of origin" on ancillary online services

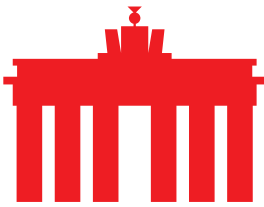
While linear TV has dominated the market for a long time, the way people watch TV has changed drastically in recent times, as a result of modern technology. Viewers

¹ http://ec.europa.eu/archives/juncker-commission/priorities/02/index_en.htm

² http://europa.eu/rapid/press-release_IP-15-6261_en.htm

³ <http://data.consilium.europa.eu/doc/document/ST-15302-2015-INIT/en/pdf>

⁴ <https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-results-public-consultation-role-publishers-copyright-value>



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enjoy the flexibility of TV and radio programmes as well as being able to consume programming with different technologies: cable, satellite, digital terrestrial networks, closed and open Internet Protocol-based networks and mobile networks.

Services associated with live-programming (such as catch up TV, replay TV, time shift, instant re-start, etc.) are increasingly replacing strictly linear programming. However, current law does not take account of these developments.

With the Satellite and Cable Directive (SatCab)⁵, cross-border transmission was simplified for satellite and cable network providers. However, this change only applied to simultaneous, unmodified and complete retransmission. Neither online services nor any other technologies aside from satellite, cable and microwave systems were included.

Online services are facing the problem of different rules being applicable to them, even though the services are similar to those of linear TV and radio programming.

The proposal tries to solve this by expanding the principal of “country of origin” to the newly defined ancillary online services. The acts of broadcasting to the public and making programmes available through such services will be facilitated by deeming them “to occur solely in the Member State in which the broadcasting organization has its principal establishment”.

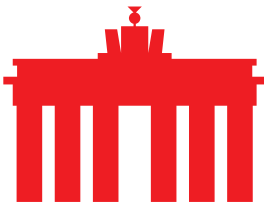
The proposal’s facilitations are indeed welcome. This is especially the case, because until now different laws have been applicable to the same or similar services, depending on the technology or means of transmission. However, the proposal explicitly allows “providing an ancillary online service by or under the control and responsibility of a broadcasting organisation”. Therefore, it excludes everyone else and creates a clear competitive disadvantage for network suppliers and other competing companies.

To prevent, or at least to minimise the risk of competitive disadvantage, simplification is needed of the licensing of the necessary rights for the modern functions that are demanded by the public – but without relinquishing the principal of territoriality. This is the only way to fully accommodate the portability regulation.

Consistent technology neutrality for transmission

The concept of obligatory collective rights management, introduced with the SatCab, had a strong influence on the transmission by cable network providers. This idea made bundled licensing possible and is nowadays – due to the fragmentation of rights – essential. Instead of concluding different contracts with partially unknown rights holders (e.g. authors, composers, studios, producers), often within a very short time, cable network providers can acquire the necessary licenses through a collective rights management organisation (one stop shop).

⁵ Directive 93/83/EEC



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A modern media and communication regulation should be based on the principle of technology neutrality. As a consequence, equivalent methods of usage should be subject to a technology neutral, balanced classification in terms of copyright.

The proposal takes on the principal of obligatory collective rights management and attempts to transfer it into the digital and online world. To achieve this, it widens the obligatory collective rights management for cross-border transmission of TV and radio programmes through broadening the term “retransmission” to include other transmission paths (aside from cable networks or microwave systems).

eco expressly welcomes this measure.

Nevertheless, it lacks convincing arguments as to why the retransmission of a TV or radio programme via cable falls under obligatory collective rights management, while the same retransmission via open Internet-based services on a computer or a mobile device is excluded; this is the case even if it concerns the same closed user group, e.g. viewers with a cable TV connection in the home.

Exercising of rights on retransmission

The obligatory collective rights management was introduced with SatCab. With *the proposal*, this obligation should now be widened to fit the newly expanded term of “retransmission”.

This is indeed welcome.

However, broadcasting organisations are explicitly excluded from this obligation and are allowed to grant or refuse licensing for retransmission themselves. This exemption violates the fundamental concept of efficiency behind the obligatory collective rights management and leads to increased licensing costs for network operators. Furthermore, the consequence of the lack of an obligation to conclude a contract could be that no license at all can be granted.

Conclusion

It is a mystery why the same or similar services are subject to different regulations. The Commission is now pursuing the objective of making online access to works broadly available Union-wide.⁶ For this reason, it seems that treating retransmission in a technology neutral manner is the only plausible solution. There must be no difference made between microwaves, cable, mobile radio, satellite, etc. as the carrier medium, or whether a closed or an open Internet is being used for transmission (as long as access is restricted).

Additional functions that are requested by consumers and are associated with linear TV programming belong to modern television viewing, and the regulation of these should therefore be same or similar to the ones for linear TV and radio programmes.

⁶ see also COM(2015) 627 final



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To avoid distortion of competition, neither ancillary online services nor the obligatory collective rights management should make a difference between services provided by broadcasting organisations or network providers.

About eco

eco – Association of the Internet Industry fosters all companies that create economic value with or in the Internet and represents their interests. The association currently represents around 1,000 member companies.

These include, among others, ISPs (Internet Service Providers), carriers, hardware and software suppliers, content and service providers, and communication companies. eco is the largest national Internet Service Provider association in Europe.