



Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?

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Introduction

Similar in intention and spirit to the Television without Frontiers Directive of 1989, the EC Satellite and Cable Directive of 1993 [1] was intended to break down national barriers and enhance trans-border broadcasting and cable retransmission of television programs within the European Union. To this end the Directive introduced two legal instruments. In the first place, in an attempt to prevent the European satellite market from being fragmented, it created a unitary right of satellite communication which can only be exercised in the country of origin ('uplink') of a satellite transmission. Second, the Directive set out a system of compulsory collective management of cable retransmission rights, in order to facilitate and promote collective licensing and avoid 'black-outs'.

More than ten years later, as the European Commission readily admits in its review report of 2002, [2] it is clear that the Directive's goals have, at best, only partially been achieved. The envisaged future of a pan-European satellite broadcasting market has not materialized. Instead, contractual licensing practices reinforced by the application of signal encryption techniques have allowed broadcasters and right holders to continue segmenting markets along national borderlines.

Moreover, the process of convergence that comes with the increasing digitalization of media and platforms, threatens to undermine the Satellite and Cable Directive. In the long run the Directive is likely to be superseded by the more 'horizontal' provisions of the Copyright (or Information Society) Directive, that reflect a traditional territorial approach.

In this contribution, guided by the Commission's review report, we will critically reflect upon the impact the Directive has had on the European market for satellite and cable television services, and consider possible revisions. More generally, we will query whether the Directive actually has a future in a world where wired and wireless broadband media are rapidly converging.

Satellite broadcasting: market fragmentation persists

The first chapter of the Directive deals with satellite broadcasting, the centrepiece of which is a legal novelty: a pan-European *droit d'injection*, i.e. 'injection right'. According to Article 1(2)(b), a

satellite broadcast will amount to communication to the public only in the country where the 'injection' (uplink) of the program-carrying signal occurs. Thus, the Directive has radically departed from the so-called 'Bogsch theory', named after former WIPO Director-General Dr. Arpad Bogsch, which held that a satellite broadcast is a restricted act in all countries within its 'footprint' and therefore requires licenses from all right holders in that geographical area. Since the transposition of the Directive, only a license in the country of origin of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is facilitated.

But this theory has not proven itself in practice. As the European Commission admits in its review report, the process of national market fragmentation which had already begun prior to the Directive's adoption, has continued until this day. Market fragmentation along territorial borders persists, no longer on the basis of national copyrights, but through a combination of encryption technology and territorial licensing. Surprisingly, the Directive does not actually prohibit territorial licensing, it simply does away with the underlying territorial copyrights. But interested parties have remained free to persist in these age-old practices.

The main problem here is that the European ideal of a pan-European television market and the reality of the market simply do not match up. Film distributors have never allowed, except in rare cases, the licensing of broadcasts of their films at the pan-European level. Film distributors have always cherished the principle that national markets within the European Union have their own dynamics, depending largely on national cultural characteristics and audience preferences. Consequently, movies are being released at varying times, and television broadcasts occur in 'windows' that differ per country. Preservation of this so-called 'media chronology' appears to be an almost sacred principle of the film industry.

The corresponding legal reality is that film producers and distributors have continued to split rights along national borderlines, and impose the use of encryption techniques upon broadcasting organisations to avoid 'spill-over' across national borders.

Concomitantly, most broadcasters in Europe do not seem to be interested in a pan-European right of satellite broadcasting. Broadcasting in Europe is still very much steeped in national culture, language and tradition, so why would a broadcaster pay (much) more to acquire 'European' rights if his market and mandate is limited to a single Member State?

In its review report the European Commission, rather weakly, protests against the ongoing process of market fragmentation by means of contract and encryption, but offers no solutions:

“Complete application of the principle of the Directive, which involves moving beyond a purely national territorial approach, should therefore be encouraged in order to allow the internal market to be a genuine market without internal frontiers for rightholders, operators and viewers alike.”

The Commission, however, appears to be unaware of the fact that pan-European television will occur only if there is a sufficient supply and demand. Here's a quotation illustrating this market reality, which is reproduced from a report of FIAPF's Legal Committee: [\[3\]](#)

“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 ignore the directive and refuse 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. ”

Indeed, who really wants to engage in pan-European television services? The answer is: a few providers of specialized content (e.g. news and sports), as well as a handful of public service broadcasters wishing to reach out to Europe. But this is a very expensive ambition that only few broadcasters can afford. Assuming that right holders would want to play the game, pan-European broadcasting necessarily implies paying licenses for the entire European market. One may wonder whether such an ambition complies with the broadcaster's public service mandate, as laid down in the national law of broadcasting, which is usually limited to the national audience that pays the broadcast license fees.

Cable retransmission: towards source licensing

Let us now turn to the cable chapter of the Directive. This part of the Directive provides for a completely different mechanism of copyright management, in order to facilitate cross-border retransmission of television programs. Again, the chosen legal instrument is a novelty: a system of compulsory collective management of cable retransmission rights. Under the Directive's rules, copyright holders of television programs, such as film producers and screen writers, cannot exercise their cable retransmission rights individually vis-à-vis cable operators. Cable rights may be exercised only by collecting societies that duly represent individual right owners.

This system of compulsory collective management was introduced in 1993 to avoid the nightmare scenario of myriads of individual right holders besieging cable operators with copyright claims, and causing 'black-outs' (or 'black holes') in retransmitted broadcasts.

The Directive's cable regime goes less far than was initially envisaged by the European Commission in its Green Paper of 1984. [\[4\]](#) In it the Commission had argued for a system of compulsory licensing which would have effectively stripped the right holders from their exclusive rights, which under the current regime the collecting societies have retained. Indeed, at least in theory, the risk of 'black-outs' remains. The Directive does not obligate collecting societies to grant licenses to cable operators.

Only one category of right holder has escaped the straightjacket of compulsory collective rights management: the broadcasting organisations. Broadcasters are allowed to individually exercise their cable rights with respect to their own broadcasts, including rights licensed or transferred to them (Article 10). This exceptional status is wholly justified; broadcasting organisations are easily identifiable, so no need for 'channelling' their copyright claims through a collecting society has ever arisen.

The Commission's report speaks in more positive terms of this part of the directive. It recognises that the system is working quite well. Indeed, collective management of cable rights was already occurring on a large scale in many European countries before the Directive was adopted and implemented. But the report also implicitly casts doubt on the need for maintaining a rigorous system of collective copyright management. The Commission is remarkably enthusiastic about the *exception* to the rule of compulsory collective management, which allows broadcasters to deal with cable retransmission rights at the source, acting as a 'one-stop' shop for cable rights. Thus, providers of satellite-to-cable services have been able to offer to cable operators a so-called 'rights-free' programming package. Cable operators wishing to carry such programs need not pay any additional copyright fees to collecting societies, except possibly for the musical works

included in the program.

In its report the Commission warns against the laws of certain countries, notably Germany, that mandate payment of equitable remuneration to collecting societies even if all rights have been licensed or transferred to a broadcasting company.

“[...], the mandatory involvement of a collecting society constitutes a constraint liable to militate against the retransmission of programmes emanating from other Member States, while it ought to be possible for the rightholder to obtain equitable remuneration within the framework of its contractual relations with the broadcasting organisation [...]”.

Clearly, the Commission's trust in a system of collective rights management has been somewhat undermined, in favour of freedom of contract. This may spell good news for broadcasters and cable operators, but not necessarily for the authors who rely on collecting societies to receive adequate remuneration.

Mediation

Another novelty that was introduced by the Directive is a system of mediation between right holders and cable operators, with the goal of reducing the risk of negotiations between right holders and cable operators collapsing, or not even taking place. This has become a particularly urgent and difficult problem in several Member States in recent years. In some countries negotiations between right holders and cable operators have been dragging on for years.

The mediation system that the Directive prescribes does not really solve these problems. As the Commission acknowledges in its report, the current system relies too much on voluntary cooperation of the parties concerned, does not impose deadlines on unwilling parties, and allows those endless legal battles that we are seeing in the court rooms today. The Commission suggests to 'upgrade' the mediation system, inter alia by imposing negotiation deadlines upon the parties concerned:

“It could therefore be appropriate to lay down, as is already the case in some Member States, the action to be taken after the serving of notice to terminate a contract, with reasonable but maximum time limits being stipulated for each stage before the mediation process, in the strict sense of the term, comes into play. If, at the end of the set time limit, negotiations have not produced any results, and if no remuneration has been paid to the rightholders, it could be arranged that the portion of the cable operators' revenue corresponding to copyright and related rights in the terminated agreement is impounded in order to maintain the balance between the parties involved.

Thus, the possibility of direct negotiation, without the involvement of a third party, could be recognised over the course of a year, followed in the event of failure by a time limit of six months to draw up the mediation agreement.

Another provision favouring the prompt implementation of the process would be an obligation for national authorities to draw up and publish a list of mediators.”

This proposal deserves serious consideration. Clearly, to solve the current stalemate between right holders and cable operators some form of binding arbitration, such as the system provided under the German law on collective rights management (*Urheberrechtswahrnehmungsgesetz*), is in order. Another example to contemplate is the Copyright Tribunal model of the United Kingdom. Where parties cannot agree between themselves, the Tribunal unilaterally sets the

terms and conditions of licences offered by collective rights organisations.

Compulsory collective management of satellite retransmission rights?

In its report the Commission also queries whether the existing system of compulsory collective management of cable retransmission rights should be extended to satellite retransmission. This was a possibility not even contemplated when the Directive was adopted in 1993. However, in recent years satellite services offering 'bouquets' of repackaged programs, much like cable networks, have emerged all over Europe. Why not subject these satellite providers to a similar system of collective management of rights? Indeed, some market players have advocated such an extension, and thus create a level playing field between providers of satellite and cable services.

Rather surprisingly, the Commission does not endorse such an extension. On the contrary, it raises all sorts of objections which confirm that the Commission no longer firmly believes in the system of compulsive collective management of rights it devised in 1993.

“In this context, implementation of the principle of mandatory collection would amount to an equality of treatment in appearance only, as this approach would lead to different situations being dealt with in one and the same way. [...].

To impose the principle of collective management on retransmission activities would amount to limiting considerably the freedom of rightholders, who would no longer be able to object to the retransmissions in question. However, some of the programmes contained in these retransmissions are not only the subject of an act of communication in the broadcasting context, but may also be presented on other media, in accordance with a chronology designed to maximise potential remuneration in respect of the work concerned. It should be noted that the chronology for the various acts of communication for a particular work is organised on a national basis, depending on the initial success achieved in the Member State where the work was produced.

However, the retransmission of programmes in packages broadcast by satellite is part of this media chronology: to the extent that the technical means used ensure a vast reach for the method of retransmission concerned, a limitation on the exercise of exclusive rights would jeopardise this chronological chain 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.”

Admittedly, many of the arguments mentioned by the Commission (loss of control by right holders; undermining the 'media chronology' of film exploitation) are valid, but do they not apply equally to cable retransmission? Also, the Commission appears to have forgotten that the 'injection right' it introduced in 1993 was precisely designed to prevent the partitioning of national markets for reasons of 'media chronology', that it now considers so important.

Convergence: can a 'dedicated' regime survive in the digital era?

The review report also touches upon the problems of media convergence. Can the two distinct, 'dedicated' regimes for satellite broadcasting and cable retransmission survive in our digital era where technical and economical differences between media and platforms are rapidly evaporating? Convergence is occurring at all levels: analogue television services are 'going digital'; radio and television programs are being 'simulcast' over the internet; cable operators are reinventing themselves as providers of broadband video services, and converting television signals into digital files using the Internet Protocol. What will remain of the Satellite and Cable

Directive if satellite and cable services can no longer be distinguished from Internet-based services to which 'normal' copyright rules, as codified in the European Copyright (or 'InfoSoc') Directive of 2001, [5] apply?

Introduce an online 'injection right'?

The special ('vertical') rules of the Satellite and Cable Directive are indeed quite different from the 'horizontal' provisions of the Copyright Directive of 2001, that apply to all media, digital or analogue, across the board. Whereas the Satellite and Cable Directive mandates a pan-European injection right, the Copyright Directive requires Member States to provide for a general right of communication to the public, including a right to make content available online, that is supposed to be exercised at the national level. Whereas rights for satellite broadcasting have to be cleared only in the country of uplink, rights for webcasting, which is a species of communication to the public, need to be cleared for every territory where a work is made available. In this respect, the Copyright Directive is a step backwards to the bad old days of Bogsch.

How to reconcile the Satellite and Cable Directive's country of origin' approach with the more traditional territorial solutions offered by the Copyright Directive, in a world where wired and wireless broadband media are rapidly converging? In the Green Paper that preceded the Copyright Directive, [6] the European Commission had been playing with the idea of applying the 'injection right' (or 'country of origin') approach to the Internet. But the Commission's suggestion to this effect was immediately and unequivocally rejected by all right holders consulted. Right holders feared they would lose control of copyrighted content once it would be offered online, under a license, somewhere within the European Union. It was also pointed out that transmission of works over the Internet is not merely an act of communication to the public, as is satellite broadcasting, but also concerns the right of reproduction. Works made available online are stored on servers, and copied repeatedly on their way from the content provider to the end user.

However, in practice the need for an Internet equivalent of the injection right is probably less urgent than it may have seemed ten years ago. Thanks to cooperative efforts of collecting societies and major right holders, systems of voluntary collective licensing on a European scale have emerged in recent years. A good example is the 'IFPI Simulcast Agreement', which permits collecting societies representing phonographic rights to offer 'one-stop' licenses for the simulcasting of broadcast programs with an almost global reach. Thus, broadcasting organisations engaging in simulcasting no longer need to seek multiple licenses from a multiplicity of national collecting societies. Importantly, the Simulcast Agreement was granted an exemption from the EC Treaty's competition rules by the European Commission in 2002. [7]

Liability of intermediaries

The review report does not address another convergence-related issues: copyright liability of intermediaries. Here again we see two very different legal regimes apply to two converging media. The Satellite and Cable Directive presumes full (direct) copyright liability for cable operators. Although the provisions of the Directive do not state so specifically, its system of collective management of retransmission rights is based on the assumption that cable retransmission constitutes a restricted act, as is illustrated by its Recital 27. [8] Indeed, prior to the adoption of the Directive, many national courts had produced decisions to this effect. The recent Copyright Directive basically confirms this; cable retransmission falls squarely within the definition of 'communication to the public', as clarified in Recital 23:

“This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.”

In marked contrast to the full copyright liability imposed upon cable operators, the very same Copyright Directive states, in Recital 27, that “the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive”. Obviously, these words are meant to apply primarily to Internet service providers (ISP's). But the Directive's language is not limited to ISP's, so the question arises: what about cable retransmission? Is that *not* a case of “the mere provision of physical facilities for enabling or making a communication”, especially in situations where the cable operator is subjected to a contractual or statutory must-carry obligation? Moreover, now that cable operators are morphing into broadband video providers, how to make a distinction? Most likely, we will be heading for another round of cable retransmission litigation in the near future.

Is there a future for the Directive?

What brings the future for the Satellite and Cable Directive? So far, the review the European Commission conducted in 2002 has had little follow-up. The Commission has convened two working groups on satellite broadcasting in 2002 and 2003. [9] Shortly after the second meeting the EC officials in charge of this dossier have been sent home, and the dossier was dispatched to the Copyright Unit of the Directorate-General Internal Market. No further initiatives are expected from the Commission within the foreseeable future.

A related project that the Commission has started to tackle is collective rights management. On April 16, 2004 the Commission has issued a Communication, which discusses problems and suggests possible solutions with respect to this difficult, and politically sensitive terrain. [10] Clearly, the focus of this initiative is not on satellite broadcasting or cable retransmission. But here and there the Communication does contain distinct references to these issues. What transpires is that the Commission wishes to promote Community-wide licensing arrangements in all segments of the copyright industry. In this context the Commission first discusses (and immediately rejects) the introduction of compulsory licensing. It goes on to consider, once again, the model of a pan-European injection right:

“A less radical option would be to adopt the model chosen for satellite broadcasting under Directive 93/83/EEC to the rights of communication to the public and making available. Under this model, according to Article 1(2)(b) of the Directive, the relevant act of communication to the public 'occurs solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth'. However, if this model is applied to copyright and related rights without limiting the contractual freedom of the parties, as was done under Directive 93/83/EEC, it does not necessarily yield the desired result of multi-territorial licensing, as it only determines the applicable law and does not by itself result in extending the licence to the footprint in question.”

Elsewhere in the Communication it becomes clear that the Commission no longer favours the kind of interventionist approach that typifies the Satellite and Cable Directive. The rules that will eventually result from this initiative, will be largely procedural, dealing mainly with the supervision and transparency of collecting societies.

Will the Satellite and Cable Directive eventually be revised? Probably not. More likely, it will slowly fade away, as contractual practice, technological measures, media convergence and the 'horizontal' rules of European copyright law gradually supersede it.

Notes

[1] Council Directive 93/83 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official Journal No. L 248 of 6 October 1993, 15.

[2] Report from the European Commission on the Application of Council Directive 93/83/EEC on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final, Brussels, 26 July 2002.

[3] FIAPF Legal Committee, Report from the Commission on the application of Directive 93/83 CEE on cable and satellite broadcasting, 20 September 2002, available at <http://www.fiapf.org/pdf/cabletsat.pdf>. FIAPF is a trade organisation of film producers.

[4] European Commission, 'Television without Frontiers', Green Paper, COM (84) def, Brussels, 14 June 1984.

[5] 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, Official Journal L 167/10 of 22 June 2001.

[6] European Commission, 'Copyright and Related Rights in the Information Society', Green Paper, COM(95) 382 final, Brussels, 19 July 1995, p. 41 ff.

[7] European Commission, Decision of 8 October 8 2002, OJ L 107/58, of 30 April 2003.

[8] Recital 27 reads as follows: "Whereas the cable retransmission of programmes from other Member States is an act subject to copyright [...]; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; [...]."

[9] Reports of both meetings are available at http://europa.eu.int/comm/internal_market/copyright/satellite-cable/index_en.htm

[10] Communication from the Commission to the Council, The European Parliament and the European Economic and Social Committee, 'The Management of Copyright and Related Rights in the Internal Market, COM(2004) 261 final, Brussels, 16 April 2004.