Kluwer Copyright Blog

Must Carry – Must Offer – Must Infringe

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How the Polish broadcasting law on must-carry and must-offer makes broadcasters choose whether to infringe copyright and licensing contracts or the Polish Broadcasting Act.

This post is about a rare mixture of folly and incompetence that is fortunately unlikely to leave any durable traces on the face of copyright law in Europe. However, the utter absurdity of the matter does not deprive it of its current (and hopefully only current) practical significance in Poland. For readers from outside Poland it may even be entertaining (for Poles, I am afraid, not so much).

The ingredients of all this are: (a) good intentions (b) dismal quality of legislation and (c) incompetence of a major public body. The subject matter the so-called must-carry and must-offer obligations. Must-carry has been usually understood as the obligation of cable TV operators to carry programs of (selected) broadcasters on a cable provider's system. As such this obligation is nothing special and may be found in legislations of many European and non-European states (for e.g. in the US where it focuses on the obligation to carry local broadcasting stations). It is not uncommon to apply the rule to satellite platforms as well.

The rationale of must-carry could be generally explained as a tool to preserve free circulation of information and cultural diversity through access to the most important TV channels. Cable (or satellite) platforms under a must-carry regime have the obligation to carry certain programs, such as (like in Poland) channels of national public TV and the principal private TV channels. Obviously such an obligation restricts the economic freedom of platform operators, but if the number of channels (and their selection) is reasonable, this restriction may be defended as serving the public by safeguarding access to content of general interest.

This justification of must-carry is based on the assumption that there is a limited broadcasting space on cable and satellite platforms and that a large (or at least substantial) part of the public uses

such services as their only or primary source of TV. Hence, if e.g. a cable operator had absolute freedom in determining what channels to carry, he/she could decide to exclude channels crucial for social and political debate (such as public TV channels) in favour of purely commercial ones, thus depriving a large part of the public of the ability to partake in the vital exchange (or at least consumption) of information and ideas. Equally important is the fact that a platform operator may exert (technically) absolute control over what programs are carried on the platform. Since, as experience and economic analysis both suggest, there is a limited number of platforms that can reasonably operate in a given country (or within a certain area) one may not expect broadcasters to create competing platforms designed just to carry their channels as there would be no (or insufficient) demand to make such an attempt economically sound.

Sometimes things look the other way round, though. It may happen that certain broadcasters enjoy a very strong position and dictate harsh business terms (especially for smaller cable operators). This is a somewhat opposite perspective of the so-called must-offer, i.e. an obligation addressed to broadcasters to make their programs available on cable and satellite platforms. It is possible (Poland being one of the examples) that must-carry and must-offer exist side by side. Of course, both economically and socially such obligations generate controversies concerning their rationale and effectiveness (see e.g. Must-Carry Regulation: A Must or a Burden? By Nico Van Eijk and Bart Van der Sloot), but this is not in itself the topic of this post.

Must-carry has been subject to regulation in art. 31 of the Universal Service Directive. This provision allows member states to impose must-carry obligations, but under certain conditions. They must be “reasonable”, apply to “specified” channels and services, and be addressed to undertakings “providing electronic communications networks used for the distribution of radio or television broadcasts to the public where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts”. Finally, the must-carry obligation should be “necessary to meet clearly defined general interest objectives and shall be proportionate and transparent.”

Poland is one of the countries that have introduced must-carry and must-offer obligation into their legal systems. The combined effort of the legislator (probably not deliberate) and the National Broadcasting Council (reasons unknown) have made it a real problem for broadcasters.

Until August 10, 2011 Poland’s must-carry provisions applied only to cable operators. Then the law changed and the must carry obligation has been extended to all operators “retransmitting a programme service, with the exception of an entity that retransmits a programme service by digital terrestrial diffusion in multiplex.” (art. 43(1) of the Broadcasting Act). Moreover, according to art. 43 (2) of the Broadcasting Act broadcasting organisations, whose programs are covered by the must-carry obligation may not refuse an operator that retransmits the programme service in the telecommunications network the consent for the retransmission of this programme service, and may not make such consent conditional upon payment of any remuneration, including in particular any fee for the award of a licence for the use of the broadcast. This, then, is must-offer, the details of which are further regulated by art. 43a. Currently the must-carry regime includes two channels of public TV, one regional television programme service transmitted by Telewizja Polska S.A. (public TV broadcaster) and leading private programme services such as TVN and Polsat that on the day the new law entered into force were broadcast by analogue terrestrial diffusion (currently 7 channels in total).

Perhaps at first the real novelty of the new law was not conspicuous enough but eventually it was

revealed. The must offer obligation has been introduced not only vis-à-vis the operators of cable and satellite platforms but applies to all entities retransmitting programs in “telecommunications networks”. The draft of the 2011 law explains this in one sentence: since new ways of receiving TV programs have emerged, it has become necessary to extend the must carry (but also in consequence the must-offer) obligation to such new technologies like IP TV or Internet TV. The Broadcasting Act itself does not define the term “telecommunications networks”, but instead refers to the Telecommunications Act. The definition of a “telecommunication network” in art. 4 p. 35 of the Telecommunications Act (interestingly amended in 2012, i.e. after the Broadcasting Act has been changed) understands this as “transmission systems and switching or routing equipment, and other resources, which permit the emission, reception, or transmission of signals by wire, by radio, by optical or by other electromagnetic means, irrespective of their type.”

It is argued the Internet is a “telecommunications network” itself in the meaning of the above mentioned definition, although this is not an obvious conclusion, and in particular not in connection with art. 43 of the Broadcasting Act. It would seem preferable to understand the latter provision as requiring a “closed” network. It does not mean such a network cannot use the Internet, but only when there are access restrictions (for example users have to log in, provide certain code, etc.).

The National Broadcasting Council seems to be oblivious of the consequences and holds that the must-offer obligation also covers broadcasting on the “open” Internet. Furthermore, the National Broadcasting Council explains art. 43 of the Broadcasting Act does not authorise broadcasters to demand (or make access to the program conditional upon) limiting the territorial reception of the program.

It is almost certain that the Polish law violates art. 31 of the Universal Service Directive. The directive allows must-carry provided that a significant number of end-users of a given network use it as their principal means to receive radio and television broadcasts. Surprisingly, the Polish legislator remembered this provision when it explained cable and satellite platforms must be included due to the fact that over 65 % of people in Poland receive television broadcasts by cable or satellite. With regard to the Internet this condition must have been entirely forgotten.

Such interpretation of the law and the blissful carelessness of the National Broadcasting Council (a body of which one could expect some basic knowledge of IP rights and contractual practices in this area) have started to cause serious problems. All contracts broadcasters conclude with rightholders with regard to copyright works, exclude, almost without exception, Internet uses from their scope, and especially in unprotected, universally accessible systems. The reasons seem to be self-evident as otherwise a copyright work could be transmitted on the Internet in such a way that everyone in the whole world could watch it and the territoriality of the licensing system would be entirely undermined. But what should a broadcaster do?

To follow the law as interpreted by the National Broadcasting Council means copyright infringement and violation of contractual agreements. To refuse would mean a risk of infringement of the national legislation. Because of the very probable incompatibility of the Polish law with the directive the only reasonable option (unless the National Broadcasting Council comes to its senses) seems to be to go to court. It would in my opinion be possible to argue with good reason that the law in fact does not require must-offer for every internet service, in particular because the law should be interpreted in a way making it possible to avoid non-compliance with EU law. If not this, then in a dispute between the public body (emanation of the state) and a broadcaster, the non-

compliant national legislation could be set aside. The advice looks good on paper, but the broadcasters may be reluctant to try it as heavy fines may be imposed for non-compliance.

What has been probably started by good intentions (let us be technologically neutral and future-proof by extending must-carry beyond its usual scope), later became corrupted by legislative slackness (it is so easy to refer to a definition from another legal act without carefully considering what it entails) and exacerbated by a complete lack of imagination on the part of the National Broadcasting Council, pretending not to notice what has actually happened. Unfortunately, probably a serious incident will be required to make the legislator intervene. If there is a more general lesson to be learned it is that extending pre-existing legal solutions on the Internet without thinking twice about the effects is a bad idea.

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