Kluwer Copyright Blog

Public Consultation on the Review of the Satellite and Cable Directive. Is the Satellite and Cable model suitable for the copyright management of online territories?

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On 4th May 2016, the European Commission published its Full report on the public consultation on the review of the EU Satellite and Cable Directive. The consultation, which was held from 24 August until 16 November 2015, focused on two main issues. First, the assessment of the current rules and, second, the possibility of the extension of some principles to the online environment with the objective of contributing to the Digital Single Market Strategy. The Report is divided into three main parts which correspond to the most significant innovations brought by the Directive.

a) The "country of origin" principle

The paramount breakthrough of the Directive is the adoption of the "country of origin" principle for the localisation of the act of communication to the public and its possible extension to online communications. A clash of views persists in relation to this principle, mainly between right holders and collective management organisations on the one hand, and other stakeholders, such as consumers, public service broadcasters and commercial radios and ISPs, on the other.

Views are split both in respect of the true effectiveness of such a principle (real facilitation of the clearance of rights and increase of consumers' access to satellite broadcasting services across borders) and as regards the possibility of its extension. In relation to the first question, the emergence of a European audiovisual space still remains a utopian goal. The flaws of the Directive had already been denounced in 2002 by the Commission's Evaluation Report, where it was noted that territorial licensing to local operators, coupled with the application of encryption measures, enabled the right holders to fragment the market. As regards the possible extension of that principle to online communications, the rhetoric against such an extension is colourful and ranges from arguments centred on the avoidance of the expansion of a failed model to online communications, to those (mainly from right holders and CMOs) focusing on the possible detrimental effects of such an expansion on the value chain of the production and distribution of creative content, on creators' revenues, the risk of forum shopping by service providers and the more complicated enforcement by right holders. On the other hand, the supporters of such an extension consider that the latter will promote legal certainty and enable the expansion of service provision to other Member States.

The debate is certainly not new and its epicentre can be located on the cherished and well established principle of copyright territoriality. As with the Internet nowadays, back in the 90s,

technological developments (mainly the possibility of direct reception of the signals of a satellite individually by the public within the whole range of its footprint) had also troubled the peaceful territories of copyright law within the EU. While satellite broadcasting was a source of new potential gains for the right holders, legal uncertainty prevailed as to whether the act of communication to the public occurs in the "country of origin" (the country from which the signals are transmitted) or the countries of reception of the signals.

For online communications, a shift from the country of reception principle, which is currently applicable under the Infosoc Directive, to the Satellite and Cable model would have a subversive impact on the existing territorial licensing practices, since a licence granted for the territory of a certain Member State will enable the licensee to transmit the licensed content online within the whole EU territory, due to the fact that the communication to the public would be deemed to take place only in the Member State where the communication originated. While the idea itself might seem appealing, further specifications and safeguards will be necessary and, in any case, the determination of the "country of origin" must take into consideration the nature of the Internet. In this context, it must be determined whether the communication originates from the Member State where the server is located or from the country where the operator has its legal or economic seat.

Furthermore, if the Satellite and Cable Directive's model is applied to Internet communications as it stands, it would still be possible for the right holder to territorially limit the licensee's exploitation contractually, unless the agreement is deemed to be a restriction to competition. The ongoing antitrust investigation by the Commission into certain provisions in licensing agreements between several major US film studios and the largest European pay-TV broadcasters should provide further clarifications on this issue. Another more radical option could be to establish the country of origin principle in conjunction with a ban on contractual and technical territorial limitations (see here). In that case, territorial licensing practices will be forced to end.

It is clear that the real challenge is found in the audiovisual sector, where tailoring the content for specific national audiences is an established practice (consumer demand for dubbing or subtitles). Indeed, music is a kind of "universal language" and, in principle, there is no consumer demand for linguistic support. Even though there is a high consumer demand for local repertoire (the IFPI Digital Music Report found that in many markets, local artists accounted for the vast majority of the top selling albums of 2013), the music sector has proved to be a more "fertile land" for the development of multi territorial licensing. In this context, multi territorial licensing has been significantly promoted in the last decade (see: Recommendation on management of online rights in musical works and Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses). Clearing audiovisual rights for the whole of Europe with one transaction would mainly interest a handful of big players (both international and European), while national platforms would probably not have the means to enter the market. Furthermore, big players would mainly be interested in relation to specific content (such as sports, news, Hollywood productions) or they might be unwilling to invest in the tailoring of content in all languages spoken in the EU.

b) The management of retransmission rights

In relation to the management of retransmission rights, the majority of respondents consider that the Directive has facilitated the clearance of rights for the simultaneous retransmission by cable of programmes broadcast from other Member States and has helped consumers to have more access to broadcasting services across borders. Indeed, under the Directive's rules, holders of copyright in

television programs can exercise their cable retransmission rights only by a way of a collecting society. As a result, cable operators are protected against the risk of blackout due to claims by right holders who are not represented by a collecting society. So, while this mechanism seems to have largely worked well in the cable sector, views are split in respect of a possible extension of the model to the simultaneous retransmission of TV and radio programmes on platforms other than cable. Right holders are opposed to such an extension, whereas consumers, the vast majority of CMOs and cable and telecoms operators are in favour. Furthermore, it is not surprising that broadcasters insist on maintaining the privilege of contractual freedom of individual licensing which they have been awarded by Article 10 of the Directive. In any case, if such an extension is favoured, it has to take into account the various "retransmission realities" of the Internet. Indeed, while simulcasting of TV and radio programs on the Internet is comparable to the "simultaneous, unaltered and unabridged" retransmission of the Directive, catch up and replay interactive retransmissions are delayed and of a different nature.

c) The mediation system and obligation to negotiate

Finally, the Report addresses the effectiveness of the mediation system between right holders and cable operators adopted in the Directive and its possible extension to facilitate the cross border availability of online services. This part of the consultation is the one where the majority of respondents coincide in their views. Indeed, the respondents stressed the limited effects of the mechanism or their negative experience of the procedures. The structural weaknesses of the mediation system had already been noted in the 2002 Evaluation Report, where the Commission stressed that in the absence of mandatory recourse to a mediation system, this particular approach is liable to remain little used. Furthermore, right holders stressed their preference for freedom of commercial negotiations which better guarantees the free exercise of their exclusive rights. So, even if in theory the extension of a mediation system to online communications could be helpful, significant structural adjustments should be made in order to give mediation a real chance of facilitating dispute resolution.

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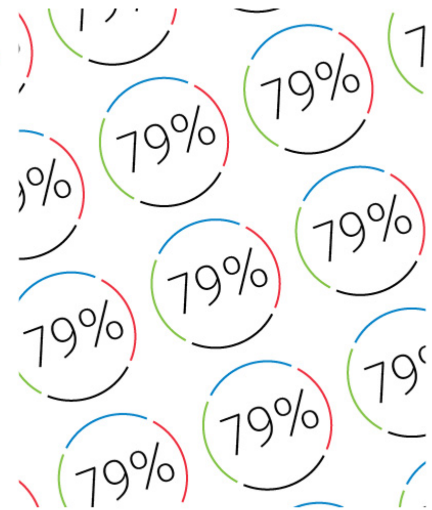

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