

Extending the Country of Origin Rule to Broadcasters' Ancillary Online Services

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Workshop “Online (re)transmission of TV programmes”,
European Audiovisual Observatory, Brussels, 21 June 2017



Brussels, 14.9.2016
COM(2016) 594 final

2016/0284 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**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**

(Text with EEA relevance)

{SWD(2016) 301}

{SWD(2016) 302}

Regulation on Online Broadcasting and Retransmission

- Regulation – not Directive
 - Directly binding, no implementation by MS's
- Extension of SatCab Directive:
 - *Country of origin rule* for 'ancillary online services'
 - *Mandatory collective rights management* for retransmissions by non-cable platforms and networks

Article 1
Definitions

For the purpose of this Regulation, the following definitions shall apply:

- (a) "ancillary online service" means an online service consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or for a defined period of time after their broadcast by the broadcasting organisation as well as of any material produced by or for the broadcasting organisation which is ancillary to such broadcast;
- (b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC and other than retransmission provided over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council¹⁹, intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite but excluding online transmission, of television or radio programmes intended for the reception by the public, provided that such retransmission is made by a party other than the broadcasting organisation

¹⁹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

“Ancillary online service”

- (Rec. 8) must “have a clear subordinate relationship to the broadcast”
- Includes:
 - Simultaneous linear online broadcasting
 - Not: webcasting
 - Non-linear ‘catch-up’ services
 - Additional content enriching or expanding broadcast (preview, review, supplemental)
 - VOD (e.g. Netflix) excluded
- By or under control of broadcasting organisation

which made the initial transmission or under whose control and responsibility such transmission was made.

Article 2

Application of the principle of 'country of origin' to ancillary online services

- (1) The acts of communication to the public and of making available occurring when providing an ancillary online service by or under the control and responsibility of a broadcasting organisation as well as the acts of reproduction which are necessary for the provision of, the access to or the use of the ancillary online service shall, for the purposes of exercising copyright and related rights relevant for these acts, be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment.
- (2) When fixing the amount of the payment to be made for the rights subject to the country of origin principle as set out in paragraph 1, the parties shall take into account all aspects of the ancillary online service such as the features of the ancillary online service, the audience, and the language version.

Article 3

Exercise of the rights in retransmission by right holders other than broadcasting organisations

Art. 2: CoO rule for ancillary online services

- AOS “deemed to occur solely” in MS where broadcasting org is established
 - SatCab Directive: MS of ‘uplink’
 - *Hejduk* (CJEU, C-441/13): posting work online is copyright relevant act in every MS
 - Also applies to related rights of reproduction (e.g. uploading to server)
 - (Rec 9) Does not apply to subsequent acts of communication/reproduction
 - Payment shall take mode of online service, audience, language version into account
-

Freedom to contractually impose territorial restrictions?

- (Expl. Memo, p. 4) no obligation to provide online ancillary services across borders
- (Rec 11) contractual freedom remains intact, if “in compliance with Union law”

- (10) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that in arriving at the amount of the payment to be made for the rights in question, the parties should take into account all aspects of the ancillary online service such as the features of the service, the audience, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used, and the language version.
- (11) Through the principle of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.
- (12) Operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks, provide services which are equivalent to those provided by operators of cable retransmission services when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes, where this initial transmission is by wire or over the air, including by satellite but excluding online transmissions, and intended for reception by the public. They should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. Retransmission services which are offered on the open internet should be excluded from the scope of this

EU competition law:

Restrictions on territorial licensing

- *Premier League* (CJEU, C-403/08): territorial licenses with absolute effect prohibited by art. 101 TFEU (antitrust)
- Pending EC case against Sky UK and US film producers (refusal to accept non-UK residents as subscribers to Sky UK pay-TV service)

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European Commission - Press release

Antitrust: Commission accepts commitments by Paramount on cross-border pay-TV services

Brussels, 26 July 2016

The European Commission has made commitments offered by Paramount legally binding under EU antitrust rules. These address the Commission's concerns regarding certain clauses in film licensing contracts for pay-TV between Paramount and Sky UK.

These clauses prevented Sky UK from allowing EU consumers outside the UK and Ireland to access films via satellite or online. They also required Paramount to ensure that broadcasters other than Sky UK are prevented from making their pay-TV services available in the UK and Ireland. Paramount has now committed that it will neither act upon nor enforce these clauses in existing film licensing contracts for pay-TV with any broadcaster in the European Economic Area (EEA). It has also committed to refrain from (re)introducing such clauses in film licensing contracts for pay-TV with any broadcaster in the EEA.

The Commission's concerns

US film studios typically license audio-visual content to a single pay-TV broadcaster in each Member State (or combined for a few Member

How might extended CoO rule affect stakeholders?

- *Broadcasters:*
 - Facilitate rights clearance for online broadcasting services across EU
 - But rights to broadcast content across EU might become more expensive
- *Consumers:*
 - Easier access to foreign broadcasting; less ‘geo-blocking’

How might extended CoO rule affect stakeholders?

- *Right holders:*
 - Film financing partially depends on pre-sales of territorial rights to distributors and broadcasters
 - But: CoO rule would apply only to ‘broadcast’ versions, other (dubbed/subtitled) language versions sold separately
 - But: rights holders could still contractually impose territorial limitations and geo-blocking
- *Authors:*
 - Fewer licensing opportunities (CMO’s)
 - Lower transaction and enforcement costs
 - Rights to fair remuneration in some MS’s bypassed

broadcast. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, within a defined time period after the broadcast, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, ancillary online services include services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content. The provision of access to individual works or other protected subject matter that have been incorporated in a television or radio programme should not be regarded as an ancillary online service. Similarly, the provision of access to works or other protected subject matter independently of broadcast, such as services giving access to individual musical or audiovisual works, music albums or videos, do not fall under the definition of ancillary online service.

- (9) In order to facilitate the clearance of rights for the provision of ancillary online services across borders it is necessary to provide for the establishment of the country of origin principle as regards the exercise of copyright and related rights relevant for acts occurring in the course of the provision of, the access to or the use of an ancillary online service. That principle of country of origin should apply exclusively to the relationship between right holders (or entities representing right holders such as collective management organisations) and broadcasting organisations and solely for the purpose of the provision of, the access to or the use of an ancillary online service. The principle of country of origin should not apply to any subsequent communication to the public or reproduction of content which is protected by copyright or related