

Insight into clearing of rights for TV programmes by broadcasters

**European Audiovisual Observatory workshop
“Online (re)transmission of TV programmes”**

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Rights clearance – What does it mean?

- Acquiring the rights necessary for the intended use
- **Everybody using copyrighted works needs to clear rights**
 - It is part of the day to day routine of the content sector
- If not the author or other initial rights owner
- **Example feature films:**
 - Different users in the **different release „windows“**
 - Theaters
 - Physical (DVD etc.) and online equivalent (“electronic sell-through”)
 - Online pay-per-view
 - Pay-TV
 - Online subscription services
 - Free-to-air broadcasters

Rights clearance by broadcasters

Chain of title

- Broadcasters have to acquire the rights for the content they want to use for broadcast and ancillary services
- **Initial right holders**
 - Authors (writers, director, cameramen, cutter, composers etc.)
 - Neighboring rights (performing artists, film producer, music producer etc.)
- **Usually rights are owned by AV producers**
 - Exception: rights to musical works owned by collecting societies
 - Exception: Certain rights with mandatory collective management
- **Acquisition of rights by broadcasters**
 - **From independent producers**
 - **Through own productions or commissioned productions**

Rights clearance by broadcasters

Licensing categories

- Licensing from independent producers
 - **(1) Forms of use (modes of exploitation)**
 - **(2) Time**
 - **(3) Quantity**
 - **(4) Exclusive/non-exclusive**
 - **(5) Territory**
 - [(6) Other (sublicenses, obligation to use etc.)]
- “Complexity of rights’ clearance”
(Recital 3 Proposed Regulation)

Rights clearance by broadcasters

Forms of use licensed (1)

- Differentiate for licensing from independent producers
- **Forms of use licensed**
 - **Rights to which version:
original, dubbed, and/or subtitled version**
 - **Rights to (linear) broadcast**
 - Pay-TV, free to air
 - Terrestrial, satellite, cable, **online (simulcast)**
 - Retransmission
 - Reproduction

Rights clearance by broadcasters

Forms of use licensed (2)

- Differentiate for licensing from independent producers
- **Forms of use licensed**
 - **Rights to on-demand uses**
 - Making available to the public
 - free, pay-per-view, pay-per-channel, pay-per-bouquet, subscription
 - Streaming, download
 - Reproduction

Rights clearance by broadcasters

Forms of use licensed (3)

- **Rights to on-demand uses for broadcasters (“ancillary”)**
 - Licensing practice for broadcasters across EU differs
 - Broadcasters try to at least acquire ancillary uses like catch-up (e.g. for 7 days after linear broadcast), but not always granted
 - Broadcasters try to acquire less limited on-demand rights
 - “Online is the future”
 - on-Demand rights – even mere catch-up - will get as important as linear rights
 - Exception: “Live” rights, e.g. sports
 - The more extensive on-demand rights broadcasters acquire, the more they will compete with non-linear on-demand services

Rights clearance by broadcasters

Licensing term

- Differentiate for licensing from independent producers
- **Time = term licensed**
 - Usually 3 to 10 years
 - Restricted usage time for ancillary catch-up services, e.g. 7 days after linear broadcast

Rights clearance by broadcasters

Quantity licensed

- Differentiate for licensing from independent producers
- **Quantity licensed**
 - e.g. how many linear broadcasts within licensing term

Rights clearance by broadcasters

Exclusive or non-exclusive license

- Differentiate for licensing from independent producers
- **Exclusive or non-exclusive license**
 - Linear broadcast rights usually exclusive
 - On-Demand rights often non-exclusive, e.g. catch-up

Rights clearance by broadcasters

Territory licensed

- Differentiate for licensing from independent producers
- **Territory licensed**
 - Usually home country of broadcaster
 - Some times multi-territorial for example by language
 - For satellite broadcasts country of origin according to CabSat Directive

Rights clearance by broadcasters

Reduction of transaction costs?

- Proposed Regulation on Online Retransmissions of TV/Radio Programmes
- **Only concerns 1 out of 5 licensing categories, i.e. territory**
- **Does not take away burden to negotiate all 5 categories**
 - Territorial rights acquisition still needs to be negotiated for the country of origin
- **No relevant reduction of transaction costs for rights clearance**

Pan-EU licenses

- Problem rather: Rights are more expensive or not available for the pan-EU uses caught by country of origin principle
- **Conflict of interests**

Pan-EU licenses

Interests at stake

- Problem rather: Rights are more expensive or not available for the pan-EU uses caught by country of origin principle
- **What are the interests at stake?**
 - Property right of independent producers
 - Interest of publicly funded broadcasters to reach audiences abroad
 - Interests of end-consumers to watch TV content EU-wide

Pan-EU licenses

Interests at stake

- Problem rather: Rights are more expensive or not available for the pan-EU uses caught by country of origin principle
- What are the interests at stake?
 - **Property right of independent producers**
 - Minority right (vis-à-vis large number of end-consumers)
 - High risk investment to be recouped
 - Exclusive rights attractive and most valuable
 - Exclusivity driving factor for competition, macro economic effects
 - Exclusive slicing of rights: forms of use (windows), territories
 - Apply exploitation strategy which promises best return on investment

Pan-EU licenses

Interests at stake

- Problem rather: Rights are more expensive or not available for the pan-EU uses caught by country of origin principle
- What are the interests at stake?
 - **Interest of publicly funded broadcasters to reach audiences aboard**
 - Pan-EU coverage desired
 - Seems not in line with interests of commercial broadcasters
 - **Interests of end-consumers to watch TV content EU-wide**
 - In particular if interested in culture of broadcaster's home country, e.g. migrants

Pan-EU licenses

Current legal status

- Balancing these interests (1)
 - **Current legal status licensing online broadcasts**
 - **Already today: Contractual freedom** for broadcaster, who wants to reach consumers abroad, **to acquire pan-EU license**
 - More expensive, as more extensive use (wider audience reached)
 - License could be limited to certain languages
 - Example: The German publicly funded broadcaster ZDF could acquire a license to online broadcast (simulcast) a motion picture dubbed in the German language in the entire EU.
 - In case only national license: New Portability Regulation secures portability for temporary stays of national consumers abroad

Pan-EU licenses

Introduction country of origin

- Balancing these interests (2)
 - **Introduction of country of origin principle online broadcasts**
 - Reasonable to always agree on a pan-EU license
 - Example: Rightholder may only offer ZDF an EU-wide license for online broadcasts (simulcasting) of the motion picture dubbed in German language
 - Problem: Contracting parties lose flexibility to shape exclusive territory according to individual needs and budget (EU or national?)
 - License more extensive and more expensive than necessary due to legal intervention
 - Problem: Pull for attractive content to licensing pan-EU broadcasters, cultural diversity of broadcasters will suffer
 - Great impact on licensing: “Online is the future”

Summary

- No relevant easing of transaction costs of rights clearance by introduction of country of origin principle
- Problem rather: Rights are more expensive or not available for the pan-EU uses caught by country of origin principle
- Balancing of interests for the right solution
 - Qualitative assessment of interests, no quantitative assessment by headcount
 - High impact of online uses for all stakeholders, “Online is the future” and as such the entire value chain is affected

Summary

- Current legal status
 - Contractual freedom for broadcaster, who wants to reach consumers abroad, to acquire pan-EU license
 - In case only national license: New Portability Regulation secures portability for temporary stays of national consumers abroad
- Introduction of a general country of origin principle for online broadcasts
 - Contracting parties lose flexibility to shape exclusive territory according to individual needs and budget (EU or national?)
 - Pull for attractive content to licensing pan-EU broadcasters, cultural diversity of broadcasters will suffer
 - Great impact on licensing: “Online is the future”

Thank you for your attention.

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