

Convergence, Copyrights and Transfrontier Television

The text below, "*SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive*" by Prof. P. Bernt Hugenholtz is taken from **the issue 2009-8 of the series IRIS *plus* entitled "Convergence, Copyrights and Transfrontier Television"**.

The entire publication as printed version can be purchased from the European Audiovisual Observatory.

For further information on the IRIS *plus* series and the 2009-8 issue as well as an order form, please consult the website of the Observatory.

Foreword

During the past years, the revision of the “Television without Frontiers” Directive and the transposition of the resulting Audiovisual Media Services Directive consumed much of the attention of the audiovisual sector. The revision of the telecoms package has been one of the few rivals that managed to receive equal consideration.

Other parts of community law were less successful in feeding the daily press. Among them feature rules on satellite broadcasting and cable retransmissions. Originally, these rules seemed so important that they were envisaged to be part of the “Television without Frontiers” Directive. When reaching agreement on copyright matters related to transfrontier television proved rather difficult, they were “outsourced” to the Satellite and Cable Directive. For years this Directive seconded the “Television without Frontiers” Directive’s contribution to reducing barriers to cross-border television.

As we just witnessed, convergence led the EU legislator to expand the scope of its television regulation, which after 19 December 2009 will cover audiovisual media services. Will convergence have a similar impact on the future of the Satellite and Cable Directive? The answer might be “yes” in practical terms and possibly “no” when it comes to revising the Directive. This has caused the Observatory to publish this IRIS *plus* on “Convergence, Copyrights and Transfrontier Television”. In the Lead Article, Bernt Hugenholtz explores not only the history, goals and application of the Satellite and Cable Directive but also the question of how its future might look like.

His article is complemented by several reports on court and administrative decisions that shed light on the current understanding of the Directive and that are therefore also referred to in the Lead Article.

As to the future of the Directive, it is likely to depend on the past. The Directive’s future might be determined especially by the actual impact that the Directive had so far on the goals it sought to foster. A central vision of the authors of the Satellite and Cable Directive was to promote pan-European broadcasting with a system of distributing original broadcasts across Europe by using satellite television. For that reason, the ZOOM of this IRIS *plus* is on how many channels transmitted in Europe reach for a European-wide or at least a multi-territorial audience.

Strasbourg, August 2009

Susanne Nikoltchev

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive

*Prof. P. Bernt Hugenholtz
Institute for Information Law (IViR), University of Amsterdam*

1. Introduction

Amongst the seven directives that have harmonised the landscape of European copyright law since 1991, Directive 93/83,¹ usually known as the Satellite and Cable Directive (or “SatCab Directive”), stands out. In contrast to the other six, this Directive has actually harmonised very few substantive norms of copyright law. Instead, its main goal was to facilitate the clearance of rights for satellite broadcasting and cable retransmission. Adopted in 1993 – four years after the “Television without Frontiers” Directive with which it shares its history and purpose – the Directive was intended to break down national barriers and enhance transborder broadcasting and cable retransmission of television programmes within the European Union. To this end, the Directive introduced two legal mechanisms. In the first place, in an attempt to prevent the emerging European satellite broadcasting market from remaining fragmented, it created a unitary right of satellite communication which can only be exercised in the country of origin (“uplink”) of a satellite programme transmission. Second, the Directive set out a system of compulsory collective management of cable retransmission rights in broadcast programmes, in order to assist cable operators in clearing all necessary rights.

Arguably, with its focus on rights management rather than on rights, the Directive was far ahead of its time, as were its innovative legal instruments. However, as the European Commission readily admits in its review report of 2002,² the Directive’s goals have, at best, only partially been achieved. The envisaged future of a pan-European satellite broadcasting market has not materialised. 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, as a recent decision by the Supreme Court of the Netherlands illustrates,³ the process of convergence that comes with the increasing digitisation of media and platforms, is gradually making redundant the Directive’s rules on cable retransmission.

This contribution will look at the past, present and future of the Satellite and Cable Directive. Following an introductory paragraph on the history and purpose of the Directive (section 2), we will offer extensive commentary on its main provisions, as interpreted by the courts. In doing so, we will follow the order of the Directive, first examining the rules on satellite broadcasting

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

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 (hereinafter “EC Report 2002”).

3) *BUMA and STEMRA v. Chellomedia Programming*, Supreme Court of the Netherlands (*Hoge Raad*), 19 June 2009, available at: www.rechtspraak.nl (encoded satellite transmission of television programmes receivable only by cable head stations not deemed a communication to the public); see text accompanying notes 12 and 20.

(section 3) and second, the provisions on cable retransmission (section 4). Both sections will conclude with an assessment of the relevant rules, which will feed into the final part (section 5), where we will query whether the Directive has a role to play in a world where wired and wireless broadband media are rapidly converging.

2. History and Purpose

The Directive's main purpose was to eliminate copyright-related barriers to transfrontier broadcasting services within the European Union. The Directive is the counterpart of the "Television without Frontiers" Directive of 1989.⁴ In contrast to its "sister" Directive, the present Directive deals both with broadcast television and radio services. Like its sister, however, the Satellite and Cable Directive has its roots in the Green Paper on Television without Frontiers that was published by the European Commission in 1984.⁵ The Green Paper proposed to eliminate legal barriers to transfrontier television services within the European Community, especially in the area of broadcasting regulation and copyright law. In its subsequent White Paper on completing the Single Market, the European Commission confirmed its vision of creating a Single European Broadcasting Area. Broadcasting was expected to become one of the key sectors of economic development for the Community.⁶ Initially, this aim was pursued by way of a single directive that would reduce legal barriers to transfrontier television found both in national broadcasting law and copyright law. The broadcasting part of the Green Paper eventually led to the adoption of the "Television without Frontiers" Directive in 1989. But the proposed rules on copyright, which included a highly controversial compulsory or statutory licence system for cable retransmission, met with fierce resistance from copyright holders, in particular film producers, and did not find their way into a directive.

The current Directive was preceded by a Discussion Paper on Broadcasting and Copyright in the Internal Market, which was published by the Commission in November 1990.⁷ This led to a proposal for a directive in 1991, which, after some discussion in the European Parliament, was amended and subsequently adopted in the course of 1993. The Member States were obliged to implement the provisions of the Directive by 1 January 1995.

The copyright norms that were finally adopted in the present Directive were very different from those envisaged in the Green Paper. In the first place, the Directive contains an entire chapter (Chapter II, on Broadcasting of Programmes by Satellite) providing rules on satellite broadcasting that were not even contemplated in the Green Paper. This part of the Directive introduces a Community-wide right of communication to the public by satellite, which is a restricted (protected) act only in the Member State of origin (uplink) of the satellite transmission. This rule was felt necessary, because in some Member States courts had determined that a satellite broadcast is a restricted act in all States within the reception area (the so-called "footprint") of the satellite, meaning that right holders in one Member State would be able to block a satellite broadcast intended for the whole of Europe. In the second place, and in remarkable contrast to the Green Paper, Chapter III of the Directive, on Cable Retransmission, does not prescribe compulsory or statutory licences for cable retransmission of works initially broadcast across borders. After collective negotiations between right holders and cable operators were concluded successfully in several Member States, such as Belgium and the Netherlands, the European Commission's faith in contractual arrangements was eventually restored.⁸ Instead of prescribing compulsory or statutory

4) Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Official Journal L 298/23, 17 October 1989. The Directive has since been amended by Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities *OJ L 332/27* (18 December 2007).

5) European Commission, "Television without Frontiers", Green Paper, COM (84) 300 final, Brussels, 14 June 1984.

6) European Commission, Completing the Internal Market, White Paper from the Commission to the European Council (Milan, 28-29 June), COM (1985) 310 final, June 1985.

7) European Commission, Broadcasting and copyright in the internal market. Discussion paper, III/F/5263/90-EN, Brussels, November 1990 (hereinafter "EC Discussion Paper 1990").

8) EC Discussion Paper 1990.

licences, the Directive introduced a less intrusive, innovative mechanism of mandatory collective exercise of cable retransmission rights. This instrument was thought to be necessary because cable operators are unable to negotiate licences with all right holders concerned prior to the broadcasting of the programme. It was feared that individual right holders might exercise their exclusive rights by not allowing cable retransmission, and thus create “black-outs” in programmes retransmitted by cable operators.

3. Satellite Broadcasting

The first part of the Directive deals with broadcasting via satellite and its centrepiece constitutes a legal novelty: a Community-wide right of communication to the public by satellite. According to Art. 1(2)(b), a satellite broadcast will amount to communication to the public only in the country where the uplink of the programme-carrying signal occurs. Thus, the Directive departs from the so-called “Bogsch theory”, named after former WIPO Director-General Dr. Arpad Bogsch that held that a satellite broadcast is a restricted act in all countries within its “footprint” and therefore requires licences from all right holders in that geographical area. Since the transposition of the Directive, only a licence 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.

Notion of “Satellite”

Art. 1(1) of the Directive defines the term “satellite” in a broad and technology-neutral way. The term encompasses both satellites broadcasting on frequencies intended for satellite broadcasting (Direct Broadcasting Satellites) and communications satellites using other frequencies (Fixed Services Satellites), but serving as broadcasting satellites nonetheless. From a copyright perspective, these technical distinctions, that stem from the domain of telecommunications law, are basically irrelevant. What is relevant is whether the signals transmitted by satellite can be received by the general public. As the Court of Justice of the European Communities (ECJ) has held in its *Lagardère* ruling, if a communications satellite is used to transmit encoded programme-carrying signals that can be received only by technical means that are available solely to professionals, and not to the general public, the satellite does not qualify as a “satellite” within the meaning of Art. 1(1) and the provisions of the Directive do not apply.⁹ In its holding, the Court expressly referred to the interpretation it had previously given to the notion of “public” in the “Television without Frontiers” Directive in the *Mediakabel* case.¹⁰

Communication to the Public by Satellite

According to Art. 1(2)(b) of the Directive, communication to the public by satellite is a relevant act only in the Member State where the signals originate, as set out in Art. 1(2)(a). A broadcasting organisation will need to acquire licences only from right holders in the Member State of origin of the signal. However, Art. 1(2)(b) does not rule out that licence fees and other contractual conditions take into account the size of the footprint (i.e. the number of countries reached) of the satellite broadcast. On the contrary, Recital 17 instructs the parties concerned to “take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version”.

Art. 1(2)(b) precludes that right owners divide the right of communication to the public by satellite into territorially defined parts. However, parties remain free to contractually agree on obligations to apply encryption or other technical means so as to avoid reception by the general public of programme-carrying signals in countries for which the broadcast is not intended. By

9) *Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others*, ECJ 14 July 2005, case C-192/04.

10) *Mediakabel BV v. Commissariaat voor de Media*, ECJ 2 June 2005, case C-89/04.

limiting the making available of decoders, territorial exclusivity can still be achieved, notwithstanding the aim of the Directive to create an internal market for transfrontier satellite broadcasting.¹¹

Art. 1(2)(c) confirms that communication to the public takes place even if the programme-carrying signals are encrypted. Therefore, transmitting copyright protected works over satellite-based pay television services is a restricted act. However, in line with the definition of “satellite” as interpreted by the ECJ in *Lagardère*, communication to the public occurs only if the means for decrypting the broadcast are provided to the public by the broadcasting organisation or with its consent. Therefore, as the Supreme Court of the Netherlands recently held in the case of *BUMA and STEMRA v. Chellomedia*, a transmission via satellite of encrypted television programmes that can be received only by cable operators, does not qualify as a communication to the public.¹²

Art. 2 instructs Member States to provide for an exclusive right, under copyright law, to communicate to the public by satellite. This provision is the necessary counterpart to the country-of-origin rule of Art. 1(2)(b). If in the country of origin of the satellite broadcast no such right existed, right holders across the European Union would have no right to authorise or prevent it. The act of communication to the public by satellite and place in which it occurs are defined in Art. 1(1) and 1(2). Art. 2 has been largely superseded by Art. 3 of Directive 2001/29/EC, the so-called Information Society (“InfoSoc”) Directive,¹³ which provides for a generally-phrased right of communication to the public, that certainly includes acts of satellite broadcasting.

Satellite Broadcasting from Outside the EU

Art. 1(2)(d) extends the definition of communication to the public by satellite (Art. 1(2)(b)) to cover two situations where the communication actually occurs outside the European Union. The provision seeks to discourage broadcasting organisations from relocating their operations outside the European Union to avoid the application of the Directive (Recital 24). If an act of communication to the public occurs outside the European Union, but either the signal is uplinked from within the EU or a broadcasting organisation established in the EU has commissioned the transmission, the communication shall be deemed to have occurred in the Member State where the uplink has taken place or where the broadcasting organisation is established. This legal fiction, however, applies only if the non-EU State where the communication actually occurs does not offer the level of protection provided under Chapter II (most importantly, an exclusive right of communication to the public by satellite). For example, if a broadcaster established in Luxembourg were to use a satellite network owned and operated by an African State, to broadcast to European audiences, the broadcast would be deemed to occur in Luxembourg, unless the copyright law of the African State provided for an exclusive right of communication to the public by satellite. With respect to satellite broadcasts from outside the EU not covered by Art. 1(2)(d), Member States remain free to apply the “Bogsch” (country of reception) theory.

Assessment

Although innovative and forward-looking in its attempt to remove the obstacles to transfrontier satellite broadcasting that copyright law presents, the Directive has largely failed to live up to its promise. 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.¹⁴ Market fragmentation along territorial borders persists, not on the basis of national copyrights, but through a combination of encryption technology and territorial licensing. Note that

11) See EC Report 2002, para. 3.1.1.

12) *BUMA and STEMRA v. Chellomedia Programming*, Supreme Court of the Netherlands (*Hoge Raad*), 19 June 2009, available at: www.rechtspraak.nl

13) 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.

14) EC Report 2002, para. 3.1.1.

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 rarely allow the licensing of broadcasts of their films on the pan-European level, but cherish the principle that national markets within the European Union have their own dynamics, depending on national cultural characteristics and audience preferences. Consequently, movies are released at varying times and television broadcasts occur in "windows" that differ from country to 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 there is little incentive for a broadcaster to pay a (much) higher licence fee to acquire "European" rights when its market or public service mandate is limited to a single Member State.

In its review report, the European Commission protests against the ongoing process of market fragmentation by means of contract and encryption, but offers no real 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."¹⁵

But a true pan-European television broadcasting market will occur only if there is sufficient supply and demand in the first place, as is emphasised by the FIAPF's Legal Committee, in response to the Commission's report:¹⁶

"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 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."

4. Cable Retransmission

The cable part of the Directive (mainly Chapter III) provides for a very different mechanism of copyright management, in order to facilitate cross-border retransmission of television programmes. Again, the chosen legal instrument was a novelty: a system of compulsory collective management of cable retransmission rights. Under the Directive's rules, copyright holders of television programmes, 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

15) EC Report 2002, para. 3.1.1, last paragraph.

16) 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.

societies that 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, however, goes considerably less far than was initially envisaged by the European Commission in its Green Paper of 1984.¹⁷ In this document, the Commission had argued for a system of compulsory licensing that would have effectively stripped right holders of their exclusive rights, which under the current regime the collecting societies have retained. Under the present regime, at least in theory, the risk of “black-outs” remains. The Directive does not obligate collecting societies to grant licences to cable operators.

Only one category of right holders 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 (Art. 10 of the Directive). 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.

Notion of “Cable Retransmission”

Art. 1(3) of the Directive defines the act of “cable retransmission”, a notion that is central to Chapter III (Arts. 8-12) of the Directive. The definition limits the scope of application of the Directive’s rules on cable retransmission in several ways. In line with the Directive’s purpose to facilitate the freedom of transborder broadcasting services across the European Union, the Directive applies only to cable retransmission of “an initial transmission from another Member State”. Thus, the Directive leaves the Member States autonomy to deal with cases of purely national retransmission or of retransmission of programmes originating outside the European Union, intact.

Such “initial transmissions” must be “intended for reception by the public” and can occur either over the air (broadcasting) or by wire. In the light of Art. 1(2)(c), this includes initial transmissions in encrypted form, insofar as the means for decrypting the signal are provided to the public by the broadcasting organisation or with its consent. But as the recent *Chellomedia* decision of the Supreme Court of the Netherlands illustrates, it excludes transmissions of encrypted signals that are merely intended for reception by the cable operators, and only subsequently communicated to the public by the cable operator.¹⁸ As a consequence, cable transmission of such signals will be deemed an act of *primary* communication to the public not subject to the Directive’s rules on cable retransmission. For the same reason, if programme-carrying signals are injected directly into cable networks, as increasingly occurs (e.g. in the Netherlands¹⁹), no cable retransmission occurs and the rules of Chapter III do not apply.

Retransmission of broadcast programmes must be “simultaneous, unaltered and unabridged” to qualify. Delayed retransmissions, therefore, are outside the scope of the Directive, as are incomplete transmissions, e.g. in cases where advertisements contained in the original broadcast programme are replaced, by the cable operator, with “local” advertisements.²⁰ Arguably, the application of mere technical procedures, such as analogue-to-digital signal conversion, remains within the ambit of the definition.

The Directive applies to retransmission not only by cable networks, but also by microwave systems; in other words, “cable retransmission” may occur by wireless means. Acts of secondary

17) European Commission, “Television without Frontiers”, Green Paper, COM (84) 300 final, Brussels, 14 June 1984.

18) *Supra* note 3.

19) See D.J.G. Visser, “Primair openbaar maken via de kabel”, AMI 2007, p. 37-44. *Norma v. NL Kabel*, District Court of The Hague, 28 January 2009, Case HA ZA 06-2844, available at: boek 9.nl, B9 7522.

20) For further examples of cases of retransmission not covered by the definition, see A. Kéréver, “Réflexions sur la directive du conseil 93/83/CEE du 27 septembre 1993 relative à la coordination de certaines règles de droit d’auteur et des droits voisins du droit d’auteur applicables à la radiodiffusion par satellite et à la retransmission par câble”, *Computer & Telecoms Law Review* 1994/4, p. 67 (hereinafter “Kéréver”).

over-the-air broadcasting, however, remain outside the scope of the Directive. The same is true for acts of retransmission by satellite, even if operators of satellite platforms offering “bouquets” of repackaged programmes nowadays compete directly with cable operators.²¹

The Directive could not take into account the use of the Internet as a programme-carrying medium. Whether the term “cable system” can be interpreted to encompass the Internet is a matter of some speculation. If so, the simulcasting of radio or television programmes over the Internet would be subject to the Directive’s rules on mandatory collective exercise of retransmission rights (see Art. 9).

The Directive does not define the notion of (radio or television) “programme”. It is therefore unclear how rigid the Directive’s requirement of “simultaneous, unaltered and unabridged” retransmission really is. “Channel sharing”, whereby Programme A is retransmitted by day and Programme B by night, is a popular practice among cable operators. A literal interpretation of Art. 1(3) would leave such retransmission outside the scope of the Directive. In the light of the Directive’s rationale of facilitating the clearance of retransmission rights, a less rigid interpretation is, however, preferred. But the Directive leaves no room for “cherry picking”, i.e. simultaneously retransmitting a selection of popular programmes from different sources on a single cable channel.²²

Mandatory Collective Rights Management

Art. 9(1) is the centrepiece of the Directive’s rules on cable retransmission. The right of cable retransmission may not be exercised by right owners individually, but only through a collecting society. In practice, even before the Directive was adopted, collective management of cable rights had become normal practice in many Member States of the European Union.

This regime of mandatory collective rights management, which does not exist elsewhere in European copyright law, seeks to ensure that cable operators are in a position to acquire all rights necessary to allow cable retransmission of broadcast programmes. Its particular aim is to avoid that right holders in parts of broadcast programmes that are not represented by a collecting society (so-called “outsiders”) enforce their exclusive rights individually *vis-à-vis* cable operators, thereby causing “black-outs” in retransmitted programmes.²³

The main justification for such a far-reaching limitation to the right holders’ freedom of contract lies in the peculiarities of cable television. Cable operators retransmitting radio or television programmes are normally not in a position to negotiate all necessary licences prior to the initial act of broadcasting. Usually, a cable operator will have only a few days’ notice of the programmes to be broadcast. Since national broadcasting law will often impose upon cable operators the obligation to retransmit programmes simultaneously and without abridgement, cable operators have only a very limited freedom to actually negotiate with the right owners concerned.

Moreover, cable operators would have to trace and deal with a multitude of right holders for each programme to be retransmitted: broadcasting organisations, film producers, freelance authors, performing artists, musical and mechanical rights organisations, etc. This structural problem of rights management is exacerbated by the fact that not all owners of rights in broadcast programmes will be represented by a collecting society. Contracts concluded with collecting societies will, therefore, never guarantee that retransmission rights are cleared by 100%. Indemnifications provided by collecting societies will protect cable operators against claims for damages, not against injunctions.²⁴

21) T. Dreier, “Satelliten und Kabel-RL”, in M. Walter, *Europäisches Urheberrecht. Kommentar*, Munich: Beck 2001 (hereinafter “Walter/Dreier”), p. 429, para. 32.

22) Walter/Dreier, p. 429, para. 33.

23) EC Discussion Paper 1990, para. 3.29 ff.; Recital 28.

24) Discussion Paper 1990, para. 3.29.

This legal mechanism replaces the statutory licence scheme that was originally envisaged by the European Commission in its Green Paper of 1984. In principle, Art. 9(1) leaves the authorisation right intact²⁵ and therefore does not qualify as a statutory or compulsory licence, something Art. 8 expressly prohibits. A collecting society may still deny permission to cable operators to retransmit certain works represented by the society, although Art. 12 prohibits bad faith refusals to license. Black-outs, therefore, may still occur in practice. Indeed, contracts between collecting societies and cable operators sometimes contain special clauses allowing for black-outs under special circumstances. However, viewed from the perspective of the individual right owner, the mandatory collective exercise of rights does indeed resemble a compulsory licence. An individual film producer, for instance, will not be able to control cable retransmission in a foreign market, once he has licensed the film for television broadcasting.

Art. 9(1) does not prevent right holders from individually assigning (transferring) their cable retransmission rights to other parties,²⁶ for instance to commercial broadcasters wishing to clear cable rights up-front, so they can offer their programmes to cable operators *gratis* as “clean products”.

Art. 9(1) refers to the right “to grant or refuse authorisation”. In cases where right owners (e.g. holders of neighbouring rights) do not enjoy exclusive rights, but merely a right to remuneration, the rule of mandatory collective exercise of rights does not apply.²⁷ In practice, however, such rights to remuneration are usually exercised and administered by collecting societies nonetheless.

Outsiders Represented by Collecting Societies

Whereas Art. 9(1) prevents outsiders (i.e. right owners not represented by collecting societies) from enforcing their retransmission rights against cable operators, Art. 9(2) deals with the relationship between such right holders and the collecting societies. According to the first sentence of para. 2, “the collecting society which manages rights of the same category shall be deemed to be mandated to manage [the outsider’s] rights”. If, for example, in a certain Member State a special collecting society exists for the management of cable rights of film producers, any non-represented film producer will be deemed, by means of legal fiction, to be represented nonetheless. Outsiders will be able to claim from the societies their share of the revenues received from the cable operators. Member States remain free to limit the period within which right owners must claim remuneration from collecting societies, although this cannot be shorter than three years from the date of the cable retransmission concerned. As the ECJ has clarified in the case of *Uradex v. RTD and BRUTÉLÉ*, the management by the collecting society of the rights of the outsider concerns not merely the right to claim remuneration from cable operators, but also the exclusive right to prohibit retransmission.²⁸ In other words, collecting societies may actually enforce rights of non-represented authors or other right holders.

Rights of Broadcasters Exempted

As an exception to the general rule of Art. 9(1), Art. 10 of the Directive specifically allows broadcasters to exercise retransmission rights on an individual basis. Exempted are, in the first place, retransmission rights that are initially owned by the broadcasters themselves, such as any original copyrights or neighbouring rights that the broadcasters may have in their broadcasts. In the second place, exempted rights include rights that have been “transferred” to the broadcasters. The Directive however does not clarify what “transfer” means. Clearly, this term is meant to include the assignment of rights, but does it also refer to licences? If so, the exception provided by Art. 10 would appear to be extremely broad.

25) Recital 28 of the Satellite and Cable Directive.

26) Recital 28 of the Satellite and Cable Directive.

27) P. Kern, *The EC Common Position on Copyright Applicable to Satellite Broadcasting and Cable Retransmission*, *EIPR* 1993/8, p. 281.

28) *Uradex SCRL v. Union Professionnelle de la Radio et de la Télédistribution (RTD), Société intercommunale pour la diffusion de la télévision (BRUTÉLÉ)*, ECJ 1 June 2006, Case C-169/05.

Art. 10 allows commercial broadcasters to offer a “clean product” (all rights cleared) to cable operators.²⁹ This may be attractive and efficient for broadcasters and cable operators alike, but is likely to lead to unfair outcomes for authors and performing artists. Broadcasters will be tempted to pressure contributing authors and performing artists into accepting all-inclusive agreements (so-called “buy-outs”), by which cable retransmission rights are assigned or licensed to the broadcasters. Recital 29 effectively warns against such practices that undermine the claims for cable revenues that authors and performing artists would otherwise have through their collecting societies.³⁰ Such practices may also affect legal certainty, since it will not always be clear to cable operators whether cable retransmission rights of individual authors or artists actually reside with the broadcasters or with collecting societies with whom the authors or artists have contracted earlier.³¹

Mediation and Negotiation

Art. 11 of the Directive requires Member States to establish a system of mediation in cases where an agreement between right owners and cable operators cannot be concluded. This provision is intended as a flanking measure to further facilitate contractual solutions and to avoid stalemates between broadcasters, collecting societies and cable operators. Member States are allowed considerable discretion as to how this mediation will be structured and carried out. Prior to the Directive, various systems of mediation in the area of collective rights management already existed in some Member States,³² such as Germany. Mediation can be initiated by either party. Mediators may help the negotiating process by submitting a proposal, which is then deemed to be accepted if a party does not object to it within three months. Note however, that the solutions offered by the mediators are not compulsory. Parties remain free to reject any proposal. The mediation process contemplated by Art. 11, is voluntary. If no party seeks recourse to mediation, prolonged stalemates may still occur, as has been, and still is, the case in several Member States. This may explain why the mediation systems set up in the Member States have been put to little use in practice.³³

Art. 12(1) provides yet another flanking measure aimed at facilitating contractual solutions. Member States must see to it that parties concerned (broadcasters, collecting societies and cable operators) conduct negotiations in good faith and do not obstruct negotiations without justification. Since most parties concerned are monopolists in their own right, the chances of such abusive behaviour are very real indeed. As does Art. 11, Art. 12(1) leaves a broad measure of discretion to the Member States. States may provide remedies against abusive behaviour in civil or administrative law. Indeed, many countries already provided, before the adoption of the Directive, for remedies under general contract law or competition law or the law of collective rights management.

To be sure, as Recital 30 admonishes, Art. 12(1) does not affect “the contractual acquisition of cable retransmission rights”. In other words, collecting societies cannot be forced into agreements with cable operators if conditions proposed by cable operators are, judged objectively, unsatisfactory. A “valid justification” to refuse a retransmission licence might also be found in the protection of the moral rights of authors. For instance, the author of a film might have a legitimate interest in preventing the retransmission of a broadcast version of his film ridden with commercial interruptions.³⁴

29) Note, however, that under German copyright law, authors will always retain a right to equitable remuneration, which will be exercised by collecting societies against cable operators; EC Review Report, para. 2.2.2.

30) Walter/Dreier, p. 486, para. 3; EC Review Report, para. 3.1.2.

31) E. McKnight, “Exclusive Licensing of Television Programmes: the Cable and Satellite Directive”, [1995] Entertainment Law Review p. 289.

32) EC Report 2002, para. 2.2.2.

33) EC Report 2002, para. 3.1.3.

34) Kéréver, p. 71.

Legal Status of Cable Retransmission

Somewhat surprisingly, the Directive does not actually provide for a harmonised right of cable retransmission.³⁵ According to Art. 8(1), Member States are merely obliged to ensure that “the applicable copyright and related rights are observed”. The Directive only mentions that cable retransmission is a restricted act under the laws of copyright of the Member States, in Recital 27: “Whereas the cable retransmission of programmes from other Member States is an act subject to copyright and, as the case may be, rights related to copyright...”.³⁶ Indeed, cable retransmission is generally considered a restricted act under the law of copyright in all Member States. The right of cable retransmission was actually harmonised much later, as part of the general right of communication to the public, by the Information Society Directive. Cable retransmission now clearly falls within the ambit of the right of communication to the public prescribed by Art. 3(1) of that Directive,³⁷ as clarified in Recital 23 of the Information Society Directive.

“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.”

According to Art. 8(1) of the Satellite and Cable Directive, Member States are to ensure that cable retransmission of programmes from other Member States is governed by contractual arrangements between right holders and cable operators. The provision applies both to holders of copyrights and related rights in retransmitted programmes. Statutory or compulsory licences, such as existed for example in Austria³⁸ prior to the implementation of the Directive, are no longer permitted.³⁹ It follows from the definition of “cable retransmission” in Art. 1(3) that Art. 8(1) applies only to cable retransmission of programmes originating in another Member State. Member States may therefore preserve and apply statutory licences in purely national situations.

Assessment

The Commission’s report speaks in more positive terms of this part of the Directive.⁴⁰ It recognises that the system is working quite well. In fact, 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. Thereby 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 programmes need not pay any additional copyright fees to collecting societies, except possibly for the musical works included in the programme.

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.

35) *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v. Hostelería Asturiana SA (Hoasa)*, ECJ 3 February 2000, case C-293/98.

36) Kéréver, p. 67-68; Walter/Dreier, p. 470 para. 5.

37) Art. 3(1) of the Information Society Directive reads as follows: “Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

38) W. Dillenz, “Die Österreichische Urheberrechtsgesetz-Novelle 1996”, GRUR Int. 1996-7, p. 800.

39) Note that statutory licences are allowed under Art. 11bis(2) of the Berne Convention.

40) EC Report 2002, para. 3.1.2.

"[...], 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 [...]".⁴¹

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 for the authors and artists who rely on collecting societies to receive adequate remuneration.

5. Conclusions

More than fifteen years after the adoption of the Satellite and Cable Directive it is clear that the Directive's goals have only partially been realised. The market for satellite broadcasting services in the EU remains as fragmented as it was in the early 1990s when the Directive was conceived. Contractual licensing practices combined with signal encryption techniques have allowed broadcasters and right holders to continue segmenting broadcasting markets along national borderlines. As a result, as the Commission laments in its report, large numbers of European citizens are still being deprived of the possibility of accessing and viewing broadcasting and pay-television services directed at domestic audiences.⁴²

Moreover, the process of convergence that comes with the increasing digitisation of media and platforms threatens to undermine the Satellite and Cable Directive's "dedicated" regimes for satellite broadcasting and cable retransmission. Convergence is occurring at all levels: analogue television services are "going digital"; radio and television programmes 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. The future of the cable retransmission provisions of the Directive looks especially bleak now that traditional over-the-air broadcasting is gradually disappearing, particularly in countries with high cable penetration where programme-carrying signals are injected directly into cable networks.

What will remain of the Satellite and Cable Directive if satellite broadcasting and cable retransmission services can no longer be distinguished from other media, including Internet-based services, to which the normal copyright rules of the Information Society Directive apply? The special ("vertical") rules of the Satellite and Cable Directive are indeed quite different from the "horizontal" provisions of the Information Society Directive of 2001, which apply to all media, digital or analogue, across the board. Whereas the Satellite and Cable Directive mandates a Community-wide right of communication to the public by satellite, the Information Society 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 origin, rights for webcasting need to be licensed for every territory where a work is made available.

While the provisions of the Satellite and Cable Directive are gradually being superseded by the general regime of the Information Society Directive, the problems of multi-territorial rights clearance that the SatCab initiative intended to alleviate persist. In the 1995 Green Paper that preceded the Information Society Directive,⁴³ the European Commission had been toying with the idea of applying to the Internet the country of origin approach that typifies the Satellite and Cable

41) EC Report 2002, para. 3.1.2, 8th paragraph.

42) EC Report 2002, para. 3.1.1. This concern is repeated in the Commission's recent (second) review of the Conditional Access Directive; European Commission, Second report on the implementation of Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, COM(2008) 593 final, Brussels, 30 September 2008, p. 4.

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

Directive. But this suggestion was immediately and unequivocally discarded by all right holders consulted. Right holders feared they would lose control of copyrighted content once it was offered online, under a licence, 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.

But the issue of multi-territorial licensing has by no means disappeared from the Commission's agenda. Territorial restrictions in collective licensing agreements are constantly being monitored for possible infringements of the EC Treaty's competition rules.⁴⁴ Moreover, the Commission issued, in 2005, a Recommendation on Music Online,⁴⁵ which aspires to promote the granting of licences at the European level. But as its name implies, the Recommendation merely concerns the use of music on the Internet.

The problem of multi-territorial licensing has resurfaced in the more recent Creative Content Online initiative of the Commission.⁴⁶ In a "Staff Working Document" that accompanies the Communication, the issue of multi-territorial licensing in the audiovisual sector and the possibility of extending the Satellite and Cable Directive's country-of-origin approach are extensively discussed:

"In the audiovisual sector, while the new Directive on audiovisual media services will facilitate cross border development of on-demand services, many right holders still choose to grant licences for only few national territories, thus slowing the availability of films in video-on-demand catalogues abroad.

As for television services, the technology-specific Satellite and Cable Directive (93/83/EEC) sought to achieve an internal market for transfrontier satellite services by applying the country of transmission principle to programmes broadcast via satellite. As a result, these programmes shall only be subject to the jurisdiction of the Member State from which the programme signal is being transmitted to the satellite.

[...]

Some stakeholders, including representatives from the broadcasters suggest that the country-of-origin principle should be considered for online services along the lines of the Satellite and Cable Directive. They consider that in particular, Internet streaming/simulcasting is comparable to the case of satellite broadcasting. While internet streaming and indeed simulcasting may indeed be structurally similar to broadcasting, this is less true for a host of 'on-demand' services and 'online retail' of music or film. In the case of online purchases, legal doctrine has established that the relevant act under copyright laws takes place in the country where the consumer has access to the relevant services. In depth analysis will be needed before considering the extension of a technology specific solution. The application of the country of transmission [principle] was introduced by the Satellite and Cable Directive in view of an overspill that could not be avoided in the context of a specific broadcasting technology. In the case of online services, the issue is the accessibility of content services at European level.

Furthermore, the extension of the country of origin principle raises a number of concerns, such as the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and licence were to be applied to the whole Internal Market, or of a 'race to the bottom' both regarding the

44) See European Commission Decision of 16 July 2008 relating to a proceeding under Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement, C(2008) 3435 final (Case COMP/C2/38.698 — CISAC).

45) Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276/54, 21 October 2005.

46) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008.

emergence of the protection and the scope of the protection. Hence, the question of whether or not the Satellite and Cable Directive (93/83/EEC) should be made technologically neutral by extending the country-of-origin principle to online services should be addressed through a review of this Directive."⁴⁷

The Communication itself, while recognizing the problems of multi-territorial licensing in the audiovisual sector, no longer discusses the country-of-origin approach of the Satellite and Cable Directive as a possible answer. Instead, the Commission suggests a more modest solution that would allow broadcasters to simulcast over the Internet primary broadcasts for which only local rights have been cleared:

"Developing a system where right holders would be encouraged to grant, next to the main licence, a second multi-territory licence would be one of the issues to be covered in the public consultation in respect of the preparation of a proposal for a Recommendation, as well as an issue for discussion within the Content Online Platform."

The discussions with stakeholders, as reflected in the Commission's "Final Report on the Content Online Platform",⁴⁸ that was published in May 2009, have obviously not led to a consensus on this controversial issue. In the Report, the Commission concludes that a study on the legal, economic and cultural aspects of multi-territorial licensing will be undertaken: "Looking beyond this study, whose final results should become available by early 2010, the Commission's services intend to continue the debate in the course of 2009 by consulting all stakeholders, Members of the Parliament and Member States."

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. So far, the review the European Commission initiated in 2002 has not produced any results. The Commission has convened two working groups on satellite broadcasting in 2002 and 2003.⁴⁹ Shortly after the second meeting, the EC officials in charge of this dossier were 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.

Nevertheless, in the long run, the European Community must confront the problem of territoriality in a fundamental way. As the Institute for Information Law has tentatively suggested in a major study on the future of European copyright law for the European Commission,⁵⁰ a truly structural and consistent solution, which would immediately remove all copyright-related territorial obstacles to the creation of a Single Market, could be the introduction of a truly European Community Copyright Law. It will be interesting to see if, fifteen years from now, this long-term solution has begun to materialise.

47) Commission staff working document - Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market, COM(2007) 836 final, Brussels, 3 January 2008, p. 25-26.

48) European Commission, "Final Report on the Content Online Platform", May 2009, available at: http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm.

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

50) P.B. Hugenholtz *et al.*, "The Recasting of Copyright & Related Rights for the Knowledge Economy", Report to the European Commission, DG Internal Market, November 2006, p. 210.