

Digital Single Market: A closer look at the draft Regulation on online transmissions of broadcasting organisations and closed networks

Last week, the European Commission officially released a communication on its endeavours to modernize the EU copyright rules. The paper was accompanied by several – long awaited – legislative proposals aiming for modelling future European copyright law (see [blog post](#)).

Following-up on our introductory [blog post](#) last week, we now take a closer look at the proposed [Regulation](#) on the exercise of copyright and related rights in the field of online transmission of broadcasting and retransmission of television and radio programmes.

Background

On 6 May 2015, the European Commission announced its comprehensive Strategy for a Digital Single Market. In December 2015, a first [action plan](#) for modernizing European copyright followed (see [blog post](#)). This plan already contained several – although still vague – proposals for the anticipated reform. In August 2015, the Commission launched a public consultation regarding the review of the Satellite and Cable Directive aiming at determining how content right holders and collecting societies would react to an extension of the "country of origin" principle to services transmitted via the Internet. In February 2016, the preliminary trends of the consultation were released (see [blog post](#)). The now published regulation builds on that consultation.

The objective of the proposal

The proposal focuses on two regulatory areas: (1) the extension of the "country of origin" principle to broadcasters own online services, and (2) the technologically neutral extension of the retransmission right to certain closed networks.

The Commission clearly aims at facilitating the provision of online services ancillary to broadcasts for broadcasting organizations and to (slightly) expand the existing law of cable retransmissions in a technologically neutral way. In accordance with the Strategy for a Digital Single Market, the proposal also wishes to simplify the clearing of rights of online services provided by broadcasting organizations. Particularly, the cross-border provision of radio and TV programs shall be promoted. This is to be achieved by establishing the principle of country of origin, which already applies to satellite transmissions, for services rendered via the Internet involving copyright as well as neighbouring rights.

What should be noted is the fact that the proposal has only a very limited scope, and that notably, video on demand platforms are not included.



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Glossary: "Ancillary online services" and "retransmission"

The proposal introduces two new definitions in Article 1 of the proposal: "*ancillary online services*" and "*retransmission*".

"*Ancillary online service*" covers the online services of broadcasting organisations in which they provide their own programmes simultaneously with the traditional broadcast or for a defined period of time. This shall obviously only include the current media libraries of broadcasting companies and not permanent video-on-demand services of a broadcasting organisation, nor an online service of a third party.

While the Satellite and Cable Directive (93/83/EEC) included the term "*cable retransmission*" the proposal for the new regulation now defines just "*retransmission*". This shall mean any simultaneous, unaltered and unabridged cross-border retransmission of television or radio programmes. Explicitly exempt are "*online*" transmissions, cable retransmissions as defined in the Satellite and Cable Directive (93/83/EEC), and finally transmissions which are provided over an internet access service as defined in the Regulation 2015/2120. The recitals indicate that this shall include all the retransmissions in closed networks comparable to cable retransmissions but exclude broadcasts via the "*open Internet*".

Extension of the country of origin principle

Article 2 of the proposal contains the extension of the "*country of origin*" principle to "*ancillary online services*". According to this provision, the exercising of copyright and related rights relevant for providing the online service shall be deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment. In consequence, the content available in media libraries of broadcasting organisations would be deemed to be streamed solely from the country in which the broadcasting organisation has its seat. It would therefore be sufficient if the broadcasting organisation had a license to stream the content for one country to be able to open the media libraries for audiences in the whole Union.

Paragraph 2 of the Article states that, when fixing the amount of the payment to be made for the rights, the parties shall take into account all aspects of the "*ancillary online services*" such as its features, the intended audience and the language version. With this the proposal seems to try to live up to the legal requirements determined in the *Murphy*-Decision by the CJEU ([CJEU, 04.10.2011 – C-403/08](#))

Retransmission Rights

Articles 3 and 4 of the proposal deal with the new retransmission right. As with the "*cable retransmission right*" the retransmission rights can only be exercised through a collective management organisation. This facilitates the licensing procedure for the retransmitting organisation tremendously because there is only one licensor to contact, who is obliged to grant a license for everyone.

Article 4 clarifies that the retransmission right is not affected if broadcasters are transmitting their own programmes. Without such clarification the broadcasting organisations possibly would have been obliged to license their own programmes via a collective management organisation.

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Outlook

After reviewing the previously published documents it was to be expected that the Commission, in accordance with their Digital Single Market Strategy, would extend the "*country of origin*" principle on areas beyond satellite transmissions. That 'retransmission' is no longer restricted to cable technology is no surprise either. The proposal however regulates either case only for strictly defined, exceptional, cases. Neither Video-on-Demand Services are covered, nor are online services which provide simultaneous broadcasts of television or radio programmes that are not operated by the broadcasting organisation itself. It remains to be seen whether the guaranteed follow-up discussions will eventually lead to an extension or to an even further limitation of the scope of the regulation.

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