

EC publishes responses to Satellite & Cable consultation

Following the launch of a consultation in summer 2015 on the proposed review of the Satellite & Cable Directive ('Directive'), the European Commission ('EC') in May 2016 published its Report on the consultation responses. The consultation and Report cover a number of areas of interest to stakeholders, including on the country of origin principle and on geoblocking. Rebecca Swindells, Partner at Jones Day, analyses key aspects of the consultation and the responses found in the Report.

The more recent EC consultations on copyright and related rights arise out of the Commission's Digital Single Market ('DSM') Strategy and are aimed at modernising IP legislation to be fit for purpose in the digital age.

It is now questionable to what extent the UK will be subject to, or have any influence over, EU copyright law and developments. Given the rapid pace with which copyright law has developed both at national and EU level over recent years, there is a concern that UK law will start to diverge from the EU. In the author's view, this is unlikely as it would simply serve to frustrate all rightsholders, intermediaries and end users of copyright content who operate on a cross-border basis. Those stakeholders need legislation that clarifies and facilitates the complex copyright rules relating to such cross-border activity. That clarification and facilitation is more likely to arise from further legislative harmonisation, rather than fragmentation.

This article's focus is the Consultation relating to the EC's proposed review of the Directive¹.

Country of origin principle

The Directive is aimed at facilitating the cross-border transmission of audiovisual programmes via satellite broadcast and cable retransmission. A crucial part of the Directive is the so-called 'country of origin principle' applicable to satellite broadcasts. This states that, for copyright purposes, the broadcast is deemed to occur in the country from which the satellite signal originates, namely where it is sent from, not where it is received. This is of great importance because it means that the broadcaster need only clear the copyright in the country of origin and not in each country where the satellite is received.

The Consultation asks (among other things) whether this principle should be extended to online transmissions of copyright content. Given the unprecedented consumer demand that exists today for access to audiovisual content online this proposal would appear to be a natural extension of the existing law, making it applicable to the practicalities of a digital age.

This may be the reason why, to a large extent, the Consultation has been very low key, with little media attention or commentary from legal practitioners. It seems, perhaps, to be quite limited in scope. However, it has piqued the interest of many stakeholders who realise that the proposed extension of the Directive has potentially major ramifications for those involved in the creation, distribution and consumption of audiovisual online content. Rightsholders in particular fear that it will dramatically change the way in which online content is distributed across the EU, thereby affecting current licensing models, and sound the death knell for geoblocking on copyright grounds, arguably the most controversial aspect of the DSM Strategy.

Geoblocking

Since launching its Strategy, the EC has made clear its intention to tackle head-on 'unjustified' geoblocking in its belief that it runs counter to the founding principles of the free market by discriminating on the ground of residence or nationality and stifling the free movement of goods and services. And yet last summer the EC appeared to do a u-turn by announcing that territorial licensing of copyright content in the audiovisual sector was unlikely to constitute unauthorised geoblocking.

Consultation: Scope and Report

The Consultation sought to do two things: first, to determine whether the current Directive rules are still fit for purpose and secondly to seek stakeholder views as to whether to extend the Directive's country of origin principle to online transmissions.

In May 2016, the EC published its Report on the Consultation responses. The 256 respondents included public authorities, broadcasters, rightsholders (including authors, performers, producers and publishers), collective management organisations ('CMOs'), service providers (such as ISPs, satellite and cable operators) and consumers.

Assessment of current rules

The EC asked stakeholders whether the Directive was currently effective in facilitating copyright clearance cross-border in respect of both cable retransmission and satellite broadcast, and whether it had increased consumers' access to such services cross-border.

Most respondents (except rightsholders) thought it was effective in respect of cable retransmission and had increased

<p>consumers' access.</p> <p>For satellite broadcast, broadcasters and other service providers concurred that it was effective; whereas most rightsholders and CMOs disagreed, arguing that multi-territorial licences are available where needed. The opinion of respondents also differed as to whether the country of origin principle currently in place had resulted in greater consumer access to satellite broadcasting services cross-border.</p> <p><u>Extension of country of origin principle</u></p> <p>On whether the principle should be extended to online services, opinion was again split, generally with public authorities, copyright owners and CMOs opposed and most ISPs, public service broadcasters and consumers in favour. The latter camp believes the proposal would facilitate the pan-European distribution of, and access to, online content. Under the extended regime, distributors who exploit the copyright owner's right to communicate the content to the public would need to obtain a licence only in the Member State from which the communication originates² rather than in all Member States in which it is communicated. This undoubtedly would result in enhanced pan-European transmission of content. But at what cost to the rightholder?</p> <p>All rightsholders and many other stakeholders consider it of utmost importance that their contractual freedom be maintained. Rightsholders in the audiovisual industry tend to sell their content on a territory-by-territory basis as that is the most effective way of financing creative content, some territories command a much higher licence fee than others depending on various factors including cultural differences,</p>	<p>On whether the country of origin principle should be extended to online services, opinion was again split, generally with public authorities, copyright owners and CMOs opposed and most ISPs, public service broadcasters and consumers in favour</p>	<p>language and population, all of which affect the market for film and TV content.</p> <p>Extending the country of origin principle to online transmissions will, it is feared, put an end to territorial licensing, forcing rightsholders to license their content instead on a generic, pan-European basis regardless of whether there is pan-European demand for the content. A potential casualty of this, it is argued³, is the small independent player in the film industry who will be unable to afford to purchase pan-European rights.</p> <p>It has been noted that, even if the Directive is amended to apply the country of origin principle to online transmissions, rightsholders can still use contract law to limit the distribution of their content to certain territories. However, such licence restrictions are currently subject to intense scrutiny by competition authorities (yes, the EC again), as the ongoing investigation into Sky's deal with the Hollywood majors demonstrates. The licences in question appoint Sky as the studios' exclusive pay-TV broadcaster in the UK and require Sky to use geoblocking to prevent consumers outside the UK accessing the content. The EC's initial finding was that the contractual restrictions are anti-competitive. The Competition Commissioner commented:</p> <p>"European consumers want to watch the pay-TV channels of their choice regardless of where they live or travel in the EU [...] they cannot do this because [of the] licensing arrangements⁴." So, the Competition Commissioner finds unlawful an act, namely geoblocking on copyright grounds in the audiovisual sector, that the Digital Economy and Society Commissioner indicated was justifiable.</p>	<p><u>Extension of collective management regime</u></p> <p>The Consultation sought views on whether the mandatory collective management regime in place for cable retransmission should be extended to the simultaneous retransmission of content on platforms other than cable. Rightsholders were opposed but consumers and intermediaries such as cable operators welcomed it.</p> <p>The EC will now consider the responses as part of its overall DSM Strategy. It is aiming to release its proposals in the autumn, although this may be delayed given its likely hefty workload in light of Brexit. A solution to this conundrum potentially workable for all stakeholders could be to make pan-European licences a readily available option alongside, rather than instead of, national licences, thereby adopting the music industry's collective rights management model. That would open up the market and facilitate cross-border transmission of content without turning copyright law on its head by outlawing territorial licensing.</p> <p>Conclusion</p> <p>The review's potential to change the way in which copyright content is transmitted online and, more importantly, how such content is licensed is certainly not something to be ignored.</p> <hr/> <p>Rebecca Swindells Partner Jones Day, London rswindells@jonesday.com</p> <hr/> <ol style="list-style-type: none"> 1. 93/83 on the coordination of certain rules concerning copyright and related rights applicable to satellite broadcasting and cable retransmission. 2. The EC is yet to clarify how exactly this will be defined, if by reference to the territory in which the content is uploaded or the servers based or other. 3. By the Producers Alliance for Cinema and Television ('PACT'). 4. http://europa.eu/rapid/press-release_IP-15-5432_en.htm
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