

16 November 2015

European Commission

Consultation on the Review of the EU Satellite and Cable Directive

About UK Music

UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. The members of UK Music are listed in an annex.

Specific Questions

II. Assessment of the current provisions of the Satellite and Cable Directive

1. The principle of country of origin for the communication to the public by Satellite

Question 1

Has the principle of "country of origin" for the act of communication to the public by satellite under the Directive facilitated the clearance of copyright and related rights for cross-border satellite broadcasts?

To a limited extent.

In the music sector *PRS for Music* licenses satellite broadcast services uplinked in the UK for the repertoire it represents in the musical works used in satellite broadcasts.

Other works such as sound recordings and musical performances contained in the satellite broadcasts are similarly being licensed by PPL on behalf of record companies and performers.

Question 1.1

If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, and news).

We note that the music industry has been operating to enable the licensing of satellite broadcasts via respective collecting societies regarding the rights contained in such satellite broadcasts.

We challenge the notion that the “country of origin” approach has actually contributed to the creation of a single market for satellite broadcasting. The music rights collecting societies were already licensing satellite broadcasters on a multi-territory basis for their entire footprint before the Directive was adopted. The law did not contribute to the development of the market. Many other influences such as technological developments and market demand might have contributed to the advance of the single market for satellite broadcasting.

Moreover, the market impact of a service is in the territory in which the service is consumed, not the territory from which it originates. The “country of origin” principle does not reflect these market realities. We note that in the related area of VAT for radio and television broadcasts (Directive on the Common System of Value Added Tax (2006/112/EC)) the principle is that such services should be taxed at the place of establishment of the customer.

Question 2

Has the principle of "country of origin" for the act of communication to the public by satellite increased consumers' access to satellite broadcasting services across borders?

No opinion.

It will be impossible to link “country of origin” with increase of consumer access given that any increase in consumer access to satellite broadcasting services across borders can be attributed to many other factors such as technological developments, reduction in price of satellite service devices, more programming, and cross border payment systems.

Question 2.1

Please explain and indicate (using exact figures if possible) what is, to your knowledge, the share (%) of audiences from Member States other than the country of origin in the total audience of satellite broadcasting services.

UK Music does not have access to such figures.

Question 2.2

If you consider that problems remain, describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, advertising based, content specific channels) or other reasons.

The Satellite and Cable Directive from 1993 was a reaction to the technology at the time and aimed at the creation of an internal market for the audio visual sector. At the time broadcast by satellite and cable was one of the most important ways of pursuing the objective of creating common markets, although not the driver of multi-territorial licensing of satellite for music. This is reflected in the Recitals of the Directive.

Digital Transmissions on the other hand have been addressed in Directive 2001/ 29/ EC on the harmonisation of certain aspects of copyright and related rights in the information society. The applicability of the Satellite and Cable Directive is limited to satellite broadcasts and cable retransmission; digital transmissions follow the regime provided by the Information Society Directive

There are some practical uncertainties on the application of the Directive, e.g. where the communication to the public by satellite takes place, the appropriate rate for the use of music in satellite broadcasts for services targeted only at other member states (Recital 17) and the lack of sufficient safeguards in respect of satellite broadcasts from non-EU states (Article 1(2)(d)). These are uncertainties which could be addressed, without reopening the Directive, through Commission statements.

Question 3

Are there obstacles (other than copyright related) that impede the cross-border provision of broadcasting services via satellite?

To a large extent.

Question 3.1

Please explain and indicate which type of obstacles.

There are many factors other than copyright that affect the market – eg. language, programming and business decisions.

Question 4

Are there obstacles (other than copyright related) that impede the cross-border access by consumers to broadcasting services via satellite?

Yes.

Question 4.1

Please explain and indicate which type of obstacles.

In addition to external reasons why satellite broadcasters are not providing comprehensive cross-border access for consumers such as available reception technologies, satellite broadcast services themselves might decide not to provide such comprehensive service based on deliberate commercial decisions, such as market demand. As far as copyright is concerned licenses are available.

Question 5

Are there problems in determining where an act of communication to the public by satellite takes place?

To a limited extent.

Question 5.1

Please explain.

Whilst Article 1 (2 a) of the Directive seemingly specifies the place of uplink, it is sometimes difficult in practice to establish the exact place.

Question 6

Are there problems in determining the licence fee for the act of communication to the public by satellite across borders, including as regards the applicable tariffs?

To a large extent.

Question 6.1

Please explain.

Especially for services targeted only at other member states (c.f. Recital 17) it is difficult to arrive at the appropriate amount of the payment to be made for the rights acquired. The music industry depends on information from the broadcaster and satellite broadcast service to establish key elements to assess the license fee such as the actual audience, the potential audience and the language version.

Question 7

Is the level of harmonisation established by the Directive (or other applicable EU Directives) sufficient to ensure that the application of the "country of origin" principle does not lead to a lower level of protection of authors or neighbouring right holders?

No.

Question 7.1

Please explain. If you consider that the existing level of harmonisation is not sufficient, please indicate why and as regards which type of right holders/rights.

We remain concerned about forum shopping. We note that our members still obtain licensing revenue from satellite broadcasts (as well as cable retransmission). We repeat that the more significant area of digital transmissions is subject to the Information Society Directive.

Question 8

Has the application of the "country of origin" principle under the Directive resulted in any specific costs (e.g. administrative)?

No opinion.

Question 9
With regard to the relevance, coherence and EU added value, please provide your views on the following:

Question 9.1
Relevance: is EU action in this area still necessary?

No.

Question 9.2
Coherence: is this action coherent with other EU actions?

No opinion.

Question 9.3
EU added value: did EU action provide clear added value as compared to an action taken at the Member State level?

No opinion.

2. The management of cable retransmission rights

Question 10
Has the system of management of rights under the Directive facilitated the clearance of copyright and related rights for the simultaneous retransmission by cable of programmes broadcast from other Member States?

To a limited extent.

Question 10.1

Please explain. If you consider that problems remain, please describe them (e.g. if there are problems related to the concept of “cable”; to the different manner of managing rights held by broadcasters and rights held by other right holders; to the lack of clarity as to whether rights are held by broadcasters or collective management organisations).

In the UK specifically, we note problems because Section 73 Copyright Designs Patents Act (CDPA) 1988 provides an exception for the reception and re-transmission of wireless broadcast by cable under certain conditions. This has led to uneven development of the market, out of line with the EU. UK Music supports the repeal of s. 73 and notes there are reservations whether Section 73 CDPA is compatible with European law.

Question 11

Has the system of management of rights under the Directive resulted in consumers having more access to broadcasting services across borders?

To a limited extent.

Question 11.1

Please explain. If you consider that problems remain, please describe them and indicate, if relevant, whether they relate to specific types of content (e.g. audiovisual, music, sports, news) or to specific types of services (e.g. public services broadcasters', commercial broadcasters', subscription based, advertising based, content specific channels) or other reasons.

In the UK supply of retransmission of foreign uplinked programmes to consumers is relatively small and, as stated above, the legal protection for rights is not comparable to other member states due to s. 73 CDPA.

Question 12

Have you used the negotiation and mediation mechanisms established under the Directive?

Not applicable

Question 13

Has the application of the system of management of cable retransmission rights under the Directive resulted in any specific costs (e.g. administrative)?

No opinion

Question 14

With regard to the relevance, coherence and EU added value, please provide your views on the following:

Question 14.1

Relevance: is EU action in this area still necessary?

No

Question 14.2

Coherence: is this action coherent with other EU actions?

No opinion

Question 14.3

Coherence: is this action coherent with other EU actions?

No opinion

Question 14.4

Please explain your answers.

Clear parameters exist for the application of the Satellite and Cable Directive and the Information Society Directive respectively. This is the basis for existing licensing structures developed in over a decade of practice.

III. Assessment of the need for the extension of the Directive

1. The extension of the principle of country of origin

Question 16

Would such an extension of the "country of origin" principle result in more cross border accessibility of online services for consumers?

UK Music opposes the extension of the “country of origin” principle. The Commission should allow the market to develop with multi-territorial licensing as it is doing in the field of music. We do not believe it will be possible to prove that “country of origin” has any impact on accessibility given the multitude of factors, such as available technologies which influence accessibility.

Additionally, technologically specific or user specific rules within online uses are inappropriate from a practical perspective in view of the increasing convergence of broadcasting and online services. Any such ancillary services need to be considered separately and are addressed in the underlying licenses. Any compulsory solution that contravenes the normal exploitation and thus infringes the Three Step test could create competition issues (discriminatory regimes), increase the risk of forum shopping and the challenge of enforcement.

In the music sector online services are already accessible across borders for consumers because the industry has developed multi-territory licensing solutions.

Question 16.1

If not, what other measures would be necessary to achieve this?

The Commission should rely on the market to deliver multi-territory licensing.

Question 18

How would the "country of origin" be determined in case of an online transmission? Please explain.

Given that we are opposed to the extension of the “country of origin” principle to online transmission we cannot answer this question. This also applies mutatis mutandis to the mandatory collective management of rights for cable retransmission.

2. The extension of the system of management of cable retransmission rights

Question 22

How would the "country of origin" be determined in case of an online transmission? Please explain.

We refer to the specific responses by UK Music members.

Question 26

Would such an extension result in greater cross border accessibility of online services? Please explain

No.

UK Music opposes the extension of the “country of origin” principle. We do not believe it will be possible to prove that “country of origin” has any impact on accessibility given the multitude of factors, such as available technologies which influence accessibility.

Question 28

Would extending the mandatory collective licensing regime raise questions on the EU compliance with international copyright obligations (1996 WIPO copyright treaties and TRIPS)?

Yes. Mandatory collective management of rights for cable retransmission impairs the freedom of rightholders, in that the transfer of their rights is subject to regulation (report COM(2002) 430 final on the application of the Satellite and Cable Directive 93/ 83/ EEC). They have to be considered a limitation to the exclusive rights provided by international copyright obligations and comply with the Three Step Test.

3. The extension of the mediation system and the obligation to negotiate

UK Music has no experience of the mediation system and is not aware that its members have used it either.

Annex

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition – the voice of the featured artists.
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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