

Territoriality at stake in both Article 2 and 3 of the Proposed Broadcasters' Regulation



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The proposed Regulation *on certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes* ("the Proposed Regulation") has been subject to much debate in the European Parliament and the Council for almost a year. Central to this debate has been the importance of ensuring diverse and high quality audiovisual content for European viewers through safeguarding a high level of copyright protection and meaningful territorial exclusivity to preserve the value of rights in the audiovisual sector and wider creative industries.

Country-of-Origin

We take good note of the European Parliament JURI Committee's step towards largely safeguarding the territorial nature of copyright through the adoption of its report on November 21, 2017, limiting the scope of the Country of Origin principle to '*news and current affairs programmes*' (Article 2).

However, we are deeply concerned about the approach taken by the Council Presidency, which we cannot support. We are encouraged by the exchanges between the Member States in the Council IP Working Party, which also largely recognise that the erosion of meaningful territorial licensing will have a negative impact on the audiovisual and wider creative sectors and their ability to continue to invest in high quality content. **Nevertheless, we must continue to stress that limiting the scope of the Country of Origin principle to certain productions (own, commissioned, 100% financed, co-produced or licensed) will not alleviate the problem.**

These concepts are not defined – legally or commercially - nor should they be. They are deployed in the marketplace as a function of the individual business plan developed for each individual project. It is therefore not a problem of definition, but one of commercial negotiation with the inherent question of sufficient bargaining power on the part of producers to preserve the territorial scope of the arrangements. In addition, the legal and business uncertainty created by the unresolved *PayTV* case means that legislators are being asked to take decisions without a clear view of the likely result. Such an approach does not represent a compromise, and language on contractual freedom and the possibility to agree on geo-blocking will not alleviate the problem as competition law would still take priority over the Proposed Regulation.

Retransmission

We would also like to draw your attention to the fact that the extension of the retransmission regime (Articles 1(b) and 3) in the Proposed Regulation to retransmission services delivered over the open internet would have equally detrimental consequences for territoriality and the exercise of rights and thus for the future of the audiovisual and other creative sectors.

In the context of the current deliberations on the definition of retransmission services and thus the scope of Article 3 of the Proposed Regulation, we wish to express our deepest concerns with regard to the inclusion of open internet retransmission services as proposed by the Estonian Presidency's latest compromise proposal of November 15, 2017. We strongly urge you to oppose the inclusion of such retransmission services in Articles 1(b) and 3. Such online services by their nature flow cross-border, with an inherent impact on managing contractual territoriality, and hence create detrimental consequences for the value of rights for other distribution channels in those territories impacted by the cross-border nature of such services.

The European Commission explicitly excluded the open internet from the new retransmission regime in the Proposed Regulation, limiting the application to retransmissions through closed networks comparable to cable retransmission and excluding a general extension to the open internet. In particular, Recital 12 of the Proposed Regulation recalls that the open internet is excluded for the following three reasons: (i) these services have different legal, commercial and economic features; (ii) they are not linked to any particular infrastructure; and,

(iii) the ability to ensure a controlled environment on the open internet cannot be guaranteed. The Commission has identified that among the risks, extending the scope to open internet retransmission services would reduce the value of distribution, and that this might result in less premium content being available through free-to-air TV, thus negatively affecting citizens' access to culturally diverse content.

The latest compromise proposal by the Estonian Presidency to extend the scope of application in Art. 1(b) to include "retransmission over an internet access service as defined in Regulation (EU) 2015/2120 (is) provided to a controlled circle of users" is unacceptable and would undermine territoriality. Open internet retransmission services simply cannot offer the same safeguards as retransmission services over closed networks (such as cable, IPTV and satellite). The fact that an open internet service retransmission could or would be "provided to a controlled circle of users", or in an encrypted manner on the basis of contractual authorisation, does not change this premise for the following reasons:

- **Open internet retransmission services are cross-border by their very nature**

The open internet is worldwide, unlike closed networks, which usually only cover a national, or even regional territory. Open internet retransmission services can therefore easily be accessed by a pan-European or wider public.

- **Potentially unlimited amount of open internet retransmission services**

By their very nature, retransmission services on closed networks are limited in number because they imply an important investment in infrastructure. Launching a retransmission service on the open internet does not entail investment in any infrastructure and their potential number is therefore unlimited.

- **Lack of ability to ensure a controlled territorial environment**

Territorial access on a *closed network* is safeguarded by the very nature of the closed network itself. There are no technical means to access a cable or IPTV network from outside the licensed territory. As the open internet is not limited to a particular licensed territory, encryption can potentially be by-passed by technological means.

- **Open internet retransmission services are more prone to piracy**

Content retransmitted on the open internet is more easily intercepted than content retransmitted on a closed network (Source: IHS Technology, "Current market and Technology Trends in the Broadcasting Sector", May 2015, p.19.). This fact is independent from the question of whether or not the retransmission service is encrypted or subject to conditional access.

Conclusion: Harm to territorial distribution strategies and right holders' possibility to tailor licenses for cross – border use of their content

In light of the above-mentioned considerable flaws, the inclusion of open internet retransmission services in the scope of the EU Proposed Regulation would enable and facilitate the establishment of pan-European platforms retransmitting programming broadly across Europe, perhaps alongside their existing popular on-demand offers. Such platforms would simply need to abide by the terms established in each Member State by the relevant CMO or, as the case may be, by a single entity to clear the retransmission rights without reference to right holders. The right holders themselves would lose control of the retransmission of their works. The territorial exclusivity upon which they rely to finance production of the audiovisual and wider creative sectors would be undermined. The consequences would ultimately be detrimental for territorial distribution strategies as well as for the recoupment of investments in the development, production, marketing and distribution for such content.

We therefore urge you to reject any extension of scope of Article 1.(b)/Article 3 to the open internet.

List of Signatories

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