



European Communities Trade Mark Association

19 January 2017

ECTA POSITION PAPER

REVIEW OF COUNCIL DIRECTIVE 93/83/EEC OF 27 SEPTEMBER 1993 ON THE COORDINATION OF CERTAIN RULES CONCERNING COPYRIGHT AND RIGHTS RELATED TO COPYRIGHT APPLICABLE TO SATELLITE BROADCASTING AND CABLE RETRANSMISSION (SATELLITE AND CABLE DIRECTIVE)

I. INTRODUCTION

The European Communities Trade Mark Association (“ECTA”) has been following the public consultation of the Satellite and Cable Directive that took place in 2015 and of the results therefrom.

The public consultations focused on three main topics:

- Extension of the country of origin principle applicable to satellite broadcasting to online transmissions;
- Extension of the regulation on the management of simultaneous cable retransmission rights to online simultaneous retransmissions;
- Extension of the mediation system and the obligation to negotiate.

ECTA has studied the various issues related to the above topics and has the following comments:

II. SUMMARY OF POSITIONS AND ECTA’S COMMENTS

1. Extension of the country of origin principle applicable to satellite broadcasting to online transmissions

a) Positions

According to the country of origin principle set forth in Article 1.2 (b) of the Satellite and Cable Directive, clearance of rights is only needed in the country of origin of the satellite broadcasting, but not in the country/countries where the programme-carrying signals are received.

The positions of the various stakeholders on the possible extension of the country of origin principle to online transmissions are divided between right holders, collective management organisations (CMOs) and commercial broadcasters, on the one side, and consumers and public service broadcasters, on the other side.

Stakeholders opposing such extension indicate that (i) the principle is intended to serve as a solution to the satellite “over-spill” effect; (ii) an extension would encourage forum shopping and (iii) the principle does not even address the main problems related to multi-territorial



European Communities Trade Mark Association

online exploitations, such as fragmentation of repertoires, economic and cultural realities of the market, and necessary freedom of right holders to determine the geographical scope of their authorizations (as extension would lead to pan-European licences).

On the contrary, customers and some of the broadcasting companies support the extension of the Satellite and Cable Directive, pointing out the legal certainty as the most important reason for the extension both with respect to the applicable law and the simplification of the rights clearance.

Service providers call for a measured approach and underline the importance of a level playing field, while Member States and public authorities take a “diplomatic” approach by stating that they are open for discussion, but any extension of the Satellite and Cable Directive should be assessed carefully and also note the importance of the level playing field.

b) ECTA's comments

ECTA has some doubts about the opportunity to extend the country of origin principle. Such principle may limit the contractual freedom of right holders to license rights as they consider most beneficial in the individual case and may also create some anti-competitive effect.

ECTA observes that voluntary multi-territorial licences could be made available at market conditions, and if cross-border offers of content are eventually limited in practice, this might be explained because of insufficient consumers' demand, language barriers as well as commercial choices of service providers, and in some cases also because specific forms of exploitation of rights also exist in some EU countries. Therefore, ECTA feels that to take into account such specificities so as not to unduly constrain contractual freedom, would certainly help.

ECTA also notes that if the country of origin principle would be extended to online transmissions, in practice only EU-wide licences would be available and this may result in anti-competitive effect, as local market players might be disadvantaged in comparison to multinational operators.

Last but not least, ECTA observes that the extension could have consequences for the value chain of the production and the distribution of creative content, and might impact creators' revenues. It may also result in right holders' withdrawal from CMOs if they conclude that CMOs cannot guarantee effective collective management of their rights across the entire EU.

Hence, ECTA considers that an extension of the country of origin principle to online services - as long as online transmission replaces or is alternative to transmissions by satellite and cable - should be further studied. Furthermore, the protection rationale of the Satellite and Cable Directive should be transferred to online transmissions so as to:

- a. protect holders' rights to see their works exploited without payment
- b. avoid blocking of the work's transmission by individual holders
- c. protect the free circulation of programmes within the EU



European Communities Trade Mark Association

Nonetheless, while ECTA feels that while for online services the country of origin principle generally facilitates clearance of rights for the purpose of multi-territorial licensing, and provides legal certainty, further harmonization of copyright legislation seems necessary to mitigate the risk of unintended economic consequences and for practical legal considerations, such as for instance, avoiding forum shopping and/or difficulties for small entities to enforce their rights and/or episodes of cyberbullying by large companies against individuals.

In light of the foregoing, ECTA as an association that includes a wide variety of members representing different stakeholders, acknowledges that the extension of the country of origin principle to online transmissions may have positive impact in terms of legal certainty and development of the initial intentions of the Satellite and Cable Directive.

Nonetheless, ECTA also indicates that the extension of the scope of the Satellite and Cable Directive should not be considered in itself, and any amendments in the current legal framework to meet the challenges of the new technologies should include careful and measured assessment of the overall impact on all participants concerned, the interaction of the amendments with other legislative acts that are being changed, and the harmonization of the copyright enforcement system at EU-wide level.

Thus, ECTA believes that a second round of public consultations on the possible extension of the principles of the Satellite and Cable Directive would be highly recommended in the near future and before any legislative proposals are put forth, so that the rights and legitimate interests of all stakeholders, i.e. broadcasters, service providers, rights holders and consumers could be fully taken into account and a balanced solution is achieved.

2. Management of online retransmission rights

a) Positions

The Satellite and Cable Directive provides for a double track clearing process for the simultaneous retransmission by a cable operator of an initial transmission from another Member State of TV or radio programmes (by wire or over the air, including by satellite – Article 1.3). Broadcasters are entitled to license to cable operators the rights exercised by them regarding their own transmissions, irrespective of whether the rights concerned belong to the broadcasters or have been transferred to them by copyright owners and/or holders of related rights (Article 10). However, according to Article 9, all other rights (copyrights or related rights) necessary for the cable retransmission of a specific programme can only be exercised through a CMO.

Most of the stakeholders (such as public services broadcasters, service providers, public authorities, consumers) support an extension of the “cable regime” to online retransmission, however, they recommend solutions where the extension is limited to “closed environments” or in geographical aspect.

On the contrary, a distinction between “closed environment” (e.g. IPTV), on the one hand, and “open” (e.g. simulcasting) services, on the other hand, as proposed by the European Commission’s questionnaire, is not recommended. In fact, the limitation shall be interpreted in a technically neutral way. Those statements (supported by right holders and commercial broadcasters) against a respective extension underline a possible undermining of



European Communities Trade Mark Association

competition on the market. They suspect an unwanted restriction of the right holders' ability to secure an adequate reward for their work.

b) ECTA's comments

Same as above, ECTA has some doubts about the opportunity to extend the cable management principle to online retransmission without further review on the impact of such extension as it may limit the contractual freedom of right holders to license rights as they consider most beneficial in the individual case and may also create some anti-competitive effect.

ECTA points out that voluntary multi-territorial licences could be made available at market conditions, and if cross-border offers of content are eventually limited in practice, this might be explained because of insufficient consumers' demand, language barriers as well as commercial choices of service providers, and in some cases also because specific forms of exploitation of rights or regulation also exist in some EU countries. Therefore, ECTA feels that to take into account such specificities so as not to unduly constraining contractual freedom would certainly help.

ECTA also notes that if the cable management regime would be extended to online retransmissions, in practice only EU-wide licences would be available and this may result in anti-competitive effect, as local market players might be disadvantaged in comparison to multinational operators.

ECTA further believes that to avoid anti-competitive effect, any extension of the cable management regime to online retransmissions should probably take into consideration the variety of technologies.

Last but not least, ECTA observes that the extension could have consequences for the value chain of the production and the distribution of creative content, and might impact creators' revenues.

Hence, ECTA considers that an extension of the cable management regime to online retransmission should be further studied. Furthermore, the protection rationale of the Satellite and Cable Directive should be transferred to online retransmissions so as to:

- a. protect holders' rights to see their works exploited without payment
- b. avoid blocking of the work's transmission by individual holders
- c. protect the free circulation of programmes within the EU

Nonetheless, while ECTA feels that while for online retransmissions the cable management regime generally facilitates clearance of rights for the purpose of multi-territorial licensing, and provides legal certainty, further harmonization of copyright legislation seems necessary to mitigate the risk of unintended economic consequences and for practical legal considerations, such as for instance, avoiding forum shopping and/or difficulties for small entities to enforce their rights and/or episodes of cyberbullying by large companies against individuals.

ECTA further recommends that the European Commission may consider providing of guidelines on which rights are managed by CMOs and which - by authors/broadcasters, as



European Communities Trade Mark Association

well as on the distinction between transmission and retransmission, which is not always clear.

In light of the foregoing ECTA, as an association that includes a wide variety of members representing different stakeholders, acknowledges that the extension of the cable management regime to online retransmissions may have positive impact in terms of legal certainty and development of the initial intentions of the Satellite and Cable Directive.

Nonetheless, ECTA also notes that the extension of the scope of the Satellite and Cable Directive should not be considered in itself, and any amendments in the current legal framework to meet the challenges of the new technologies should include careful and measured assessment of the overall impact on all participants concerned, the interaction of the amendments with other legislative acts that are being changed, and the harmonization of the copyright enforcement system at EU-wide level.

Thus, ECTA believes that a second round of public consultations on the possible extension of the principles of the Satellite and Cable Directive would be highly recommended in the near future and before any legislative proposals are put forth, so that the rights and legitimate interests of all stakeholders, i.e. broadcasters, service providers, rights holders and consumers could be fully taken into account and a balanced solution is achieved.

3. Extension of the mediation system and the obligation to negotiate

a) Positions

The public consultation does not reveal opinions by stakeholders that any serious need of extension of the mediation mechanism is in place. At this stage it seems that some of the stakeholders, such as consumers, public authorities and Member States, lack practical experience on the application of the mediation system, while others that have experienced occasional use (e.g. some right holders, CMOs, broadcasters and other service providers) argue on its time-efficiency, confidentiality deficiencies, high costs and non-binding results on the parties, as well as on its overall effectiveness.

Stakeholders were also invited to suggest other measures to facilitate contractual negotiations and their summarized opinion shows demand for a level playing field and a better balance in the digital markets.

b) ECTA's comments

ECTA believes that extension of the mediation system to online services should remain open to discussion in case it shows significant need to be adapted to new technological and/or social changes and challenges. As long as the rare application of the existing mediation mechanism showed some deficiencies in terms of timeframe, costs and effectiveness, extension of the mediation system might require improvement and reinforcement in future. ECTA further finds that any new negotiation measures need to guarantee the balance in the digital markets and to take into account all online services available in order to guarantee a level playing field and to encourage competition and investment in new business models.

Therefore, a second round of public consultations on the possible extension of the mediation and negotiation mechanism of the Satellite and Cable Directive is recommended, so the

practical impact and the rights and legitimate interests of all stakeholders are balanced and fully taken into account.

III. CONCLUSION

Taking into consideration the results from the public consultation on the Satellite and Cable Directive, and following their analysis, ECTA calls upon the European Commission to consider a second round of public consultations on the possible extension of the principles of the Satellite and Cable Directive in the near future and before any legislative proposals are put forth, so that the rights and legitimate interests of all stakeholders, i.e. broadcasters, service providers, rights holders and consumers could be fully taken into account and a balanced solution is achieved.



ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world. ECTA brings together those practicing in the field of IP, in particular trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.

The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- Community Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.