1. Background

The Digital Single Market is one of the priorities of the European Commission. In May 2015, the Commission adopted the Digital Single Market Strategy for Europe, which defined the Digital Single Market as a market 'in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection'. Among other issues, the 2015 strategy announced its intention to review the Satellite and Cable Directive 93/83 'in order to assess the need to enlarge its scope to broadcasters' online transmissions and the need to tackle further measures to ensure enhanced cross-border access to broadcasters' services in Europe'. The current EU digital single market is built on three pillars:

- better online access to digital goods and services,
- an environment where digital networks and services can prosper.

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1 At the time of adoption of the EU legislation the committee was called the Committee on Legal Affairs and Citizens’ Rights.
4 Ibid., p. 3.
5 Ibid., p. 7.
One of the first pillar actions is a review of the Satellite and Cable Directive 93/83. The aim of these actions is to 'rapidly remove key differences between the online and offline worlds to break down barriers to cross-border online activity'. The review of the Satellite and Cable Directive intends to assess whether the directive's scope needs to be expanded to include broadcasters' online transmissions. Furthermore, the review reacts to numerous technical developments as, since the adoption of the directive in 1993, there have been considerable changes in the European broadcasting landscape. Currently, digital technologies and the growing use of internet-based services allow consumers to access more content and information. New technologies include means of accessing content from mobile phones and smart devices. Furthermore, there are various new forms of broadcasting, such as webcasting and simulcasting, that were not present when the directive was adopted. In 2009, satellite broadcasting accounted for a 25% share of TV households in the EU and cable TV for 39%. By 2015, this number had dropped to 23% for satellite broadcasting and to 30% for cable TV.

The Audiovisual Media Services Directive 2010/13 establishes a legal framework for audiovisual media services, including the cross-border transmission and reception of broadcasting services in and across the EU. This directive coordinates legislation on audiovisual media, including traditional TV broadcasts and on-demand services. The framework for audiovisual media services is complemented by the Satellite and Cable Directive 93/83, which facilitates cross-border satellite broadcasting and cable retransmissions. For the moment, online audiovisual media services, including cross-border services, are not covered by European law. At the same time, the Satellite and Cable Directive is a part of the EU regulatory framework for copyright and related rights, which currently includes a set of 10 directives.

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**Council Directive 93/83** on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive)

The Satellite and Cable Directive provides for minimum harmonisation of certain aspects of protection of copyright and related rights in the context of satellite broadcasting and cable retransmission. It outlines how and where copyright and related rights should be acquired with regard to cross-border satellite broadcasting and cable retransmissions of programmes between Member States. The directive intends to harmonise national provisions on copyright, strengthen legal certainty and enhance cross-border broadcasting and cable retransmission of television programmes within the EU. Furthermore, it introduces a mediation mechanism to deal with possible conflicts between right holders and cable operators.

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1 Webcasting or web streaming is a broadcast (presentation) distributed over the internet. See the EC website.
2 Simulcasting is the transmission by radio and TV stations of their signal simultaneously and unaltered both via the traditional means (air, cable and satellite) and the internet. See, M. Mendez Pereira (2003): From Discothèques to Websites, A New Approach to Music Copyright Licensing: The Simulcasting Decision, EC Competition Policy Newsletter, p. 44.
3 Yearbook 2015 Key Trends, European Audiovisual Observatory, Council of Europe, 2016, p. 40.
4 See also Directive 98/84 on the legal protection of services based on, or consisting of, conditional access and Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society to a certain extent influence this particular framework.
5 See also paragraph 209, Joined Cases C-403/08 and C-429/08 Football Association Premier League.
With regard to satellite broadcasting the directive establishes what is known as the ‘country-of-origin principle’, according to which a copyright relevant act takes place in the Member State where the programme-carrying signals were introduced to ‘an uninterrupted chain of communication leading to the satellite and down towards the earth’ i.e. the Member State where the satellite transmission took place. Therefore, the applicable law is that of the Member State from which the programme-carrying signals are broadcast and not that of the Member State where the signals were received. As a result, this principle allows broadcasting organisations to broadcast throughout the EU requiring only one licence from the country of origin of the satellite broadcast. According to the directive, authors have exclusive rights to authorise, usually by an agreement, the broadcasting of copyright works (Article 2). These rights include (1) a right to authorise and prohibit broadcasting of a performance to the public, (2) a right to authorise and prohibit a fixation/recording of a performance and (3) a right to authorise or prohibit reproduction of a recording of a performance. The right to authorise and prohibit broadcasting can be limited by the Member State as they have discretion to provide broader protection for holders of copyright-related rights.

As to cable retransmission, the Satellite and Cable Directive requires that it take place ‘on the basis of individual and collective agreements between copyright owners, holders of related rights and cable operators’. In this regard the directive (Article 9) introduces a ‘system of mandatory collective copyright management’. Based on this system, cable retransmission rights may be exercised only through a collecting society representing individual right owners who cannot exercise their rights individually vis-a-vis cable operators. The only exception are broadcasting organisations, which are allowed to exercise their cable retransmission rights with respect to their own broadcast including rights licensed or transferred to them by themselves. This system was established in order to enable cable operators to ensure that they had all the rights to the programmes and that possible ‘blackouts’ owing to lack of rights were avoided. Individual right owners can chose a collecting society to manage their rights.

2. EU-level reports, evaluations and studies


The report notes that only Belgium transposed the directive before the deadline of 1 January 1995. The last two countries to transpose the directive were Ireland and Luxembourg in 2001. Apart from the missed deadlines, the report points out that with regard to satellite broadcasting the directive has been correctly transposed into all national legislations. However, with regard to cable retransmission, the Commission notes that despite being correctly transposed, in some Member States the exercise of some of the rights (e.g. the author’s right to equitable remuneration) might have been weakened by existing national legislation. Here the report refers to market fragmentation resulting from a combination of encryption technology and territorial licencing.

The report subsequently gives an overview of the principles included in the directive, notably ‘the footprint parameter’ in the management of copyright and related rights linked to satellite broadcasting, the specific nature of contractual relations in the context of cable retransmission and a framework for the mediation process. It also reflects on the improvement of certain mechanisms included in the directive. According to the report, there is a need to facilitate negotiations concerning cable retransmission owing to the large number of negotiators in the Member States. In this context the report recommends setting up different mechanisms for different types of negotiations (overall negotiations, negotiations by right-holder category

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11 Sometimes also called the ‘injection right’ (droit d’injection). See, for example, B. Hugenholtz, Copyright without Frontiers: is there a Future for the Satellite and Cable Directive? in Die Zukunft der Fernsehrichtlinie - The Future of the 'Television without Frontiers' Directive, European Academy of Law, Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, Baden-Baden: Nomos Verlag 2005.
12 Article 1 (2) b) Directive 93/83.
13 Article 8, Directive 93/83.
14 A blackout, in this context means non-airing of a certain programme by a cable operator because of lack of rights to this particular programme.
17 The footprint parameter, in this context, means a geographic area where the satellite signal can be received.
and extended collective licence negotiations). The report also recommends Member States establish a one-stop shop in the context of cable retransmission, with this role being played by a broadcasting organisation. The broadcasting organisation would be then obliged to negotiate an 'all rights acquired' contract with the Member State's collecting societies to determine remuneration for initial transmission. Furthermore, the report underlines the need to rationalise the management of rights relating to the installation of shared antennas. Only very limited space is given to the directive in the new media context as, according to the report, the latest developments do not affect the principles of the directive. However, the report discusses a possible extension of the directive to other transmission methods, for example, to retransmission of programmes via the internet and to retransmission by microwave channel of digital programmes. In this context it notes some similarities, however the report does not consider it appropriate to extend the mandatory collective-management regime to other categories of retransmission. The report concludes that the Commission intends to assess the methods of managing rights to cable retransmission and mediation in the general context of the evolution of the media in the information society.

**European Broadcasting Union Copyright White Paper: Modern copyright for digital media**

The European Broadcasting Union (EBU) as a professional association of national broadcasters represents interests of public broadcasters in Europe. In its 2010 paper, the EBU underlines the fact that cable operators and digital satellite providers are not the only players on the broadcast retransmission market. It points to new platforms and new developments currently available to consumers, such as DSL (digital subscriber line), IPTV (Internet Protocol television) and mobile telephone networks. Subsequently, it argues that the country-of-origin principle adopted for satellite broadcasting could be extended to electronic communication networks including those on line. The paper also discusses broadening the application of the country-of-origin principle. In this context it notes various advantages, such as (1) a single act of communication covered by a single licence, (2) no need for 'multi-territorial' licensing for audiovisual media services and (3) continued contractual freedom. With regard to the collective rights management system linked with cable retransmission, the white paper argues that because of the developments in the broadcasting framework the collective rights-acquisition method could be applicable also beyond traditional cable retransmission. The paper notes that the broadening of this principle beyond cable broadcasting might strengthen equality of treatment, legal certainty and compliance with copyright. These points, according to the paper, may justify an extension of this principle to 'all cases of retransmission of programme services broadcast from EU MS by operators over wire and wireless new media platforms'. In 2015, the EBU welcomed the steps taken by the Commission to update the directive and subsequently took part in the Commission's public consultation (see below, point 5).

**European Commission Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market (2011)**

The green paper reflects on 'the effect of technological developments on the distribution of, and access to, audiovisual and cinematographic works'. The paper notes the considerable changes in the European broadcasting landscape such as the development of social networking and social media sites 'relying on the creation and upload of online content by end-users'. In this context, it discusses whether, based on these changes, the existing legal frameworks need amendments. The new digital platforms have enabled the retransmission of programmes simultaneously across different networks. It points out that the latest developments have also opened the discussion about the mandate to licence the broadcasting rights linked with cable retransmission under Directive 93/83. It claims that collective licensing for cable retransmission may in the latest situations decrease legal clarity as to who has the mandate to licence which rights.

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24 Ibid., p. 12
25 Ibid.
26 Ibid., p. 15.
27 EBU, White paper, p. 34
28 Ibid., p. 35.
29 Ibid., p. 37.
31 Ibid., p. 4.
32 Ibid., p. 9.
Further issues are linked with the different policy approaches of the European Commission as it intended to create 'a European framework for online copyright licensing of multi-territorial and pan-European services'.27 One of the policy options discussed includes an extension of the country-of-origin principle, as set out by the Satellite and Cable Directive, to the delivery of programmes online if the services are made available on demand. In such cases, the law of the Member State where the online transmission originates, shall be the one applicable. The paper claims that this approach should not affect the contractual freedom of the parties. The green paper however raises the question of determination of the country-of-origin principle in respect of online transmissions.28


Although the Commission study covers mainly the application of the Copyright **Directive 2001/29**, it also discusses the country-of-origin principle established by the Satellite and Cable Directive. In this context the study notes that the aim of the directive was undermined by right holders' practice of imposing territorial restrictions by contract. The study shows that producers often sell their programmes to broadcasters 'under a condition requiring encryption of the satellite broadcast restricting reception of the programmes beyond national borders'.30 Furthermore, the study provides a critical assessment of the right of retransmission by cable while pointing to several national experiences.


In October 2015 the European Commission started the second evaluation of the Satellite and Cable Directive. It intended to assess the facilitation of provision and reception of broadcasting services by satellite and cable retransmission and possible extension of the directive to online services. The evaluation covers the period after 2002 and focuses on the impact of the new technologies, such as online transmissions, on the functioning of the Satellite and Cable Directive. Furthermore it will assess whether the directive has facilitated cross-border access to broadcasting services and their distribution. According to this roadmap, the evaluation should be finished in 2016.

### 3. European Parliament position and questions from MEPs

#### 3.1 Resolutions of the European Parliament

**European Parliament resolution of 12 March 2014 on Preparing for a Fully Converged Audiovisual World**31

The resolution calls for the removal of barriers to media innovation by European media and internet policy while not ignoring the aspects of a democratic and culturally diverse media policy. It stresses the need for a 'uniform, flexible, user-friendly and accessible legal framework' for similar content on the same device. This legal framework must be, according to Parliament, 'technology-neutral, transparent and enforceable'. Parliament, furthermore, underlines the significance of the country-of-origin principle as it is 'a significant prerequisite for the provision of audiovisual content across borders and a milestone on the way to a common market in services'. However, according to Parliament the existing European legislation needs to be adapted in order to cope with 'the realities of the internet and the digital environment'. In this context the Commission is called upon to examine whether copyright law needs to be adapted to these latest developments in the broadcasting framework.

The European Commission reacts to this resolution in its **follow-up** document.32 In this context it notes that in 2013 it initiated a stakeholder dialogue **Licences for Europe**. The Commission also mentions that it intends to analyse the results of the **public consultation** on the EU copyright framework and potentially set

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29 The study was outsourced by the European Commission and carried out in 2013 by De Wolf & Partners.
30 Ibid., p. 60.
32 SP(2014)457.
out the policy orientation on its possible adaptation to the digital world. The Commission presents an objective for the EU copyright framework, which should be 'to stimulate creativity, innovation and development of business models, help industries re-invest in new creative productions, facilitate research, education, and dissemination of cultural heritage and, at the same time, ensure appropriate remuneration and reward for right holders, helping them to thrive in the digital age'.

**European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union**

Parliament points to developments in the area of audiovisual works. In this context, it stresses that digital services such as video streaming should be made available to all EU citizens irrespective of the Member State in which they are located. It also calls on the Commission to 'take actions to remove geographical controls (e.g. IP address blocking) across the Union'. Furthermore Parliament asks the Commission to draft an analysis of the application of the Cable and Satellite Directive to digital distribution. In its follow-up document the Commission refers to the 2011 public consultation on its [Green Paper on the online distribution of audiovisual works](http://eur-lex.europa.eu). Based on the results of the public consultation the Commission intended to adopt a communication that would set out the necessary policy initiatives. The Commission, however, did not specify if it intended to present an analysis on the application of Directive 93/83.

**European Parliament resolution of 25 September 2008 on concentration and pluralism in the media in the European Union**

Parliament underlines media developments such as broadband internet and satellite channels. It calls on the Commission and the Member States to 'consolidate an objective framework for granting broadcasting licences in the areas of cable and satellite TV and analogue and digital broadcasting markets on the basis of transparent and fair criteria'. In this context, Parliament notes the importance of a system of pluralist competition that prevents abuses by companies enjoying monopolies or dominant positions.

The Satellite and Cable Directive is also mentioned in some other Parliament resolutions, for example, the European Parliament resolution of 19 January 2016 on Towards a Digital Single Market Act or the European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union. In the latter resolution Parliament asked the Commission to draft an analysis of the application of the Cable and Satellite Directive to digital distribution.

### 3.2 Written questions from MEPs

**Written question by MEP Richard Sulík (ECR, Slovakia), February 2016**

The MEP asks the Commission whether it intends to revise European legislation and whether it is going to take into account examples of existing practice. The Commission should also provide a provisional timetable for revising the relevant acts. Furthermore, the Commission should explain whether 'the owner of broadcasting rights has to give consent for retransmission to operators from other Member States once it has ensured that the copyright is protected (e.g. by encrypting the parts subject to the consent of an author outside the territory covered by the licence)'.

### 4. The European Economic and Social Committee

In several of its opinions the European Economic and Social Committee (EESC) points out the necessary changes that need to be made to the systems set up by the Satellite and Cable Directive. In its opinion of 9 December 2015 on the Communication on a Digital Single Market Strategy for Europe, the EESC notes...
that clarification of audiovisual delivery rules for cable satellite and broadband is a pressing matter. It also agrees that it is necessary to review the directive in the context of the latest legislative developments but also in the context of the most recent developments in the field of satellite broadcasting and cable retransmission. In its opinion of 22 February 2012 on the Green Paper on the online distribution of audiovisual works in the European Union, the EESC argues that implementation of the Satellite and Cable Directive 'has not produced pan-European satellite broadcasting services'. The EESC also notes a need for collecting societies to manage rights for simultaneous retransmission from Member States. In this context the EESC underlines the importance of avoiding 'black-outs during programming'.

5. European Commission public consultations

Between 24 August and 16 November 2015, the European Commission carried out a public consultation on the review of the EU Satellite and Cable Directive. The goal of the public consultation was to assess whether EU rules included in the directive are still up to date in the new environment. The public consultation focuses on the functioning of the directive and it discusses its possible extension to online transmissions. Based on the answers received, the summary report notices two overall trends. With regard to satellite broadcasting the report highlights that most of the respondents consider that the existing provisions, including the country-of-origin principle, remain relevant. The report, however, notes a lack of consensus concerning the extension of the country-of-origin principle to online transmissions. With regard to cable retransmission the report stresses that most of the respondents consider the existing provisions on cable retransmission relevant. Nonetheless, it points out that there is no clear consensus concerning the extension of the clearance system applicable to cable retransmission to the simultaneous retransmission of TV and radio programmes on platforms other than cable such as the internet or IPTV.

Between 5 December 2013 and 5 March 2014, the European Commission carried out a public consultation on the Review of the EU Copyright Rules. Although this public consultation covers a broad area of copyright rules it also touches on the application of the Satellite and Cable Directive. The consultation shows that the majority of public service broadcasters call for a system currently applicable to cable retransmission under the Satellite and Cable Directive to be applied also to the simultaneous retransmission of broadcasts via online platforms. In this context they emphasise the need to find ‘effective rights management solutions for on-demand services which are related to linear programmes’. Furthermore, public service broadcasters note that the extension of the Cable and Satellite Directive’s country-of-origin principle to simultaneous online retransmissions is preferable and proportionate. On the other hand, the academics argue that the introduction of a country-of-origin approach to the making available right would not be justified for interactive on-demand scenarios. They consider that in this context the country-of-origin approach could cause problems ‘because of a currently insufficient level of copyright harmonisation in the EU’.

6. The Court of Justice of the European Union

On several occasions, the Court of Justice of the European Union (CJEU) has reacted to preliminary questions from national judiciaries and provided interpretation for several principles included in the Satellite and Cable Directive and other relevant EU legislation. For example, in Case C-277/10 Luksan the CJEU gave a ruling concerning the interpretation of Articles 1 and 2 of the Satellite and Cable Directive. The court in this context stated that these articles must be interpreted as meaning 'that rights to exploit a cinematographic work including satellite broadcasting right vest in the principal author'. Therefore, the application of these provisions precludes national legislation to allocate the exploitation rights exclusively

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41 See also the Opinion of 29 April 1998 on the Green Paper on the Convergence of the telecommunications, media and information technology sectors, and the implications for regulation - Towards an information society approach, or the Opinion of 28 November 2001 on an Internal Market Strategy for Services.
42 Introduction: Context of the Consultation, p. 2.
44 Ibid., p. 90 and 93.
to the producer of the work in question.\footnote{Paragraph 72.} Furthermore in \textit{Joined Cases C-431/09 and C-432/09 Airfield} the CJEU provided an interpretation of Article 2 of the directive. The court ruled that a satellite package provider has to obtain authorisation from the right holders for its intervention in the direct or indirect transmission of television programmes unless the right holders have agreed with the broadcasting organisation that the protected works will also be communicated to the public through that provider.\footnote{Paragraph 84.} In \textit{Joined Cases C-403/08 and C-429/08 Football Association Premier League} the Court provided a ruling in which it dealt with practices of right holders who were contractually imposing territorial restrictions on the footprint of the broadcasted signal by encrypting the satellite broadcast in order to restrict the reception of the programmes. With regard to Directive 93/83 it ruled that the directive has to be interpreted as 'not having a bearing on the lawfulness of the acts of reproduction performed within the memory of a satellite decoder and on a television screen'.\footnote{Paragraph 72.} The Court ruled that ‘a system of exclusive licences is contrary to competition law if licence agreements prohibit the supply of decoder cards to TV viewers who wish to watch the broadcasts outside the Member State for which the licence is granted’\footnote{Court of Justice of the European Union, Press release No 102/11, Luxembourg, 4 October 2011.}

7. Conclusions

Since 1995, when the Satellite and Cable Directive 93/83 was supposed to be transposed into the national laws of the Member States, the broadcasting landscape has been through various changes. While cable retransmission and satellite broadcasting still play their roles, new forms of broadcasting have found a stable place in the broadcasting landscape. This includes the ability to watch content on demand, through webcasting or simulcasting. Furthermore, a considerable role is played by online broadcasting. These new forms of broadcasting (e.g. online broadcasting, webcasting or simulcasting) bring various challenges for traditional broadcasting organisations, as well as for the rights connected with the broadcasted content (mainly copyright and related rights). As these new forms of broadcasting are not covered by the existing legal principles, broadening the principles included in Directive 93/83 might be one way to deal with the situation.

On several occasions Parliament has called for changes in the existing legislation to reflect the latest technological developments. The European Economic and Social Committee in its opinions and various studies has also noted that existing legislation will need to be adapted in order to react to these developments. The intention of the European Commission to review Directive 93/83 and potential amendments of the existing legislation might result in changes to the existing legislation and bring it up to date with the latest developments.

8. Other sources of reference


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