



2016/0284(COD)

10.5.2017

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## **DRAFT REPORT**

on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes  
(COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))

Committee on Legal Affairs

Rapporteur: Tiemo Wölken  
Rapporteur for the opinion (\*):  
Petra Kammerevert, Committee on Culture and Education

(\*) Associated committee – Rule 54 of the Rules of Procedure

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

#### **Amendments by Parliament set out in two columns**

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

#### **Amendments by Parliament in the form of a consolidated text**

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes**

**(COM(2016)0594 – C8-0384/2016 – 2016/0284(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2016)0594),
  - having regard to Article 294(2) and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0384/2016),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the opinion of the European Economic and Social Committee of 25 January 2017<sup>1</sup>,
  - having regard to Rule 59 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education (A8-0000/2017),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

### **Amendment 1**

#### **Proposal for a regulation**

##### **Recital 2**

*Text proposed by the Commission*

*Amendment*

(2) The development of digital

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<sup>1</sup> Not yet published in the Official Journal.

technologies and internet has transformed the distribution of and access to television and radio programmes. Users increasingly expect to have access to television and radio programmes both live and on-demand, using traditional channels such as satellite or cable and also through online services. Broadcasting organisations are therefore increasingly offering, in addition to their own broadcasts of television and radio programmes, online services ancillary to their broadcast, such as simulcasting and catch-up services. Retransmission services operators, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously to the initial transmission of the broadcast, unaltered and unabridged, use various techniques of retransmission such as cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks as well as the open internet. On the part of users, there is a growing demand for access to broadcasts of television and radio programmes not only originating in their Member State but also in other Member States of the Union, including from members of linguistic minorities of the Union as well as from persons who live in another Member State than their Member State of origin.

technologies and internet has transformed the distribution of and access to television and radio programmes. Users increasingly expect to have access to television and radio programmes both live and on-demand, using traditional channels such as satellite or cable and also through online services. Broadcasting organisations are therefore increasingly offering, in addition to their own broadcasts of television and radio programmes, online services ancillary to their broadcast, such as simulcasting and catch-up services. ***Furthermore, over-the-top audiovisual content services which are intended for end-users and run over an Internet network for the purpose of providing audiovisual content not directly related to a specific broadcast continue to gain in importance.*** Retransmission services operators, which aggregate broadcasts of television and radio programmes into packages and provide them to users simultaneously to the initial transmission of the broadcast, unaltered and unabridged, use various techniques of retransmission such as cable, satellite, digital terrestrial, closed circuit IP-based or mobile networks as well as the open internet. On the part of users, there is a growing demand for access to broadcasts of television and radio programmes not only originating in their Member State but also in other Member States of the Union, including from members of linguistic minorities of the Union as well as from persons who live in another Member State than their Member State of origin.

Or. en

## Amendment 2

### Proposal for a regulation Recital 8

(8) The **ancillary** online services covered by this Regulation are those services **offered by broadcasting organisations which have a clear and subordinate relationship to the broadcast**. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, **within a defined time period after the broadcast**, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, **ancillary** online services include services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content. **The provision of access to individual works or other protected subject matter that have been incorporated in a television or radio programme should not be regarded as an ancillary online service. Similarly, the provision of access to works or other protected subject matter independently of broadcast, such as services giving access to individual musical or audiovisual works, music albums or videos, do not fall under the definition of ancillary online service.**

(8) The online services covered by this Regulation are those services **giving access to television and radio content offered by broadcasting organisations**. They include services giving access to television and radio programmes in a linear manner simultaneously to the broadcast and services giving access, to television and radio programmes which have been previously broadcast by the broadcasting organisation (so-called catch-up services). In addition, online services include services which give access to material which enriches or otherwise expands television and radio programmes broadcast by the broadcasting organisation, including by way of previewing, extending, supplementing or reviewing the relevant programme's content, **as well as material genuinely and solely produced for the digital environment. Such access is particularly important to reach younger audiences. Younger audiences are the main users of the internet as a means of watching television and listening to radio programmes. Therefore it is essential to enable broadcasters to disseminate also such kinds of programmes online across national borders. Public broadcasters in particular, which are financed by public funds, paid by citizens' contributions, need to adapt to this changing consumer behaviour. Otherwise their right to exist might be put into question in the future.**

Or. en

*Justification*

*The deletion of "ancillary" in "ancillary online services" should be applied throughout the whole document.*

### Amendment 3

#### Proposal for a regulation Recital 10

*Text proposed by the Commission*

(10) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that in arriving at the amount of the payment to be made for the rights in question, the parties should take into account all aspects of the ***ancillary*** online service such as the features of the service, the audience, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used, ***and the language version***.

*Amendment*

(10) Since the provision of, the access to or the use of an ancillary online service is deemed to occur solely in the Member State in which the broadcasting organisation has its principal establishment, while de facto the ancillary online service can be provided across borders to other Member States, it is necessary to ensure that in arriving at the amount of the payment to be made for the rights in question, the parties should take into account all aspects of the online service such as the features of the service, ***the duration of online availability, the potential size of its audience having regard to the language of the online service***, including the audience in the Member State in which the broadcasting organisation has its principal establishment and in other Member States in which the ancillary online service is accessed and used. ***Use of the principle of 'country of origin' may result in having a broader audience which is in turn beneficial for broadcasters. Such benefits should be mirrored in an appropriate way, by means of unwaivable additional remuneration for right holders. To effectively enforce that right to additional, fair remuneration, transparency is indispensable. Therefore, the additional remuneration should be disclosed separately from the total remuneration in the contract between broadcasters and right holders. Furthermore, diversity is one of the key features of European culture. To make sure that this diversity prevails, an industry agreement should ensure that additional remuneration for niche artistic works is higher than average, as their right holders have limited bargaining power.***



**Amendment 4****Proposal for a regulation****Recital 11**

*Text proposed by the Commission*

(11) Through the ***principle*** of contractual freedom it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.

*Amendment*

(11) Through the ***principles*** of contractual freedom ***and territoriality*** it will be possible to continue limiting the exploitation of the rights affected by the principle of country of origin laid down in this Regulation, especially as far as certain technical means of transmission or certain language versions are concerned, provided that any such limitations of the exploitation of those rights are in compliance with Union law.

Or. en

**Amendment 5****Proposal for a regulation****Recital 11 a (new)**

*Text proposed by the Commission*

*Amendment*

***(11a) This regulation is not aimed at encouraging forum shopping practices. The principle of 'country of origin' does not apply to online services which are mainly or solely targeted at audiences other than the audience of the Member State in which the broadcasting organisation has its principal establishment, in order to limit practices whereby a broadcaster attempts to establish itself in other Member States to avoid disadvantageous financial obligations or to profit from more favourable licencing arrangements compared to the Member State in which it has its principal establishment. To assess***

*whether the service is targeting an audience outside of its Member State, the features of the service as well as the language versions used should be taken into account.*

Or. en

## Amendment 6

### Proposal for a regulation

#### Recital 12

##### *Text proposed by the Commission*

(12) Operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks, provide services which are equivalent to those provided by operators of cable retransmission services when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes, where this initial transmission is by wire or over the air, including by satellite but excluding online transmissions, and intended for reception by the public. They should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. Retransmission services which are offered on the open internet should be excluded from the scope of this Regulation *as those services have different characteristics. They are not linked to any particular infrastructure and* their ability to ensure a controlled environment is limited when compared for example to cable or closed circuit IP-based networks.

##### *Amendment*

(12) Operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile and similar networks, *as well as on the open internet*, provide services which are equivalent to those provided by operators of cable retransmission services when they retransmit simultaneously, in an unaltered and unabridged manner, for reception by the public, an initial transmission from another Member State of television or radio programmes, where this initial transmission is by wire or over the air, including by satellite but excluding online transmissions, and intended for reception by the public. They should therefore be within the scope of this Regulation and benefit from the mechanism introducing mandatory collective management of rights. Retransmission services which are offered on the open internet should *not* be excluded from the scope of this Regulation, *unless* their ability to ensure a controlled environment is *significantly* limited when compared for example to cable or closed circuit IP-based networks. *This lack of ability cannot be assumed, if the relevant retransmission service, which is offered on the open internet, is only provided under subscription or upon registration by an identifiable group of users.*

**Amendment 7****Proposal for a regulation****Recital 13***Text proposed by the Commission*

(13) In order to provide legal certainty to operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile or similar networks, and to overcome disparities in national law regarding such retransmission services, rules similar to those that apply to cable retransmission as defined in Directive 93/83/EEC should apply. The rules established in that Directive include the obligation to exercise the right to grant or refuse authorisation to an operator of a retransmission service through a collective management organisation. This is without prejudice to Directive 2014/26/EU<sup>18</sup> and in particular to its provisions concerning rights of right holders with regard to the choice of a collective management organisation.

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<sup>18</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

*Amendment*

(13) In order to provide legal certainty to operators of retransmission services offered on satellite, digital terrestrial, closed circuit IP-based, mobile or similar networks, ***as well as on the open internet in controlled environments***, and to overcome disparities in national law regarding such retransmission services, rules similar to those that apply to cable retransmission as defined in Directive 93/83/EEC should apply. The rules established in that Directive include the obligation to exercise the right to grant or refuse authorisation to an operator of a retransmission service through a collective management organisation. This is without prejudice to Directive 2014/26/EU<sup>18</sup> and in particular to its provisions concerning rights of right holders with regard to the choice of a collective management organisation.

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<sup>18</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72–98.

**Amendment 8****Proposal for a regulation****Recital 14 a (new)**

*Text proposed by the Commission*

*Amendment*

***(14a) In order to address the lack of liability in the field of direct injection, broadcaster organisations and distributors should be jointly liable for the act of communication to the public and making available to the public, as defined in Article 3 of Directive 2001/29/EC.***

Or. en

## **Amendment 9**

### **Proposal for a regulation Recital 18**

*Text proposed by the Commission*

*Amendment*

(18) A review of the Regulation should be undertaken after the Regulation has been in force for a period of time, in order to assess, among others, to what extent the cross-border provision of ***ancillary*** online services has increased to the benefit of European consumers and hence also to the benefit of improved cultural diversity in the Union.

(18) A review of the Regulation should be undertaken after the Regulation has been in force for a period of time, in order to assess, among others, to what extent the cross-border provision of online services has increased to the benefit of European consumers and hence also to the benefit of improved cultural diversity in the Union. ***The review should include an assessment of whether the principle of 'country of origin' ought to be extended to other online platforms.***

Or. en

## **Amendment 10**

### **Proposal for a regulation Article -1 (new)**

*Text proposed by the Commission*

*Amendment*

***Article -1  
Subject matter***

1. *This Regulation establishes legal mechanisms to facilitate the clearance of copyright and related rights relevant for the cross-border provision of online services and to facilitate digital retransmissions over closed networks of television and radio programmes originating in other Member States.*

2. *Those legal mechanisms include the establishment of the country of origin principle as regards the exercise of those rights. The legal mechanisms also include provisions on mandatory collective management of copyright and related rights relevant for retransmission, on legal presumptions of representation by collective management organisations, on the exercise of retransmission rights by broadcasting organisations and on liability rules for direct injections.*

Or. en

## Amendment 11

### Proposal for a regulation Article 1 – paragraph 1 – point a

*Text proposed by the Commission*

(a) "**ancillary** online service" means **an online service** consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of radio or television programmes simultaneously with or **for a defined period of time** after their broadcast by the broadcasting organisation **as well as** of any material produced by or for the broadcasting organisation which **is ancillary to such** broadcast;

*Amendment*

(a) "online service" means **a service provided via the internet** consisting in the provision to the public, by or under the control and responsibility of a broadcasting organisation, of **linear and non-linear** radio or television programmes **before, during** or after their broadcast by the broadcasting organisation, **and** of any material produced by or for the broadcasting organisation which **enriches or expands the** broadcast;

Or. en

## Amendment 12

### Proposal for a regulation

#### Article 1 – paragraph 1 – point b

*Text proposed by the Commission*

(b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC **and other than retransmission provided over an internet access service as defined in Regulation (EU) 2015/2120 of the European Parliament and of the Council<sup>19</sup>**, intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite **but excluding online transmission**, of television or radio programmes intended for the reception by the public, **provided that** such retransmission is made by a party other than the broadcasting organisation which made the initial transmission or under whose control and responsibility such transmission was made.

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<sup>19</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

*Amendment*

(b) "retransmission" means any simultaneous, unaltered and unabridged retransmission, other than cable retransmission as defined in Directive 93/83/EEC, intended for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for the reception by the public. Such retransmission is made by a party other than the broadcasting organisation which made the initial transmission or under whose control and responsibility such transmission was made **and is equivalent to retransmissions from operators of cable retransmission services**.

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<sup>19</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

Or. en

## Amendment 13

### Proposal for a regulation

#### Article 1 – paragraph 1 – point b a (new)

*Text proposed by the Commission*

*Amendment*

***(ba) "direct injection" means a two-step process involving firstly the transmission by broadcasting organisations of their programme-carrying signals for reception by the public to distributors point to point via a private line, whether by wire or over the air, including by satellite, without those signals being accessible or communicated to the public during such a transmission and secondly the transmission by those distributors of those signals to their respective subscribers, to enable them to view or listen the programs on networks, including cable networks, microwave systems, digital terrestrial, closed-circuit IP-based and mobile networks and similar networks.***

Or. en

#### **Amendment 14**

##### **Proposal for a regulation Article 2 – title**

*Text proposed by the Commission*

*Amendment*

Application of the principle of ‘country of origin’ to ***ancillary*** online services

Application of the principle of ‘country of origin’ to online services

Or. en

#### **Amendment 15**

##### **Proposal for a regulation Article 2 – paragraph 2**

*Text proposed by the Commission*

*Amendment*

(2) ***When fixing the amount of the payment to be made*** for the rights subject

(2) For the rights subject to the country of origin principle as set out in paragraph

to the country of origin principle as set out in paragraph 1, the parties ***shall take into account*** all aspects of the ***ancillary*** online service ***such as the*** features of the ***ancillary online service, the audience, and the language version***.

***1, appropriate additional remuneration shall be fixed by the parties. When calculating the amount of that appropriate additional remuneration all aspects of the online service shall be taken into account in particular its features, the potential size of the audience, having regard to the relevant language version, and the duration of online availability.***

***To ensure cultural diversity, an industry agreement shall ensure higher than average additional remuneration for niche artistic works.***

***It shall not be possible to waive the additional remuneration. Such additional remuneration shall be disclosed separately to the right owners in the contract from the total remuneration and may not be ceded except to a collective management society in advance. If the right owner decides to cede this claim, only the collective management society may claim the additional remuneration. Any management costs incurred for this purpose shall be disclosed individually. Such an arrangement shall not preclude collective agreements, operating agreements or joint remuneration rules for broadcasters, insofar as they guarantee appropriate additional remuneration.***

Or. en

## Amendment 16

### Proposal for a regulation

#### Article 2 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***(2a) Paragraph 1 shall not apply to online services that are solely or mainly targeted at an audience other than the audience of the Member State in which the broadcasting organisation has its***



*principal establishment, taking into account the features of the service and the language versions used, in order to limit practices whereby a broadcaster attempts to establish itself in Member States to avoid disadvantageous financial obligations or to profit from more favourable licencing arrangements compared to the place of its principal establishment.*

Or. en

## **Amendment 17**

### **Proposal for a regulation**

#### **Article 2 – paragraph 2 b (new)**

*Text proposed by the Commission*

*Amendment*

*(2b) Paragraph 1 shall apply to purchased films and purchased episodes of television series, which are not productions that have been commissioned, only 3 years after the date of entry into force of this Regulation.*

Or. en

## **Amendment 18**

### **Proposal for a regulation**

#### **Article 2 – paragraph 2 c (new)**

*Text proposed by the Commission*

*Amendment*

*(2c) Any disputes over the exercise of the rights resulting from this Article shall fall under the jurisdiction of the courts of the Member State in which the broadcasting organisation is established.*

Or. en

## Amendment 19

### Proposal for a regulation

#### Article 3 – paragraph 5 a (new)

*Text proposed by the Commission*

*Amendment*

***(5a) Where an author or performer transferred or assigned the right of retransmission, he or she retains an unwaivable right for appropriate remuneration against the retransmission operator for the retransmission of his or her work, to the extent that such remuneration is not already granted by Art. 2(2). This claim may only be ceded to a collective management society in advance and only a management society may claim it. Any management costs incurred for this purpose shall be disclosed individually. Such an arrangement shall not preclude collective agreements, operating agreements or joint remuneration rules for broadcasters, insofar as they guarantee appropriate additional remuneration.***

Or. en

## Amendment 20

### Proposal for a regulation

#### Article 4 – paragraph 1

*Text proposed by the Commission*

*Amendment*

Article 3 shall not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other holders of copyright or by holders of related rights.

Article 3(1) to 3(5) shall not apply to the rights exercised by a broadcasting organisation in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other holders of copyright or by holders of related rights.

Or. en

## Amendment 21

### Proposal for a regulation Article 4 a (new)

*Text proposed by the Commission*

*Amendment*

#### **Article 4 a**

##### ***Direct Injection Liability***

***A broadcasting organisation which transmits its programme-carrying signals through direct injection to distributors shall be jointly liable with such distributors for acts of communication to the public and making available to the public, as defined in Article 3 of Directive 2001/29/EC, which they carry out together.***

Or. en

## Amendment 22

### Proposal for a regulation Article 6 – paragraph 1

*Text proposed by the Commission*

*Amendment*

(1) No later than [3 years after the date mentioned in Article 7(2) to be inserted by OPOCE], the Commission shall carry out a review of this Regulation and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

(1) No later than [5 years after the date mentioned in Article 7(2) to be inserted by OPOCE], the Commission shall carry out a review of this Regulation ***in the light of legal, technological and economic developments***, and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.

Or. en

## Amendment 23

### Proposal for a regulation Article 6 – paragraph 1 a (new)

***(1a) The report referred to in paragraph 1 shall inter alia evaluate whether the application of the principle of 'country of origin' to online services has proven to have eased the burden on cross-border media broadcasting and whether it should be extended to other platforms. It shall take into account newly developed technologies, industry standards and practices. The report shall pay special attention to the impact of this Regulation on SMEs and the protection of personal data. The Commission's report shall be accompanied, if appropriate, by a legislative proposal.***

Or. en

## EXPLANATORY STATEMENT

Easier access to TV and radio programmes via the internet is central to the efforts to complete the Digital Single Market. The invisible national borders which still persist in the digital sphere must become more permeable so that content which is already available online can be accessed across borders. It is absurd that access to digital content, which of its very nature is rapidly transferable and accessible, should be restricted by national borders, while physical goods have been able to cross these borders for some time.

In the field of copyright, geoblocking measures are the result of both legal fragmentation and the application of the territoriality principle.

While the regulation under consideration here does not restrict the application of the territoriality principle, the legal fragmentation problem is to be resolved through the introduction of a legal fiction in the form of the country-of-origin principle. In that respect, the regulation achieves a very balanced compromise between the conflicting interests. The rapporteur rejects other restrictions, so as not to narrow the scope of the regulation.

Legal fragmentation leads to excessive transaction costs, which in turn discourage broadcasting operators from guaranteeing cross-border access. The lack of opportunities for legal access prevents works from realising their full social potential. Broadcasting services are increasingly being consumed not via the traditional transmission routes of cable, satellite and the airwaves, but via the internet. In the process, however, it is not just the preferred way of accessing broadcasting services which is changing, but viewer behaviour as a whole, away from linear TV towards the non-linear, deferred consumption of services via the user's terminal device of choice. This change is particularly striking among the younger generation. The proposal deliberately does not go down the route of abolishing national licences in favour of a single pan-European licence, however. Instead, it takes up the tried and tested principle laid down in Article 1(2)(b) of Directive 93/83/EEC, the 'country-of-origin' principle, and extends it to the online sphere. In practice, this will simplify the management of rights by determining which national copyright law applies, thereby doing away to a very great extent with the problem of excessive transaction costs. On the other hand, the regulation does not introduce an obligation for broadcasting operators to provide services.

The rapporteur is aware of the significance of the European film industry and is keen for it to be safeguarded and promoted. For example, it provides some 1 million jobs, for scriptwriters, for film crews and actors and for ancillary service providers, and contributes to cultural diversity, which in turn is vital to the functioning of an information society and of democracy.

However, this diversity will have its full impact only if it is available to individuals, because only in this way can inclusive public discourse be promoted. The regulation promotes this form of diversity, without in any way calling into question any quantitative or qualitative aspect of diversity.

The rapporteur takes the view that the regulation will greatly improve the everyday lives of people in a wide range of groups in the EU. While the regulation on the cross-border portability of online content services in the internal market (hereinafter: the Portability Regulation) guarantees the cross-border use of payment services for services which have already been purchased, it makes this conditional on the user's stay in another Member State

being merely temporary. This includes stays for travel, holiday or study purposes.

The regulation under consideration here, meanwhile, focuses on groups of people who are permanently resident in a Member State and yet have a legitimate interest in accessing the online services of broadcasting operators established in other Member States.

This covers the 13.6 million or so people who, along with their families, are actively exercising their right to freedom of movement under EU law. This shows up particularly clearly the rigid nature of the borders that still exist in the digital internal market, unlike in the analogue single market. While freedom of movement for persons and goods in the internal market is guaranteed, access to broadcasting services, and thus to programmes from one's home country, is not.

The regulation will also benefit linguistic minorities in a number of Member States. In border areas in particular it is hard to explain to people why access to programmes broadcast in their native language is possible using old technologies, but not via the internet - which is by now also an established technology.

The regulation will also protect the legitimate interest in promoting foreign languages, which are the basis of understanding between European nations, by enabling people to listen to programmes broadcast in languages other than their own.

It will also simplify pan-European access to programmes from other Member States, thus making an important contribution to forming a European viewing public.

Lastly, the services covered by the Portability Regulation mostly provide only entertainment, while access to news and information services is excluded from its scope. Such access, however, is essential, particularly in the era of 'fake news' and declining trust in traditional media. It has special relevance as a tool for fostering democracy. Easier access to programmes from other Member States is to be welcomed in the interests of promoting an information society.

Competition law limits contractual freedom only in cases where anti-competitive agreements have been concluded (Article 101 and 102 TFEU). It is not the purpose of copyright law, however, to protect against possible breaches of primary law. What is more, in its *Murphy* judgment<sup>1</sup> the Court of Justice of the European Union has explicitly stated that its case law on intellectual property licensing agreements should be interpreted as meaning that exclusive licensing agreements referring to a single broadcasting Member State do not as such automatically lead to a finding of a breach of competition law. Other factors are needed to justify such a finding.

By broadening the scope of the country-of-origin principle, the justifying factor under competition law, namely the lack of the necessary broadcasting rights, ceases to apply. It is conceivable, however, that other legitimate interests, such as local interests and cultural preferences, might continue to be used to justify geoblocking measures.

The need for legislation is also emphasised by the fact that 82% of public and 62% of private broadcasting operators employ some kind of geoblocking, making it significantly harder to

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<sup>1</sup> ECJ judgment of 4.10.2011, C-403/08 and C-429/08, paragraphs 137 et seq.

access information services. The number of people using Video Private Networks (VPN) to access content shows that there is a need for means of access, which should be met by enacting legislation which makes it possible to access this content legally.

The rapporteur is proposing the following important improvements to the Commission text:

- Rules on remuneration. The rapporteur is keen to reiterate the immense cultural importance of European film. To take account of the concerns voiced in particular by creative workers in the European film industry, the rapporteur proposes to clarify the rules on remuneration in Article 2(2) and to incorporate rules on remuneration into Article 3. The proposed clarification will ensure that authors, in particular of niche works, receive appropriate additional remuneration.
- The scope of the regulation, applying only to ancillary online services, seems too narrow in view of technological developments and the rapidly changing nature of the services on offer. In order to make that scope more appropriate, the rapporteur takes the view that the specific reference to broadcast programmes should be deleted. There are already programmes provided by broadcasting operators which are available only online.
- A transitional provision is being proposed regarding the application of the country-of-origin principle for purchased films and purchased episodes of television series, which are not productions that have been commissioned, so that business models can be brought into line with the new rules.
- A narrow time restriction is likewise not appropriate and the rapporteur is proposing to delete this reference. Time limits are already imposed under national law. In the rapporteur's view, it should be for the contracting parties to decide on the period of accessibility and to pay for this accordingly.
- Provision is made for direct injection liability.
- Cable retransmission must be made technology-neutral where it is equivalent to retransmissions from cable network operators, in order to take account of technological progress in this area too.