LEGAL COMMITTEE-20/09/2002

Report from the Commission on the application of Directive 93/83 CEE on cable and satellite broadcasting.

- On 26 July 2002, the Commission released its first Report on the application of the EC Cable and Satellite Directive. It was beholden to do so under Article 14 of the directive
- The report states that the mechanisms put in place by the Directive have contributed to the growth in cross-border broadcasting of television programmes but the remaining obstacles to transfer copyright and related rights should be addressed in order to bring about the objectives of freedom of reception and transmission as laid down in the TWF Directive.
- The report does not call for immediate changes to the Directive but for a reflection on how to “ensure access to EU citizens to satellite channels from EU Member states outside of their country of residence”.
- The Commission notes that the territorial licensing of satellite broadcasts remains the norm and deplores its. It asserts that the principle of rights’ clearance in the country of origin of the broadcast, for the entire footprint should prevail.
- The report rejects the extension of the mandatory collective licensing regime implemented for cable retransmissions, to Internet transmissions and satellite platform retransmissions (“bouquets”).

IMPLEMENTATION OF THE DIRECTIVE

- **Cable retransmission**:
  - Provisions of the Directive concerning payment in respect of cable retransmission rights have been correctly transposed in all Member States.

- **Contractual relations in the context of cable retransmission**:
  - The report states that the latitude introduced by the Article 10 (which allows broadcasting organisation to negotiate the acquisition of rights without rightholders being mandatorily represented by a collective society) is largely used by broadcasting organisations.
  - The Commission notes that the provision on mediation and good faith have been correctly implemented but some weaknesses appear in practice.
- The footprint in satellite broadcasting:
  - The provisions of Article 2 and 3 of the Directive on the transfer of copyright and related rights with regard to satellite broadcasting have been correctly transposed in all national legislations. However, their application by the interested parties is not in line with the country-of-origin principle laid down in the Directive.
  - The Commission insists on the full scope of the law applicable in the context of satellite broadcasting: the transfer of rights for a programme applies for the entire footprint, and only the contractual relations between the right holders (or the collecting societies representing them) and the broadcasting organisations relating to the entire footprint are compatible with the principles of the internal market.

PROPOSALS FOR THE FUTURE

- Introduction of a one-stop shop for cable retransmission:
  The Commission proposes to establish a one-stop shop for the transfer of cable retransmission rights where the broadcasting organisation would be obliged to negotiate with the collecting societies of a single Member State an “all rights acquired” contract which would determine the remuneration for transmission and retransmission to other territories.

- The future of the Directive in the new media context:
  - The Commission reflects on the need to adapt certain existing mechanisms relating to the protection of copyright and related rights (settlement of disputes, roles of collecting societies) to new media in the information society.
  - Digital television, which is already transmitted by satellite and terrestrial broadcast, will extend to cable retransmissions in the near future. The Commission notes that this will not affect the principles of the Directive which are applicable whether a transmission is analogue or digital.
  - However, the reports says, transmission methods other than those covered by the Directive could be taken into account.
    - diversification of national broadcasting methods: The Directive could take into account satellite-broadcast-only programmes in the establishment of the rules for negotiations between collecting societies and broadcasting organizations.
    - Diversification of cross-border retransmission methods: Digital retransmission by microwave channel of digital programmes have similarities with the cable retransmission. However, the Commission considers premature to extend the current copyright system for cable broadcasting to this type of transmission.
      - With regards to retransmission via Internet, the management of copyright and related rights should be thought through within the framework established by Directives 2000/31/EC (“the e-commerce Directive”) and 2001/92/EC (“the Copyright Directive”).
    - Digital Satellite platforms (“Bouquets”) (retransmission via satellite of a package of channels): This type of retransmission presents similarities with cable retransmission. However, transposing the principle of collective management on those activities would not be appropriate because cable retransmission is geographically restricted whereas satellite retransmission goes beyond Europe.
To back up this argument, the Commission states that satellite retransmission is subject to a chronology of exploitation windows designed to maximise potential remuneration to rightholders. Therefore, “the chronology for the various acts of communication for a particular work is organised on a national basis” (vs. the entire footprint for satellite transmission!).

**Conclusions:**

The wholesale application to satellite broadcasting of the country-of-origin principle laid down in the Directive could have very significant consequences on our activities in that it would interfere with current custom and practice which is designed to maximise revenues across the value chain, through windows and territorial licensing.

The Commission’s concern seems to stem from a vision of the broadcast sector’s development that is at least ten years out of date. It is clear that the main inhibitory factor to the growth of pan-European broadcasters is not so much the right holders’ lack of willingness to ignore the directive and refuse to license for multiple territories, as the conclusion drawn by leading broadcasting organisations that pan-European services only make economic sense in very narrow segments of the TV market. It is baffling to think that an issue that seems of concern to no one in the industry itself, should thus be selected as a high priority by the Commission.

At this stage, the Commission merely intends to study the issues further but it is clear that it intends to push for a stricter application of country-of-origin. Developments will have to be very closely followed in the near future if we are to avoid an outcome that would flagrantly contradict and oppose natural developments in the broadcast licensing market. The one-stop-shop idea for the negotiation of rights would represent undue interference by the Commission in the business practice of our industries.
REMINDER ON THE DIRECTIVE:

- The directive introduces an exclusive right in favour of holders of copyright and related rights, to authorise or prohibit satellite broadcasting and cable retransmission.

- The Directive establishes the principle of the contractual licensing of programme/film rights between holders of copyright and related rights and cable operators (Article 8). These exclusive rights may however only be exercised through a collecting society (Article 9).

- Broadcasting organisations (which are both holders of exclusive rights to their own programmes and acquirers of rights for programmes they broadcast) may negotiate the licensing of cable retransmission rights to their programmes directly with cablers, without having to be represented by a collecting society (Article 10).

- The Directive designates the law of the country of origin of the transmission as the only law applicable for the acquisition/licensing of satellite broadcasting rights.

- All these measures are applicable within the framework of contractual freedom which the directive explicitly recognises.

- Member states were under an obligation to implement the Directive before 1 January 1995. However, Belgium was the only Member State to meet this deadline. The majority of implementations took place between 1995 and 1998 (except for Ireland and Luxembourg in 2001).

According to the Commission report, the application of the country-of-origin principle for satellite broadcasting has still not yet been transposed, the maximum period allowing five years to adapt or renegotiate existing contracts which were based on territorial division of rights before the adoption of the Directive.