

## MORE ONLINE TV PROGRAMMES ACROSS BORDERS, SAFEGUARDS FOR CONTRACTUAL FREEDOM AND TERRITORIALITY



### WHY THE EUROPEAN COMMISSION'S PROPOSAL FOR A REGULATION ON BROADCASTERS' ONLINE TRANSMISSIONS AND RETRANSMISSIONS SHOULD BE SUPPORTED.

The general approach put forward by the European Commission strikes the balance between the need to give more access to TV content across borders in the Digital Single Market and the importance of safeguarding the contractual freedom of rightsholders and broadcasters. While a certain number of points of the Commission's Proposal can still be strengthened, it effectively introduces the missing elements which will give broadcasters the efficiency and legal certainty they require to give access to their programmes online, and where desired, outside of their domestic market.

The new rules proposed by the European Commission will enable viewers and listeners to enjoy more content online across borders, whether this is through the broadcasters' own websites, or on authorized local third-party platforms. At the same time, these new rules are compatible with the principles of territoriality and contractual freedom, which are crucial for the long-term viability of Europe's audiovisual sector.

In this regard, the Commission's proposal will not prevent broadcasters from geoblocking online content. There are many cases where geoblocking programmes is crucial to safeguard the interests of both rightsholders and broadcasters, and this should remain possible when the contracting parties deem it necessary to do so.

Looking at the broader picture – the need to develop a copyright framework which is adapted to the Digital Single Market – the EBU considers that there is at

present no better alternative than the model currently proposed by the European Commission. It addresses the core problem – the absence of a suited licensing framework for online transmissions and retransmissions across borders – with the right solution: a new set of licensing instruments which provide the necessary legal certainty and contractual flexibility for broadcasters and rightsholders to agree on giving access to a programme online across borders.

A solution was found to address this issue in the 'analogue' age with the 1993 Satellite and Cable Directive. The current absence of a solution in the digital era is, simply put, an anachronism which must be and is being addressed by the EU legislator.

- **More access to TV and radio programmes online in the EU Digital Single Market**
- **Appropriate remuneration for rightsholders**
- **No weakening of rightsholders' and broadcasters' contractual freedom**
- **Geoblocking remains possible when deemed necessary by rightsholders or broadcasters**
- **No obligation for broadcasters to offer programmes across borders**
- **A licensing instrument fit for Europe in the digital age**

## **The proposed licensing rules are built upon a tried and tested licensing model**

The Commission's proposal is largely inspired by the 1993 Cable and Satellite Directive, which completed the Internal Market for satellite and cable TV at the time by introducing adapted licensing rules: country-of-origin licensing for satellite broadcasting and collective rights management for the clearance of underlying rights by cable operators with broadcaster authorisation. Today, around 1500 unencrypted free-to-air satellite channels and 3000 cable TV channels are available around Europe. The 'Satcab' Directive has delivered positive results for viewers, broadcasters and rightsholders.

## **Broadcasters need legal certainty and efficient licensing to offer their programmes online**

Offering a wide range of programmes, public service broadcasters in the EU invest over 16 billion euros in content every year. Broadcasters need to obtain all the necessary rights from a great variety and number of rightsholders: a major public service broadcaster is likely to conclude more than 70000 contracts with rightsholders to produce hundreds of thousands of hours of programming every year. A single one-hour TV programme can be made up of around 70 different contributions and involve up to 100 rightsholders. In addition to programmes which are available both via broadcast and online, broadcasters also make 'online-only' content available.

Lack of legal certainty – stemming from the potential application of several national legal copyright frameworks to the same online transmission – coupled with the sheer magnitude of rights broadcasting organizations need to clear currently prevents most of their programmes from being accessed online across borders.

Ensuring that licences for all those hours and contributions are compatible with several (and potentially 28) different legal frameworks creates a disproportionate burden. This lack of legal certainty represents a major disincentive.

The new model proposed by the Commission will offer the legal certainty and the efficiency broadcasters require to help give access to services across borders, by applying a single licensing framework – based on the law in the broadcaster's country-of-origin – to their online transmissions.

## **Compatibility with contractual freedom and exclusive territorial licensing**

Since its introduction for satellite broadcast transmissions, the country of origin principle has neither affected the contractual freedom of rightsholders and broadcasters, nor the practice of exclusive territorial licensing for satellite services.

Likewise, the new proposed regulation is based on the principle of contractual freedom and will continue allowing exclusive territorial licensing, which is often necessary to enable the funding of new European works. The country of origin principle maintains the exclusive rights of communication to the public for all rightsholders. It also allows the rightsholder to insist on exclusivity in the relevant territory. This is explicitly stated in the European Commission's proposal.

## **Collective management for underlying rights offers efficiency for third party retransmissions**

While the country-of-origin principle will largely facilitate viewers' access to broadcasters' online offers, the collective rights management system for underlying rights addresses the case where broadcasters wish to authorise third party platforms to retransmit their programmes.

Collective rights management is particularly well-suited to clear underlying rights in broadcast programmes because clearing such rights on an individual basis is impossible in practice. The system so far has been applied to cable TV operators – under the 1993 'SatCab' Directive licensing regime – where broadcasters authorise cable services, as third party platforms, to retransmit their programmes unabridged and simultaneously. The system would now be broadened to include IPTV platform service providers in order to reflect market evolutions.

While this is a positive start, the EBU believes that collective management solutions should also cater for similar closed OTT services and broadcasters' catch-up services offered by third party platforms to fully reflect market evolutions.